STRATEGY FOR STRATEGY'S SAKE*

EDITH BEERDSEN**

Litigation is a strategic enterprise, by design. Not only is it impossible to design rules of procedure that account for every circumstance; our adversarial system gives litigants strategic maneuvering room that could be eliminated but has not been. Although procedural rules regulate many aspects of civil litigation and have significantly reduced opportunities for strategy and surprise, the "sporting theory of justice" that John Henry Wigmore and Roscoe Pound railed against a century ago is still very much alive.

This Article explores the tension between, on the one hand, well-established goals of the judicial system—accuracy, fairness, efficiency, etc.—and the room that exists for litigants to engage in a vigorous adversarial context ("strategy space"). It canvases strategy space in contemporary civil litigation and argues that there exists an implicit appreciation of strategy in the legal system, sometimes in direct conflict with recognized procedural values. It concludes that some strategy exists "for strategy's sake"—as a procedural value in its own right.

Recognizing the role of strategy in litigation is important because an acceptance of strategic maneuvering room is an implicit grant of power to represented, resourced parties. These parties are able to make optimal choices where the law provides choice, and exploit ambiguities and other room for strategic maneuvering, to the detriment of unrepresented, less resourced litigants.

** Assistant Professor of Law, Temple University, James E. Beasley School of Law. For helpful comments, suggestions, and support, I thank Gilat Bachar, Jane Baron, Rachel Bayefsky, Jeffrey Dunoff, Nate Ela, Gabriella Femenia, Richard Friedman, Alex Gouzoules, Craig Green, Paul Gugliuzza, J. Benton Heath, Deborah Hensler, Helen Hershkoff, Duncan Hollis, Kip Hustace, Brian Hutler, Chris Jaeger, Dan Lewerenz, Tom Lin, Jonathan Lipson, Ellie Margolis, Meghan Morris, David Noll, Andrea Olson (including for suggesting this title), Charlie Perkins, Julie Randolph, Dorit Reiss, Matthew Shapiro, Chris Upton, Bill Watson, Harwell Wells, and participants at the Maryland Law School's Legal Theory Workshop, the Drexel Law School faculty workshop, the Junior Scholars Workshop at Northeastern Law School, the Junior Federal Courts Workshop, the Ninth Civil Procedure Workshop, and internal workshops at Temple Law School. I am grateful to John J. Choi and his team at the North Carolina Law Review for their care and effort in editing this manuscript.

INTRODUCTION

Clarence Darrow, the story goes, used to put a metal wire in his cigar, then smoke it while his adversary delivered his closing argument. Instead of paying attention to the argument, the jurors could not help but stare at Darrow's cigar, wondering when the ash would finally fall off.[1]

If we told this story to a group of law students or lawyers, some might smile, appreciating Darrow's clever trick. Some might wonder about the trick's effectiveness: did it *actually* distract the jury? A few might question why, if this trick was effective, every lawyer in the land was not deploying it. It is easy to be lured in by the inventiveness and the chutzpah. To the extent that it crosses our mind at all that Darrow's adversary might be put at a disadvantage, discomfort is unlikely to be our primary reaction because, in an adversary context, surely Darrow's behavior is just "part of the game." Darrow was one of the greatest trial lawyers of his generation, and this tactic is shared because it

1. John D. King, *Gamesmanship and Criminal Process*, 58 AM. CRIM. L. REV. 47, 86 (2020).

illustrates a certain view of "good lawyering."[2] Clever tactics are considered part of the litigation game. But if we think about the anecdote a moment longer, we might get stuck on some uncomfortable questions: What if Darrow's adversary had the stronger case? Worse: What if Darrow's adversary had the stronger case but lost *as a direct result* of Darrow's antics? In other words, what if Darrow's adversary lost on a meritorious claim or defense directly as a result of litigation strategy completely unrelated to the merits?

This Article explores the tension that exists between the legal system's acceptance of strategic behavior by litigants and more well-rooted goals of the same system.[3] It argues that, while some types of strategic behaviors serve well-established procedural values such as accuracy, fairness, and efficiency, others do not, and some even conflict with some of these values.[4] Indeed, I argue in this Article that an appreciation for strategy functions as a procedural value in its own right. In other words, our litigation system seems to value strategy for its own sake.

In the United States we have an adversarial system of litigation, and outsmarting and outmaneuvering one's opponent is considered part of a litigator's role.[5] Litigants are required to abide by rules of procedure and other applicable law, but those rules leave ample room for strategic behavior.[6] Many strategic activities are neither explicitly allowed nor explicitly disallowed. Part of this "open texture" in the rules is nearly unavoidable, as it is not practical to design rules of procedure that account for every conceivable circumstance—every tactical move that a party might undertake, every trick that a lawyer might try to pull. But this practical limitation is not the only reason why litigants are given strategic latitude. In our adversary system, we do not seem to *want* to

2. The story is likely apocryphal. *See* Cecil Adams, *Did Clarence Darrow Distract a Jury by Using Wire to Keep His Cigar Ash from Falling?*, STRAIGHT DOPE (Sept. 11, 2009), https://www.straightdope.com/21343990/did-clarence-darrow-distract-a-jury-by-using-wire-to-keep-his-cigar-ash-from-falling [https://perma.cc/ZYV5-UTLC]. But whether or not the story is true is not important. This story circulates among lawyers as an illustration of successful courtroom behavior.

3. Writers often distinguish between strategy (a plan or method for achieving a particular goal) and tactics (the individual steps or actions taken as part of that strategy). This Article focuses on the role of strategic behavior in civil litigation, and, in this context, attempting to draw lines between strategy and tactics can be rather arbitrary. For example, forum shopping could be considered a strategy (made up of tactics such as the inclusion or omission of certain claims or parties, or filing in a certain court, at a certain time), but might just as easily be cast as a tactic (part of the larger strategy of tiring out the adversary through vigorous motion practice on jurisdiction and venue issues). In this Article, I therefore use the term "strategy" somewhat indiscriminately for both large-scale and smaller-scale strategic behavior.

4. *See infra* Sections II.B, III.A.

5. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 7 (1998) (describing the "Dominant View" with respect to lawyers' ethics: "[T]he lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action.").

6. *See infra* Section III.A.

eliminate all strategic maneuvering room, even if it sometimes directly conflicts with more well-established and more easily justifiable procedural values.[7]

Historically, not everyone has been enamored with stunts like Darrow's. More than one hundred years ago, Roscoe Pound and John Henry Wigmore railed against the "sporting theory of justice"—the conception of a legal proceeding as a game or sporting match—and the possibility that cases were won or lost depending on who played the best game rather than who had the best claims or defenses.[8] In a famous 1906 lecture, Pound took a forceful stand against "the common-law doctrine of contentious procedure, which turns litigation into a game."[9] He argued that "[t]he idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point."[10] Instead of focusing on the needs of justice, judges are engaged in policing the rules of the game.[11] Pound found the game-like conception of justice distasteful and wasteful, and called for a fundamental overhaul of the American system of justice and "deliverance from the sporting theory of justice."[12] John Henry Wigmore similarly complained that the common law was "permeated by the instinct of sportsmanship,"[13] where the search for the truth sometimes had to yield to tactics that turned litigation into "a mere game of skill or chance," with lawyers using evidence "as one plays a trump card, or . . . holds back a good horse till the home-stretch."[14]

The civil justice system has come a long way since then. The Federal Rules of Civil Procedure, in effect since 1938, created a pretrial discovery process that significantly reduced opportunities for trial by ambush.[15] Judicial management tools have streamlined many aspects of litigation and provide a check against

7. *See infra* Section II.B, Part III.

8. *See* Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Before the American Bar Association (August 29, 1906), *in* 14 AM. LAW. 445, 447 (1906) [hereinafter Pound, Causes]; JOHN HENRY WIGMORE, A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: CONTAINING THE STATUTES AND JUDICIAL DECISIONS 1904–1914, at xxxi (2d ed. 1915).

9. Pound, Causes, *supra* note 8, at 447.

10. *Id.*

11. *Id.* at 447–48. Pound railed in particular against the staggering number of reported decisions that revolved around whether the case had been brought in the right court. "A system that permits this," argued Pound, "is out of place in a modern business community. . . . It ought to be impossible for a cause to fail because brought in the wrong place." *Id.* at 449.

12. *Id.* at 451.

13. JEROME FRANK, COURTS ON TRIAL 91 (1949) [hereinafter FRANK, COURTS ON TRIAL].

14. *Id.*

15. *See* James R. Maxeiner, *The Federal Rules at 75: Dispute Resolution, Private Enforcement or Decisions According to Law?*, 30 GA. ST. U. L. REV. 983, 997 (2014); United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958) (stating that the discovery instruments created by the Federal Rules of Civil Procedure ("FRCP" or "the Rules") are intended to make litigation "less a game of blind man's buff"); *see also* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524–26 (2012) (describing how modern discovery enables litigants to gather the information they need to settle their case).

egregious party behavior.[16] Today's civil proceedings follow much more predictable paths than they did in Pound and Wigmore's era and are less apt to turn into a spectacle.[17] Nevertheless, the "sporting theory of justice" is still alive, and today's litigants still have ample room to flex their strategic muscle through surprise, concealment, aggression, or trickery.[18] Rules of procedure put some bounds on parties' room for strategic behavior ("strategy space") but do not aim to eliminate this space entirely.[19] Indeed, today it is often the very rules that were originally promulgated to stamp out the sporting theory that create opportunities for strategic behavior.[20] When parties engage in forum shopping, snap removal, delay tactics, or a wide variety of discovery chicanery, they are exploiting what is left of strategy space.[21]

This Article examines strategic space in civil litigation and the role it serves. It canvasses the room for strategic behavior in contemporary litigation and argues that an implicit appreciation of strategy in the legal system is keeping the sporting theory of justice alive, even though "sporting behavior" is sometimes in direct tension with recognized procedural values such as accuracy, efficiency, and fairness.[22] It concludes that some strategy exists "for strategy's sake"—as a procedural value in itself and in competition with other, more established procedural values.

It is important to recognize and interrogate this reality. A procedural regime that celebrates strategy implicitly allocates a measure of power to sophisticated, represented, well-resourced litigants with the wherewithal to identify and seize strategic opportunities, at the expense of others. These litigants, especially represented repeat players, tend to be much better positioned to exploit strategic opportunities presented to them than

16. *See, e.g.*, Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 21 (1984) (describing an increasingly active role taken by judges in civil proceedings, as well as acceptance by litigants of the judge as "an ally against a common enemy—the abusive opponent").

17. *Compare* John J. Parker, J., 4th Cir., Social Progress and the Law, Address Before Annual Meeting of Michigan Bar Association at Grand Rapids (Sept. 12, 1930), *in* 16 A.B.A. J., November 1930, at 701, 705 [hereinafter Parker, Social Progress] (asserting that the sporting theory of justice turns some cases into "a great public spectacle"), *with* Austin W. Scott, *Pound's Influence on Civil Procedure*, 78 HARV. L. REV. 1568, 1575 (1965) (claiming that, in the past, court was theater). *See also* Roscoe Pound, A Generation of Improvement of the Administration of Justice, Address Before the 42d Annual Meeting of the American Political Science Association at Cleveland, Ohio (Dec. 28, 1946), *in* 22 N.Y.U. L.Q. REV., July 1947, at 369, 379 [hereinafter Pound, Generation] (stating that in the late nineteenth century, "a trial was a sort of cock fight").

18. *See infra* Section III.A.

19. *See* Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 883 (2020).

20. *See infra* Sections II.B, III.A.

21. *See infra* Section III.A.

22. *See infra* Part III.

unrepresented, poor, unsophisticated one-shotters.[23] When we fail to recognize this gift of power to certain litigants at the expense of others, we miss an opportunity to consider and debate what the role of strategy should be, including how limited or expansive strategy space should be, and how strategy as a procedural value should compete with other values—when it might rightfully trump them, and when it should yield to them.

This Article starts with a historic overview of the role of strategy in modern litigation, starting in the early twentieth century. Part I introduces the sporting theory of justice and situates it in a broader discussion about adversary values—hotly debated during certain historical periods, but currently rarely discussed or questioned.[24] Part II attempts to untangle the relationship between adversary values generally and sporting behavior more specifically (in Section II.A), and examines the functions that could legitimate traditional forms of sporting behavior within an adversary system (in Section II.B). Part III turns to strategy space in litigation today. It catalogues "strategy space" in contemporary litigation (in Section III.A) and demonstrates that strategic latitude given to litigants is not always in line with the procedural values that underlie the civil litigation system and, indeed, sometimes even conflicts with them. It revisits justifications for the presence and shape of strategy space and concludes that the existing room for strategy in civil litigation cannot be explained fully by reference to traditional procedural values, such as accuracy, fairness, or efficiency.[25] Instead, strategy functions as a de facto procedural value in its own right. This Article concludes (in Section III.B) by discussing the implications. When strategy is not recognized as a procedural value in its own

23. *See infra* Sections III.A, III.B.

24. Early twentieth-century literature discussed the role of strategy in litigation in an era when parties' ability to trick and surprise each other was much more prominent than it is today. *See infra* Sections I.A, I.B. These discussions relate to a litigation context that is no longer recognizable today. Later scholarship on adversarial values is more relevant to contemporary litigation but tended to focus on broader questions of procedural design rather than on the strategic dimensions. *See infra* Sections I.D, II.A.

25. There is no definitive, universally agreed-upon list of values by which the quality of a process can be measured, and some procedural values arguably overlap. Nevertheless, accuracy, fairness, and efficiency are widely considered to be important values for any litigation system. *See, e.g.*, FED. R. CIV. P. 1 (providing that the Federal Rules of Civil Procedure should be construed to "secure the just, speedy, and inexpensive determination of every action and proceeding"); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 320–21 (2004) ("[P]rocedural justice aims at accuracy and efficiency. . . . When we sacrifice procedural justice on the altar of substantive advantage, we risk a very great evil."); Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 304 (2010) (framing efficiency and fairness as two competing metrics for the allocation of any substantive error); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1824 (2015) (examining the role of efficiency in litigation). Other procedural values include simplicity, participation, privacy, and accessibility. *E.g.*, Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 67–68 (2018). In this Article, I will focus primarily on accuracy, fairness, and efficiency, but will reference other procedural values where relevant to the discussion.

right, a particular form of inequality is allowed to sneak into our legal system unquestioned and unaddressed.

I. THE SPORTING THEORY OF JUSTICE

Understanding the tension between recognized procedural values in civil litigation and the desire to maintain strategic maneuvering room for litigants requires some historical background. This part reviews the history of the "sporting theory of justice," including the origins of the term, successive efforts to limit its influence, and past debates on the need for sporting elements in an otherwise largely regulated and orchestrated legal proceeding.

A. *Roscoe Pound's Landmark Speech*

Debates about the "sporting theory of justice" are typically traced to a landmark speech delivered in August 1906 by Roscoe Pound, to an audience of American Bar Association ("ABA") members gathered for an annual meeting in St. Paul, Minnesota.[26] Pound was not yet the celebrated jurist and dean of Harvard Law School he would later become but a young, relatively unknown lawyer from Nebraska.[27] Speaking at a time of widespread cynicism about American court procedure, Pound summarized at length "the causes of popular dissatisfaction with the administration of justice."[28] Some of the causes he identified were the result of institutional inefficiency, such as arcane jurisdictional rules[29] and "the lavish granting of new trials."[30] But Pound reserved particular vitriol for "the common-law doctrine of contentious procedure, which turns litigation into a game."[31] He railed against the notion that litigators engage each other in a sports-like contest, seeking tactical advantage by catching each other in mistakes, bullying witnesses, turning experts into partisan actors—"forget[ting] that they are officers of the court."[32] This "sporting theory of justice," he noted, "is so rooted in the profession in

26. Pound, Causes, *supra* note 8, at 445.

27. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944 (1987) [hereinafter Subrin, *Equity*].

28. Pound was not unique in identifying dissatisfaction. *See* Frederick N. Judson, *The Procedure in Our American Judicial System*, 46 AM. L. REV. 865, 865–66 (1912) (reporting on a late nineteenth-century American Bar Association ("ABA") investigation into "the causes of the delay in the administration of justice" and summarizing the findings as "[c]omplex procedure, inadequate judiciary, procrastination, retrials, unreasonable appeals and uncertain law").

29. *See* Pound, Causes, *supra* note 8, at 449 (noting that almost twenty percent of reported decisions in a sample volume revolved around whether the court had jurisdiction to hear the case and arguing that "[i]t ought to be impossible for a cause to fail because brought in the wrong place").

30. *Id.* at 450.

31. *Id.* at 447.

32. *Id.* at 447–48.

America that most of us take it for a fundamental legal tenet," even though it "disfigures our judicial administration at every point."[33] The sporting theory, Pound argued, relied on the judge to play the role of umpire, enforcing the rules of the game, and rendered the judge reluctant to interfere otherwise, even when interference would be in the interest of justice.[34] By allowing parties to jostle for tactical advantage, the sporting theory of justice essentially elevated the rules of the game above the search for truth.[35]

Pound did not explicitly disaggregate the concept of sporting attitudes in litigation from adversary procedure more generally, and parts of his lecture read as a lament against the adversary system writ large. On the one hand, Pound saw the sporting theory as a direct result of adversarial practice.[36] On the other hand, he viewed American legal practice as inferior not only to continental, inquisitorial systems of law but also to common-law, adversarial practice in England, suggesting that Pound saw room for adversarial practice without the sporting behavior he loathed.[37]

Accounts of audience reaction to Pound's 1906 address tend toward the dramatic.[38] John Henry Wigmore, describing the event from memory thirty-one years later, related that young, progressive lawyers listened "with thrills of admiration" as "the truth was being unfolded to [them]."[39] More conservative, established lawyers, on the other hand, "were sensing alarm," "sat in dumb

33. *Id.* at 447. While the exact phrase "sporting theory of justice" may have been coined and popularized by Roscoe Pound, the phrase "sporting theory" in this context had been used previously by John Henry Wigmore. *See* 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 784 (1904) [hereinafter WIGMORE, TREATISE] (describing "the sporting theory of the common law, in which litigation was a game of skill, to be conducted according to specific rules and to be decided by the combined effects of skill, strength, and luck"). Several contemporary authors, including Roscoe Pound himself, attributed the term "sporting theory of justice" itself to Wigmore. *See, e.g.*, ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 127 (1921) [hereinafter POUND, SPIRIT]; William L. Ransom, *The Changing Profession*, 9 CORNELL L.Q. 29, 32 (1924); FRANK, COURTS ON TRIAL, *supra* note 13, at 91; Alexander Holtzoff, *The Elimination of Surprise in Federal Practice*, 7 VAND. L. REV. 576, 578 (1954) [hereinafter Holtzoff, *Elimination of Surprise*].

34. Pound, Causes, *supra* note 8, at 447. Wigmore argued that the "sporting theory" never represented the dominant mode of litigation in England, but "in the United States, the degenerate tendency has steadily been towards the domination of the function of umpire presiding over contestants in a game." *See* WIGMORE, TREATISE, *supra* note 33, § 784.

35. Pound, Causes, *supra* note 8, at 447–48.

36. *See id.* at 447 (blaming the "disfigurement" of the American court system on "[t]he idea that procedure must of necessity be wholly contentious").

37. *Compare id.* at 445 (noting that "[e]ven the wonderful mechanism of modern German judicial administration" has some detractors), *with id.* at 447 (noting that "contentious procedure" has been "strongly curbed in modern English practice").

38. In addition to Wigmore's account discussed below, see Rex E. Lee, *The Profession Looks at Itself—The Pound Conference of 1976*, 1981 BYU L. REV. 737, 737–38.

39. John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark That Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176, 177 (1937) [hereinafter Wigmore, *The Spark*].

dismay and hostile horror," in "astoniment" [sic] and "resentment."[40] Some attendees opined that Pound's views were "too unconscionable to discuss" and that "[a] more drastic attack upon the system of procedure could scarcely be devised."[41] In short, wrote Wigmore, many lawyers who had heard Pound speak were "hotly impatient to suppress the whole matter."[42]

B. *Early Efforts to Vanquish the Sporting Theory of Justice*

Not everyone describes the events of August 1906 with the same rapture,[43] but historical accounts agree that Pound's speech resulted in a flurry of activity, and by the end of the twentieth century some considered it "the most influential paper ever written by an American legal scholar."[44] Wigmore described the address as "the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession and radiating the spirit of resolute progress in the administration of justice."[45] Calls for reform were heard at state bar association meetings across the country.[46] Leaders of the bar, including Elihu Root and later president William Howard Taft, expressed their support.[47] The ABA referred Pound's address to its Committee on Judicial Administration and Remedial Procedure and convened a special committee to suggest measures for reducing cost and delay in litigation.[48] A New York State board called for

40. *Id.*

41. *Id.*

42. *Id.* (describing how younger lawyers had no chance to reclaim the floor from those "stout defenders of Things-As-They-Are").

43. *See, e.g.*, Lee, *supra* note 38, at 738. What Pound faced "was not so much hostility (although there was indeed some hostility on the part of the more conservative members of the bar), but inertia." Scott, *supra* note 17, at 1574; *see also id.* at 1569 ("I think Professor Wigmore exaggerated the hostility on the part of the senior members of the bar.").

44. Lee, *supra* note 38, at 738 (citing William T. Gossett, Bernard G. Segal & Chesterfield Smith, *Foreword* to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 7 (A. Levin & R. Wheeler eds., 1979)); *see also, e.g.*, Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 513 (2006) [hereinafter Tidmarsh, *Pound's Century*] (arguing that Pound's 1906 address "commenced the most thoroughly successful revolution in American law"); Maxeiner, *supra* note 15, at 992 (asserting that Pound's 1906 speech is "among the most famous addresses ever given to American lawyers").

45. Wigmore, *The Spark*, *supra* note 39, at 176; *see also* Judson, *supra* note 28, at 866 (summarizing reform efforts started as a direct result of Pound's address); William E. Doyle, J., U.S. Dist. Ct. for the Dist. of Colo., The Pretrial Is Here to Stay, Address Before the American Bar Association (Aug. 13, 1963), *in* 1963 A.B.A. SECTION INS. NEGL. & COMP. L. PROC. 345, 346 (1963) (Pound's speech "had a tremendous impact").

46. Scott, *supra* note 17, at 1574.

47. *Id.*; Subrin, *Equity*, *supra* note 27, at 952–53.

48. Judson, *supra* note 28, at 866 (describing the ABA's Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost of Litigation); Wigmore, *The Spark*, *supra* note 39, at 177.

"[s]implification of [p]ractice" rooted in Pound's principles.[49] For many years after 1906, Pound's excoriation of the sporting theory of justice was "the catechism for all progressive-minded lawyers and judges."[50]

Roscoe Pound himself authored a number of articles and speeches in which he explored the origins of the sporting theory and laid out his vision for procedural reform.[51] Pound saw two major influences on the American justice system that had steered it toward contentious procedure: (1) Puritanism and (2) a "frontier mentality" not found in other common-law systems.[52] Puritanical thought, according to Pound, conceived of the ideal judge as a "pure machine."[53] Because any human judgment would be tainted by original sin, the judge's authority, according to this line of thinking, ought to be constrained by unyielding formalist rules of procedure and evidence, to be applied with no discretion.[54] From these Puritanical beginnings, "keep[ing] down the judicial personality" became an end in itself, separate from substance or merit,[55] and advocates gained significant freedom to play around within the rules. Life on the frontier, according to Pound, further reduced the power of the judge vis-à-vis courtroom advocates.[56] As traditional hierarchies had collapsed in frontier America, so had the distance between the bench and the bar.[57] Lawyers had free rein to present their cases, with judges "sit[ting] by and administer[ing] the rules of the combat."[58] Pound worried that the sporting theory had become so entrenched in the American judicial system that his contemporaries could no

49. Subrin, *Equity*, *supra* note 27, at 954 (referring to the New York State Board of Statutory Consolidation).

50. Wigmore, *The Spark*, *supra* note 39, at 178. Law schools took an active role, too, turning their "Courses on Pleading" into courses of Civil Procedure. Scott, *supra* note 17, at 1574.

51. *See, e.g.*, Roscoe Pound, Some Principles of Procedural Reform, Address Before the Chicago Law Club (Dec. 3, 1909), *in* 4 ILL. L. REV. 388 (1910) [hereinafter Pound, Principles] (laying out three principles for reform: (1) more judicial discretion; (2) reforms aimed at ensuring that procedural rules serve only to vindicate substantive rights and not as a source of rights; and (3) code revisions that aim for a code that is simple and provides general principles rather than exhaustive detail); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 24 (1910) (drawing on concepts of Roman law to argue that U.S. law had become too rigid and formal); Roscoe Pound, Organization of Courts, Address Before the Minnesota State Bar Association (Aug. 20, 1914), *in* 6 AM. JUDICATURE SOC'Y, 1914, at 1, 18–28 (proposing reforms to the federal court structure); Roscoe Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 176 (1915) [hereinafter Pound, *Regulation*] (reiterating Pound's commitment to a simple, streamlined code with ample judicial discretion).

52. *See* Pound, Principles, *supra* note 51, at 397–98 (discussing Puritanism and frontier spirit); POUND, SPIRIT, *supra* note 33, at 127 (discussing "the frontier attitude").

53. Pound, Principles, *supra* note 51, at 397.

54. *Id.*

55. *Id.* at 397–98 ("[O]ur law of procedure distrusts the judge profoundly."). *See generally* Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811 (1911) (describing the influence of Puritanism on the common law).

56. Pound, Principles, *supra* note 51, at 398; POUND, SPIRIT, *supra* note 33, at 137.

57. Pound, Principles, *supra* note 51, at 398 (noting that the distance between bench and bar in the United States was small compared to England, leading to a distrust of the judge).

58. *Id.*

longer conceive of a courtroom as a place of dignity and decorum, and that it had furthermore stripped judges of much of their power:

> The descendants of the frontiersman have been slow to learn . . . that the court of a sovereign people may be surrounded by dignity which is the dignity of that people, that order and decorum conduce to the dispatch of judicial business, while disorder and easy-going familiarity retard it; that a counsellor at law may be a gentleman with fine professional feelings without being a member of a privileged caste; that a trial may be an agency of justice among a free people without being a forensic gladiatorial show; that a judge may be an independent, experienced, expert specialist without being a tyrant.[59]

Pound wrote against an early-twentieth-century backdrop in which (a) most states and the federal court system used a highly detailed and formalistic form of common-law procedure;[60] (b) some states had adopted versions of the "Field Code," a much simpler set of rules that had mitigated some of the most contentious aspects of litigation;[61] and (c) New York used a heavily expanded and widely criticized version of the Field Code known as the "Throop Code."[62] Pound advocated for a simple federal code of procedure modeled on the Field Code and considered the sprawling Throop Code an "impossible statute."[63] He preferred a simple code, to be shaped and updated further by an active judiciary, over a detailed code that would only lead to disputes about its application and interpretation.[64] Pound proposed a number of principles to guide procedural reforms: more judicial discretion, simpler rules, and a more flexible system for amending and adding rules.[65] He did not believe that a legislature could ever

59. POUND, SPIRIT, *supra* note 33, at 137–38.

60. *See generally* Subrin, *Equity*, *supra* note 27, at 917–32 (describing procedure in the decades preceding the Field Code).

61. *See* Everett P. Wheeler, *Reformed Legal Procedure, Federal and State*, 47 AM. L. REV. 48, 48 (1913) (explaining that the Field Code "was comparatively simple": "In a somewhat revised form as it existed in 1867, it consisted of 473 sections and was comprised in a little volume easily carried in your breast pocket."); Pound, *Regulation*, *supra* note 51, at 165–67.

62. Subrin, *Equity*, *supra* note 27, at 940; Wheeler, *supra* note 61, at 48–49. New York had once been the first state to adopt the Field Code but had over time expanded it to encompass several thousands of provisions, eroding its original simplicity. Subrin, *Equity*, *supra* note 27, at 940; Pound, *Regulation*, *supra* note 51, at 166–67.

63. Holtzoff, *Elimination of Surprise*, *supra* note 33; Pound, *Regulation*, *supra* note 51, at 166–67 (lamenting the rigidity of a code that can be amended only by legislative action); Pound, Principles, *supra* note 51, at 403–04.

64. *See* Pound, Principles, *supra* note 51, at 407 (asserting that a detailed code would serve only to "furnish material for forensic strife and judicial construction for the next generation").

65. *See id.* at 402–03. Pound believed, first, that too much of the enforcement of procedural rules had become the responsibility of parties rather than judges, and that this power should be returned to

fully anticipate how a rule of practice would work in practice.[66] He therefore believed that judges are best positioned to determine what adjustments are necessary, based on their own experience with the rule and what they hear about it from members of the bar.[67] While later discussions of the sporting theory of justice frequently aimed their criticism of contentious procedure at the element of undue surprise—the possibility of gaining a strategic benefit by springing unexpected evidence or an unanticipated procedural move on an opponent or witness[68]—Roscoe Pound took primary aim at the role of the judge in relation to the parties.[69]

Pound was not the only voice crying out for reforms.[70] Other lawyers contributed proposals for eradicating the sporting theory of justice, which included the wholesale abolition of rules of procedure,[71] "change[s] in . . . mental attitude,"[72] an expansion in the role of the judge by assigning factfinding responsibilities to jurors and judges jointly,[73] and proposals to retain the existing adversary system but level the playing field by creating a public defense function.[74] Pound's voice was a prominent one, however, and his calls for increased judicial discretion and simpler rules received support from a number of influential jurists.[75]

the judiciary, with limited appellate oversight. *Id.* at 402. Second, procedural rules should be much simpler and less detailed. *Id.* at 403. Rules should protect the parties' opportunity to present their case but should not become a source of rights or entitlements in themselves. *Id.* at 402. Third, courts should be involved in the creation of procedural rules. *Id.* at 403. Legislators should lay out only the code's "general features" and empower courts to amend or supplement the provisions of the code from time to time. *Id.*

66. *Id.* at 404.

67. *Id.*

68. *See infra* Section II.B.1.

69. Pound occasionally wrote about the need to "repress cunning," Roscoe Pound, *Enforcement of Law*, 20 GREEN BAG 401, 410 (1908), but, to the best of my understanding, he focused his advocacy on the need for increased pretrial discovery or other reforms aimed specifically at diminishing the element of surprise in litigation.

70. William Howard Taft, running for president, advocated for new rules of procedure for cases in equity. Subrin, *Equity*, *supra* note 27, at 952–53. Thomas Shelton, a prominent Virginia lawyer originally generally opposed to judicial discretion, changed his mind under Pound's influence and became one of the draftsmen of the ABA's first draft Enabling Act. *See id.* at 948, 955–56; *see also* Pendleton Howard, *American Criminal Justice and the "Rules of the Game,"* 24 A.B.A. J. 347, 347 (1938) ("The widely publicized results of what has been euphemistically called 'the sporting theory of justice' are the stock and trade of every college debater and journalistic analyst . . . .").

71. Judson, *supra* note 28, at 869.

72. Parker, Social Progress, *supra* note 17, at 705.

73. *Id.*

74. Maurice Parmelee, *A New System of Criminal Procedure*, 4 J. AM. INST. CRIM. L. & CRIMINOLOGY 359, 365 (1913).

75. *See, e.g.*, Judson, *supra* note 28, at 866, 869 (describing reform efforts by the ABA, Congress, and the Supreme Court, spurred by Pound's writings); Parker, Social Progress, *supra* note 17, at 705 (Fourth Circuit judge advocating for Pound-style reforms). Pound was active in numerous ABA

The road to reform was very long and very winding and has been described in detail elsewhere.[76] The ABA first recommended an amendment to the Federal Judiciary Act to vest federal judges with more discretion in 1909.[77] A first implementation of Pound's vision materialized in the Federal Equity Rules, which were enacted in 1912 and widely praised for their simplicity and efficiency.[78] The Rules Enabling Act that opened the door for a trans-substantive procedural code was not passed until 1934,[79] with the Federal Rules of Civil Procedure promulgated under its authority taking effect in 1938.[80] Pound's wish for more power for the judiciary was at least partially answered by the 1939 Federal Administrative Office Act, under which the federal judiciary gained additional powers.[81] The Federal Code of Criminal Procedure, similarly enacted with the objective to curb the sporting theory of justice, took effect in 1946.[82] Reforms were not limited to the federal judicial system. A large-scale ABA initiative sought to bring similarly sweeping reforms to the forty-eight then-existing states.[83] Pound turned his attention to appellate

committees, including a Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost of Litigation, the Committee on Uniform Judicial Procedure (created in 1911 to move toward an Enabling Act to be passed by Congress, which would authorize the Supreme Court to promulgate uniform federal rules), and the Standing Committee on Jurisprudence and Law Reform. Scott, *supra* note 17, at 1572; Subrin, *Equity*, *supra* note 27, at 944, 948. He traveled around the country to speak at state bar associations, usually armed with statistics he would compile from local case reports demonstrating what percentage of cases in that particular jurisdiction were being decided on procedural grounds rather than on points of substantive law. Scott, *supra* note 17, at 1573. In 1913, the American Judicature Society was formed, "to promote the efficient administration of justice," with Pound as a founding board member. *Id.* at 1574; Warren E. Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, 15 JUDGES' J. 27, 29 (1976).

76. *See, e.g.*, Jay Tidmarsh, *Resolving Cases "on the Merits*,*"* 87 DENV. U. L. REV. 407, 409–31 (2010) [hereinafter Tidmarsh, *Resolving Cases*]; Maynard E. Pirsig, *The Historical Role of the American Bar Association in Judicial Administration*, 16 WM. MITCHELL L. REV. 1195, 1196–1217 (1990). For an excellent discussion of the political tides and personalities involved in reform efforts in 1906–1938, see Subrin, *Equity*, *supra* note 27.

77. Judson, *supra* note 28, at 866; Scott, *supra* note 17, at 1571.

78. Tidmarsh, *Resolving Cases*, *supra* note 76, at 407; Subrin, *Equity*, *supra* note 27, at 953–54.

79. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072).

80. Subrin, *Equity*, *supra* note 27, at 910.

81. John J. Parker, Chairman, Special Comm. on Improving the Admin. of Just., Improving the Administration of Justice: The Work of the Committee (Sept. 30, 1941), *in* 27 A.B.A. J. 746, 746 (1941) [hereinafter Parker, Improving] (describing how the Federal Administrative Office Act changed the organization of the judiciary and gave it self-regulatory powers).

82. Alfred W. Blessing, Note, *Criminal Procedure—Discovery Practice in Nebraska*, 34 NEB. L. REV. 645, 645 (1955).

83. *See* Maxine Virtue, *Sweet Are the Uses of Discovery: A Reply to Mr. Hawkins*, 40 A.B.A. J. 303, 303 (1954) (explaining that each of the forty-eight states had a committee working on "minimum standards of judicial administration"); Parker, Improving, *supra* note 81, at 746–47 (describing large-scale ABA operations including one ABA committee in each state, plus seven committees of forty-nine

procedure.[84] He remained an active campaigner for procedural reform for the rest of his life.[85]

C. *Mid-Twentieth Century: Refining Practice Under the FRCP*

The 1938 Federal Rules of Civil Procedure ("FRCP" or "the Rules") were enacted to "secure the just, speedy, and inexpensive determination of every action and proceeding"[86] and are commonly thought to embody Pound's vision.[87] Hailed as the "great trans-substantive code,"[88] the Rules were calibrated to make procedure simpler, more orderly, and more predictable, and to expand judicial discretion to increase the likelihood that the best claims or defenses would prevail, rather than the best strategy.[89] Among other innovations, the Rules vastly expanded the scope of pretrial discovery,[90] reducing parties' ability to ambush each other with unexpected evidence at trial.[91] They also simplified the pleading process, so that cases were less likely

members each to provide further support); *see also* Burger, *supra* note 75, at 33 (stating that some states had developed pretrial procedure codes in the 1920s, but the Federal Rules of Civil Procedure provided a catalyst for further development on the states' side).

84. Scott, *supra* note 17, at 1572–73.

85. *Id.* at 1572.

86. FED. R. CIV. P. 1.

87. *See* Tidmarsh, *Resolving Cases*, *supra* note 76, at 407 ("Our modern procedural system was built largely on the foundations of Roscoe Pound's vision.").

88. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

89. *See, e.g.*, F. Hastings Griffin, Jr., *Discovery: A Criticism of the Practice*, 1 FORUM 11, 12 (1966) ("Then along came the Federal Rules . . . . Light replaced obscurity. Reasonable men would try reasonably clear issues after a reasonable chance to prepare. Or so the theory went."); Tidmarsh, *Resolving Cases*, *supra* note 76, at 407 (the Rules were "built largely on the foundations of Roscoe Pound's vision"); Tidmarsh, *Pound's Century*, *supra* note 44, at 528 ("[T]he linchpin of Pound's principles—judicial discretion—saturates the Federal Rules.").

90. *See, e.g.*, Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 (1998).

91. Walter A. Newport, Jr., *Notes and Legislation*, 35 IOWA L. REV. 422, 422–23 (1950) ("The spirit and purpose of the rules, of changing the old 'sporting theory of justice' into one of full knowledge to all parties of all relevant facts before trial, is now commonly accepted."); Parker, Improving, *supra* note 81, at 748 (explaining that the new federal practice, and in particular its pretrial discovery features, are rendering trials "more business-like and the old 'sporting' theory of justice is being abandoned"); William K. Coblentz, *Discovery Under the Federal Rules of Civil Procedure*, 7 LAWS. GUILD REV. 266, 266 (1947) ("One of the main objectives of the new Federal Rules of Civil Procedure was to discard what has been appropriately called the 'sporting theory of justice' and reduce the element of surprise to a minimum . . . ."); Abraham E. Freedman, *Discovery as an Instrument of Justice*, 22 TEMP. L.Q. 174, 175 (1948) (asserting that the purpose of the FRCP, and in particular its discovery provisions, has been "to abolish what has been termed as 'the sporting theory of justice'"); Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205 (1942) [hereinafter Holtzoff, *Instruments of Discovery*] ("The elimination of the 'sporting theory' of justice, the simplification of procedure, and the prompt disposition of controversies on their merits are the great objectives of the new federal civil practice.").

to be thrown out on a foot fault.[92] In the decades that followed, the Rules, and their discovery provisions in particular, were frequently credited with a substantial reduction or even elimination of the sporting theory of justice in civil litigation.[93] Pretrial discovery allowed parties to investigate their own claims and defenses and those of their adversaries, and it enabled the exchange of information that might previously not have come to light until the time of trial.[94] Some commentators went so far as to suggest that the sporting theory of justice had been vanquished.[95]

The newly enacted FRCP left open a number of questions relating to strategic behavior. Central to many of these questions was disagreement over whether the new procedural regime had truly eliminated all room for strategic maneuvering and surprise at trial, or whether there were aspects of litigation

92. *See* Alexander Holtzoff, *Random Thoughts on Federal Discovery Practice*, 1948 A.B.A. PROC. SEC. INS. L. 53, 58 (1948) [hereinafter Holtzoff, *Random Thoughts*] (stating that the FRCP's discovery provisions "make it possible more effectively than ever before to ascertain the truth, to curtail unnecessary disputes at the trial . . . and to render substantial justice"); Alexander Holtzoff, *Two Years' Experience Under the Federal Rules of Civil Procedure*, 21 B.U. L. REV. 33, 33 (1941) ("The objectives of the new procedure were attained to an extent far beyond the expectations and even the hopes of its most ardent advocates and champions.").

93. *See* Parker, Improving, *supra* note 81, at 746 (asserting that the new procedure "works so well that in the federal courts questions of procedure can be almost entirely dismissed from consideration and the time of court and counsel given to the merits of the controversy before them"); Virtue, *supra* note 83, at 303 ("[T]he right to discovery goes to the essence of a trial as a search for truth as contrasted with the now outmoded view of the trial as a 'mere sporting contest.'"); Holtzoff, *Elimination of Surprise*, *supra* note 33, at 577 ("The new procedure . . . effectively carried out the basic concept that the purpose of litigation is not to conduct a contest or to oversee a game of skill, but to do justice as between the parties and to decide controversies on their merits.").

94. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (noting that the FRCP's discovery instruments are intended to make litigation "less a game of blindman's buff"); *see also* Holtzoff, *Elimination of Surprise*, *supra* note 33, at 577–78 (stating that the FRCP permitted "fishing . . . if there is a reasonable prospect of fish being caught"); Langbein, *supra* note 15, at 524–26 (describing how modern discovery enables litigants to gather the information they need to settle their case).

95. *See, e.g.*, Parker, Improving, *supra* note 81, at 748 ("[T]hroughout the country . . . the old 'sporting' theory of justice is being abandoned."); Glenn E. Coven, Jr., *Work Product Exception to Discovery—The New York Experience*, 53 CORNELL L. REV. 98, 98 (1967) ("[T]he 'sporting' theory of justice has been displaced by the belief that justice is served by revealing information and thereby minimizing surprise at trial."); William E. Knepper, *Some Suggestions for Limiting Discovery*, 34 INS. COUNS. J. 398, 398 (1967) ("Surprise, dearly cherished by an earlier generation of trial lawyers, is no longer possible if the discovery rules are properly used." (quoting Charles Alan Wright, *Discovery*, 35 F.R.D. 39, 40 (1963))). *But see* Virtue, *supra* note 83, at 303 (arguing that the sporting theory "has so pervaded litigation" that it will take further adjustments of the Rules to fully eliminate it); Earl Warren, C.J., Sup. Ct. of the U.S., The Advocate and the Administration of Justice in an Urban Society, Address Before the Roscoe Pound American Trial Lawyers Law Center, *in* 47 TEX. L. REV. 615, 619 (1969) ("Despite the wide adoption of the Federal Rules of Civil Procedure . . . the view is still widely held that the law suit belongs to the lawyers; that the judge is an umpire . . . [and] that concealment and surprise are proper weapons in the lawyer's arsenal of tricks . . . ."); William Seagle, *If Men Were Angels*, 29 VA. L. REV. 664, 668 (1943) (reviewing JEROME FRANK, IF MEN WERE ANGELS (1942)) ("The sporting theory of justice is a malign factor in judicial administration . . . .").

practice where secrecy or strategic choice could or should be preserved. Questions included whether parties should be able to surprise witnesses with impeachment material,[96] their ability to discover each other's legal positions before trial,[97] whether they should be able to seek discovery regarding the opinions of expert witnesses,[98] whether a party could be required to undergo a medical examination,[99] whether a plaintiff could seek to discover a defendant's insurance policy limits,[100] and whether relevance was truly the only requirement for obtaining discovery or whether some additional showing might be required.[101]

One major open question concerned the continued viability of the attorney work-product doctrine, which enables parties to shield information from discovery. Like every other form of discovery privilege, the work-product doctrine has the power to take potentially relevant evidence off the table, and there were more than a few lawyers who believed that the doctrine fundamentally violated the spirit of the FRCP and its open-discovery ideals.[102]

96. The use of surprise impeachment materials remained a debated topic for several decades. Holtzoff, *Instruments of Discovery*, *supra* note 91, at 210 (describing debates on whether depositions may be taken for the purpose of obtaining information for impeachment of the deposed witness at trial); Kenneth B. Hawkins, *Discovery and Rule 34: What's So Wrong About Surprise?*, 39 A.B.A. J. 1075, 1079 (1953) (arguing that the ability to impeach a witness with unexpected information is essential to a lawyer's ability to unmask a lying witness); Charles Alan Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909, 944 (1953) (portraying the use of surprise in impeachment as an outdated practice); Holtzoff, *Elimination of Surprise*, *supra* note 33 (arguing against any and all surprise at trial); Robert F. Kane, *The Work-Product Doctrine—Cornerstone of the Adversary System*, 31 INS. COUNS. J. 130, 133 (1964) (arguing that surprise is necessary in personal injury cases); John P. Frank, *Pretrial Conferences and Discovery—Disclosure or Surprise?*, 1965 INS. L.J. 661, 663, 665 (1965) [hereinafter Frank, *Pretrial Conferences*] ("the overwhelming weight of professional opinion is that surprise should be eliminated," but arguing that surprise is necessary to unmask lying witnesses).

97. The FRCP refashioned not only pretrial discovery but also pleading requirements. In its early years, it was not obvious to what extent a party could seek to discover the bases for an adversary's claims or defenses through the use of interrogatories. *See* Holtzoff, *Instruments of Discovery*, *supra* note 91, at 215.

98. The original FRCP's discovery provisions were silent on the topic of expert discovery. *Id.* at 210. It was not as self-evident as it is today that parties can seek pretrial discovery of an opposing party's expert's opinions and the basis for those opinions. Holtzoff, *Random Thoughts*, *supra* note 92, at 57 (observing in 1948 that "it seems astonishing" in hindsight that the availability of expert discovery was called into question); Knepper, *supra* note 95, at 402 (describing in 1967 that some authorities still decline to permit expert discovery, because it is "a vehicle for making use of an adversary's trial preparation," as well as a "taking [of] property"); FED. R. CIV. P. 26(a)(2), (b)(4).

99. Holtzoff, *Random Thoughts*, *supra* note 92, at 57. This question is now settled in FED. R. CIV. P. 35.

100. Knepper, *supra* note 95, at 401–02. This question is now settled in FED. R. CIV. P. 26(a)(1)(iv).

101. William Schwartz, *The New Discovery Rule: Some Significant Minnows Among the Tritons*, 46 B.U. L. REV. 435, 438–39, 449–50 (1966) [hereinafter Schwartz, *New Discovery Rule*].

102. *See, e.g.*, Coblentz, *supra* note 91, at 267–69; Holtzoff, *Instruments of Discovery*, *supra* note 91, at 211–12. Additionally, some believed that under the new discovery regime the work-product doctrine created major inefficiencies. SIMON, *supra* note 5, at 64–65.

The contrary view held that, in the context of the attorney work-product doctrine, the desire to eliminate surprise must give way to other considerations.[103] In *Hickman v. Taylor*,[104] the Supreme Court settled the broad contours of the question.[105] It held that the concept of attorney work product does not violate the principles of the FRCP and that (subject to certain exceptions) attorney work product is not discoverable.[106] As discussed in more detail in Section III.A, the *Hickman* Court rested its decision on the notion that if work-product protection were to be abandoned, "[t]he effect on the legal profession would be demoralizing."[107]

But in other procedural areas, the Court seemed more committed to the reduction of strategy space. In 1957, in *Conley v. Gibson*,[108] the U.S. Supreme Court endorsed what has come to be referred to as notice pleading, a fairly minimal pleading standard requiring a plaintiff to include in its complaint no more than "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[109]

In essence, the *Conley* decision forced the Court to consider two anti-sporting principles that tend to collide in the pleading context: (a) the anti-foot-fault principle, which holds that a plaintiff should not lose his case because of a minor pleading mistake and (b) the anti-surprise principle, which holds that a defendant is entitled to be notified of the claims brought against him and not to be surprised with unexpected claims later. The *Conley* Court acknowledged both the two considerations and the opinion reflects a belief that, in the pleading context, principle (a) needed to be clarified and reinforced.[110] The Court explicitly invoked the Federal Rules as a force against the sporting theory of justice, noted that this simplified form of pleading was made possible by the pretrial procedures created by the Rules, and held that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome."[111] (Fifty-one years later, concerns

103. One argument held that without protection for attorney work product, parties may reduce their investigative efforts, and reduced investigative efforts might result in reduced (and possibly lower-quality) information being available to the trier of fact, thereby reducing the likelihood of a correct outcome. SIMON, *supra* note 5, at 64–67.

104. 329 U.S. 495 (1947).

105. *Id.*

106. *Id.*

107. *Id.* at 511, 513–14; *see infra* notes 214–18 and accompanying text.

108. 355 U.S. 41 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

109. *Id.* at 47 (quoting FED. R. CIV. P. 8(a)(2)).

110. *Id.* (referencing "a short and plain statement of the claim," representing principle (a), and "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," representing principle (b)).

111. *Id.* at 47–48 (holding that, instead, the Rules "accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

about abusive discovery caused the pendulum to swing back, and the "notice pleading" standard was superseded by *Bell Atlantic v. Twombly*'s[112] "plausibility standard."[113])

In the criminal context, *Brady v. Maryland*[114] represented another repudiation of the sporting theory of justice, requiring criminal prosecutors to turn over exculpatory information that, if disclosed, could change the verdict or the defendant's sentence.[115] Allowing individual prosecutors to decide to withhold this kind of information, the Court held, would "cast[] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."[116]

D. *Late Twentieth Century: Revisiting Adversarial Practice*

By the middle decades of the twentieth century, some believed that the sporting theory of justice had been firmly left behind in the past,[117] though others disagreed and still saw too much "contentious proceeding" in the courts.[118] Procedural reforms in the states were still underway.[119] Appellate procedure, according to Pound, also still needed work.[120] At the same time, there were concerns that some reforms had gone too far, creating problems that had not existed previously. By the 1960s and 1970s, concerns increased about the FRCP's tendency to enable overdiscovery and delay tactics.[121] As much as the FRCP's discovery rules delivered transparency, they also provided new avenues

112. 550 U.S. 544 (2007).

113. *Id.*

114. 373 U.S. 83 (1963).

115. *Id.* at 87–88. A decade later, the Supreme Court imposed significant limits on this requirement, a move that has been interpreted as a resuscitation of the sporting theory. United States v. Agurs, 427 U.S. 97, 107–14 (1976); Steven H. Goldberg, *What Was Discovered in the Quest for Truth?*, 68 WASH. U. L.Q. 51, 56–59 (1990).

116. *Brady*, 373 U.S. at 88.

117. *See* Parker, Improving, *supra* note 81, at 746 (the FRCP "has been in force now for three years and works so well that in the federal courts questions of procedure can be almost entirely dismissed from consideration"); Coven, *supra* note 95, at 98, 114 ("the 'sporting' theory of justice has been displaced"); Knepper, *supra* note 95, at 398 (stating that surprise "is no longer possible").

118. *See* Seagle, *supra* note 95, at 668 (interpreting a move towards agency adjudication to be a result of continued domination of the courts by the sporting theory of justice); Virtue, *supra* note 83, at 303 (arguing that the sporting theory still drives people away from litigation); Warren, *supra* note 95, at 615 (noting that the problems that Pound observed in 1906 still exist today).

119. *See* Freedman, *supra* note 91, at 174; Pound, Generation, *supra* note 17, at 369; Virtue, *supra* note 83, at 303; Ira W. Jayne, *Discovery: The New Michigan Rule*, 40 A.B.A. J. 304, 304–05 (1954).

120. *See* John Cornyn, III, *Preserving Error on Appeal in Texas Civil Cases: A Practical Guide for Civil Appeals in Texas*, 23 ST. MARY'S L.J. 11, 12 (1991) (citing Pound in 1941 as "tempted to think that appellate procedure existed as a system of preventing the disposition of cases themselves upon their merits").

121. *See* Knepper, *supra* note 95, at 401 (describing concerns about overdiscovery, especially in small cases); Warren, *supra* note 95, at 619 (delay); Burger, *supra* note 75, at 33 (describing "misuse[] and overuse[]" of FRCP pretrial procedures); Simon H. Rifkind, *Are We Asking Too Much of Our Courts*, 15 JUDGES' J. 43, 49 (1976) (describing discovery as a "sporting match" and "endurance contest").

for strategic action, such as burdensome production requests and dilatory tactics.[122]

The 1970s and 1980s saw a lively debate on whether the civil litigation system should be an adversary system at all. Empirical studies tested whether adversary presentation of evidence is more effective than nonadversary presentation.[123] (The question remained unsettled.)[124] Scholars debated whether changes in society and the legal profession—changes such as better education, mass media, larger cities with bigger law firms, and changing roles for lawyers in society—called for a reevaluation of the role of surprise and adversary values.[125]

In 1976, Chief Justice Warren Burger convened a "Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," which almost immediately became known as "the Pound Conference."[126] The gathering reinvigorated debates about the adversary system—why it exists, whether it should continue to exist, and whether it was in need of reform.[127] The most critical views did not win the day. Indeed, the adversary system is still with us today. But these important questions were never conclusively answered

122. *See infra* Section III.A.

123. *See generally* John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972) (finding that adversary presentation helps counteract pre-existing biases in jurors); Allan Lind, John Thibaut & Laurens Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 VA. L. REV. 271 (1976) [hereinafter Lind et al., *Comparison*] (replicating Thibaut et al.'s 1972 study in France). *See also* Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1095–1100 (1975) (criticizing Thibaut et al.'s experimental design).

124. *Id.* To the best of my understanding, there is no uniformly accepted answer to this question.

125. *See* Charles W. Joiner, *Fog in the Courts and at the Bar: Archaic Procedures, and a Breakdown of Justice*, 47 TEX. L. REV. 968, 972 (1969) (arguing that "[p]eople have changed": they are more educated and have become more aware of world events through radio and television); Warren, *supra* note 95, at 615 (arguing that legal practice now involves bigger firms in bigger cities; the judge no longer knows the jurors and the jurors do not know each other); James Marshall, *Lawyers, Truth and the Zero-Sum Game*, 47 NOTRE DAME LAW. 919, 926 (1972) (arguing that the image of lawyers as fighters is anachronistic).

126. J. Clifford Wallace, *Judicial Reform and the Pound Conference of 1976*, 80 MICH. L. REV. 592, 592 (1982); Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 679 (2017).

127. Lee, *supra* note 38, at 737–40; M. Peter Mosser, *Future Shock: Challenges Facing the Legal Profession*, 5 BAR LEADER 11, 12–13, 28 (1980); Subrin, *Equity*, *supra* note 27, at 944–48; *see also* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1864–67 (2014) (arguing that the Pound Conference started a "fourth era" of American civil procedure). The conference was followed by a task force headed by U.S. Attorney General Griffin Bell, tasked with formulating recommendations for reform. Mosser, *supra*, at 13.

and receive much less attention today.[128] They are important to revisit when considering the role of strategy in litigation.

II. THE PURPOSE(S) OF SPORTING BEHAVIOR IN CIVIL LITIGATION

To examine the role of strategy in modern civil litigation,[129] it is necessary to understand the relationship between sporting behavior and adversary litigation practice writ large. As discussed below, unambiguously untangling the two realms of practice is not straightforward, but there are types of litigation behavior that are generally considered to belong to one realm or the other. This part explores two higher-level questions: (1) What is the relationship between the adversary system and sporting behavior in litigation? (Section II.A.) And (2) what purpose(s) might the sporting elements of adversary practice serve? (Section II.B.)

A. *Sporting Behavior Within an Adversarial System*

The sporting theory of justice can be difficult to disentangle from the adversary system of litigation more generally. First, a note about terminology. In the pages that follow, I will be discussing a category of behavior that is frequently disparaged as "gamesmanship," "foul play," "sharp practice," etc. For the sake of continuity of a narrative that started with Pound and Wigmore's sporting theory of justice, I will refer to these behaviors as "sporting behavior" here.

Historically, sporting behavior has frequently been described as part and parcel of adversary practice,[130] though there have long been lawyers and other commentators who have sought to separate some of the more controversial aspects of contentious litigation practice as distinct and potentially severable from the adversary system writ large.[131] Separate, party-driven presentation of

128. *See, e.g.*, Damaška, *supra* note 123, at 1083 (describing debates about "the relative advantages of the adversary and nonadversary presentations of evidence as tools in the quest for the truth"); Thibaut et al., *supra* note 123, at 386–401 (attempting to assess the value of adversary presentation empirically); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 354–55 (1989) (describing a twentieth-century shift in ideological underpinnings of the adversary system); *see also* John R. Couch, *A Trial Lawyer's Perspective*, 9 BRIEF 9, 9 (1980) (complaining about other lawyers' complaints about the adversary system); *infra* Section II.A (discussing views of the adversary system in more detail).

129. *See infra* Part III.

130. *See, e.g.*, Pound, Causes, *supra* note 8, at 447 (lamenting that the American court system is being disfigured by "[t]he idea that procedure must of necessity be wholly contentious").

131. *See, e.g.*, Burger, *supra* note 75, at 31 (asserting that Pound believed that "exaggerated contentiousness" was "perverting the adversary idea"); SIMON, *supra* note 5, at 66–67 (theorizing that rules curbing aggression within the existing system would be effective); Schwartz, *New Discovery Rule*, *supra* note 101, at 438 (stating that the federal rules should have "excised" the sporting elements from civil procedure); Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME

evidence is a defining part of an adversary system of litigation.[132] A sense of contest is an inevitable consequence. But the adversary system has also invited elements of trickery and secrecy, aggression and obstruction—elements where, in the words of Jerome Frank, the "fight" can get in the way of the "truth."[133]

While to my knowledge no one has offered a precise delineation of the sporting theory within an adversary system, around the time of the 1976 Pound Conference, it seems to have been generally assumed that the adversary system contains sporting elements (which may or may not be acceptable), but also other, non-sporting, adversarial elements that are more universally accepted.[134] The sporting elements were typically taken to be those elements that relied on an element of surprise, concealment, aggression, or trickery.[135]

In the wake of the Pound Conference, the existence of the adversary system itself was called into serious question.[136] Some common criticisms of the adversary system as a whole can be interpreted as aimed at behavior that is "sporting" in nature (e.g., aggressive, conniving, obfuscating, or otherwise strategic) but that flows directly, almost as a natural consequence, from adversarial bedrock. The adversary system has been accused, for example, of having low regard for the truth—i.e., of subverting rather than supporting the judicial system's truth-seeking objectives—because of the way that it allows parties to "massage the facts" as a part of adversary procedure.[137] For instance, when a lawyer is permitted to prepare a witness for deposition or trial testimony (as part of a partisan effort to present its version of the facts in the best possible light), the truth may end up being distorted by the interaction between the lawyer and the witness.[138]

LAW. 479, 484 (1962) ("The sporting theory of justice in a lawsuit is a corruption of the assumptions of the adversary system; it is not their necessary consequence.").

132. *See Adversary System*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A procedural system . . . involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.").

133. FRANK, COURTS ON TRIAL, *supra* note 13, at 85 ("[T]he lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts.").

134. *See supra* notes 130–31 and accompanying text.

135. *See* Frank, *Pretrial Conferences*, *supra* note 96, at 663 (surprise); Sward, *supra* note 128, at 312 (concealment); Freedman, *supra* note 91, at 175 (surprise and concealment); Warren, *supra* note 95, at 619 (concealment, surprise, trickery); Burger, *supra* note 75, at 31 (aggression); Marvin E. Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465, 472 (1976) [hereinafter Frankel, *The Adversary Judge*] (aggression); Griffin, *supra* note 89, at 11 (trickery).

136. *See supra* notes 126–28 and accompanying text.

137. Edmund Byrne, *The Adversary System: Who Needs It?*, 6 ALSA F. 1, 10 (1982); Damaška, *supra* note 123, at 1105; G. Alexander Nunn, *Judicial Enforcement of Evidence Law*, 78 VAND. L. REV. (forthcoming 2025) (arguing that "[o]ur legal system's commitment to truth is overshadowed by a near-religious commitment to the adversarial process").

138. *See* Damaška, *supra* note 123, at 1094.

This "truth-distorting" effect may not be a major cause for concern when both sides engage in it. In that sense, the adversary system represents an ideal: a system calculated to let the truth surface through the contest of two equally capable and equipped contestants.[139] Today, however, it is fairly uncontroversial that an adversary system can only meet this ideal when there exists an equality of resources between the parties.[140] When only one side is represented, or when one side is represented by much more sophisticated counsel than the other, any hope that the truth will emerge from the competitive efforts of both sides is significantly diminished.[141] An unrepresented party faces real challenges when litigating against a sophisticated adversary, and those challenges are due in significant part to sophisticated counsel's ability to engage in strategic behavior that an unrepresented party does not expect, does not know how to fend off, and cannot reciprocate.[142]

But as many detractors as the adversary system has had at various points in time, many arguments have been raised in its favor, and indeed it survives to this day. A well-trodden defense of adversary systems of litigation (as distinct from inquisitorial or continental systems, and not necessarily involving trickery, surprise, or other sporting behavior) is that adversary procedure, despite its imperfections, promotes accurate outcomes; that, at least among equally powerful adversaries, they improve the likelihood that the truth will emerge in court.[143] If each side has an incentive to bring forward its best facts and arguments, the finder of fact will have access to the full universe of relevant information, and will be more likely to reach a correct result.[144] A number of variants of this argument are in circulation, many focusing on a particular aspect of adversary practice. Many lawyers, for example, believe that party-driven cross-examination in particular is necessary to expose inconsistencies and plain lies in a witness's testimony, thereby increasing the likelihood that the truth

139. *See* SIMON, *supra* note 5, at 34 (describing Pound's reaction to this argument: Pound found it "nihilistic and dishonest. Nihilistic, because this kind of equality—an equal opportunity to win without regard to the substantive merits—seemed morally empty, indeed pernicious. Dishonest, because in fact the system doesn't even provide this type of 'sporting equality,' since access to counsel and other litigation and planning resources usually depends on the wealth of the client.").

140. *See, e.g.*, Sward, *supra* note 128, at 329; SIMON, *supra* note 5, at 34.

141. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) [hereinafter Galanter, *Haves*] (cataloguing the ways in which sophisticated, represented repeat players come out ahead of less sophisticated, unrepresented one-shotters).

142. *See id.* at 103 & n.20 (explaining that parties' ability to "mobilize and utilize legal resources" affects both their positions and their ability to use their position strategically); *see also infra* Part III.

143. *E.g.*, Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1137 (1982); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 81 (2000).

144. *E.g.*, Byrne, *supra* note 137, at 1 ("[T]he best way to get to an answer is by arguing each side before an impartial and enlightened arbiter of fact and law.").

will come out.[145] This kind of questioning can require some hostile engagement with witnesses, and only an adversary system fully allows for that: party representatives are able to approach a witness with hostility in a way that a judge could not.[146]

Another accuracy-based argument holds that adversary practice, compared to a system where the judge takes a more active investigatory role, reduces the risk that the trier of fact will reach a conclusion prematurely and therefore perhaps incorrectly.[147] The argument, articulated most completely by Lon Fuller, runs as follows: an inquisitorial judge, endeavoring in good faith to uncover the truth, starts from a clean slate and tries to construct a coherent and accurate picture of what happened by examining one piece of evidence at a time. As the judge engages in this process, some preliminary pattern will start to emerge from the evidence—Fuller argues that this tends to happen early in a case—and a human impulse compels the judge to notice it and assign a preliminary label to it.[148] That is to say, the judge reaches a tentative conclusion. The judge does not do so out of laziness or prejudice, Fuller argues, but because it is cognitively difficult to bring order and coherence to a collection of evidence without forming some tentative theory of the case, updating that theory as more evidence is presented.[149] Of course, the tentative theory may be incorrect, and evidence presented later may prove it to be so. And the judge remains free to revise the tentative theory at any point until he renders the verdict. But, Fuller argues, tentative theories can be dangerously sticky. He worried about what today is commonly called "confirmation bias"[150]: "[W]hat starts as a preliminary

145. *See, e.g.*, Edward F. Sherman, *Dean Pound's Dissatisfaction with the "Sporting Theory of Justice": Where Are We a Hundred Years Later?*, 48 S. TEX. L. REV. 983, 986 (2007) ("[C]ross-examination is . . . founded on the belief that it is necessary to expose untruths and inconsistencies in witnesses' testimony and that the truth will best be discovered if live witnesses give spontaneous testimony in a posture of direct and cross-examination."); Damaška, *supra* note 123, at 1106 (quoting John Henry Wigmore: "cross-examination is the greatest legal engine ever invented for the discovery of truth"); *see also infra* Section II.B.1.

146. *See* Damaška, *supra* note 123, at 1092; Frankel, *The Adversary Judge*, *supra* note 135, at 469–70; *see also* Pendleton Howard, *American Criminal Justice and the "Rules of the Game*," 24 A.B.A. J. 347, 348 (1938) (arguing that in the United States, unlike in England, jurors may be adversarially inclined with respect to the judge, as they lack respect for authority).

147. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978); Frankel, *The Adversary Judge*, *supra* note 135, at 479 n.37; Damaška, *supra* note 123, at 1092; *see also* Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7, 14 (1987) (discussing how in a nonadversary system, the judge is both an investigator and a decider, while in an adversary system, the judge is a regulator and a decider).

148. Fuller, *supra* note 147, at 383.

149. *Id.*

150. Fuller may have been aware of the then-recent work by British psychologist Peter Wason, who is considered the discoverer of the concept "confirmation bias," first describing it in a paper

diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that *confirms* the diagnosis makes a strong imprint on the mind, while all that *runs counter* to it is received with diverted attention."[151] A judge who is in control of the inquiry will therefore be inclined to pursue questions that will confirm her tentative conclusions and ignore any testimony that tends to conflict with it. When, conversely, evidence is presented by two opposing parties and not controlled by the finder of fact, the case is held "in suspension" and the finder of fact will be much less inclined to attempt any premature labeling or classification.[152] Empirical studies have lent some support to this notion, providing moderate indications that adversary presentation of evidence is "bias-moderating."[153]

The adversary system has been kept in place not only by accuracy-based arguments. It has also been explained or defended on grounds rooted in individual rights,[154] or in the right of the public to observe a "public trial" of issues and facts.[155] It has also been defended on various cultural grounds: as an expression of cultural priorities that value individual liberty,[156] or as an evolved form of conflict resolution that allows parties to work through their conflict in a relatively civilized way, wrested free from government control.[157] The adversary system has been described as a "defining element of American legal

published in 1960, though the term itself was coined later. *See* P.C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q.J. EXP. PSYCH. 129, 138–39 (1960); Jonathan St B.T. Evans, *Reasoning, Biases and Dual Processes: The Lasting Impact of Wason (1960)*, 69 Q.J. EXP. PSYCH. 2076, 2078–79 (2016).

151. Fuller, *supra* note 147, at 383 (emphasis added).

152. *Id.*; *see also* Frankel, *The Adversary Judge*, *supra* note 135, at 479 n.37 (quoting Italian jurist Piero Calamandrei: "[T]he soul of a judge is composed of two lawyers in embryo, facing each other, like the Biblical twins who were struggling against each other even in the womb. The highest virtue of the judge, impartiality, is the result of this psychological conflict."); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 442 (1980) (noting that the adversary system allows the judicial system to let values play out against each other).

153. *See* Lind et al., *Comparison*, *supra* note 123, at 282 (finding that adversary presentation of evidence is "bias-moderating," especially in jurors with the strongest pre-conceived ideas).

154. *See* Murray L. Schwartz, *The Zeal of the Civil Advocate*, 8 AM. BAR FOUND. RSCH. J. 543, 548 (1983) [hereinafter Schwartz, *Zeal*] (arguing that adversary procedure represents "the best way of preserving human dignity"); Jack Norton, *Truth and Individual Rights: A Comparison of United States and French Pre-Trial Procedures*, 2 AM. CRIM. L.Q. 159, 172 (1964) (arguing that in a criminal context, the U.S. system "is adversary and places a premium on surprise and tactical maneuvering," with individual rights "paramount even at the risk that the guilty will go free and the truth will not prevail.").

155. Fuller, *supra* note 147, at 383–84.

156. RHODE, *supra* note 143, at 110.

157. Byrne, *supra* note 137, at 2.

identity,"[158] entrenched as it is not only in American law, but also in American culture.[159]

Some historical arguments in favor of the adversary system are much less lofty. For example, it has been put forward that (especially in the criminal context) departing from the existing adversary process risks upsetting a carefully calibrated balance of advantages held by prosecution and defense.[160] The system has also been propped up by an argument that the adversary system is simply no better or worse than any other legal system.[161] More cynically, some have argued for the adversarial status quo on the ground that no legal system will ever allow us to *truly* know the truth anyway, so the adversary system is as good as any.[162] Almost equally cynical but less defeatist in nature are opinions that the adversary system is "itself an intrinsic good."[163] Perhaps then, the adversary system survived the Pound Conference simply because no other system was obviously better.

The survival of the adversary system into the twenty-first century did not necessarily imply the survival of surprise and other sporting elements *within* the adversary system. Some opportunities for surprise in litigation have disappeared, but others have remained or newly emerged, many of them intricately intertwined with adversary practice more broadly.

Again, it is probably not possible to definitively and unambiguously separate sporting practices from the adversary system more broadly, and whether a particular litigation behavior is considered "sporting behavior" or a legitimate, honorable part of zealously executed adversarial practice is often a

158. SIMON, *supra* note 5, at 62–63.

159. Stephan Landsman, *Who Needs Evidence Rules, Anyway?*, 25 LOY. L.A. L. REV. 635, 635 (1992) ("Competition and contest are deeply ingrained in our culture."); John DJ Havard, *Expert Scientific Evidence under the Adversarial System. A Travesty of Justice?*, 32 J. FORENSIC SCI. SOC'Y 225, 233 (1992) ("[I]t is an incontrovertible article of belief of the legal 'establishment' in this country that our system of justice will continue to be adversarial and that any attempt to introduce civil law procedures must be rejected out of hand."); Cornyn, *supra* note 120, at 12 ("We stand on the shoulders of our forbears in the law and are largely left to incremental efforts to reform and improve our legal system . . . ."); *see also* SIMON, *supra* note 5, at 67 ("[E]ach party feels compelled to be aggressive solely in anticipation of the other's aggression."). More theoretically, it has also been argued that adversary presentation facilitates the search for a Hegelian synthesis of thesis and antithesis. Byrne, *supra* note 137, at 11. *But see* Thomas D. Barton, *The Adversary System: Who Needs It? A Response to Edmund Byrne*, 6 ALSA F. 18, 18–21 (1982) (arguing that litigation is not about finding a synthesis from a thesis and an antithesis, but about complete vindication of one side's thesis).

160. *See* Jerry E. Norton, *Criminal Discovery: Experience Under the American Bar Association Standards*, 11 LOY. U. CHI. L.J. 661, 663 (1980).

161. Marvin Frankel, *Partisan Justice: A Brief Revisit*, 15 LITIGATION 43, 44 (1989) [hereinafter Frankel, *Partisan Justice Revisited*] ("[T]he status quo, however unsatisfactory in principle, suits us pretty well.").

162. *Id.* That said, some have seen no justification for the adversary system at all and have called it "a phenomenon in search of a justification." Sward, *supra* note 128, at 319.

163. Schwartz, *Zeal*, *supra* note 154, at 548 (citing Charles Fried).

subjective determination. In general terms, however, aspects of adversary practice that tend to come under attack as "too sporting" in nature tend to be those that involve surprise, concealment of relevant information, aggression, or "trickery"—behaviors that have in common that they can put an opponent at a disadvantage that may be viewed as unfair.[164] Many of these behaviors are not contemplated by rules of practice (though typically not prohibited either) and tend to give the party engaging in the behavior a strategic advantage over its opponent.[165]

Some commentators have defended the adversary system on the ground that it does not *necessarily* incorporate sporting elements. They have argued, for example, that the adversary system would emerge stronger if the sporting elements were excised from it;[166] that it was critical to do so because sporting behavior causes widespread cynicism and dissatisfaction with the law;[167] and that, moreover, it is a waste of resources to allow parties to engage in procedural moves that are intended only to vex their opponents.[168] Following the 1976 Pound Conference, more reform-minded commentators argued that the adversary system was welcome to stay but should be improved, for example through better regulation of lawyers or updated methods of jury selection modeled after English practice.[169] Some went so far as to advocate for an abolition of all confidentiality, privilege, and other doctrines that shield information from discovery, because the fewer opportunities there are to strategically hide information from the other side, the more likely a litigation will result in a correct outcome.[170]

164. *See supra* note 135 and accompanying text.

165. *See supra* note 135 and accompanying text; *infra* Section III.B.

166. *See, e.g.*, Blessing, *supra* note 82, at 646 (arguing that lawyers will be better able to represent their clients if the elements of surprise and concealment were eliminated); Frank, *Pretrial Conferences*, *supra* note 96, at 663 ("[S]urprise should be eliminated."). *But see* Mosser, *supra* note 127, at 28 ("While the 'sporting theory of justice' . . . can be reduced, it cannot be entirely eliminated from our adversary system."); Kevin S. Burke, *A Judiciary That Is as Good as Its Promise: The Best Strategy for Preserving Judicial Independence*, 41 CT. REV. 4, 6 (2004) ("[W]e must move away from the sporting theory of justice. To do so does not by implication destroy or threaten the adversary system: it strengthens it.").

167. Couch, *supra* note 128, at 12; MILTON R. WESSEL, SCIENCE AND CONSCIENCE 36–37 (1980).

168. SIMON, *supra* note 5, at 66–67; *see also* RHODE, *supra* note 143, at 83–84.

169. Schwartz, *New Discovery Rule*, *supra* note 101, 543 (arguing that a lawyer should consider himself personally accountable for immoral litigation results); Burger, *supra* note 75, at 31 ("[T]here is no more vigorous advocacy or fairer justice than in British courts," and yet "[w]hen juries are used, England's courts manage to do without spending days and weeks selecting a jury.").

170. *See, e.g.*, Frankel, *Partisan Justice Revisited*, *supra* note 161, at 44 ("I [have] allied myself with such miscreants as Bentham and Wigmore, along with more contemporary suspects, such as, Henry Friendly and Walter Schaefer, in questioning whether the [attorney-client privilege] exacts too high a price in injustice to third parties and to the wider public."). Historically, some have argued that these doctrines harm innocent criminal defendants in particular, by making it harder for the genuinely innocent to communicate their innocence. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 22 (1998) (citing Bentham).

In debates about the extent to which the sporting theory of justice has led to the corruption of an otherwise serviceable adversary system, lawyers have always received a good portion of the blame. It has been argued that the sporting theory simply did not exist until lawyers became involved in conflict resolution.[171] The more complex a litigation process is, and the more knowledge and skill it takes to navigate it successfully, the more critical it may be for a litigant to retain a lawyer.[172] Complex rules and rules that can be exploited by those with experience therefore benefit lawyers, allowing them to earn a livelihood and professional respect.[173]

In recent years, interest in debating the merits of adversariality itself seems to have waned. Whereas in the years after the Pound Conference there was a lively debate over whether the adversarial system should, on the whole, be kept or discarded, these days its continued existence tends to be taken as a given, and the legal profession tends to question (at most) only the more problematic aspects of the system.[174] Oftentimes these aspects are ones that conjure the sporting theory of justice. The current status quo is an adversary system in which adversarial practices are constrained somewhat by rules and norms, but the tension between well-respected procedural values (such as accuracy, efficiency, and fairness) and the parties' room for sporting behavior is as alive as ever.

Part III catalogs the strategic space that still exists in the current litigation system, whether by design or by legislative neglect, and examines how this space might be justified. Before proceeding to that discussion, however, it is worth considering at a higher level of generality what, broadly conceived, the role

171. *E.g.*, Seagle, *supra* note 95, at 667. Others emphasized that the sporting theory, by placing a premium on skill and experience, benefits lawyers above everyone else. Fischel, *supra* note 170, at 3–9; *see also* SIMON, *supra* note 5, at 63 (observing that there has always been a tension between the lawyer's role as a partisan representative and the lawyer's role as an officer of the court); Burger, *supra* note 75, at 29 ("What [Pound] meant by the sporting theory was that lawyers, instead of searching for truth and justice, often tended to seek private advantage, forgetting they were officers of the court with a monopoly on legal services that mandated duties to the public as well as to clients.").

172. Sward, *supra* note 128, at 322 (observing that, even as early as the twelfth and thirteenth centuries, the complexity of pleading spurred litigants to turn to the legal profession "to enhance their chances of prevailing").

173. *Id.* at 323 n.112 ("It has been suggested that lawyers prefer not only adversarial adjudication, but complex legal rules . . . because those institutions are professionally advantageous to them."); Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2098 (2017) (describing a litigation subculture that aims to "extract[] settlement and maximiz[e] billable hours"); Frankel, *Partisan Justice Revisited*, *supra* note 161, at 45 (suggesting that the primary beneficiaries of litigation privileges are lawyers, rather than clients or third parties).

174. *See, e.g.*, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 647–48 (1989) (describing wasteful and aggressive discovery practices); Burke, *supra* note 166, at 6 (attributing the survival of the sporting theory of justice to lack of judicial leadership).

might be of sporting behavior in litigation, separate and distinct from the adversary system.

B. *What Is Sporting Behavior for?*

First, a clarification: in trying to distill "sporting behavior" from the mash of adversarial practice writ large, I do not mean to suggest that "sporting behavior" necessarily refers to the "bad" or undesirable aspects of the adversary system. Distinguishing the two is not necessarily an effort aimed at separating the wheat from the chaff, because even aspects of adversarial practice that are commonly viewed as "sporting" in nature have some credible defenses. Below, I discuss four aspects of adversary practice that are frequently categorized as "sporting," including surprise (the strategic revelation of information at an opportune moment), concealment (arguably the opposite of surprise; the strategic withholding of information), aggression (aimed at adversaries and witnesses), and trickery (including various forms of deception and distraction).[175] These are all forms of optional behavior that can allow a party to reap strategic benefits at the expense of its adversary, and it is worth considering the role they play in litigation. For each category of behavior, I consider justifications and criticisms.

1. Surprise

Even at the time of the Pound Conference, not everyone took a dim view of all sporting aspects of the adversary system. Surprise in particular has frequently been defended on the ground that it may be a necessary element of procedure if the objective is to discover the truth.[176] It may not be possible, for instance, to unmask a witness who is lying on the stand without the ability to surprise the witness with unexpected impeachment material.[177] (An oft-told story involves Abraham Lincoln, lawyer for the defendant, confronting a witness who claimed to have seen the defendant assaulting the victim by the light of the moon. Lincoln exposed the witness as a liar by confronting him with an almanac that indicated that there was no moon on the night of the assault.)[178] The witness, confronted with unexpected information, is forced to react in the moment and, so the argument goes, it is difficult to invent a credible lie without

175. *See supra* note 135 and accompanying text.

176. *E.g.*, Hawkins, *supra* note 96, at 1079; *see also* Frank, *Pretrial Conferences*, *supra* note 96, at 663–71 (arguing that surprise is a necessary element in certain narrow areas: small cases, impeachment, rebuttal, expert witnesses, work product, and legitimately unexpected issues).

177. *See* Hawkins, *supra* note 96, at 1079; *see also* Damaška, *supra* note 123, at 1106 (quoting John Henry Wigmore: "cross-examination is the greatest legal engine ever invented for the discovery of truth").

178. Frank, *Pretrial Conferences*, *supra* note 96, at 661 (adding that "[e]very lawyer knows the familiar tale").

having time to think.[179] Moreover, the witness's demeanor when confronted with a "gotcha" question is thought to reveal relevant information to the finder of fact: a witness who responds calmly and consistently will be assessed as more credible than a witness who is startled and struggles to come up with a coherent response.[180] Impeachment, therefore, has been frequently cited as one area where sporting behavior in the form of surprise can serve a critical truth-focused purpose.[181] It has even been argued that in a modern, secularized society, surprise during impeachment may be more necessary than ever, because oaths and penalties for perjury are no longer the reliable safeguards against lying witnesses that they once were.[182]

Not everyone agrees that the ability to surprise an adverse witness is an unalloyed good. Some scholars have argued that an ethical lawyer should certainly use surprise to unmask a suspected perjurer, but not to score an unjust victory.[183] This argument accords with the position of some critical scholars that it is a lawyer's ethical duty to determine independently whether the rights allocated to his client are consistent with the public interest.[184] A middle road between these two positions was proposed by legal ethicist Deborah Rhode. Rhode reluctantly dismissed the Crits' outcome-focused view for practical reasons but proposed that a lawyer should be prohibited from trying to discredit a witness whenever the lawyer believes that the witness is testifying

179. *See* Sherman, *supra* note 145, at 986; Holtzoff, *Elimination of Surprise*, *supra* note 33, at 579.

180. This interpretation is likely misguided as an empirical matter. *See* Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 166 (2020) ("[T]here "is a cultural assumption to believe that demeanor is a major clue to our judgment of a person and his or her credibility. . . . Yet, there is no [empirical] evidence that we can learn much, if anything, about truthfulness from a person's demeanor."); *see also* Teneille R. Brown, *The Content of Our Character*, 126 PENN STATE L. REV. 1, 5, 9 (2021) (asserting that "people make instant decisions about whether to trust someone based only on the features of their face" and implicitly assume that these features are more predictive of a person's character than they actually are).

181. *See, e.g.*, Frank, *Pretrial Conferences*, *supra* note 96, at 661; Hawkins, *supra* note 96, at 1079; Sherman, *supra* note 145, at 986; Holtzoff, *Elimination of Surprise*, *supra* note 33, at 579.

182. Hawkins, *supra* note 96, at 1079.

183. Barrett, *supra* note 131, at 485 (citing moral theologian Francis J. Connell).

184. *See* SIMON, *supra* note 5, at 26–76 (comparing and contrasting the "public-interest view," which holds that substantive outcomes should inform the positions a lawyer is willing to take; the "contextual view," which holds that a lawyer should do what seems most likely to promote justice; and the "dominant view," which holds that a lawyer must—or at least may—assert any nonfrivolous claims on behalf of a client); *see also* W. Bradley Wendel, *Lawyering with Heart: A Warrior Ethos for Modern Lawyers*, 54 OSGOODE HALL L.J. 1371, 1376–77 (2017) (summarizing Allan C. Hutchinson's view that "the responsibility for making decisions about the justice of a cause" should belong to the lawyer, not the client, and Duncan Kennedy's view that "it is ethically wrong for a lawyer to argue a case or a cause that will do more harm than good"); Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TEX. TECH L. REV. 1157, 1159 (1987) (arguing that it is wrong for a lawyer to represent a client if the lawyer is opposed to the client's litigation goals).

truthfully.[185] Importantly, none of these scholars have opposed the use of surprise with a witness whom the lawyer *does* believe to be lying and whose lies, if unchallenged, may contribute to an unjust verdict. In that scenario, there appears to be broad agreement that surprise is useful and justifiable.[186]

In the decades following the enactment of the FRCP, a few scholars did push for the elimination of surprise altogether,[187] but that seems to have been a minority view, and the use of surprise in this circumstance appears to be almost universally accepted.[188]

2. Concealment

Parties' ability to surprise an opposing party is held in counterbalance by their responsibility under the rules of discovery. Discovery serves at least in part to inform parties of evidence that their opponent might use at trial, so the broader in scope and the more transparent discovery practice is, the less likely it is that surprise will play a major role at trial.[189] Although the discovery process is governed by more rules than any other part of civil procedure, those rules leave significant room for negotiation of the details, including limitations on scope, sources, sequencing, search terms to be used, etc.[190]

185. RHODE, *supra* note 143, at 103.

186. *See supra* notes 176–82 and accompanying text.

187. *See* Holtzoff, *Elimination of Surprise*, *supra* note 33, at 577, 579 (reasoning that, if, following the enactment of the FRCP, trial is no longer a contest, then there can no longer be an element of surprise at trial); Seagle, *supra* note 95, at 667–68 (arguing that the use of surprise is not even rooted in primitive methods of trial, but was created and is kept alive by lawyers' need to make everything complicated, as well as guilty defendants who want to preserve their liberty); Wright, *supra* note 96, at 945–46 (excoriating the "medievalisms" of a state code that has not been updated to allow for modern-form pretrial discovery); *see also* Frank, *Pretrial Conferences*, *supra* note 96, at 673 (trial should not be "a fully rehearsed play" but also not a field of boobytraps); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (trial should be "less a game of blindman's buff").

188. *See, e.g.*, Frank, *Pretrial Conferences*, *supra* note 96, at 663 (claiming that the "overwhelming weight of professional opinion" supports the elimination of surprise as much as possible, but recognizes the need for surprise in a few narrow areas, including impeachment).

189. *E.g.*, Blessing, *supra* note 82, at 646 ("The most powerful affirmative argument for discovery is that the element of surprise and the practice of concealment are to a large extent eliminated from the trial."); Norton, *supra* note 160, at 666 (discovery serves to "minimize surprise at trial"). Fascinatingly, it took decades to fully "sell" the legal profession on discovery. *See, e.g.*, Freedman, *supra* note 91, at 181 (trying to convince the reader that discovery is an instrument of justice); Goldberg, *supra* note 115, at 51 (citing a 1963 lecture by Justice Brennan, who "attacked arguments opposing discovery by implying that they furthered the 'sporting event,' while discovery furthered the 'quest for truth'"); Knepper, *supra* note 95, at 398 ("Surprise . . . is no longer possible if the discovery rules are properly used.").

190. *See* FED. R. CIV. P. 26(f)(2) (placing the responsibility on parties to confer about the particulars of the discovery process and develop a discovery plan); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 550 & n.185 (2000) ("[A]ttorneys . . . try in good faith to reach an agreement concerning the desired discovery without judicial intervention."); N.Y. STATE BAR ASS'N, BEST PRACTICES IN E-DISCOVERY IN NEW YORK STATE AND FEDERAL COURTS 21

Giving parties a choice in deciding what to disclose is a controversial area of strategy that has its defenders and detractors. In favor of (qualified) party choice in disclosures, it has been argued that discovery, especially in the criminal context, functions as a mechanism for allocating strategic advantages between the prosecution and the defense.[191] Even the mere concern that a limitation on the use of surprise might shift the balance of advantages and disadvantages between defendants and plaintiffs or prosecutors has been enough to convince some that room for surprise should be retained and therefore some information should remain undisclosed.[192]

And there are several other arguments that support maintaining room for strategic nondisclosure of information in discovery. Doctrines of confidentiality and attorney-client privilege can sometimes be wielded strategically[193] and are rooted in an assumption that a client may be more inclined to hire a lawyer if he knows that his conversation with the lawyer is going to remain confidential, and the lawyer will be better able to do her job if the client is freely able to share any relevant information.[194] On this view, in a system that relies on adversarial presentation, confidentiality of attorney-client communications may well be an essential and inextricable ingredient.[195]

Perhaps more controversially, the ability to disclose information selectively can grease the wheels for settlement. A party might strategically choose to disclose information that it believes will bring settlement closer, while

(2011), https://nysba.org/app/uploads/2020/02/ediscoveryFinalGuidelines.pdf [https://perma.cc/7SYN-QBTQ] ("One common practice is for counsel for both parties to attempt to enter into an agreement regarding the scope of the search and the search terms."); Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1348 (2019) (describing a "sampling" process whereby "the producing party only searches a designated portion of the discoverable material").

191. *See, e.g.*, Rebecca Westerfield, Note, *The Conundrum of Criminal Discovery: Constitutional Arguments, ABA Standards, Federal Rules, and Kentucky Law*, 64 KY. L.J. 800, 818 (1976) (arguing that it may be just to give criminal defendants greater latitude to surprise witnesses than prosecutors, if wrongful convictions, particularly those based on false testimony, are a greater concern than the possibility that a guilty defendant may walk free).

192. Norton, *supra* note 160, at 662.

193. For example, FRCP 26(c) permits, but does not require, a party to seek a protective order shielding information from discovery, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c); *see also* Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1262–66 (2020) [hereinafter Endo, *Confidential Discovery*] (describing litigants' reasons for entering into confidentiality agreements). Attorney-client privilege can be waived by a client, through voluntary disclosure. *See, e.g.*, TEX. EVID. R. 511 ("Waiver by Voluntary Disclosure"); MONT. R. EVID. 503 ("Waiver of privilege by voluntary disclosure").

194. Fischel, *supra* note 170, at 15.

195. *Id.* at 17 ("Confidentiality frequently is viewed as a necessary corollary of the adversary ideal.").

withholding information that could stand in the way of a possible settlement.[196] If settlement is a legitimate goal of a litigation system,[197] then the parties' ability to engage in strategic disclosure and concealment to pave the way to a settlement that is acceptable to both sides of a dispute has at least potential merit as a public good. It is, however, difficult to conclude with certainty whether it does. A party that engages in selective disclosures to steer negotiations toward a target settlement range is increasing the chances of landing a settlement that *it* finds acceptable, but in doing so, it may be steering away from the settlement range deemed acceptable by the other side.[198] Moreover, settlements (like verdicts) can be objectively just or unjust—consistent with the weight of the evidence, from an outside observer's point of view, or running against it—so that it is hard to say conclusively that party choice in disclosures, on the whole, promotes justice.[199] Nevertheless, there is an element of active party choice in settlements that does not exist in a court's verdict and that could be considered valuable.[200] Even if one side were to succeed in grossly misrepresenting the strength of its position and other settlement-relevant information, each party always has the option not to accept the terms of a settlement.[201]

196. *See generally* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435 (1994) (examining the effects on settlement negotiations of voluntary and involuntary disclosures of information).

197. Whether settlement is a legitimate goal is well beyond the scope of this Article, but it is a reality that in the present civil litigation system most cases settle and that many judges view encouragement of settlement to be part of their role. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) ("Over the past five decades, first state and then federal judges have embraced active promotion of settlement as a major component of the judicial role."); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992) (describing a prevailing "policy preference for settlement" as reflected in the Civil Justice Reform Act of 1990 and other legislation). *But see* Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 55–59 (questioning whether settlement should be a goal of litigation).

198. *See, e.g.*, Colin F. Camerer & George Loewenstein, *Information, Fairness, and Efficiency in Bargaining*, *in* PSYCHOLOGICAL PERSPECTIVES ON JUSTICE 155, 173 (B.A. Mellers & J. Baron eds., 1993) ("If parties disagree on what makes an agreement fair, they may disagree more when information is shared."); Cooter & Rubinfeld, *supra* note 196, at 437 ("[E]ach side loses an advantage in settlement bargaining by revealing information that corrects the other side's false pessimism.").

199. *See* Cooter & Rubinfeld, *supra* note 196, at 437 ("[C]omplete information in bargaining before trial promotes settlement on terms approximating the complete information judgment."); *id.* at 455 ("The accurate resolution of disputes relative to existing law is a goal that seems attractive for legal policy.").

200. *See* Galanter & Cahill, *supra* note 197, at 1350–51 (listing common arguments for favoring settlement over adjudication, including that settlement "is what the parties seek," "leads to greater party satisfaction," and "is superior because it results in a compromise outcome between the original positions of the parties").

201. Of course, there is always the possibility of undue coercion or fraud. *See generally* James M. Fischer, *Enforcement of Settlements: A Survey*, 27 TORT & INS. L.J. 82, 82 (1991) (listing mistake, fraud, and duress as common reasons for nonperformance of settlement agreements).

Another category of justifications for the possibility of strategic concealment is rooted in various public policy rationales—social objectives that can sometimes override considerations of accuracy or fairness. For example, a litigant may sometimes withhold information for reasons external to a litigation, such as concerns about privacy, negative publicity, or misappropriation of its trade secrets.[202] In theory, a litigant may even knowingly make strategic disclosure decisions that *harm* its litigation position, when nonlitigation interests outweigh its desire to win the case. Since the assessment of these competing interests is personal to each litigant (and oftentimes does not harm its opponent), there is a strong argument for giving parties the strategic freedom to engage in this kind of "strategic self-harm," and there seems to be little serious objection to this.

A similar category of information that most parties would be loath to disclose includes confidential information that does not directly relate to the strength of its claims or defenses, but that informs a party's subjective evaluation of settlement opportunities. A party's eagerness or reluctance to settle a claim worth $x for a settlement worth some fraction of $x depends not only on the party's assessment of factors internal to the litigation—the strength of its legal position, the expected cost of continued litigation, or the likelihood that the finder of fact will reach the correct outcome, the likelihood and cost of potential appeals, etc. It also depends on confidential information unique to the party and its current circumstances, such as its tolerance for risk and its financial, logistical or emotional ability to weather a protracted litigation storm.[203] Is the party so anxious about the litigation that it is interfering with their daily life? In the case of a corporate party, is the board experiencing pressure to settle from shareholders, clients, or other stakeholders? Are there financial benefits to paying or receiving a settlement before the end of the company's fiscal year? Such questions have a major influence on the range of settlements that a litigant may be willing to accept at a given point in time, and yet disclosure of these kinds of details will typically be *strongly* against the party's interest, because, in an adversary system with room for strategic

202. John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV., Jan.–Feb. 1990, at 166, 174–75 (asserting that direct negotiation allows parties to keep trade secrets and other sensitive information private).

203. *See* STATE OF ILL. DEP'T OF HUM. RTS., THE SETTLEMENT NEGOTIATION PROCESS: THE PROS AND CONS OF SETTLEMENT 1 (2015), https://dhr.illinois.gov/content/dam/soi/en/web/dhr/filingacharge/documents/settlement-pros-and-cons.pdf [https://perma.cc/2EM4-WA46] ("You may experience emotional costs, such as stress, as the dispute drags on. Settlement can reduce this stress.").

maneuvering, they are virtually guaranteed to be exploited by the other side.[204] If, as a society, we value settlements that represent the parties' expressed preferences and that are not based on exploitation of nonlitigation vulnerabilities, but also recognize that the parties' valuation of the merits of settling or continuing the litigation is subjective, then allowing parties to keep certain settlement-relevant information confidential is in the public interest.[205]

A more complex argument for granting parties some room for strategic concealment is one that rests in part on straightforward practical concerns and in part on second-order strategic considerations. The discovery process, as it has developed in recent decades, is well known for its potential to impose heavy burdens on parties, sometimes for limited benefit.[206] A well-honed form of strategic behavior involves the strategic use of burdensome discovery requests, for no other purpose than to inflict pain on the opponent and thereby induce it to agree to a settlement.[207] This by itself is reason enough to impose some reasonable limitations on the scope of discovery. But additionally, if the scope of discovery were limitless, a party could request vast amounts of information not only to (a) find information of relevance to the case or (b) inflict burdens, but also to (c) find information that is not directly relevant but can be exploited for strategic gain: information that is potentially embarrassing or otherwise usable to exploit one's opponent. The *potential* of disclosure of this kind of information in discovery can harm a party in a way that is wholly separate from the disclosure itself. A party may expend significant resources trying to avoid disclosure of information it prefers not to disclose, and anything that threatens

204. A defendant who knows that the plaintiff is strapped for cash will low-ball a settlement offer. A party who knows that its opponent is under time pressure will aim to slow down the process *and* low-ball a settlement offer. *See, e.g.*, *From Stress to Success: How Cash Settlements Can Ease Financial Burdens*, LEGAL BAY LAWSUIT FUNDING, https://lawsuitssettlementfunding.com/from-stress-to-success-how-cash-settlements-can-ease-financial-burdens.php [https://perma.cc/UPM5-ZDS4] ("Financial stability allows plaintiffs to hold out for a fair settlement rather than accepting a low offer due to immediate financial pressures."); *see also* Cooter & Rubinfeld, *supra* note 196, at 457 ("If animals had discovery, their combat rituals would include exchanging exact information on height and weight.").

205. This argument is sometimes framed in terms of party autonomy. Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 297–300 (1999).

206. Kane, *supra* note 96, at 134 ("[U]nrestricted discovery presents a tremendous threat to our adversary system."); Hawkins, *supra* note 96, at 1076 ("This is not 'a fishing expedition' with rod and reel; it's 'a fishing expedition' with dynamite. Dynamite that kills all the fish in the stream."); Doré, *supra* note 205, at 326 (arguing that limitations such as confidentiality agreements and protective orders are necessarily due to the "extraordinarily broad scope of discovery"); Knepper, *supra* note 95, at 401 (describing a trend toward overdiscovery).

207. *See generally* Easterbrook, *supra* note 174 (describing how parties can use "discovery as abuse" for the prospect of favorable settlement). Cooter and Rubinfeld have used the term "informational abuse" to describe "requests for facts whose expected value to the requesting party is less than the transaction costs of producing them." *See* Cooter & Rubinfeld, *supra* note 196, at 453.

either disclosure or significant expenditures to prevent disclosure has settlement value.[208]

Some forms of strategic concealment operate in an entirely consensual manner. Parties can enter into agreements that mutually limit their exposure to undesired disclosures not only vis-à-vis the public (for example, via confidentiality agreements),[209] but also vis-à-vis each other (for example, via clawback agreements).[210] That is to say, in situations where parties on *both* sides value the protection of their own strategically sensitive information more highly than the chance to obtain information from the other side, the law (to an extent) allows them to do so by mutual agreement.[211] To the extent that the public has an interest in transparent procedure and accurate outcomes, this interest may be harmed by such agreements.[212] But it is hard to argue (absent coercion or significant power imbalances) that such confidentiality agreements conflict with the parties' right to a fair and efficient procedure that results in an accurate outcome. To the extent that mutual concealment results in a less-than-accurate outcome, this is arguably a possibility that the parties bargained for.[213]

One final argument in favor of strategic latitude for concealment was articulated by the Supreme Court in *Hickman*. As discussed in Section I.C, in *Hickman*, the Court created the work-product doctrine, a major avenue for

208. Easterbrook, *supra* note 174, at 637 ("It is the (credible) threat rather than the reality of discovery that affects the settlement of cases."); *see also* Endo, *Confidential Discovery*, *supra* note 193, at 1262–66 (describing litigants' reasons for entering into confidentiality agreements); Russ Buettner, Susanne Craig & Mike McIntire, *The President's Taxes: Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html [https://perma.cc/DE58-W73R (staff-uploaded, dark archive)] ("When prosecutors and congressional investigators issued subpoenas for [President Donald Trump's tax] returns, he wielded not just his private lawyers but also the power of his Justice Department to stalemate them all the way to the Supreme Court.").

209. *See* Endo, *Confidential Discovery*, *supra* note 193, at 1249–54.

210. A clawback agreement is an "[a]greement between parties to a litigation outlining procedures to protect against waiver of privilege or work product protection due to inadvertent production of documents or information." *See* N.Y. STATE BAR ASS'N, *supra* note 190, at 31. Such agreements help parties communicate more freely with each other by softening the consequences of inadvertent disclosures. *See* Endo, *Confidential Discovery*, *supra* note 193, at 1267.

211. *See, e.g.*, Endo, *Confidential Discovery*, *supra* note 193, at 1264 (describing parties' motivations to seek confidentiality of trade secrets, client data, etc. and the possibility of mutually convenient agreements). Aside from confidentiality agreements, parties can also limit discovery altogether by mutual agreement, through the meet-and-confer process. *See* FED. R. CIV. P. 26(f).

212. *See* Endo, *Confidential Discovery*, *supra* note 193, at 1264–65 (discussing arguments by opponents of confidential discovery focused on transparency of judicial proceedings).

213. *See id.* at 1262 ("If one views [dispute resolution] as the primary function of courts, then party-agreed secrecy is likely viewed as beneficial because it should protect legitimately private information while also promoting the efficient exchange of information and an expanded bargaining range for settlement."). Confidentiality agreements and clawback agreements tend to be features of litigation involving sophisticated parties on both sides, but as with any type of agreement, unequal bargaining power can be a serious concern.

concealing relevant information.[214] Justice Murphy wrote for a majority that if work-product protection were to be abandoned, "[t]he effect on the legal profession would be demoralizing."[215] A concurrence by Justice Jackson offered an almost explicit resurrection of the sporting theory of justice: whatever the virtues of expansive discovery, discovery was not intended to allow a lawyer to "perform [his] functions either without wits or on wits borrowed from the adversary."[216] In other words, in some circumstances the truth has to yield to weightier considerations: (1) lawyers' ability to keep certain information from their adversary, even when the information is not covered by the attorney-client privilege, and (2) the impropriety of allowing lawyers to benefit from each other's work.[217] In the context of attorney work product, strategic concealment in part serves to improve lawyers' job satisfaction and in part exists because it simply *does not seem fair* in an adversary system for lawyers' notes and mental impressions to be shared with opposing parties.[218] As expressed more bluntly by Glenn Coven, work product "was born of an awareness that a trial is not a collegial search for truth."[219]

Notwithstanding these rationales for allowing parties to approach disclosures strategically, the case in favor of strategic optionality in disclosures is not open and shut. There has long been a strand of evidentiary scholarship disfavoring all forms of privilege. Jeremy Bentham and John Henry Wigmore believed that privilege doctrines should be abolished because they exist for the benefit of the counselor—not for the benefit of the client, and certainly not for the benefit of the public.[220] Even today, in a litigation system that recognizes a

214. Hickman v. Taylor, 329 U.S. 495, 510 (1947).

215. *Id.* at 511.

216. *Id.* at 516 (Jackson, J., concurring).

217. The Court acknowledged the difficulty of the question presented in *Hickman*, noting that the scope of work-product protection was "one of the most hazy frontiers of the discovery process." *Id.* at 513–14. In some state courts, whether attorney work product was discoverable remained an open question for decades after *Hickman*. *See, e.g.*, Kane, *supra* note 96, at 131 (noting that California's highest court refused to recognize work-product protection until the state's legislature created it by statute in 1963).

218. *See* Coven, *supra* note 95, at 114 ("Although discovery has long been ingrained in our civil practice, the feeling lingers that there is something essentially unfair about rooting through the papers of one's adversary."); *see also* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 511 (1993) (Scalia, J., dissenting) (objecting to an amendment to a discovery rule to include mandatory disclosures, on the ground that "the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is 'relevant to disputed facts' plainly requires him to use his professional skills in the service of the adversary.").

219. Coven, *supra* note 95, at 106; *see also* Knepper, *supra* note 95, at 399 (explaining that the work-product protection was enacted in California in part "to prevent an attorney from taking undue advantage of his adversary's industry or efforts."); Frankel, *The Adversary Judge*, *supra* note 135, at 485 n.53 (quoting Italian jurist Piero Calamandrei: "Like the antagonism between the devil and holy water, the conflict between the lawyer and the truth is an ancient one.").

220. *See supra* note 170.

variety of privileges, many believe that rules of confidentiality indefensibly give lawyers an advantage that other professional groups do not have.[221] Daniel Fischel, for example, has argued that rules of confidentiality "victimize clients as a class," because they increase, in the aggregate, the amount of work for which lawyers are able to charge, with no commensurate benefit for clients as a group.[222] Another argument against party choice in disclosures states that openness of information can promote public confidence in the judicial system, increase the public's ability to monitor it, and thereby help ensure fair and accurate decisions.[223]

Accuracy of decisions aside, whether party choice in disclosures is efficient is not immediately obvious. One efficiency-based argument relies on the fact that acquiescence in or resistance to disclosure can function as a communicative device, allowing parties to signal their willingness or unwillingness to settle. Consider a defendant who receives discovery requests from the plaintiff that pertain to both elements of a two-element claim. For each request, the defendant has an option to resist the request (in whole or in part) or to comply fully. Some of the decisions that the defendant might make can have a communicative function. For example, imagine that the defendant vigorously resists any discovery relating to element #1, but smoothly complies with any request relating to element #2. The plaintiff could read this approach in a number of ways. First, it could read the defendant's decision as a signal of the defendant's confidence in the merits of its defense to element #2 or in the plaintiff's inability to prove this element. Since the plaintiff typically bears the burden of proof on each element of its claim, prevailing on a single element is enough for a defendant to win.[224] Second, the plaintiff could interpret the defendant's choice to fight the war on a single front as a signal that the defendant is strapped for cash. Depending on the circumstances, this *can* be a useful signal for a defendant to send, because it can serve to lower the plaintiff's settlement expectations. More commonly, though, a defendant will try to avoid implicitly communicating financial constraints during discovery. A plaintiff who smells financial distress on the defendant can very easily dial up the intensity of discovery with costly and burdensome discovery requests and thereby all but force the defendant to accept a settlement to avoid further hostilities and expense.[225] Finally, the defendant's decision could be interpreted as a lack of investment or interest in the case. Perhaps the defendant is choosing

221. *E.g.*, Fischel, *supra* note 170, at 19; Frankel, *Partisan Justice Revisited*, *supra* note 161, at 45.

222. Fischel, *supra* note 170, at 17.

223. Doré, *supra* note 205, at 322–24.

224. *E.g.*, United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 407 (1934).

225. *See* Easterbrook, *supra* note 174, at 636 (discussing parties who "heap[] costs on the adverse party. . . . The prospect of these higher costs leads the other side to settle on favorable terms").

to invest only limited resources in the case because it does not view the case as a big threat—either because it expects to win or because the cost of a losing verdict would be small potatoes to this particular defendant.[226]

This constellation of implicit signals can counsel in favor of granting parties some flexibility in what they communicate, as discussed above. But there is also an efficiency-based argument that runs in the opposite direction. The more each party knows about the other party's position, the more transparent settlement negotiations can be, and the more easily settlement can be reached.[227]

3. Aggression

It is hard to conjure up an argument that frames the use of aggression in litigation as a societal good, though some have been attempted. Those who believe (as discussed above) that lawyers' enjoyment of the litigation game is a valid consideration might argue that mutual jousting is essential to that enjoyment.[228] Leslie Howe has argued that any behavior that does not break a rule simply cannot be unfair.[229] And Barbara Babcock has argued that public spectacle (including in the form of aggression) serves a communicative function in a public trial, by introducing an element of community catharsis into the proceeding.[230] In a world that increasingly recognizes the unfairness in disparities between differently situated litigants, the first two grounds are untenable. And in a modern civil justice system that relies so much on settlement that trials have become a rarity, it is difficult to justify aggression on

226. A party who does see the case as a threat will often be compelled to make additional efforts. *See* SIMON, *supra* note 5, at 66–67 ("Hiring an expert to testify on an issue that only marginally requires expert testimony might seem a waste of money if viewed in isolation, but if each party expects that the other will do so if he doesn't, and thereby gain a comparative advantage, each will feel compelled to do it.").

227. *See, e.g.*, FAC. OF FED. ADVOCS., HOW TO SETTLE A CASE 2–3, https://www.facultyfederaladvocates.org/resources/Documents/FFA%20-%20How%20to%20Settle%20a%20Case.pdf [https://perma.cc/X3WB-5UHG] (stressing the importance of sharing detailed information with an opposing party in settlement mediation); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 30 (1994) (asserting that "enlightened settlement" is one of the two main goals of modern discovery).

228. *See supra* notes 214–18 and accompanying text.

229. Leslie A. Howe, *Gamesmanship*, 31 J. PHIL. SPORT 212, 214 (2004) ("If the gamer's behavior is within the rules, it cannot be unfair," and if the other side lacks the psychological strength or preparedness to respond effectively, that player's competitive failure "is not the result of unfair advantage.").

230. Babcock, *supra* note 143, at 1140–41 (arguing that trials, at least in the criminal context, are dramatic communicative events "complete with ceremony and ritual . . . that preserves the ideal that trials are meant to do justice"). Jeremy Bentham deplored this way of thinking. *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 238–39 (1827) (decrying legal practices that frame fairness the way a fox hunter would describe a fox hunt: for a hunt to be "fair" in the mind of fox hunters, the fox needs to have a chance to escape, and "[just as] the use of a fox is to be hunted; the use of a criminal is to be tried").

the grounds put forward by Babcock. Additionally, even if we accept that public aggression, in open court during a hearing, serves a valid purpose, that purpose does not necessarily apply in the same manner to nonpublic aggression, i.e., to the many opportunities parties have to direct aggression at each other in a nonpublic setting, witnessed and experienced only by the parties themselves and possibly the court.[231]

Perhaps it is unsurprising, therefore, that historically, many who have bemoaned the sporting theory of justice have taken aim primarily at the element of aggression. While the bullying of witnesses may not be as common as it once was, it is still "a hallmark of American practice."[232] Many have argued that mutual aggression simply wastes resources without any concomitant benefit[233] and serves only to obfuscate, confuse, and divert from key issues.[234] It is now known that a witness who is put under stress while being asked to recall facts from memory tends to perform this task less accurately than a witness who is asked to recall the same facts under calmer circumstances.[235] This lends further support to the notion that approaching a witness with aggression is unlikely to improve the accuracy of a verdict and may well have the opposite result.[236]

Much aggression nowadays takes place behind closed doors. Arthur Miller has described how the smooth and efficient pretrial process that the drafters of the FRCP envisioned has come to be "a morass of litigation friction points."[237] The existence of friction is not *necessarily* wasteful or harmful; friction can be part of an effective process of conflict resolution. However, as has been extensively documented, pretrial friction, especially in the discovery phase, can go well beyond what is necessary for two parties to resolve a dispute, with parties commonly using aggressively broad and burdensome discovery requests as opening salvos, to be narrowed down later through a protracted meet-and-

231. *See infra* Section III.A.

232. Sherman, *supra* note 145, at 986.

233. SIMON, *supra* note 5, at 66–67 (e.g., hiring a "marginally" useful expert only because the other side will have retained one; preparing a witness for aggressive cross-examination).

234. Sherman, *supra* note 145, at 986.

235. *See, e.g.*, Kimberly S. Dellapaolera, How Does Stress at Time of Identification Affect Eyewitness Memory (Aug. 2019) (Ph.D. dissertation, University of Nebraska-Lincoln) (ProQuest) (finding that stress during the moment of recall tends to have a negative effect on memory); *see also* FRANK, COURTS ON TRIAL, *supra* note 13, at 83 (citing Anthony Trollope to illustrate modern cross-examination methods: a witness "must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give his evidence. . . . Eels are skinned alive, and witnesses are sacrificed, and no one's blood curdles at the sight, no soft heart is sickened at the cruelty.").

236. Questioning a witness aggressively is also unlikely to be more efficient, and it is certainly no fairer.

237. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309 (2013) [hereinafter Miller, *Simplified Pleading*].

confer process.[238] Lawyers frequently receive the bulk of the blame.[239] Most cases settle, and the threat of burdensome and expensive discovery requests is a mighty weapon in a lawyer's settlement-driven arsenal.[240] But when parties use discovery to inflict burdens and expense on each other, rather than in ways reasonably calculated to find useful information, it is often only lawyers who benefit.[241]

On the whole, aggression can be beneficial for repeat players (who benefit from creating a tough reputation), well-resourced parties (who can land more blows because they can easily withstand any aggression directed at them in return), and sometimes lawyers (who benefit from additional billable work).[242] For repeat litigants, the benefit of inflicting pain on an opposing party transcends the individual case. It can be immensely worthwhile to be known as an aggressive player who will inflict untold misery on anyone unlucky enough to be on the other side of the "v."[243] Despite the fact that some parties thus benefit from aggression, it is hard to argue that, as a general matter, aggressive practice is a societally valuable aspect of litigation.

4. "Trickery"

A final category frequently considered to be "sporting" is what I will call here, for lack of a more precise term, "trickery." It consists of behaviors that have been called "deceit," "dirty tricks," "cheating," "deceptive lawyering,"

238. *See supra* note 121 and accompanying text (discussing complaints about "overdiscovery"); *see also* Pollis, *supra* note 173, at 2098 (asserting that the vanishing trial has made the pretrial phase of litigation "a stage unto itself"); Beckerman, *supra* note 190, at 543 ("One consequence of discovery flows from the value of information gleaned, while another derives from the burden discovery inflicts on the respondent."); CRAIG BALL, COMPETENCY AND STRATEGY IN ELECTRONIC DISCOVERY 292 (2018), http://www.texasbarcle.com/cle/OLViewArticle.asp?a=199277&t=PDF&e=16257&p=1 [https://perma.cc/KHQ3-VNGX] ("Meet and confer is more a process than an event."). *See generally* Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 995–97 (2023) [hereinafter Beerdsen, *Discovery Culture*] (describing the typical sequence of discovery practice).

239. *See* Pollis, *supra* note 173, at 2098 (describing the "twin objectives" of "extracting settlement and maximizing billable hours").

240. Pollis, *supra* note 173, at 2100. Within the framework of a single case, pain is only useful in its non-infliction. As soon as a party is actually made to expend effort or money, the threat value of a discovery request is gone. *See* Easterbrook, *supra* note 174, at 636–37 (explaining that parties can threaten to "heap costs on the adverse party" and "the prospect of these higher costs leads the other side to settle on favorable terms").

241. *E.g.*, Pollis, *supra* note 173, at 2097; *see also supra* notes 171–73 and accompanying text.

242. *See* Pollis, *supra* note 173, at 2097–98 (discussing lawyers' objectives to maximize billable hours); Galanter, *Haves*, *supra* note 141, at 120–21 (describing benefits accruing to parties who have more resources than their adversaries); *Quinn Emanuel Again Named 'Most Feared' Firm in the World*, P.R. NEWSWIRE (Oct. 6, 2023, 3:30 PM), https://www.prnewswire.com/news-releases/quinn-emanuel-again-named-most-feared-firm-in-the-world-301949859.html [https://perma.cc/L48S-KYDC] [hereinafter *'Most Feared' Firm*] (describing "Most Feared" law firm award).

243. *See, e.g.*, *'Most Feared' Firm*, *supra* note 242 ("This is the fourth time Quinn Emanuel has been selected as the 'Most Feared' law firm in the world and we are extremely proud of this distinction. In our line of work, fear is a virtue and translates to respect.").

etc.—the types of adversarial behaviors that do not necessarily involve surprise, concealment, or aggression, but are nevertheless "sporting" in nature.[244] A list compiled by Abraham Oldover offers a litany of tried-and-true examples:

> Dropping books and paraphernalia on the floor to distract the jury during opposing counsel's summation, influencing jurors with unsubtle remarks or gestures in the hallway during recess, positioning exhibits not in evidence so that jurors will see them, quoting out of context or purposely misciting cases, and even worse, omitting important authorities from briefs and arguments, . . . the intentionally misleading question tendered on cross-examination; the question asked, not in good faith, but merely to have the jury hear the question (sometimes known as the question asked with intent to withdraw); and the attempt to coach the witness while he is on the stand.[245]

"Trickery" is a complicated area of lawyering ethics, and a full elaboration of lawyers' (widely debated) duties and restrictions is beyond the scope of this Article.[246] But many lawyers believe that as part of their advocacy for a client, they are permitted, or even *required*, to engage in trickery when strategically advantageous.[247]

In a series of articles, Larry Solan analyzed the distinctions that advocates and judges draw between outright lies and deceit that falls short of lying.[248] He observed that "lawyers are given special license to be insincere to an extent that would ordinarily violate social norms."[249] While lawyers generally are not

244. *See, e.g.*, Lawrence M. Solan, *Lawyers as Insincere (but Truthful) Actors*, 36 J. LEGAL PROF. 487, 500 (2012) [hereinafter Solan, *Lawyers as Insincere*] (asserting that a lawyer's "license to be insincere . . . covers deceit, but not outright lies"); Abraham P. Ordover, *The Lawyer as Liar*, 2 AM. J. TRIAL ADVOC. 305, 314 (1979) (providing a list of commonly used "dirty tricks"); Richard H. Underwood, *Adversary Ethics: More Dirty Tricks*, 6 AM. J. TRIAL ADVOC. 265, 266 (1982) (providing "a primer on the more common forms of cheating employed by trial lawyers"); Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 583–84 (2005) (discussing "common forms of deceptive lawyering").

245. Ordover, *supra* note 244, at 314.

246. For an overview of lawyers' ability (or indeed duty) to lie or deceive, see *supra* note 244 and accompanying text; *see also* Bruce A. Green, *Deceitful Silence*, 33 LITIGATION 24, 24–28 (2007); Richard H. Underwood, *The Professional and the Liar*, 87 KY. L.J. 919, 937–38 (1998).

247. *See* Solan, *Lawyers as Insincere*, *supra* note 244, at 488 (asserting that lawyers are trained to be insincere); Albert W. Alschuler, *Lawyers and Truth-Telling*, 26 HARV. J.L. & PUB. POL'Y 189, 191 (2003) (arguing that some lawyers believe that when it comes to zealous advocacy, "everything not forbidden is required").

248. Solan, *Lawyers as Insincere*, *supra* note 244, at 500; Lawrence M. Solan, *Lies, Deceit, and Bullshit in Law*, 56 DUQ. L. REV. 73, 76–90 (2018) [hereinafter Solan, *Lies, Deceit, and Bullshit*].

249. Solan, *Lawyers as Insincere*, *supra* note 244, at 488.

permitted to lie, they have broad latitude to engage in insincerity and deceit that does not amount to a lie.[250]

Some look to tradition and see sufficient justification for trickery in the notion that lawyers have a duty to try to make the jury believe that the law is on their client's side, and that there is simply no obligation in litigation to help one's adversary.[251] Some have gone even further, by suggesting that a lawyer's job has nothing to do with getting at the truth. In the words of a New York criminal defense attorney: "A trial may be a search for the truth, but I—as a defense attorney—am not part of the search party."[252] Trickery has been regarded as a gift to lawyers and their livelihood. It can be what gives a lawyer's job value, and lawyers may be "disturbed" at the suggestion that trickery should be put to the side for a more truth-focused approach.[253]

But the use of trickery is certainly not beyond controversy. Numerous commentators have criticized its existence and called for changes in lawyer behavior, whether through rule changes, judicial enforcement, or attitude changes.[254] Trickery is a category of behavior that is widely recognized as being in (potential) tension with the truth-seeking function of trials.[255] And it is difficult to conceive of an established procedural value that is promoted by trickery. Trickery usually does not tend to increase the fairness of a proceeding, and neither does it improve its efficiency. And yet, it persists and is allowed to persist. For example, the Supreme Court has held that testimony that is technically truthful but intended to mislead cannot be prosecuted as perjury,[256] a decision that, in Larry Solan's words, explicitly "elevates the combative nature of the adversarial system above candor."[257]

* * *

250. *Id.* at 500 ("[L]awyers are a font of subterfuge, only some of which is not tolerated."). For examples, see *infra* Section III.A.4.

251. *E.g.*, Holtzoff, *Elimination of Surprise*, *supra* note 33, at 578 ("[A] litigant should not be required to help his adversary."); Nasamba v. North Shore Med. Ctr., Inc., 727 F.3d 33, 40 (1st Cir. 2013) (holding that a party has no obligation to make adversary's case for her and that the defendant's "prudent refusal to make their adversary's case for her . . . is simply good lawyering").

252. Solan, *Lies, Deceit, and Bullshit*, *supra* note 248, at 73 (quoting Gerald Shargel).

253. Doyle, *supra* note 45, at 348–49. That said, not every lawyer is eager to engage in trickery. *See* RHODE, *supra* note 143, at 103 (proposing an approach permitting lawyers to choose to *not* engage in trickery).

254. For views recognizing lawyers' routine engagement in trickery and calling for better behavior, see FRANK, COURTS ON TRIAL, *supra* note 13, at 87 (suggesting that "[t]he legal profession should not take much pride" in a system were trickery is common); Warren, *supra* note 95, at 619 ("[A] truly professional bar . . . will be stronger in advocacy when truth, rather than trickery, is the weapon."); Ordover, *supra* note 244, at 306 ("Where deception succeeds, the lawyer arrogates power to himself . . . at the expense of society as a whole.").

255. *See* Solan, *Lies, Deceit, and Bullshit*, *supra* note 248, at 73.

256. Bronston v. United States, 409 U.S. 352, 352–57 (1973).

257. Solan, *Lawyers as Insincere*, *supra* note 244, at 502.

As noted previously, an attempt to distinguish between the sporting and nonsporting elements of an adversary system should not be taken to imply a normative position on the relative validity or utility of individual types of behavior. As discussed above, there are some forms of sporting behavior that have some justifications (at least in some contexts), while others are harder to defend. Some forms of strategy support well-recognized procedural values; some support certain values while impinging on others; others are hard to justify at all in terms of traditional procedural values. Part III will explore in more detail what sporting behavior exists in civil litigation today, and what role(s) it serves.

III. STRATEGY IN CIVIL LITIGATION TODAY

Twentieth-century efforts greatly reduced the opportunities for sporting behavior in litigation (especially the use of surprise), but they left numerous areas of opportunity for strategic behavior. Section III.A starts to catalog the strategic space that still exists in the current litigation system, whether by design or by legislative neglect, and observes that (at least in some instances) this space may exist at the expense of better recognized procedural values. Section III.B builds on this observation to argue that strategy (again, in some instances) functions as a de facto procedural value, i.e., that some parts of strategy space allow strategy to exist "for strategy's sake." It also discusses some of the consequences, including an unacknowledged allocation of power to already powerful parties, increased demand for lawyers' services, and a grant of significant ad-hoc rulemaking authority to the judiciary.

A. *Strategy Space in Civil Litigation Today*

As described in Part I, twentieth-century developments have eliminated many of the opportunities for strategic behavior. In civil litigation, the element of surprise in particular has been vastly reduced by procedural innovations such as pretrial discovery mechanisms, modern pleading requirements, and managerial judging.[258] Nevertheless, an advocate in a modern-day civil litigation who would like to outmaneuver her opponent still has plenty of opportunity.

Ironically, while pretrial discovery has undoubtedly made trials more predictable, with less opportunity for "trial by ambush,"[259] discovery itself has

258. *See supra* Section I.C.

259. *See* Langbein, *supra* note 15, at 526 (arguing that modern discovery provides so much information that it enables litigants to settle their case rather than litigate it through trial); Pollis, *supra* note 173, at 2097 ("What has supplanted trial culture is . . . a culture of pretrial practice."); Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing*

become a major arena for strategic behavior, albeit with a veneer of cooperation,[260] with little in the way of rules or statutes to constrain it and little apparent appetite to formally standardize procedure or impose more control.[261] But it is by no means the only area of litigation practice with significant room for strategic behavior.

This section reviews and categorizes some of the ways in which a skilled advocate can benefit from strategic behavior today—that is, specific areas of strategic space remaining in civil litigation today. In these pages, I do not purport to capture every remaining pocket of "strategy space" and other categorization schemes could certainly be devised.[262] But, since (to my knowledge) no similar efforts exist to map the landscape of strategy space in civil litigation, this section represents an initial effort to do so. It reviews, in order, what I call "case-framing strategy," pacing, side shows, surprise, "having it both ways," and psychological warfare.[263] For each of these categories of strategy space, it also discusses possible justifications.

1. "Case-Framing Strategy"

I define "case-framing strategy" as the collection of strategic choices that determine the broad contours of a case, including where it is filed, which parties it will include, and which claims it will involve. Strategic framing decisions typically precede the filing of a lawsuit and may include actions *outside* of litigation made for the purpose of optimizing a litigant's position *inside of*

Civil Trial, 1 J. EMPIRICAL LEGAL STUD. 943, 951 (2004) ("Discovery produces settlements."). *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) [hereinafter Galanter, *Vanishing Trial*] (describing trends that have contributed to a reduction in the number of trials).

260. *See* Beerdsen, *Discovery Culture*, *supra* note 238, at 998 ("The Rules create an expectation that parties collaborate to determine the contours of discovery and work together in good faith to resolve any disagreements, preferably without assistance from the judicial system."); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 499 (2007) ("[V]irtually all discovery . . . take[s] place extrajudicially . . . .").

261. *See* Moffitt, *supra* note 260, at 499 & n.150 (collecting sources supporting the notion that "most judges hate to deal with discovery disputes"); Beckerman, *supra* note 190, at 518 (judges "tend to assume that discovery's cooperative ideal should be realizable in all cases"); Victor Marrero, *The Cost of Rules, The Rule of Cost*s, 37 CARDOZO L. REV. 1599, 1657 (2016) (opining that discovery is "a virtually unpatrolled no-man's land of litigation"); H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787, 803 (2017) (stating that parties have "tremendous flexibility in tailoring discovery processes").

262. The overview in this section is also primarily focused on civil litigation, though a few examples relate to criminal proceedings.

263. This breakdown is illustrative only and far from an exhaustive list of vexatious litigation conduct. It does not, for example, include conduct identified by Deborah Rhode as the focus of "civility efforts," including unreasonable scheduling practices and abusive conduct toward opposing counsel. *See* RHODE, *supra* note 143, at 83.

litigation.[264] While strategic behavior in this space occasionally is labeled unacceptable and disallowed,[265] most of it is relatively uncontroversial and much of it is explicitly envisioned by rules of procedure.[266]

A plaintiff cannot file her case *anywhere* she pleases—only in a court that has subject-matter jurisdiction as well as personal jurisdiction over all defendants, and where venue is proper—but within these limitations, many plaintiffs have multiple viable forum options, and in these circumstances a plaintiff can bring its case in its forum of choice.[267] Most would agree, therefore, that choosing a forum from among multiple permissible options is a legitimate part of litigation, even if sometimes pejoratively called out as "forum shopping,"[268] even though there can be significant strategic benefit in choosing one forum over another,[269] and even though some find at least some forms of it objectionable.[270]

Dialing the strategic behavior up a notch, a plaintiff who is not satisfied with forum options available to her can attempt to *create* additional viable fora, through strategic actions before initiating the litigation. For example, a plaintiff can create personal jurisdiction and proper venue by insisting on a forum-selection clause in a contract,[271] by luring the defendant into a jurisdiction,[272] or (most cunningly) by enticing the defendant to engage in actions that create the necessary connection between the defendant and the jurisdiction.[273] A plaintiff may be able to manipulate both personal jurisdiction and subject-matter jurisdiction by choosing which parties to include as defendants, such as by including only parties over whom personal jurisdiction will be readily available

264. Such nonlitigation actions might include interstate moves, (re-)incorporation, assignment of claims, liability, or property, etc. *See infra* notes 273–83.

265. *See, e.g.*, Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 335 n.7 (2006) (collecting authorities referring to forum shopping as a "game").

266. *See id.* at 339 ("Far from being illegitimate . . . the law has authorized choice.").

267. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); 28 U.S.C. §§ 1331, 1332, 1391.

268. *See, e.g.*, Bassett, *supra* note 265, at 334–45.

269. *See id.* at 339 (explaining that because some jurisdictions' laws may be more attractive to litigants than others, "[p]ermissive theories of choice of law are the engine that drives much contemporary forum-shopping" (quoting George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 665 (1993))); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("Venue is worth fighting over because outcome often turns on forum.").

270. *See, e.g.*, Clermont & Eisenberg, *supra* note 269, at 1510–11 (summarizing critiques of current venue rules).

271. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473–74 (1985).

272. Burnham v. Super. Ct., 495 U.S. 604, 608, 619 (1990).

273. A plaintiff who worries that a contractual relationship might go south and lead to litigation can insist on a forum-selection clause in the contract; negotiate and sign the contract in the target jurisdiction; and/or engage in contract-related communications, meetings, and other acts in the target jurisdiction. *See, e.g.*, *Burger King*, 471 U.S. at 462.

in the target forum,[274] by strategically including or excluding potential defendants who break diversity to create or prevent federal jurisdiction,[275] or by including or omitting claims of a federal nature, again to create or avoid federal jurisdiction.[276] A plaintiff can destroy or create diversity (and thereby federal jurisdiction) by assigning their interest to another individual or entity,[277] or even by moving to (or reincorporating in) another state.[278]

Defendants oftentimes have strategic options, too. Removal of a case is permitted by federal statute (provided certain conditions are met) but not required, which means that many defendants have a (qualified) choice of forum after the complaint has been filed.[279] Just like plaintiffs, defendants may have pre-litigation options to optimize the forum where the case is litigated by engaging in (or avoiding) behavior in a particular jurisdiction, or by moving, reincorporating, or assigning relevant interests.[280] In multi-party cases, they might also be able to manipulate jurisdiction through strategic settlement.[281]

Judicial and scholarly discussion suggests that room for strategic behavior in this context is not unlimited, but quite substantial. Behavior aimed at removal *can* take on forms that are so distasteful that they cross some line of morality, propriety, decorum, or common sense, and sometimes this prompts a court to deny jurisdiction.[282] But as with many forms of strategy, where the line is that a party cannot cross is not particularly well defined. A current live controversy involves the questionable legality of what has been termed "snap

274. Int'l Shoe Co. v. Washington, 326 U.S. 310, 310 (1945).

275. 28 U.S.C. § 1332.

276. FED. R. CIV. P. 19, 20; 28 U.S.C. § 1331.

277. William L. Daniels, *Judicial Control of Manufactured Diversity Pursuant to Section 1359*, 9 RUTGERS CAMDEN L.J. 1, 13–16 (1977) (discussing creation of diversity through assignment of interest). *See also, generally*, William L. Daniels, *Use of Assignments and Appointments to Create or Destroy Federal Diversity Jurisdiction*, 1 LOY. U. CHI. L.J. 111 (1970) [hereinafter Daniels, *Assignments*] (discussing a variety of mechanisms for "manufacturing" diversity and artificial destruction of diversity, and their nonuniform reception by the courts).

278. 28 U.S.C. § 1332; Black & White Taxicab v. Brown Co. & Yellow Taxicab Co., 276 U.S. 518, 532, 535–36 (1928).

279. *See* 28 U.S.C. § 1441 (removal of civil actions); *see also* 28 U.S.C. § 1391(b) (providing for multiple parallel federal venue options).

280. *See supra* notes 271–78.

281. Federal jurisdiction might be created, for example, by dropping parties who would break diversity, early in the case, and then removing the case to federal court. 28 U.S.C. §§ 1332, 1441. Federal jurisdiction might be destroyed, on the other hand, by settling all claims giving rise to federal question jurisdiction, then moving to remand or dismiss the case for lack of subject-matter jurisdiction. 28 U.S.C. § 1367(c)(3).

282. *See, e.g.*, Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469, 476 (2d Cir. 1976) (holding that diversity jurisdiction improperly manufactured where nondiverse parent company assigned claim to diverse subsidiary "engaged in no business other than the prosecution of that claim").

removal."[283] Snap removal exploits an ambiguity in the federal removal statute, which provides that even with complete diversity of citizenship, a case cannot be removed to federal court when any "properly joined and served" defendant is a citizen of the forum state.[284] Litigators will recognize this provision as the "forum-defendant rule."[285] The meaning of "properly joined and served" is currently the subject of a circuit split, as some (forum and non-forum) defendants have taken this language as an invitation to remove cases to federal court after a complaint has been filed but before any forum-defendant has been served.[286] In an environment with electronic filings and docket monitoring services, a well-resourced defendant can remove a case within minutes of filing, if the plaintiff has not managed to serve a forum defendant even faster.[287] Some courts have rejected snap removal even though it (at least arguably) is permitted by the letter of the rules, holding that it is inconsistent with "the fundamental purposes of removal" and therefore smacks of unfairness.[288] But other courts have allowed it and in doing so endorsed it as a "legitimate litigation strategy.[289]

Case-framing strategy space extends beyond just choice of forum. Procedural rules give a plaintiff considerable range when it comes to combining claims and parties[290] and parties frequently make use of this flexibility in strategic ways, including for non-forum-related strategic reasons.[291] A plaintiff may choose to litigate against multiple defendants at the same time for the cost-savings and settlement leverage that this might generate, or may prefer to sue

283. *See generally* Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 BAYLOR L. REV. 423 (2020) (criticizing snap removal and suggesting corrective action by Congress).

284. 28 U.S.C. § 1441.

285. *See* Stempel et al., *supra* note 283, at 465.

286. *See, e.g.*, Perez v. Forest Lab'ys, Inc., 902 F. Supp. 2d 1238 (E.D. Mo. 2012); Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361 (N.D. Ga. 2011). *See generally* 16 MOORE'S FEDERAL PRACTICE - CIVIL § 107.55 (2022) [hereinafter MOORE'S].

287. *Examining the Use of "Snap" Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. 10–11 (2019) (statement of Ellen Relkin, Esq., Weitz & Luxenberg) (reporting that "snap removals were literally being effected in less than 10 minutes from when the case was electronically filed in New Jersey state court").

288. *See* MOORE'S, *supra* note 286, § 107.55; *Perez*, 902 F. Supp. 2d at 1240; *Hawkins*, 785 F. Supp. 2d at 1372–73.

289. Saurabh Vishnubhakat, *Pre-Service Removal in the Forum Defendant's Arsenal*, 47 GONZ. L. REV. 147, 161 (2011).

290. FED. R. CIV. P. 13–14, 18–20 (allowing liberal joinder of defendants for claims).

291. *See, e.g.*, Huffman v. Granite Servs. Int'l, Inc., No. 4:21-CV-01184, 2022 WL 821424, at *5–6 (M.D. Pa. Mar. 17, 2022) (involving strategic splitting of claims to avoid CAFA threshold). This is not always tolerated by the courts. *See, e.g.*, Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773 (2017) (disallowing plaintiffs' strategic clustering of claims on personal-jurisdiction grounds).

defendants separately in a strategically sequenced order.[292] It might choose to band together with other plaintiffs to maximize settlement leverage or publicity, or go it alone in hopes of a quicker resolution.[293] It might choose to include all possible claims in a single lawsuit, again for both efficiency and settlement leverage, or it might choose to bring claims separately, to avoid the jurisdictional threshold for diversity suits.[294] Judges have significant discretion in deciding when case-framing decisions cross a line of propriety.[295] In some instances, behavior aimed at removal can take on forms that courts consider disagreeable enough to disallow them.[296] Nevertheless, case-framing strategy space is large and provides room for a lot of strategic behavior that passes by unremarked upon.

The kind of optionality that allows for strategic choice of forum most of the time does not evoke the kinds of sporting behavior discussed in Section II.B (surprise, concealment, aggression, and trickery). It happens out in the open and tends to exploit existing procedural rules in well-explored ways. Nevertheless, it is strategic behavior, and it can have real effects on the course of litigation, including on the parties' comparative likelihood of success on the merits and at what price success can be achieved. This applies *a fortiori* in situations where a choice of court not only represents a choice of location and jury pool, but also, effectively, a choice of judge.[297] The choice of litigation venue is not equally distributed among plaintiffs and defendants—plaintiffs are considered "masters of the forum"[298]—and neither is it equally distributed among parties on the same side of the "v." Well-resourced parties are much more likely than poorer parties to be able to afford to retain counsel to explore

292. FED. R. CIV. P. 18–20, 23. Defendants have options, too. *See* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendant's Terms:* Bristol-Myers Squibb *and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1253–60 (2018).

293. FED. R. CIV. P. 19–20.

294. FED. R. CIV. P. 18; 28 U.S.C. § 1332.

295. *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE § 3848 (4th ed. 2024) [hereinafter WRIGHT & MILLER] ("Some courts say that the plaintiff's choice [of forum] is 'highly esteemed,' . . . [or] should 'rarely be disturbed' . . . . Other courts are less enthusiastic about the factor. . . . [S]ome courts give less weight to a plaintiff's forum choice if that party appears to be forum shopping."); Bassett, *supra* note 265, at 363–70 (collecting examples of courts permitting "forum shopping" over various objections).

296. *See, e.g.*, Daniels, *Assignments*, *supra* note 277, at 112 (discussing a variety of mechanisms for "manufacturing diversity" and artificial destruction of diversity, and their nonuniform reception by the courts).

297. *See* J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419 (2020); Alexander Gouzoules, *Choosing Your Judge*, 77 SMU L. REV. 669, 715 (2025).

298. Greta N. Hininger, *Two Heads Are Better than One: Making a Case for the Either Party Viewpoint for Removal*, 69 MO. L. REV. 275, 287 (2004) (discussing "the historical and traditional notion that the plaintiff is the master of the forum"); Clermont & Eisenberg, *supra* note 269, at 1509 ("The American way is to provide plaintiffs with a wide choice of venues.").

potential case-framing options, exploit opportunities for snap removal, or afford options that are more costly but offer a strategic advantage.[299]

It is consistent with our adversary systems' emphasis on party autonomy to allow parties some choice when it comes to the general contours of their case.[300] And perhaps this optionality improves access to justice for a wider variety of putative plaintiffs. But much of the case-framing choice that exists in the system is harder to defend. For example, we might ask why, though both plaintiff and defendant are likely to prefer certain fora over others, the choice of forum is primarily allocated to the plaintiff, with the attendant result that a plaintiff also has a greater opportunity for strategic manipulation when it comes to case-framing.[301] We might also ask why rules of jurisdiction (in particular personal jurisdiction) and venue often offer multiple plausible fora to begin with. The law of personal jurisdiction is complex, still far from settled, and in large part governed by considerations that (rightfully) carry more weight than the amount of strategic leeway given to parties—notions of due process, practicality, predictability, the convenience of the parties, etc.[302] The (frequent) existence of multiple *venue* options within a given state is a legislative choice whose purpose is much harder to divine. The general federal venue statute frequently gives a plaintiff multiple venue options.[303] The venue statute could have been written in a more directive way, providing for a single "correct" venue for every case, but it was not. The legislative history of the federal venue statute suggests that successive rounds of legislative action have been primarily focused on providing *at least* one viable venue for each action, but there is also some indication that a desire to provide plaintiffs a choice of forum has played an occasional role.[304]

The choice to give plaintiffs the benefit of a forum choice (as opposed to allocating this choice either to defendants or to neither party, by legislative

299. *See generally* Galanter, *Haves*, *supra* note 141 (describing the many ways in which the "haves" come out ahead).

300. In addition, it could be hypothesized that this choice increases the likelihood that a plaintiff will choose to file suit in the first place. *See* Michalski, *supra* note 25, at 68 (including accessibility as a procedural value).

301. In some circumstances, a defendant can remove a case to federal court or file a motion to transfer venue. 28 U.S.C. § 1441 (removal statute). But these options are not available in every case, and even when they are, plaintiffs' strategic forum options tend to be much more expansive. 28 U.S.C. § 1391 (general federal venue statute).

302. *See, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017 (2021); Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023).

303. 28 U.S.C. § 1391.

304. *See, e.g.*, H.R. REP. NO. 112-10, at 3 (2011) (citing a risk of "frustrating the plaintiff's choice of forum" in recommending amendment to Federal Courts Jurisdiction and Venue Clarification Act of 2011, relating to cases involving derivative jurisdiction). For a history of the federal venue statute, see WRIGHT & MILLER, *supra* note 295, § 3802.

designating a unique forum for each case) has some rationales that sound in conventional litigation values. For example, a choice of forum may improve access to (actual and perceived) justice.[305] It may also be efficient: providing multiple viable venues will avoid litigation over what "the" correct venue is.[306] We will have to look further for more compelling examples of strategic space being valued for its own sake, but in venue we find the first indication that a desire for strategic optionality might sometimes carry some weight.

2. Pacing (Playing It Fast or Slow)

A classic type of strategic behavior—one for which the rules of civil litigation provide ample room—aims to manipulate the timing of litigation events or the overall duration of a litigation.[307] Famously, slowing down litigation can be helpful, most stereotypically for defendants.[308] But plaintiffs are occasionally accused of delay tactics as well, for example when they slow-roll discovery requests or submit eleventh-hour motions.[309] In extreme cases, plaintiffs can be sanctioned for "failure to pursue discovery."[310]

Speed can be used strategically, just as sloth can. When multiple parties file overlapping claims in different fora, the first-to-file rule can offer the plaintiff his forum of choice if he is the first to file.[311] The first-to-file rule does not take into account the relative suitability of the various fora or the relative stake of parties in interest; whoever filed first presumptively gets the benefit of

305. *See supra* note 300.

306. A stricter venue statute creates the risk of reverting to the time of Roscoe Pound, who complained that justice was too often evaded by cases being thrown out because they had been filed in the wrong court. Pound, Causes, *supra* note 8, at 449 ("It ought to be impossible for a cause to fail because brought in the wrong place.").

307. For a well-publicized recent example, see *Kevin Costner Accuses Christine Baumgartner of Trying to Delay Divorce*, YAHOO NEWS (Aug. 13, 2023), https://nz.news.yahoo.com/kevin-costner-accuses-christine-baumgartner-080035279.html [https://perma.cc/C5C9-AH2H] ("Christine asserts she cannot admit or deny that she understood the Premarital Agreement because she (and apparently all of her attorneys) do not understand the word 'understood.' This is gamesmanship of the worst sort.").

308. *See, e.g.*, Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2087 (1989) ("[M]ost defendants benefit from delay.").

309. *See, e.g.*, Channing Bete Co. v. Greenberg, No. 3:19-cv-30032, 2022 WL 43692, at *11–12 (D. Mass. Jan. 5, 2022) (involving a defendant accusing a plaintiff of gamesmanship for late amendment of complaint); Google LLC v. Sonos, Inc., No. C 20-06754, 2022 WL 195850, at *8–9 (N.D. Cal. Jan. 21, 2022) (same).

310. *See* Pop Top Corp. v. Rakuten Kobo Inc., No. 20-cv-04482, 2022 WL 267407, at *6 (N.D. Cal. Jan. 28, 2022) (considering whether plaintiff's erratic behavior in slow prosecution of its claims amounted to "egregious behavior" and "gamesmanship").

311. Pacesetter Sys., Inc., v. Medtronic, Inc., 678 F.2d 93, 94–95 (9th Cir. 1982) ("There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district.").

his choice of forum.[312] Snap removal, discussed in more detail above, is another strategic maneuver where speed is of the essence.[313] Districts that allow it have effectively set up a race between plaintiff (who will seek to serve any forum defendants as quickly as possible after filing the complaint) and defendants (who will seek to remove the case before plaintiff has succeeded in doing so).[314] Nothing about these speed games serve to support fairness or accuracy, and much of it does not even promote efficiency.

Perhaps the first-to-file rule promotes efficiency by reducing litigation about which forum should be the one to hear the case.[315] But it is hard to make a similar efficiency-based argument in support of snap removal. Moreover, parties with the greatest interest in the outcome or the strongest case on the merits are not necessarily the ones who are able to move the most quickly. Unrepresented parties in particular will rarely have the wherewithal to engage in strategic pacing. Bright-line rules are efficient, but granting a procedural benefit to those who are able to move quickly does not seem intuitively just. At least one court has interpreted the first-to-file rule in a manner aimed at *preventing* unwanted strategic behavior,[316] but it is not clear that the rule prevents more undesirable behavior than it invites.[317] By creating an incentive for being the "first to file," the rule effectively allocates a benefit to resourced parties, who can move quickly and assess the pros and cons of multiple forum options. The rule provides a first more serious inkling that a desire for strategic space may exist as a procedural value onto itself.

312. Commc'ns Test Design, Inc. v. Contec, LLC, 952 F.3d 1356, 1362 (Fed. Cir. 2020) ("The 'first-to-file' rule is a doctrine of federal comity . . . .").

313. *See supra* notes 283–89 and accompanying text.

314. Pennsylvania's Supreme Court amended the state's service statute in recognition of this race. CIV. PROCEDURAL RULES COMM., ADOPTION REPORT AMENDMENT OF PA. R. CIV. P. 400 (2022). Previously, service of process in certain types of actions could only be performed by a sheriff. Recognizing that "the method of original service available to plaintiffs can be a significant factor in the magnitude of [a] delay" that might "provid[e] the opportunity for 'snap' removal," the court changed the service rule for cases involving diversity of citizenship and a forum defendant (i.e., precisely the kinds of cases where snap removal may be possible), to allow service by "a competent adult." *Id.*

315. *See, e.g.*, Andrew J. Fuller, *A "Procedural Nightmare": Dueling Courts and the Application of the First-Filed Rule*, 69 FLA. L. REV. 657, 659 (2017) (noting that the first-to-file rule "promotes efficiency and judicial comity").

316. Bellone v. First Transit, Inc., No. 21-cv-09617, 2022 WL 4292964, at *3 (N.D. Cal. Sept. 16, 2022) ("To avoid rewarding gamesmanship and consistent with its purpose, the first-to-file rule does not require exact identity of the parties, and instead requires only substantial similarity of parties." (internal quotation marks omitted)).

317. The first-to-file rule aims to prevent the filing of second and subsequent lawsuit that compete with the first-filed lawsuit, which can result in either a race to adjudication or in litigation over which of the cases should be stayed pending resolution of the competing case(s). But the first-to-file rule by its very nature can also invite a race to the courthouse to be the first to file.

Snap removal is not universally accepted. It is currently the subject of a circuit split,[318] with some courts rejecting it as "gamesmanship" and "absurd."[319] But courts that allow snap removal have justified it on grounds that it is "within both the language of [the removal statute] and [its] historical trajectory,"[320] suggesting that sometimes procedural tactics are allowed with no justification other than tradition or settled practice, even when they conflict with other procedural values.

Most of the time, moves that cause delay or that speed the process along are not powerful enough to endanger the accuracy of litigation outcomes. An extension of a filing deadline or a deliberately fast frenzy of discovery requests is rarely going to be outcome-determinative. But, of course, in some cases it might: as a direct consequence of one party's delay tactics, another party may be forced to expend additional money, and some parties, unable to incur those costs, may in effect be forced to settle or abandon the case.[321] This example demonstrates how the shape of strategy space can affect the accuracy of outcomes at least in some cases. And yet, delay tactics are permitted, at least up to a certain ill-defined point.[322] When it comes to delay and deliberate speed, pacing strategy may not be celebrated exactly, but rather grudgingly accepted, tolerated as part of the game of litigation.[323]

318. *See* WRIGHT & MILLER, *supra* note 295, § 3730. The Second and Third Circuits have allowed nonlocal co-defendants to remove before their forum-defendant co-defendant has been served, and some have even allowed forum-defendants to effect removal. *See id.*

319. *See, e.g.*, Pratt v. Alaska Airlines, Inc., No. 2: 21CV84, 2021 WL 1910885, at *5 (W.D. Wash. May 12, 2021) (expressing concerns about gamesmanship by resourceful defendants monitoring electronic dockets and evading the forum-defendant rule through quick action); Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1365 (N.D. Ga. 2011) (noting that a literal interpretation of the statute would create an absurd result that could not have been intended).

320. *See* Vishnubhakat, *supra* note 289, at 161.

321. Even a simple rescheduling of a hearing will typically trigger some attorneys' fees and other expenses—the attorney will learn of the rescheduling; will have to communicate it to the client; both attorney and client may have to reschedule travel arrangements, etc. Added costs caused by delay can be much higher if delay comes in the form of burdensome discovery requests of dubious substantive utility. *See infra* Section III.A.3; Easterbrook, *supra* note 174, at 636 (imposing costs on an opposing party can induce that party to settle); Marrero, *supra* note 261, at 1658 (noting that high costs can force an opponent to end a litigation).

322. *See* Turner v. Mike Raisor Buick GMC Cadillac Inc., No. 1:19-cv-04141, 2022 WL 44648, at *3–4 (Jan. 4, 2022) (stating that "unwarranted delays or misleading communications ha[ve] no place in practicing before this Court" and nevertheless declining to impose sanctions for such behavior); Collar v. Abalux, Inc., No. 16-20872, 2018 WL 3328682, at *20 (D.S. Fla. Jul 5, 2018) (holding that a "never say die" campaign toward discovery, while "atypically aggressive," is not sanctionable). Federal Rules of Civil Procedure 11 and 26 prohibit filing or serving court filings or discovery documents "for any improper purpose" including to "cause unnecessary delay," but "unnecessary delay" is left undefined. FED. R. CIV. P. 11(b)(1), 26(g)(1)(B)(ii).

323. *See, e.g.*, Marrero, *supra* note 261, at 1659 (asserting that abuse is ingrained as the "customary way" parties find information); DirectBuy, Inc., v. Buy Direct, LLC, No. 2:15-CV-344, 2022 WL 683651, at *5 (N.D. Ind. Mar. 8, 2022) (grudgingly granting motion to amend answer, "com[ing] after years of delay and gamesmanship").

3. Sideshows

Once a lawsuit is underway, there are numerous opportunities to distract or engage an opponent in time-consuming 'sideshows.' Any party can bury the other in discovery requests that go beyond what is reasonably necessary to find useful information.[324] Any party can make pointless motions.[325] In some situations, a string of successive motions with incremental levels of support can strategically draw proceedings out.[326] Discovery can be rolled out incrementally to keep the other side tied up in a never-ending series of requests, in extreme cases even after the close of discovery.[327] Discovery can also be obstructed in numerous ways.[328]

Sideshow tactics can function as a type of delay tactic, but they tend to visit much greater burden and expense on the other side than many other delay tactics. They therefore have a much greater potential for determining the outcome of the case, posing a real danger to the accuracy of litigation outcomes. For an under-resourced litigant, the expense of mounting discovery activity can cause tremendous pressure, which may in some cases even cause the party to give up and settle a case when it otherwise might not have.[329] A less extreme, and indeed very common, scenario is for "sideshows" to force parties to be very frugal in how they decide to spend their litigation war chest. Even the *specter* of future discovery warfare might prompt a party to limit its claims, defenses, or theory of the case to only those that it believes are either the most promising or

324. *See* Easterbrook, *supra* note 174, at 647–48.

325. *See, e.g.*, Corle Bldg. Sys., Inc. v. Ogden Welding Sys., Inc., No. 3:21-cv-104, 2022 WL 4639647, at *2–3 (W.D. Pa. Sept. 30, 2022) (court warning parties to stop "gamesmanship" involving a "flurry" of motions); Davis v. Miss. Dep't Child Protective Servs., No. 3:21-CV-513, 2022 WL 2187556, at *1–2 (S.D. Miss. May 9, 2022) (denying without prejudice motion to strike characterized by opposing party as raising "issues that are either non-existent and/or utterly premature"). See *supra* note 322 on limitations imposed by the Federal Rules of Civil Procedure.

326. Lee Swimming Pools, LLC v. Bay Pool Co. Constr., No. 1:18-cv-118, 2022 WL 1217241, at *1, *7 (S.D. Miss. Apr. 25, 2022) (reviewing accusations of "gamesmanship" for filing successive motions with incremental amounts of supporting evidence, and declining to impose sanctions).

327. *See, e.g.*, Marrero, *supra* note 261, at 1637–39 (describing "scorched earth" and "call to arms" discovery strategies).

328. Beckerman, *supra* note 190, at 525 ("Proficient advocates . . . propound[] wide-ranging, penetrating and comprehensive discovery requests . . . [while] simultaneously asserting all possible objections in response to adversaries' requests . . . ."). A party can drag its feet when scheduling depositions, delay production of documents or decline production altogether, assert attorney-client privilege in overbroad ways, disclaim access to document sources, etc. Courts can order the party to comply, but court orders are often a remedy of last resort, and only available after other mechanisms have failed. *See supra* note 261. For a discussion of opportunities for gamesmanship in electronic discovery, see generally Neel Guha, Peter Henderson & Diego A. Zambrano, *Gamesmanship in Modern Discovery Tech*, *in* LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 112 (2023).

329. Easterbrook, *supra* note 174, at 636.

the cheapest to pursue.[330] The use of "sideshow" tactics can cause prejudice in a strategic dimension as well: it can weaken the other side's settlement position or exact a psychological toll.[331] It can also deplete an opposing party's resources for mounting its own strategic course of action.

Accuracy is not the only procedural value that may be implicated by these tactics. Not only are wars of attrition not necessarily won by the most deserving party, they can also be grotesquely inefficient as a form of dispute resolution.[332] Even in cases with well-resourced parties on both sides, a shocking amount of wasteful litigation activity can be generated through mutually destructive discovery and motion practices.[333]

Federal Rules of Civil Procedure 11 and 37 provide some protection against abusive filings and abusive discovery, but leave vast amounts of discretion to district judges.[334] "[R]easonable" and "reasonably" together appear 36 times in Rule 37 and the accompanying Advisory Committee Notes,[335] so judges deciding what is or is not appropriate have a vast amount of discretion, without much guidance.[336] Many judges, meanwhile, are disinclined to play an active role in the day-to-day practice of discovery.[337] This suggests that the potential for strategic behavior in discovery is at the very least accepted as a consequence of the pretrial litigation process as it is currently designed.

There are indications, however, that the role of strategy in this pretrial phase is not only reluctantly condoned, but that it is (at least by some) embraced as a status quo worth protecting, perhaps even worth celebrating. Wasteful and harmful strategic behavior in discovery and motion practice is practically a

330. *Id.* at 637 ("It is the (credible) threat rather than the reality of discovery that affects the settlement of cases . . . ."). This may mean giving up on some potentially meritorious arguments in order to retain enough ammunition to pursue others.

331. *Id.* The higher the future costs Party A can inflict on Party B, the weaker Party B's settlement position becomes.

332. *See, e.g.*, Marrero, *supra* note 261, at 1658 ("The typical aim of excessive discovery tactics is to overwhelm an adversary with serial requests to disclose documents of massive proportions or questionable value, or to meet burdensome production schedules. In either event, the design of the demand, as one court observed in a commercial dispute, is to drive the inconvenience and costs of litigation so high as to force the opponent to abandon the fight.").

333. *See id.* at 1656 ("[D]iscovery can consume from fifty to as much as ninety percent of total legal costs."); *id.* at 1658 ("The typical aim of excessive discovery tactics is to overwhelm an adversary with serial requests to disclose documents of massive proportions or questionable value, or to meet burdensome production schedules.").

334. FED. R. CIV. P. 11; FED. R. CIV. P. 37 advisory committee's note to 1970 amendment ("[T]he rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists.").

335. FED. R. CIV. P. 37.

336. *See* Beerdsen, *Discovery Culture*, *supra* note 238, at 1001 (the FRCP "pitch[] [their] guidance at a high level of generality").

337. *See, e.g.*, Moffitt, *supra* note 260, at 499 & n.150 ("[M]ost judges hate to deal with discovery disputes . . . ."); Beckerman, *supra* note 190, at 568 & n.253 (collecting sources describing discovery disputes as "puerile affairs," "spitting match[es]," and "distasteful and wasteful in general").

tradition.[338] While obstruction, delay, and even outright abuse are not the goal, it is widely known that they happen, and not only on rare occasions.[339] And yet there has been a remarkable lack of legislative or judicial action to curb these practices. The scope of discovery under the federal rules has been amended several times in the past few decades,[340] but these amendments have not done much to change litigant behavior[341] and in any event were not targeted at reducing strategic maneuvering room. The Rules have allocated primary responsibility for discovery practice to parties and managerial responsibility to judges, and they have left this allocation of responsibility unchanged in the face of decades of evidence that judges are inclined to be hands-off in the realm of discovery.[342] For better or for worse, strategic room in discovery practice has been the status quo for a long time.

4. Surprise and Concealment

Throughout a litigation proceeding, but especially toward trial, there are opportunities to strengthen one's litigation position by surprising an opponent. There are, of course, disclosure requirements that limit parties' ability to surprise each other with unexpected information.[343] In addition to discovery obligations and pre-trial disclosures,[344] there are notice requirements that apply to complaints and answers,[345] and duties to notify other parties of inadvertent disclosures and other errors.[346] While these mechanisms have rendered legal proceedings much more transparent and predictable than they were in Pound's time, they still leave large amounts of room for surprise, potentially at the

338. *See, e.g.*, Ordover, *supra* note 244, at 309 ("Who among us has not been guilty of filing and arguing dilatory motions?").

339. *See id.* (describing discovery practices that make up "the usual deception known as pretrial litigation strategy"); Marrero, *supra* note 261, at 1659 (arguing that abuse is ingrained as "the customary way" for parties to obtain information).

340. FED. R. CIV. P. 26(b)(1) & advisory committee's notes.

341. Miller, *Simplified Pleading*, *supra* note 237, at 353–54 (arguing that a 1983 amendment to the scope of discovery "seems to have created only a ripple in the caselaw"); Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 235–36 (2010) (arguing that a 2000 amendment was "perceived as having little effect on practice").

342. *See* Beckerman, *supra* note 190, at 518 ("[J]udges unrealistically tend to assume that discovery's cooperative ideal should be realizable in all cases.").

343. *See, e.g.*, FED. R. CIV. P. 26(a)(1) (initial disclosures); FED. R. CIV. P. 26(a)(2) (expert disclosures); FED. R. CIV. P. 26(a)(3) (pretrial disclosures).

344. FED. R. CIV. P. 26–37.

345. FED. R. CIV. P. 8; Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554–63 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 677–84 (2009).

346. *See, e.g.*, FED. R. EVID. 502(b); FED. R. CIV. P. 26(b)(5)(B) (covering inadvertent disclosures); Zielinski v. Phila. Piers Inc., 139 F. Supp. 408, 413 (E.D. Pa. 1956) (imposing adverse consequences on party who failed to correct misunderstanding it had created in discovery).

expense of parties' ability to respond thoughtfully to information or arguments leveled against them.

In some contexts, surprise can be defended as serving a truth-finding purpose. As discussed in Section II.B, some argue that it may not be possible to expose a lying witness at trial if one cannot question them in unexpected ways, including with unexpected materials.[347] In this way, it is claimed, surprise serves an important truth finding function.[348] A similar rationale supports allowing a lawyer to show a witness unexpected documents at a deposition.[349] Regardless of whether surprising a witness *actually* makes her more likely to be truthful (or more likely to be unmasked as a liar), there seems to be no serious debate today as to whether impeachment with surprise materials or questions should be permitted.[350]

The rationale for allowing lawyers to surprise each other in opening and closing arguments is much less clear. Parties do not typically exchange opening and closing statements before delivering them in court,[351] so surprise in those contexts is certainly a possibility. A lying witness may appear more credible to the trier of fact if she has had a chance to prepare and rehearse a response to impeachment material,[352] but a lawyer is not a witness. I am not aware of any contemporary suggestion that draft arguments should be exchanged before they are delivered, to allow the parties to anticipate each other's statements and be ready to respond.[353] But a lawyer's credibility is not at issue the way a witness's credibility is, and it is hard to argue that a lawyer can serve either the client *or* the cause of justice best when she has to think on her feet and respond to unexpected arguments. Again, we see here a suggestion that some surprise

347. *See supra* notes 176–82 and accompanying text.

348. *See id.*; *see also* Damaška, *supra* note 123, at 1106 (quoting John Henry Wigmore: "cross-examination is the greatest legal engine ever invented for the discovery of truth").

349. *See, e.g.*, FED. R. EVID. 613(a) ("When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness.").

350. In a current work in progress, I argue that at least in some circumstances there should be. *See* Edith Beerdsen, *Expert Evidence and Strategy* (work in progress) (on file with the North Carolina Law Review).

351. The Federal Rules of Civil Procedure do not include rules requiring parties to exchange opening and closing arguments with each other prior to delivering them in court.

352. *See supra* notes 176–82 and accompanying text.

353. Indeed, the secrecy of opening arguments invites the filing of "just in case" pretrial motions *in limine* seeking to bar arguments or references to certain facts until they have been established during trial. Conversation with Jules Epstein, Professor, Temple Univ. Beasley Sch. of L., in Phila., Pa. Similarly, a party defending against a motion for summary judgment is not required to preview its case in opposing the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986). There are efficiency reasons for this allocation of burdens at the summary judgment stage, but the allocation also rests at least in part on an unarticulated notion of unfairness that would result if a party were to be required to "preview" its case before trial. *Id.* at 328 (White, J., concurring) (opining that a "plaintiff need not . . . reveal his witnesses or evidence" to defeat a summary judgment motion).

seems to exist in the legal system purely for strategy's sake; for the joy of being a lawyer or judge; for the thrill of the spectacle.[354]

Doctrines that shield information from discovery are also frequently on a direct collision course with established procedural values, most notably accuracy. Any information that is shielded from discovery shrinks the pool of potential evidence to be considered by the finder of fact.[355] As discussed above and in Section II.B, some secrecy doctrines can be justified by reference to established competing procedural or societal values. The attorney-client privilege elevates (to an extent) the need for frank attorney-client communications above a desire for accuracy.[356] The trade-secrets doctrine elevates (to an extent) the protection of a business's intellectual property above a desire for accuracy.[357] Various rules of evidence elevate (to an extent) other social priorities above a desire for accuracy.[358] But there are other secrecy doctrines that elevate much less established values above accuracy.

The work-product doctrine and the "playbook" doctrine each (to an extent) elevate a different value over the desire for accuracy, but the values that these doctrines promote are lawyers' opportunity to outsmart or outplay the other side, and the notion that every litigant is entitled to engage in strategic behavior, respectively. These values offer perhaps the clearest demonstration thus far that strategy is appreciated—perhaps even celebrated!—for its own sake. The attorney work-product doctrine is designed to prevent a certain category of information from discovery—material prepared by counsel in anticipation of litigation.[359] This material by definition is bound to be relevant to the litigation, and therefore, if disclosed, could improve the accuracy of the outcome. The doctrine contributes to parties' ability to obscure information from each other and to surprise each other with unexpected information, and it

354. Sherman, *supra* note 145, at 985 ("Americans still consider litigation as something of a sport to watch . . . ."); Babcock, *supra* note 143, at 1140 (claiming that a trial's "dramatic and spectacular qualities are not unfortunate by-products to be minimized or eliminated, but treasures to be cherished and enhanced").

355. *See* FED. R. CIV. P. 26(b)(1) (providing that privileged materials are nondiscoverable).

356. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (holding that the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice").

357. *See, e.g.*, UNIF. TRADE SECRETS ACT WITH 1985 AMENDS., Prefatory Note (UNIF. L. COMM'N 1985) (indicating that the Act protects "commercially valuable information"); *id.* § 5 ("[A] court shall preserve the secrecy of an alleged trade secret by reasonable means . . . .").

358. *See, e.g.*, FED. R. EVID. 407 & advisory committee's note (evidence of subsequent remedial measures is generally inadmissible, owing to "a social policy of encouraging people to take . . . steps in furtherance of added safety"); FED. R. EVID. 409 & advisory committee's note (evidence of offers to pay medical expenses is generally inadmissible, because "to hold otherwise would tend to discourage assistance to the injured person").

359. *See* FED. R. EVID. 502(g)(2).

appears to exist at least partially in service of an appreciation of strategic space. As discussed in Section II.B, in the *Hickman* opinion that created the doctrine, the Supreme Court rested its decision at least in part on two virtues the Court saw in the doctrine: (1) the fundamental fairness of requiring a lawyer to do her own work rather than profit from opposing counsel's work; and (2) the job satisfaction a lawyer can derive from being able to outsmart her opponent, inuring to society's benefit as it invites capable individuals to become lawyers.[360] Neither of these rationales appears to promote any of the traditional procedural values—accuracy, predictability, due process, efficiency, etc.

The "playbook" doctrine is smaller in scope but similarly elevates strategic values over the discovery of potentially relevant information. Under this doctrine, a lawyer who has represented "Client A" in the past can subsequently be barred from representing another party in litigation *against* Client A, even when the lawyer is not privy to case-relevant information.[361] It is thought that if the lawyer through past representation has become familiar with Client A's litigation "playbook"—its approach to settlement, its appetite for risk, its discovery sensitivities, etc.—this familiarity would put the new client at an unfair advantage vis-à-vis Client A.[362] As discussed in Section II.B, being able to shield some information from disclosure can be socially valuable if it eases the parties' ability to reach a mutually agreeable settlement.[363] And in a litigation system where most cases settle, protecting Client A in this manner may therefore be supportable. However, the playbook doctrine represents another instance where room for strategy is valued and protected by the judicial system.

Just as with sideshow tactics, accuracy is not the only procedural value that is implicated in our litigation system's acceptance of the work-product and playbook doctrines. These doctrines also raise fairness concerns. Less sophisticated, less resourced parties will typically be less able to shield information from discovery through the work-product doctrine.[364] They are also less able to contest bogus claims of work-product protection. It is evident that protection of strategic maneuvering room has played a role in determining the

360. Hickman v. Taylor, 329 U.S. 495, 511 (1947). Whether the jousting aspect of litigation is also *preventing* some capable individuals from entering the legal profession was not addressed by the *Hickman* Court.

361. Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 723 (1997).

362. *Id.*

363. *See supra* Section II.B.

364. Unprivileged information does not *become* privileged by communicating it to a lawyer. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney . . . ."). But work product created in anticipation of litigation is typically only protected if it is created by a lawyer or at a lawyer's direction, so the equivalent material created by a litigant, for the same purpose, does not receive the same protection. *See, e.g.*, FED. R. CIV. PROC. 26(b)(3); N.Y. C.P.L.R. § 3101(c).

de facto scope of discovery, in the most explicit elevation of strategy above other procedural values we have encountered so far.

5. "Having It Both Ways"

A form of strategy that is frequently criticized involves attempts to (arguably) "have it both ways": for a party to take one legal position on one occasion and a different and mutually inconsistent position in another. "Pleading in the alternative" is a basic and uncontroversial lawyering technique within one case,[365] but when a party takes inconsistent positions in separate, parallel cases, the move is sometimes labeled "gamesmanship" and occasionally punished.[366] Changing procedural positions in the middle of a case, likewise, can draw complaints from the opposing side, but does not always lead to negative consequences.[367]

Relatively flagrant instances of "having it both ways" involve attempts to challenge a judgment on procedural grounds after first having acquiesced in the challenged procedure.[368] This is one of the few scenarios where courts can be relied upon to block the challenge.[369] But subtler, more contentious variations of "having it both ways" exist, such as "sleeping on" a procedural defect for

365. "Pleading in the alternative" refers to the pleading of multiple, potentially inconsistent claims to relief or theories of recovery. It is permitted under the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 8(d) ("A party may state as many separate claims or defenses as it has, regardless of consistency."); Molo Design, Ltd. v. Chanel, Inc., 21-CV-01578, 2022 WL 2135628, at *4 n.1 (S.D.N.Y. May 2, 2022) ("[Plaintiff] asserts that . . . [defendant] has engaged in gamesmanship by advancing conflicting arguments," but "[a]lternative pleading before a district court is common practice.").

366. Tetra Tech EC, Inc. v. U.S. Env't Prot. Agency, No. 20-cv-08100, 2022 WL 4372073, at *2 (N.D. Cal. Sept. 21, 2022) ("There is . . . an element of gamesmanship by [plaintiff] in professing injury here from a loss in [another case] while hotly contending in that case that it is not liable in any manner.").

367. Grzegorczyk v. United States, 142 S. Ct. 2580, 2580 (2022) (holding that an unconditional plea agreement bars later challenges to conviction even when based on new law); Ramirez v. Collier, 595 U.S. 411, 434–36, 452–53 (2022) (granting stay of execution over dissent's argument that "the shift in Ramirez's litigation posture alone justifies denying equitable relief because it indicates that the change in position is strategic and that delay is the goal." (internal quotation marks omitted)).

368. *See, e.g.*, Roell v. Withrow, 538 U.S. 580, 590–91 (2003) (barring party who participates in adjudication by magistrate from later attacking the judgment based on lack of consent to "check[] the risk of gamesmanship"); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs, 558 U.S. 67, 71–72, 78 (2009) (declining to vacate decision after appellant first acquiesced in an administrative procedure, and subsequently challenged it).

369. *See id.*; *see also* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 684–85 (2015) (applying *Roell* to adjudication by bankruptcy judge); Zedner v. United States, 547 U.S. 489, 503 (2006) (requiring defendant to invoke protections of Speedy Trial Act *before* the start of trial "prevents undue defense gamesmanship").

months and then raising the defect right before judgment,[370] or (in a criminal case) failing to request production of *Brady* material and then moving to dismiss for lack of production of *Brady* material.[371] For those types of behavior, the shape of strategy space is less well defined.

The doctrines of res judicata and collateral estoppel set some bounds on parties' ability to relitigate issues or claims, but they do not bar inconsistent positions on issues that have not yet been adjudicated.[372] Yet taking inconsistent positions, at least according to some courts, is unacceptable.[373] The principles behind letting a party take inconsistent positions *within* a case when doing so *across* cases is disallowed is not obvious, and courts labeling the practice "gamesmanship" without offering further discussion[374] do not help clarify the boundaries of strategy space. It is clear, however, that some strategy space does exist here and that courts are interested in keeping it alive.

In some situations, "having it both ways" is an exercise of strategy that can create inequitable situations. As discussed above, surprise generally works to the disadvantage of under-resourced parties, and even a sophisticated, represented party may suffer a setback when suddenly faced with a new theory of the case. The permissibility of pleading in the alternative can be partially justified by reference to accuracy and fairness. In many cases, a plaintiff does not have access to all relevant information at the pleading stage.[375] A system

370. Gonzales v. Thaler, 565 U.S. 134, 148 (2012) (reflecting disagreement between majority and dissent over whether "a possibility of gamesmanship" can render a defect in a certificate of appeal jurisdictional); Yeager v. United States, 557 U.S. 110, 131 (2009) (Scalia, J., dissenting) (no "risk of . . . gamesmanship" where government seeks to retry a count that led to a hung jury); Hicks v. United States, 582 U.S. 924, 924 (2017) (Gorsuch, J., concurring) (cautioning against vacating a conviction at the government's request "when the [government's] confession [of error] bears the marks of gamesmanship").

371. United States v. Balwani, No. 5:18-cr-00258, 2022 WL 1405404, at *10-*11 (N.D. Cal. Apr. 7, 2022) (involving accusations of gamesmanship by the prosecution where a criminal defendant failed to ask for alleged Brady material and then trying to get the case dismissed over its nonproduction); *see also* Williams v. Pennsylvania, 579 U.S. 1, 6 (2016) (describing lower court finding that "the trial prosecutor had suppressed material, exculpatory evidence in violation of *Brady v. Maryland*, and engaged in 'prosecutorial gamesmanship'" (citation omitted)).

372. Foss v. E. States Exposition, 593 F. Supp. 3d 1, 1 (D. Mass. 2022) ("The doctrine of claim preclusion serves [to protect] litigants against gamesmanship."); *see also* Swatt v. Hawbaker, No. 4:21-CV-01025, 2022 WL 4453344, at *8–10 (M.D. Pa. Sept. 23, 2022) (avoiding "reward[s for] strategic gamesmanship" is one of the goals of *Colorado River* abstention).

373. *Compare* Tetra Tech EC, Inc. v. U.S. Env't Prot. Agency, No. 20-cv-08100, 2022 WL 4372073, at *2 (N.D. Cal. Sept. 21, 2022) (there is "an element of gamesmanship . . . in professing injury here from a loss in [another case] while hotly contending in that case that it is not liable in any manner."), *with* Mercado v. Snyder, No. 1:21-CV-01743, 2022 WL 1609073, at *8 (M.D. Pa. May 20, 2022) (action not barred by *Younger* abstention where "there is no evidence that [plaintiff] instituted the instant case as a means to engage in gamesmanship or in a race for res judicata.").

374. *See Tetra Tech EC, Inc.*, 2022 WL 4372073, at *2.

375. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that a complaint must raise "enough fact to raise a reasonable expectation that discovery will reveal evidence" of the alleged wrong).

that allows a plaintiff to allege first and discover the details later, but that also demands that a complaint provide the defendant adequate notice of the claims, logically has to allow the plaintiff to assert multiple viable theories of the case at the complaint stage, and to drop some of them later when discovery does not bear them out. This procedural design, concerned with fairness for both plaintiff and defendant, is in line with Pound's vision for a post-sporting-theory litigation system, in which cases would no longer be thrown out on a foot fault.[376] But as described above, "having it both ways" tactics can take a variety of forms, and some of them can take parties by surprise.

A lack of predictability can harm any party, well-resourced or not, to some extent. But well-resourced parties will often be better equipped to respond to unexpected situations. These parties will often also be better positioned to *engage* in "having it both ways" tactics, as they will generally be better able to predict whether a particular litigation behavior is worth attempting and what strategic value (if any) might be extracted from it, and they are likely to be more familiar with prevailing norms and the attitudes of the presiding judge.

6. Psychological Warfare

Finally, there is perhaps the most colorful form of strategic behavior, which we can collect under the term "psychological warfare": actions intended to influence the behavior or mindset of other participants in a litigation. Clarence Darrow's wired cigar from the opening anecdote to this Article falls into this category.[377] Darrow's antics are a form of what in recent years has come to be known as a "Chewbacca defense," a "type of distraction technique that aims to divert the jurors' attention away from the actual facts and evidence . . . of the case, muddling their ability to arrive at an informed decision."[378] A more recent example of strategic physical trickery—this one an attempt to influence a witness rather than a group of jurors—is said to have occurred in a highly

376. *See* Pound, Causes, *supra* note 8, at 411–12; *see also* Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . ."), *abrogated by Twombly*, 550 U.S. at 555–63.

377. *See supra* note 1 and accompanying text.

378. *The Chewbacca Defense: What Is It & How Is It Used in Court*, DEFENDERS, https://thedefenders.net/blogs/chewbacca-defense [https://perma.cc/67EJ-BGSA]; *see also* Willing v. State, No. 61421, 2013 WL 3297070, at *1 n.1 (Nev. May 14, 2013) (involving a party accusing another of engaging in a Chewbacca defense by making irrelevant arguments). The term derives from a 1998 *South Park* episode in which a plaintiff's lawyer inexplicably digresses at length about Chewbacca, Wookiees, Endor, and Kashyyyk. *See South Park: Chef Aid* (Comedy Central broadcast Oct. 7, 1998), https://southpark.cc.com/video-clips/y4lavz/south-park-the-chewbacca-defense [https://perma.cc/C9CG-ARDJ] (on file with the North Carolina Law Review).

publicized trial between actors Johnny Depp and Amber Heard.[379] In an effort to unsettle Ms. Heard (Depp's ex-wife) before her testimony, Depp's legal team sprayed the women's restroom in the courthouse with Depp's cologne.[380] More everyday forms of psychological warfare include sartorial tactics such as the "nerd defense"—dressing a criminal defendant accused of a violent crime in glasses[381]—and the practice of bringing strategically chosen observers to depositions or witness appearances, to "keep them honest."[382]

There are few rules that operate to cabin behavior in this category, and those that exist, perhaps unsurprisingly, are vague. An ABA Model Rule of Professional Conduct provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person,"[383] which could conceivably cover the Depp team's behavior, but none of the other examples mentioned above. The Model Rules also reject "conduct that is prejudicial to the administration of justice," that "seeks to influence . . . [jurors] by means prohibited by law," or is "intended to disrupt a tribunal."[384] It is far from clear that any of the listed behavior would be covered by these Rules. The American College of Trial Lawyers maintains a Code of Pretrial and Trial Conduct, which instructs that a lawyer should not "allude to any matter that the lawyer does not reasonably believe is relevant," "attempt to introduce evidence or to make any argument that the lawyer knows is improper," or "interrupt or interfere with an examination or argument by opposing counsel, except to present a proper objection to the court."[385] The first admonition may well take care of the Chewbacca defense, but what is considered "improper" or an "interruption" or "interference" is left to the reader's

379. *Amber Heard Faced 'Evil' Mind Games from Johnny Depp's Legal Team During Trial*, NEWS (Sept. 24, 2023), https://www.thenews.com.pk/latest/1112988-amber-heard-faced-evil-mind-games-from-johnny-depps-legal-team-during-trial [https://perma.cc/L5ZG-ZMYS].

380. *See id.*

381. *See* Sarah Merry, *"Eye See You": How Criminal Defendants Have Utilized the Nerd Defense to Influence Jurors' Perceptions*, 21 J.L. & POL'Y 725, 728 (2013). A white-collar defendant, conversely, may be instructed to take off his glasses. Michael J. Brown, *Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions*, 23 JURY EXPERT 1, 3 (2011). More generally, lawyers can aim to convey a large variety of messages through sartorial choices and instructions, ranging from "Black Lives Matter" buttons and ties depicting nooses to more subtle approaches involving clothing that is strategically oversized, demure, formal, or plain. *See generally* Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 878–79 (2018) (providing several examples of sartorial strategy).

382. An anecdote from my own practice: at an expert's deposition, the party taking the deposition brought along as an observer its own expert, who had been the witness's direct supervisor in a past job—a costly and otherwise highly unusual move, ostensibly to prevent the witness from embellishing his experience or his findings.

383. MODEL RULES OF PRO. CONDUCT r. 4.4(a) (2019).

384. *Id.* at r. 3.5(a), (d), 8.5(d).

385. *See* AM. COLL. OF TRIAL LAWS., CODE OF PRETRIAL AND TRIAL CONDUCT 11–12 (2009).

interpretation, and in any event, the code by its own terms sets forth "aspirational, rather than minimal, guidelines for trial lawyers and judges."[386]

Clarence Darrow's cigar trick is likely apocryphal.[387] And it would be hard to argue that silent observers who are involved in a case should be barred from attending a deposition or hearing. But as for cologne, glasses, and sartorial strategies, it is unclear whether judges have any concrete tools to draw lines between acceptable and unacceptable behavior.

Meanwhile, these tactics are alive and well. Neither Johnny Depp nor his legal team was sanctioned for attempting olfactory intimidation.[388] The strategic move was widely reported in mass media, and while it drew plenty of criticism, it was also praised as a "brilliant" tactic.[389] There was no widespread outrage in the legal community.[390]

I am not aware of any source that authoritatively states that there is a right to hoodwink the jury, but as a practical matter, it seems that such a right does exist (to an extent), even if it can lead the jury to the wrong result,[391] and even when it may cause real distress for a human being in the process.[392]

386. *Id.* at 1. When proposed *evidence* risks distracting or misleading the jury it is excludable under FED. R. EVID. 403, but actions and arguments by counsel during trial are not typically evidence. *See generally* Capers, *supra* note 381 (discussing forms of information communicated to jurors in the form of attire, presence of family members in the courtroom, race, etc. that are not regulated by the rules of evidence).

387. *See* Adams, *supra* note 2.

388. At least, as far as we know. Bar disciplinary proceedings can be confidential.

389. Alessia Dunn, *Johnny Depp's Lawyer Admits to "Psychological Warfare" Against Heard in Bathroom*, INSIDE MAGIC (Sept. 26, 2023), https://insidethemagic.net/2023/09/johnny-depp-lawyer-psychological-warfare-heard-bathroom-ad1 [https://perma.cc/66CL-9GLS]. Indeed, sales of the fragrance in question soared as a result of the trial. Tatiana Siegel, *Johnny Depp Signs $20 Million-Plus Dior Deal, Marking the Biggest Men's Fragrance Pact Ever*, VARIETY (May 12, 2023), https://variety.com/2023/film/news/johnny-depp-dior-biggest-mens-fragrance-deal-1235611017 [https://perma.cc/9CQF-PMRT].

390. For more war stories, see Solan, *Lawyers as Insincere*, *supra* note 244, at 515; Green, *supra* note 246, at 24, 26.

391. Green, *supra* note 246, at 24, provides an example where the jury seems to have been misled by early-twentieth-century trial lawyer Earl Rogers:

> Rogers defended a hotel thief charged with stealing a three-dollar ring of great sentimental value to its owner. The middle-aged defendant entered the courtroom dressed to the nines, wearing a diamond ring, a ruby pin in his cravat, and a heavy gold chain bearing a gold watch across his vest. Finding it laughable to think that such a well-to-do gentleman would filch a cheap ring, the jury quickly acquitted him. . . . Once the client left the courtroom and was out of view, Rogers and his assistant stripped the client of his valuables and clothes and returned them to the pawnbroker from whom they had been rented.

Id.

392. *See, e.g.*, Dunn, *supra* note 389.

B. *Strategy for Strategy's Sake*

As noted earlier, it is not easy to untangle the sporting theory of justice from the general concept of adversary litigation.[393] Some suggest that it is not possible to have one without the other.[394] The adversary system requires, by definition, adversariality—a contest with multiple parties trying to defeat one another. And adversariality does not exist without some room for choice or decision-making. If a lawsuit were to unfold in a way that was entirely predetermined, then we would not need advocates. (In fact, we would not even need parties!) Wherever there is choice, some options will be more advantageous than others. In a litigation system that is nondeterministic, opportunities for strategy are inevitable.

However, there are many indications that the desire for a "sporting" aspect in litigation goes beyond what is strictly required to maintain an adversary system. The continued existence of the work-product doctrine, which permits nondisclosure of relevant materials, is justified at least in part on a theory that abolishing the doctrine would decrease lawyers' job satisfaction.[395] The playbook doctrine is based explicitly on the notion that strategy is valuable.[396] Venue rules offer a plaintiff flexibility and seem to express no intention to steer them toward the most convenient, efficient, or suitable venue.[397] These rules seem to exist for no other reason than to give the plaintiff options. Other "case-framing" rules, which determine which parties and claims can be joined in a single case and which cannot, similarly could have been drafted with much more specificity and direction, to maximize fairness and efficiency. The fact that they have not been suggests that the drafters wanted parties to have some choice in these matters.[398] The federal removal statute's loophole for snap removal may have originally been an oversight,[399] but the statutory language that allows parties to engage in snap removal has been allowed to stand.[400] Discovery rules

393. *See supra* Section II.A.

394. *E.g.*, Byrne, *supra* note 137, at 1.

395. Hickman v. Taylor, 329 U.S. 495, 511 (1947) ("The effect on the legal profession would be demoralizing."); *id.* at 517 (Jackson, J., concurring) ("I can conceive of no practice more demoralizing to the Bar than to require a lawyer to [turn over work product]."); *see also* Fischel, *supra* note 170, at 25 ("Why legal rules should depend on the 'morale' of the legal profession, however, is nowhere explained.").

396. *See supra* Section III.A.4.

397. *See supra* Section III.A.1.

398. *See supra* notes 303–06 and accompanying text.

399. *See, e.g.*, Hawkins v. Cottrell, Inc., 785 F. Supp. 2d 1361, 1365 (N.D. Ga. 2011) (suggesting that a literal interpretation of the statute would create an absurd result that could not have been intended).

400. *See, e.g.*, KEVIN M. LEWIS, CONG. RSCH. SERV., LSB10380, MAKE IT SNAPPY? CONGRESS DEBATES "SNAP" REMOVALS OF LAWSUITS TO FEDERAL COURT (2020) (discussing Congressional efforts to amend the federal removal statute).

famously afford parties vast amounts of freedom and flexibility.[401] The strategic space that results from this design choice may not have been *created* out of an appreciation for strategy, but is at least accepted as a necessary consequence. Much of the trickery that falls into the "psychological warfare" category is harmless, but some of it is not. It is a time-honored tradition for lawyers to try to outsmart each other and the jury, with few rules to regulate this behavior.[402]

Our legal system seems to value strategic room to maneuver. We celebrate it in stories[403] and we let it happen in our courtrooms. And some of that appreciation does not seem to be justifiable by reference to recognized procedural values, or at least not in all instances. Room for strategic choice respects the parties' dignity when it gives a party freedom to litigate its case in a manner of its choosing, within certain limits.[404] In some cases, strategic space may help the finder of fact reach correct outcomes.[405] Legitimate arguments in favor of retaining strategic latitude also include financial reasons[406] and fairness reasons.[407] Additionally, there are some areas of litigation where secrecy may well be crucial or at least beneficial. As discussed in Section II.B.1, the ability to surprise a witness with unexpected impeachment material may well be crucial to a party's ability to obtain credible, truthful testimony from some witnesses and to discredit lying witnesses.[408] Other arguments rooted in recognizable procedural or other values include legitimate business reasons external to the litigation, such as a desire to keep competitive information out of the hands of competitors and privacy reasons.

An underexplored rationale for maintaining some forms of surprise and other strategic behavior is rooted in the reality that in today's civil justice

401. FED. R. CIV. P. 30–36. *See generally* Beerdsen, *Discovery Culture*, *supra* note 238, at 1001–06 (describing the flexibility afforded by the discovery rules).

402. *See supra* notes 383–86 and accompanying text.

403. *See, e.g.*, *supra* notes 1–2.

404. *See, e.g.*, H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787, 800 (2017) (discussing the wide latitude offered parties under the Federal Rules of Civil Procedure); Old Chief v. United States, 519 U.S. 172, 186 (1997) (the party bearing the burden of proof "is entitled to prove its case by evidence of its own choice").

405. *See supra* notes 176–82 and accompanying text (surprising lying witnesses); *supra* notes 375–76 and accompanying text (pleading in the alternative).

406. A party might choose its battles in litigation in part based on cost considerations. For example, it might sacrifice one defense to make another stronger. Wiggins v. Smith, 539 U.S. 510, 517 (2003). It might decide whether to retain an expert witness based in part on its ability to pay the expert's fees. *See supra* note 226; *see also supra* Section III.A.2.

407. For example, a party's ability to strike prospective jurors from a jury pool rather than be forced to accept a randomly drawn jury panel, is rooted in notions of due process. *See, e.g.*, Aldridge v. United States, 283 U.S. 308, 310 (1931).

408. *See supra* notes 176–82 and accompanying text.

system most cases settle or are otherwise resolved without trial.[409] A party's ability to conceal and reveal information at opportune times may well be a social good if it enables parties to reach a fair settlement.[410] Even if it sometimes leads a party to accept a settlement that is not as good as the resolution it could have obtained otherwise (whether at trial or in a hypothetical negotiation where every party had access to all relevant information), an early resolution of the matter at mutually acceptable terms may well justify the availability of strategic maneuvering space in this context. While there is empirical evidence that information asymmetries in settlement negotiations tend to delay settlement rather than promote it,[411] it is conceivable that settling parties end up more content with a settlement agreement when they leave the negotiation table without having revealed all their cards. If that is the case, then allowing litigants some flexibility with respect to disclosures of relevant information may well be beneficial.

And yet, although the above discussion shows that surprise and concealment serve a legitimizable function in some instances, the judicial system seems to allow more surprise and concealment than can be justified by these considerations. It appears to maintain some room for strategy just for the sake of strategy; strategy that is difficult to explain in terms of procedural values such as accuracy, efficiency, or fairness. The system seems to express an appreciation for strategy as a process value in its own right. Meanwhile, many instances of strategic behavior today no longer revolve around concealment or undue surprise.[412] Surprise and concealment have not been fully eradicated, but accusations of improper strategic behavior today are more likely to surface in reaction to (perceived) undue delay or exploitation of rules in ways that makes litigation more burdensome for an adversary.[413] The potential evil in these forms of litigation behavior is not that they catch an adversary by surprise, but rather that they put an adversary in a worse (sometimes arguably unfairly worse) position, usually without the adversary's consent. Even when a party knows to expect the behavior, it may be put in a position where it has to react quickly or without much time for preparation.[414]

A major problem with the unacknowledged presence of strategy as a procedural value is that in many circumstances it tends to function as an unacknowledged allocation of power to parties who are already powerful. It reflects an implicit choice to benefit resourced parties and lawyers, in ways that

409. *See* Galanter, *Vanishing Trial*, *supra* note 259, at 515.

410. *See supra* Section III.A.2.

411. Sean P. Sullivan, *Why Wait to Settle? An Experimental Test of the Asymmetric-Information Hypothesis*, 59 J.L. & ECON. 497, 520–21 (2016).

412. *See supra* Section II.B.

413. *See supra* Section II.B.

414. *See supra* Sections III.A.2 (pacing), III.A.6 (psychological warfare).

are somewhat hidden and unexamined, because some classes of litigants are likely to benefit more than others from a system that has room for exploitation. Litigants who can afford to retain lawyers and have the resources to engage in any litigation maneuver they believe might yield a strategic upside will benefit more from any existing strategy space than resource-strapped litigants.

Strategy space tends to arise from flexible rules, flexible norms, or the absence of rules or norms.[415] Complex or nonexistent procedural rules and customs that create flexibility and rules that can be bent under ill-defined circumstances can be navigated more effectively by lawyers than by laypersons and allow resourced litigants to gain an advantage.[416] Additionally, well-resourced litigants—especially "repeat players"—famously also have the ability to "play for rules" and keep a flexible system with room for strategic maneuvering in place.[417] When it comes to the strategy space that formal rules set up, these litigants are able to lobby for favorable rule changes.[418] A sizable strategy space is a gift to these litigants.

The benefit accruing to resourced parties is arguably amplified when a procedural framework is created by norms rather than rules. To the extent that courts set the bounds of strategy space with reference to cultural norms that exist among legal actors, these sophisticated parties are able to set the norms.[419] Litigants who proceed from a less powerful position end up being bound by norms and conventions that they had a limited voice in creating and have limited power to change.[420] Strategy that takes the form of trickery or surprise is perhaps particularly liable to exploitation by well-off litigants. The essence of these forms of strategy are that they tend to be unexpected; not contemplated by a formal rule and likely also not settled under a community norm. When it comes to trickery and surprise then, only a player who is familiar with the workings of the judicial system and the particular judge will be able to predict how the judge might react with any level of reliability.

415. *See, e.g.*, *supra* Section III.A.2 (discussing snap removal created by an ambiguity in the federal removal statute); *supra* Section III.A.1 (noting that the general federal venue statute frequently offers plaintiff multiple forum options); *supra* notes 271–83 and accompanying text (indicating that strategic behaviors used to create personal jurisdiction are varied and have no clearly defined limitations).

416. Frankel, *Partisan Justice Revisited*, *supra* note 161, at 44 (noting that the primary beneficiaries of litigation privileges are lawyers); Fischel, *supra* note 170, at 25 (same); Galanter, *Haves*, *supra* note 141, at 97–99 (discussing the effects of differences in resources); Nunn, *supra* note 137 (manuscript at 7) (explaining that adversariality in an evidentiary context can "stack[] the deck against economically disadvantaged defendants").

417. *See generally* Galanter, *Haves*, *supra* note 141 (describing well-resourced repeat-players' ability to "play for rules").

418. *Id.* at 100.

419. *Id.*; *see also* Beerdsen, *Discovery Culture*, *supra* note 238, at 1050–51.

420. *See, e.g.*, Beerdsen, *Discovery Culture*, *supra* note 238, at 1050–51.

Strategy space benefits lawyers as well, by helping them earn a livelihood.[421] It is for good reason that some have argued that lawyers are the problem; that their tendency toward a sporting theory of justice is a perversion of the adversary system; that as soon as lawyers become involved, things turn more adversarial and by extension more gamesman-like, harming procedural values.[422] To be an effective sportsperson, one has to know the rules of the game and how they can be exploited, and so *pro se* litigants start off at a disadvantage in any game that has exploitable rules.[423]

Even courts arguably benefit from the presence of strategy space. Strategy space vests significant ad hoc rulemaking authority in the judiciary. Courts frequently address allegations of inappropriate gamesmanship in a haphazard way and avoid discussing where the line should be drawn that delimits the parties' available strategy space.[424] The unexamined way in which strategy space has been maintained allows them to continue to do this.

Perhaps some jousting and gameplaying may be necessary to allow the adversary system to function. But in maintaining room for strategy, inequality is allowed to sneak in, unexamined, and both accuracy and fairness may end up being sacrificed, to an extent. It is worth considering whether the strategic space that currently exists in the litigation system is justifiable; whether a plain appreciation for strategy should ever trump other procedural values the way it does today and if so when; and whether there are places where we would be better off with less strategic space and less strategic gameplaying.[425] The fact that these questions are not being discussed should give us all pause.

CONCLUSION

An examination of the scope for strategy in litigation forces us to confront a tension that underlies our entire legal system: the tension between, on one

421. *See supra* note 253 and accompanying text.

422. *See* Sward, *supra* note 128, at 323 n.112 (explaining how adversarial practice and complex rules are professionally advantageous for lawyers); Fischel, *supra* note 170, at 27 (arguing that the sporting theory places a premium on skill and experience and thereby benefits lawyers); Burger, *supra* note 75, at 29 (explaining how the sporting theory allows lawyers to seek private advantage).

423. *See* Fischel, *supra* note 170, at 26.

424. *See, e.g.*, Aquino v. Alexander Capital, LP, 642 B.R. 106, 124 (S.D.N.Y. 2022) (holding that a lengthy Rule 56.1 statement represented "an act of obvious gamesmanship"); Wang v. Shun Lee Palace Rest., Inc., No. 17-CV-840, 2022 WL 2718453, at *4 (S.D.N.Y. July 13, 2022) (finding that timing of communications between counsel "smack[ed] of gamesmanship"); Grzegorczyk v. United States, 142 S. Ct. 2580, 2587 (2022) (Sotomayor, J., joined by Breyer, Kagan & Gorsuch, JJ., dissenting) ("GVR order [is inappropriate] 'when the confession bears the marks of gamesmanship . . . .'" (quoting Hicks v. United States, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J., concurring))).

425. This Article leaves for a future project—Edith Beerdsen, *Gamesmanship in Civil Litigation*, 60 GA. L. REV. (forthcoming 2026)—to explore some factors that we might consider in deciding what forms of strategy to permit or disallow.

side, a desire for fairness, efficiency, and a high likelihood that cases will be won by the party with the best claims or defenses rather than the party with the greatest strategic skill; and on the other side, an enduring appreciation for the role of strategy in litigation. Some forms of strategy can be explained by reference to traditional procedural values or practical constraints. Others cannot, and they collectively suggest that strategy is serving as a procedural value in its own right. For those that cannot, it is important to consider the role they serve in our judicial system.

If we truly do value strategy for its own sake, there are still many questions that we ought to consider: What should strategy space look like? What risks are we willing to accept "for strategy's sake"? How readily should the desire for strategic space yield to other, more established procedural values? And how do we protect those who do not have much ability to exploit strategic opportunities in litigation from being taken advantage of by those who can?

Many types of strategic behavior take place "off the books"; they are not specifically provided for or contemplated by any formal rules. When room for strategy functions as a procedural value—one that in some circumstances can trump other procedural values—there is a risk that we are, without realizing it, prioritizing values, rights, and litigants that we did not set out to prioritize. We risk implicitly importing all the baggage of hidden hierarchies that come with practices that are not rule-based and not even norm-based. If we plan to continue to value strategy for strategy's sake, we ought at least to give these implications a second thought.