
ARTICLES

LITIGATION RULES, CLAUSEWITZ, AND THE STRATEGIES OF WAR

DAVID CRUMP*

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* A.B. Harvard College; J.D. University of Texas School of Law. John B. Neibel Professor of Law, University of Houston.

INTRODUCTION

Litigation has a great deal in common with war, and for that matter, with football and chess.¹ Various strategies and tactics of war are useful in each of these human endeavors, even though there are important differences.² Many strategic principles have been familiar to students of war for centuries. Probably the greatest exponent of the theory of war who ever lived was the Prussian General Carl Philipp Gottfried von Clausewitz.³ Although his remarkable book on the subject, *Vom Krieger* (“*On War*”), remained unfinished at his death, it teaches principles that remain valid today.⁴

Clausewitz recognized that his ideas connected with other subjects not involving war. He is famous for the aphorism, “War is . . . nothing but a continuation of [politics] [by] other means.”⁵ He saw war as different from the abstractions that scholarly interpreters proposed, and instead, he took a realist’s approach, according to experience.⁶ In fact, his approach was dialectical, in that it recognized inconsistencies, so much so that he has been compared to Hegel, who saw history as dialectical.⁷ He maintained, contrary to others of his time, that “war could not be . . . reduced to mapwork, geometry, and graphs.”⁸ Another

¹ See DAVID CRUMP, HOW TO REASON 480–85 (Quid Pro Books 2d ed. 2014) [hereinafter HOW TO REASON] (comparing strategies in war, football, chess, and litigation).

² *Id.* at 480–81. Most significantly, killing an enemy is not an objective in contests other than war. *See id.*

³ His name is spelled differently in different places, as Carl and Karl. *See generally Frequently Asked Questions About Clausewitz*, CLAUSEWITZ.COM, <http://www.clausewitz.com/mobile/faqs.htm#LearnMore> (last visited Nov. 7, 2016) (discussing the history and different spellings of Clausewitz’s name).

⁴ Christopher Bassford, *Clausewitz and His Works*, CLAUSEWITZ.COM, <https://www.clausewitz.com/readings/Bassford/Cworks/Works.htm> (last visited Nov. 12, 2016).

⁵ KARL VON CLAUSEWITZ, ON WAR 596 (O.J. Matthijs Jolles trans., Random House Modern Library ed. 1943) (1832) [hereinafter ON WAR]; *see Frequently Asked Questions About Clausewitz*, *supra* note 3.

⁶ *Frequently Asked Questions About Clausewitz*, *supra* note 3.

⁷ *See generally* Julie Maybee, *Hegel’s Dialectics*, STANFORD ENCYCLOPEDIA OF PHIL. (June 3, 2016), <http://plato.stanford.edu/entries/hegel-dialectics/> (describing Hegel’s particular dialectical method relying on contradictory processes between opposing sides); W.B. GALLIE, PHILOSOPHERS OF PEACE AND WAR: KANT, CLAUSEWITZ, MARX, ENGELS AND TOLSTOY 53 (1978) (describing Clausewitz’s thoughts on war as a dialectical relationship at all stages and levels of warfare).

⁸ FRANCIS PARKER YOCKEY, IMPERIUM: THE PHILOSOPHY OF HISTORY AND POLITICS 182 n.154 (Wermod & Wermod 2013).

of his sayings recognized the “friction” or “fog” of war, which meant that armies struggled with “incomplete, dubious, and often completely erroneous information and high levels of fear, doubt, and excitement.”⁹ Clausewitz also recognized the horrors and destruction created by war, although his work is a testament to the need to understand it.¹⁰

There is a fog of litigation that resembles the fog of war. And there are analogies in litigation to many of the strategies that are shared by Clausewitz and modern war.¹¹

The first part of this article describes the strategies of warfare, from Clausewitz and elsewhere, and shows how some of them have analogies in today’s litigation. Here, aficionados of Clausewitz (however few they may be in law schools) will find parallels to litigation in the fog of war, the culminating point of victory,¹² the uses of surprise and paradox,¹³ and other phenomena. Part two describes advantageous compromises among strategies, in both litigation and war. Many tactics, such as simplicity of design, must be sacrificed in varying degrees to achieve other advantages, particularly surprise.¹⁴ In fact, Clausewitz’s strategies are not so much principles as suggestions that are to be weighed against each other.¹⁵

The third part of the article considers these analogies between warfare and litigation as indicators of possible rule adjustments. It addresses rules that might mitigate the disadvantages of trial: confusion, surprise, deception, and such tactics as attrition. As in Clausewitz’s own theories, there is a need for flexibility in the use of these analogies. A final section sets out the author’s conclusions, which tend heavily toward the value of simplification in particular processes, from discovery to the rules of evidence.

⁹ ON WAR, *supra* note 5, at 53–54; see *Carl von Clausewitz*, CONSERVATIVEBOOKCLUB.COM, <http://www.conservativebookclub.com/authors/karl-von-clausewitz> (last visited Nov. 10, 2016).

¹⁰ See ON WAR, *supra* note 5, at 586.

¹¹ See *infra* Part I.A (discussing Clausewitz’s famous “fog of war” theory as it relates to litigation).

¹² See *infra* Part I.E (discussing the parallels relating to the culminating point of victory).

¹³ See *infra* Part I.B (discussing these strategies).

¹⁴ See *infra* Part I.B (discussing value of surprise, even at cost of increased friction).

¹⁵ See *infra* Part I.A (explaining that strategies are to be weighed against each other).

A caveat is in order here. One early reader of my writing in this area criticized it for being too masculine.¹⁶ My response is that this is a sexist view, and in teaching this kind of material to law students (as I do, to the surprise of many), I mention this disparaging view and show photographs of helmeted women soldiers in a live-fire exercise as an antidote. Today, there is little value in military criticism that assigns gross sex-related roles.¹⁷ Furthermore, there is value in having every member of the society understand military strategy, and it is perhaps unfortunate that it is not widely studied.¹⁸ It is difficult for people who are ignorant of the strategies of war to exercise their roles in a democracy.¹⁹

And perhaps there is need for another caveat. This article will make more sense to readers who have experience that tells them what real litigation is like. For example, the law school fiction that discovery removes surprise,²⁰ and the novice's failure to understand how seriously the rules of evidence can impede proof of what is known,²¹ are examples of the reasons. I hope, however, that the article will be accessible to all who have passed a course in civil procedure that adequately covered such subjects as discovery and trial as well as pleading and jurisdiction.

¹⁶ See HOW TO REASON, *supra* note 1, at 460 n.1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ One particularly unfortunate example is the habitual insistence, in a democracy, for the population to know military plans in advance and the concomitant tendency of politicians to disclose them in ways that give advantages to the enemy. President Clinton publicly disclosed limits imposed on ground troops during war, which was criticized by former Secretary Powell. HOW TO REASON, *supra* note 1, at 242 (“I would have argued strongly not to tell [the enemy] what we might or might not do with ground troops.”). The tendency toward this kind of non-strategy is attributed to the requirements of a democratic electorate and opposition. *Id.*

²⁰ *Cf.*, e.g., Bradford J. Gower, *Discovery of Private Investigator Surveillance in South Carolina: Navigating the Work Product Doctrine Under Samples v. Mitchell*, 61 S.C. L. REV. 691 (2010) (describing policy as “free and open discovery so as to *prevent surprise*” (emphasis added)).

²¹ *Cf.*, e.g., David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585 (2006) (showing how Rules exclude evidence in dysfunctional ways).

I. LITIGATION AND THE COMPARISON TO WARFARE

A. The “Fog of [Litigation]”

Clausewitz wrote famously about “die Nebels des Krieges,” the “fog of war,”²² in which “[e]verything is very simple . . . , but the simplest thing is difficult.”²³ Military Strategist Edward Luttwak used a similar phrase to describe the phenomenon.²⁴ Both of them saw that simplicity was a desirable solution to this problem, although both recognized that simplicity had to be compromised against counterbalancing concerns.²⁵

1. Disconnections, Failures, Fear, and Excitement

In war, equipment does not uniformly work as designed or intended.²⁶ Artillery fails to fire, is off target, or simply is not right for the mission.²⁷ Ordnance from aircraft strike harmlessly or even against friendly forces.²⁸ Troops are not where they are supposed to be, and sometimes, they are not equipped properly or trained for conditions.²⁹ Weather, wounds, and exhaustion for which commanders have not prepared complicate the situation.³⁰ If two forces are expected to coordinate, either in meeting or in attacking from different places, they may fail to coincide in timing or in mission.³¹

²² HOW TO REASON, *supra* note 1, at 483–84.

²³ ON WAR, *supra* note 5, at 53.

²⁴ EDWARD LUTTWAK, STRATEGY: THE LOGIC OF WAR AND PEACE 12 (President & Fellows of Harvard Coll., 1987) (describing the “friction” of war; attributing the concept to Clausewitz).

²⁵ See *infra* notes 79, 85–87 and accompanying text.

²⁶ See LUTTWAK, *supra* note 24, at 12–13.

²⁷ See ON WAR, *supra* note 5, at 54.

²⁸ See generally Lieutenant Colonel Robert A. Coe & Lieutenant Colonel Michael N. Schmitt, *Fighter Ops for Shoe Clerks*, 42 A.F. L. REV. 49 (1997) (describing different techniques used by the Air Force to avoid incidents of friendly fire, while acknowledging the inherent risks of firing on friendly forces in war).

²⁹ See LUTTWAK, *supra* note 24, at 12–13 (providing examples of problems faced by military).

³⁰ See ON WAR, *supra* note 5, at 54–55 (describing how certain unforeseen elements may complicate war strategies).

³¹ Cf. LUTTWAK, *supra* note 24, at 11–14 (describing similar kinds of failures).

The enemy, of course, will be diligently working to increase these kinds of friction.³² Inscrutability, and indeed deception and diversion, are opposing tactics.³³ Human beings in combat are immersed in fear, confusion, and excitement, all of degrees that hinder proper decisions.³⁴ In fact, nothing can be taken for what it seems to be. The enemy may be hidden in jungle, meaning that a “meeting encounter” will result, in which friendly troops search for the opponent while traversing unfamiliar territory, and without knowing when, where, or how the battle will develop.³⁵

In fact, these issues are shared by other kinds of combat-related endeavors.³⁶ Similar issues present themselves in football.³⁷ The defense shifts unpredictably, confounding the ability to call workable plays in advance, and the offense uses the play-action pass, in which a running back confuses rushers.³⁸ In chess, the opponent is also unpredictable, perhaps alternating among “the Sicilian Defense, the French Defense, and the (very difficult) Lange Attack” while camouflaging the approach as long as possible and frustrating efforts to tell what is going on.³⁹

And as we shall see, litigation presents analogous problems.

2. The Advantages of Simplicity

In response to these difficulties, the military commander seeks simplicity.⁴⁰ The fewer moving parts the better, other things being equal (although they never really are).⁴¹ Combining forces from different directions, particularly from long distances, is to be avoided absent good

³² See *id.* at 14 (describing how enemies create friction).

³³ See HOW TO REASON, *supra* note 1, at 482–85 (describing these strategies).

³⁴ See *supra* text accompanying note 9; see also, ON WAR, *supra* note 5, at 53–54.

³⁵ See HOW TO REASON, *supra* note 1, at 484–85 (describing different modes of engagement).

³⁶ *Id.* at 483.

³⁷ *Id.*

³⁸ Cf. *id.* at 481–85 (describing football analogies to war).

³⁹ Cf. *id.* (describing chess analogies to war).

⁴⁰ See LUTTWAK, *supra* note 24, at 13 (describing why military commanders seek simplicity).

⁴¹ See *id.* at 13–15 (providing examples of how moving parts can compound one another).

reason.⁴² Again, “the simplest thing is difficult,”⁴³ because a battlefield is disorganized.⁴⁴ A plan that requires artillery, troops, aircraft, and vessels to be brought together must leave room for disconnections.⁴⁵ The same is true in football, where runs through the center and down-and-out passes are strategic, and in chess, where the Bishop’s Opening is easy to execute and permits transition into other styles.⁴⁶

But a major disclaimer awaits. Simplicity must be balanced against other tactics, some of which are described below.⁴⁷ The advantages of surprise, for example, are worth significant sacrifices of simplicity. Some of the most successful battle plans have operated with huge amounts of self-imposed complexity, friction, and confusion.⁴⁸

3. The Litigation Analogy

The difficulties of litigation are more like those in warfare than most people who have not done it are likely to recognize. The malleability of the substantive law, of evidence law, and of the most basic testimony and exhibits, makes the events in a trial confusing.⁴⁹ Even during pretrial or pre-suit stages, considerations change so that fixed plans are no longer strategic.⁵⁰ In fact, there is a “fog of litigation” that parallels the fog of war.⁵¹ In the author’s former law firm, there was a standard and often repeated expression for this idea: “Nothing’s ever easy.”⁵²

⁴² See *id.* at 11–15 (analogizing the meeting of multiple forces to the problems of multiple families meeting at a given location, but pointing out the greater confusion of war).

⁴³ See Crump, *supra* note 21 and accompanying text.

⁴⁴ HOW TO REASON, *supra* note 1, at 483.

⁴⁵ See *id.*

⁴⁶ See generally *id.* at 481–88 (describing analogous strategies).

⁴⁷ See *infra* Part II.

⁴⁸ See *id.*

⁴⁹ See generally Crump, *supra* note 21, at 586–87 (discussing unpredictability of these processes).

⁵⁰ Telephone Interview with Lonny Hoffman, longtime trial lawyer, now Professor at Univ. of Hous. Law Ctr. (June 5, 2016).

⁵¹ See *Masikrovka and the Fog of Litigation*, LEGAL STUDIO (Jan. 29, 2015), <http://www.legalstudio.co.uk/masikrovka-and-the-fog-of-litigation>.

⁵² This aphorism probably is attributable to Lynne Liberato of Haynes and Boone, a former President of the State Bar of Texas.

This phenomenon is rarely taught or even recognized in law school.⁵³ Take, for example, the service of process. For the most part, casebooks excerpt decisions that present relatively clear legal issues or errors.⁵⁴ And for the most part, these teaching devices do not show the difficulty, on occasion, of identifying, locating, or serving the unknown defendant, much less the elusive one.⁵⁵ A case about product liability may show an identified product with a known alleged defect.⁵⁶ Books rarely show the detective work that, before the lawsuit, has gone into finding whose product it was.⁵⁷ In such a situation, the indications may suggest one marplot and then another, and sometimes they leave the question in a state of ambiguity.⁵⁸

There is a fiction, unfortunately, that discovery prevents surprises at trial.⁵⁹ It does not.⁶⁰ Even a thorough deposition leaves gaps: enough wiggle room for a witness to point out that the crucial question and

⁵³ See generally David H. Getches, *What's New in Legal Education—Experiential Learning*, 38 COLO. LAW. 13, 13 (Apr. 2009) (discussing shortfalls of legal education system).

⁵⁴ Cf. *United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 886–87 (9th Cir. 1981) (reversing summary judgment rendered on date of trial because it contradicted provisions in pretrial order). A little more subtlety in the opponent's draft of the order might have resulted in affirmance of the judgment with nearly as much surprise.

⁵⁵ See generally Jessica D. Gabel, *The Lean Legal Clinic: Cost-Effective Methods of Implementing Experiential Education*, 7 ELON L. REV. 261, 267–70 (2015) (explaining that law students are not taught the human side of law).

⁵⁶ See, e.g., *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253 (2d Cir. 1991), excerpted at length with extensive notes in RICHARD FREER AND WENDY COLLINS PERDUE, *CIVIL PROCEDURE: CASES, MATERIALS AND QUESTIONS* 159–64 (7th ed. 2016). This case deals only with a purely legal question, and the relevant section of this generally competent casebook contains only one short paragraph about evasion, and no opinions about rules for obtaining substituted service on defendants who cannot practically be served by traditional means. *Id.* at 165. It is possible to deal in Civil Procedure cases with these realities of service. Cf. DAVID CRUMP ET AL., *CASES AND MATERIALS ON CIVIL PROCEDURE* 126–29 (6th ed. 2012) (containing materials on substituted service). This coverage includes an excerpt from *Butler v. Butler*, 577 S.W.2d 501 (Tex. Civ. App. 1978), which illustrates the fog of litigation: the major difficulty that can result from unknowns about service of process. *Id.*

⁵⁷ Cf. *Williams v. Fulmer*, 695 S.W. 411, 412–14, (Ky. 1985) (stating that a claim against a known manufacturer was invalid for lack of privity and that a claim against a potential defendant in privity was unsuccessful because seller remained unknown).

⁵⁸ Cf. *Mark v. Zhellott Mfg. Co., Inc.*, 666 N.E.2d 631 (Ohio App. 1995) (displaying that where plaintiff sued three unidentified defendants, the first one, when identified, obtained summary judgment; the second obtained a jury verdict, which an appellate court affirmed; the third apparently was never identified).

⁵⁹ See Gower, *supra* note 20 and accompanying text.

⁶⁰ See, e.g., *id.*

answer assumed a fact that was not there and that changes reality.⁶¹ And that issue pales by comparison with the variances that will result from one's own witnesses.⁶² Diligent lawyers, after spending a day in trial, work deep into the night to prevent the disasters that are going to happen anyway during the next day of testimony.⁶³

4. The Effort toward Simplicity in Litigation

As in warfare, there are advantages to simplicity in litigation.⁶⁴ In the first place, everything that is done must be cost-effective.⁶⁵ Simple evaluation of the case in the beginning, recognition of what can go wrong, and straightforward development is best, other things being equal (although, again, they rarely are).⁶⁶ Finding out facts with inexpensive discovery devices such as disclosures, interrogatories, and admissions is strategic, for example.⁶⁷

The adoption of self-initiated disclosures follows this line of thought. This process can simplify litigation—but only if judges keep it simple.⁶⁸ Interrogatories can be used to obtain the opponent's contentions.⁶⁹ It might be desirable if this device, or disclosures, could be used to obtain the opponent's knowledge of potential parties and

⁶¹ See, e.g., DAVID CRUMP & JEFFERY B. BERMAN, *THE STORY OF A CIVIL SUIT: DOMINGUEZ V. SCOTT'S FOOD STORES* 83–85, 100–01 (3d ed. 2014) (illustrating the situation where plaintiff impeached by deposition but explained apparent contradiction and won verdict).

⁶² See, e.g., *Young v. Chi., Rock Island & Pac. Ry. Co.*, 45 P. 583, 583–84 (Kan. 1896) (sustaining demurrer because plaintiff's testimony contradicted itself).

⁶³ Telephone Interview with Lonny Hoffman, *supra* note 50.

⁶⁴ See KENNEY F. HEGLAND, *TRIAL AND LAWYERING SKILLS IN A NUTSHELL* 247 (5th ed. 2016) (urging simplicity in the trial story during opening statement).

⁶⁵ John D. Shugrue, et al., *ABA Manual for Complex Insurance Coverage Litigation: A Prescription for Efficient, Cost Effective and Manageable Litigation—A Reply*, 8 *FORDHAM ENVTL. L.J.* 59, 65 (1996).

⁶⁶ See D. Reneker, *Geary, Stahl & Spencer Litigation Section Orientation*, as reprinted in WILLIAM V. DORSANE III, *TEXAS CIVIL PROCEDURE: PRETRIAL LITIGATION* 21–23 (2016–17 ed.).

⁶⁷ See CRUMP ET AL., *supra* note 56, at 392–93 (describing less expensive devices).

⁶⁸ See MAJOR BRADLEY, *INTERROGATORIES-TO ANSWER OR NOT TO ANSWER, THAT IS THE QUESTION: A PRACTICAL GUIDE TO FEDERAL RULE OF CIVIL PROCEDURE* 33 (Dept. of the Army ed., 1997).

⁶⁹ See generally FED. R. CIV. P. 33 (identifying federal rule for drafting and responding to interrogatories).

issues that are likely to arise.⁷⁰ This kind of device, which is available in some jurisdictions,⁷¹ can make things simpler than an all-out investigation by a party in the dark.⁷² Again, the advantages would depend on the willingness of judges to keep the demands of these devices simple.⁷³

The principle of simplicity extends to trial tactics, too. Many good lawyers follow a policy of having a single lawyer handle all parts of a trial.⁷⁴ The reasons include jury impressions—a desire not to create perceptions of needing an army of teammates—but another reason is simplicity.⁷⁵ The framing of the lawsuit should be reduced to one, two, or three themes.⁷⁶ For example, “The defendant was negligent in driving too fast; the plaintiff is blameless; and it would take more than five million dollars to compensate for these injuries.”⁷⁷ The opening statement must tell a familiar and understandable story, but not be so detailed about ambiguous issues that its promise cannot be delivered.⁷⁸

Again, however, in litigation, as in warfare, this principle of simplicity only occurs sometimes. It must be balanced against other

⁷⁰ See, e.g., Robert K. Wise, *Ending Evasive Responses to Written Discovery: A Guide for Properly Responding (and Objecting) to Interrogatories and Document Requests Under the Texas Discovery Rules*, 65 BAYLOR L. REV. 510, 518 (2013) (“[A]n interrogatory asking the responding party to identify ‘all documents concerning or relating to’ or ‘all persons with knowledge about’ a particular matter or subject is an identification, rather than a contention, interrogatory that does not require evidence marshalling and generally is appropriate.”).

⁷¹ See, e.g., TEX. R. CIV. P. 194.2(b), (c) (requiring parties, on request, to disclose names of potential parties and known potential issues).

⁷² See, e.g., *Dahl v. City of Huntington Beach*, 84 F.3d 363, 364 (9th Cir. 1996) (“If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.”).

⁷³ American Bar Association, *National Conference of State Trial Judges Discovery Guidelines-Reducing Cost and Delay*, 16 REV. LITIG. 321, 321 (1997).

⁷⁴ Telephone Interview with Lonny Hoffman, *supra* note 50. Professor Hoffman adds that when there is a second chair because of complexity, one lawyer is likely to perform all the actual trial tasks, and in cases where multiple lawyers must do so there is usually one principal lawyer. *Id.*

⁷⁵ See, e.g., PRACTICAL LAW LITIGATION, PREPARING FOR TRIAL IN FEDERAL COURT, PRACTICAL LAW PRACTICE NOTE 9–576–7025 (Westlaw 2016) (“Counsel [] should consider early on in the case whether separate or additional trial counsel is warranted.”).

⁷⁶ Barbara Hillmer and Bob Gerchen, *Using the Story: The Importance of Developing Memorable Themes*, LITIGATION INSIGHTS BLOG (Jan. 29, 2010), <http://www.litigationinsights.com/case-strategies/using-the-story-the-importance-of-developing-memorable-themes/>.

⁷⁷ See HEGLAND, *supra* note 64, at 224, 247.

⁷⁸ See *id.* at 253.

factors. Maneuverability and surprise are other factors that create advantages, and they may require sacrifices of simplicity.⁷⁹

B. The Value of Surprise

1. Paradox, Inscrutability, Deception, and Diversion in War

In warfare, surprise is a crucially strategic value.⁸⁰ The military commander seeks to set the battle in a location, at a time, and in a manner that the enemy does not expect.⁸¹ A spectacular example is the Battle of Chancellorsville in the Civil War.⁸² General Jackson persuaded his commander in chief to permit him to take his entire corps around the face of the opposing troops and to attack from the flank—a maneuver not so well established at the time as it is now.⁸³ His commander remained with a minimal “fixing force,” retaining the enemy’s concentration while Jackson’s flanking force attacked from the side.⁸⁴ The result was a decisive victory over General Hooker’s much larger opposing force.⁸⁵

Edward Luttwak calls this idea “the line of least expectation.”⁸⁶ Israel, he points out, is a master at the strategy.⁸⁷ Luttwak observes that “Israeli forces much weaker materially than they need have been (because of secrecy, deception, improvisation and overextension), and operating with so much self-imposed friction that their condition bordered on the chaotic, have regularly defeated [larger] enemies caught by surprise”⁸⁸

These strategies became familiar to Israel’s enemies, who looked for the opposite of the simple.⁸⁹ During the 1982 Lebanon War, Israel

⁷⁹ For example, “[i]f it is possible that the plaintiff’s case will not come in as planned, it is not a good idea to commit to a theory of defense.” *Id.* at 250.

⁸⁰ See ON WAR, *supra* note 5, at 142–45 (stating this principle and giving examples).

⁸¹ See *id.* at 144–45 (giving examples).

⁸² HOW TO REASON, *supra* note 1, at 485.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 485 (describing this battle); see also TOM CLANCY & FRED FRANKS JR., INTO THE STORM: A STUDY IN COMMAND 128–29 (1997) (also describing the battle).

⁸⁶ See LUTTWAK, *supra* note 24, at 16.

⁸⁷ *Id.*

⁸⁸ *Id.* at 17.

⁸⁹ *Id.*

created a diversion along seemingly irrational mountain roads.⁹⁰ Syria anticipated this attack.⁹¹ But the Syrians did not expect the Israeli strategy for which the mountain-road feint was a deception: a direct, old-fashioned frontal attack through the valley, which overwhelmed the divided Syrians.⁹²

Luttwak puts it this way: “Consider an ordinary tactical choice, of the sort frequently made in war [A] bad road can be good *precisely because it is bad* and may therefore be . . . left unguarded by the enemy.”⁹³ The result is that an approach that seems nonstrategic may become a good option.⁹⁴ “[T]he paradoxical logic of strategy reaches the extreme of a full reversal.”⁹⁵ Luttwak adds, in fact, that “[a]t least some paradoxical elements will be present in . . . most competent military actions.”⁹⁶

Deception and diversion are regular tactics in war.⁹⁷ The Normandy Invasion on D-Day during World War II was preceded by various diversionary tactics.⁹⁸ In Operation Desert Storm, General Norman Schwarzkopf started with a celebrated diversion that strengthened the predictions of the opposing Iraqis about where the Allies were likely to strike.⁹⁹

2. Analogous Tactics in Litigation

And lawyers use surprise, paradox, deception, and diversion in litigation, too.

Sometimes, it is a matter of inscrutability. An interrogatory asks the opponent to “[d]escribe, in detail, how the accident happened.”¹⁰⁰ The opponent answers, with ostensible but useless transparency, “It

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (describing Israeli strategy and this incident).

⁹³ *See id.* at 7.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 15.

⁹⁷ *Id.* at 9.

⁹⁸ The code name for part of the diversion was “Operation Fortitude.” *Id.* at 6.

⁹⁹ *See* HOW TO REASON, *supra* note 1, at 483 (describing this event).

¹⁰⁰ *See* CRUMP & BERMAN, *supra* note 61, at 32 (recognizing that beginning a deposition with “a broad, open-ended inquiry encourages the witness to narrate,” which results in “fuller discovery”).

happened because your client was negligent.”¹⁰¹ The opponent thus gains valuable maneuverability as well as potential surprise. Or, the answer can be affirmatively misleading. The question, “[d]o you know of any photographs of the accident scene?” is answered in the negative, although the lawyer knows of a video that shows the accident actually happening.¹⁰²

Sometimes, it starts with pleadings. A plaintiff’s lawyer in a business dispute may assert more than thirty distinct claims.¹⁰³ And the lawyer may then appear to concentrate on developing two or three of them, but late in the game, may pivot to a fourth and fifth.¹⁰⁴ This is a tactic that can withstand discovery, of course, because the lawyer is not required to disclose strategy.¹⁰⁵ And perhaps the apparently weakest expert is the one that ultimately presents the gist of the lawyer’s case.¹⁰⁶ During the charge conference, the lawyer submits to the judge a complete proposed set of instructions and verdicts, which has all of the correct instructions included but confusingly cross-references some of them, so that the opponent’s theories of the case, although present, are not easy to recognize—or to argue to the jury.¹⁰⁷

For example, I recall a driving-while-intoxicated case—not memorable, and not memorialized by any written opinion or order other than a long-dead-filed order embodying a not-guilty verdict—that came

¹⁰¹ See *id.* (providing a similar example).

¹⁰² See *id.* at 31–32 (providing a similar example).

¹⁰³ Telephone Interview with Lonny Hoffman, *supra* note 50.

¹⁰⁴ *Id.*

¹⁰⁵ Under the work-product doctrine, which is codified in Federal Rule of Civil Procedure 26(b)(3) and similar state statutes, attorneys are generally not required to disclose their legal strategies during the discovery process if the legal strategies are memorialized in “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative.” FED. R. CIV. P. 26(b)(3).

¹⁰⁶ The analogous tactic of changing expert opinions is illustrated in *Conway v. Chemical Leaman Tank Lines, Inc.*, 687 F.2d 108 (5th Cir. 1982) (identifying the synthesized rule and standard of review, as predicated by Federal Rule of Civil Procedure 59, as to when relief should be granted after the admission of surprise witness testimony).

¹⁰⁷ For example, the state trial court in the *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), instructed the jury to consider whether the parties “intended” to enter into the relevant agreement, implying a subjective intent to do so in the future. Court’s Charge and Jury’s Verdict in *Pennzoil Co. v. Texaco, Inc.*, No. 84–05905, as reprinted in CRUMP, *supra* note 56, at 678. A separate instruction, placed elsewhere, told the jury to judge “intent” objectively, but the charge, as worded, was deceptive unless jurors correlated these instructions. *Id.*

up during my time trying criminal cases.¹⁰⁸ The defense lawyer made numerous non-credible pleas to the prosecutors to dismiss or reduce the charge because of an allegedly faulty blood-alcohol test as well as explanations for the defendant's sloppy conduct, based upon lack of sleep. At trial, the prosecutors put on convincing evidence that the defendant was indeed intoxicated. The defense's testimony, however, was that the defendant was not driving or operating the vehicle; he had merely exchanged places with the driver and sat in the driver's seat without using any of the controls. The testimony was a surprise, and the prosecution had no answer.

C. Intelligence

The United States Army uses the acronym "M-E-T-T-T" to signify its intelligence objectives, which include knowing the Mission, Enemy, Terrain, Troops, and Timing.¹⁰⁹ The mission cannot be something so vague as "to win the battle"; instead, it should be more precise: "[T]o destroy [or capture] Iraqi troops in the area of operations and stand by to defend Northern Kuwait (a paraphrase of the mission statement for VII Corps in [Operation] Desert Storm)."¹¹⁰ The enemy should be known in terms of strength, equipment, and capabilities, among other issues. Similar kinds of information fit under the headings of terrain, troops, and timing.¹¹¹

Intelligence is important in litigation, too.¹¹² Obviously, discovery provides a major part of this intelligence; it is where litigation lawyers live.¹¹³ But it is only the start. Just as the Army studies the terrain, a trial lawyer will study the court—or rather, the judge.¹¹⁴ There are various

¹⁰⁸ This case arose and was resolved in the early 1970's, more than forty years ago. It would be difficult to document in dead storage, if it were even possible, and no existing documents would be likely to show the strategy at issue.

¹⁰⁹ See HOW TO REASON, *supra* note 1, at 481; see also CLANCY & FRANKS, *supra* note 85, at 2 (describing military intelligence and wartime tactics used during the Persian Gulf War).

¹¹⁰ See HOW TO REASON, *supra* note 1, at 481; see also CLANCY & FRANKS, *supra* note 85, at 2 (providing another example of a specific mission statement).

¹¹¹ See generally HOW TO REASON, *supra* note 1, at 481–82 (comparing descriptions of Desert Storm's and the Iraq War's terrain, troops, and timing); CLANCY & FRANKS, *supra* note 85, at 8–11 (identifying the terrain, troops, and timing of the Gulf War).

¹¹² See HOW TO REASON, *supra* note 1, at 482.

¹¹³ *Id.*

¹¹⁴ See JAMES M. STANTON, WHAT JUDGES WANT: A FORMER JUDGE'S GUIDE TO SUCCESS IN COURT 31–33 (2013).

public sources that tell the researcher about the judge's proclivities and habits.¹¹⁵ Likewise, the lawyer will investigate the analog of the enemy (who, it is to be remembered, is not an enemy): the opponent.¹¹⁶ There are trial reports,¹¹⁷ and there can be interviews of friendly reportees: "Bruce, do you know anything about the way that John Q. Badlaw tries a lawsuit?"¹¹⁸ And the lawyer had better have a detailed mission statement (a trial notebook) and an assessment of assets—supporting lawyers, assistants, and witnesses.¹¹⁹

The trouble is that inscrutability, diversions, and deception happen here, too.¹²⁰ The opponent may write parts of the proposed pretrial order so that contested facts are difficult to identify or even are camouflaged.¹²¹ The opponent may frustrate discovery.¹²² And the opponent may pretend that certain issues are foremost when they are not.¹²³

Incidentally, it might be better if legal research courses showed how to find out about judges, expert witnesses, opposing lawyers, and proof sources, in addition to the details of traditional research that are more likely to be the only content of these courses.¹²⁴

D. Attrition

One reason for intelligence is to identify enemy shortages for purposes of attrition.¹²⁵ If there is a limited supply of gasoline, for example, the military commander will maximize the need for enemy

¹¹⁵ See UNIV. OF CINCINNATI, RESEARCHING JUDGES <http://www.law.uc.edu/sites/default/files/Researching%20Judges.pdf> (last visited Nov. 14, 2016).

¹¹⁶ Cf. HOW TO REASON, *supra* note 1, at 481.

¹¹⁷ See generally Trial Report Service Inc., TRS, <http://trialreports.net/index.html> (last visited Nov. 14, 2016) (database of trial reports).

¹¹⁸ See generally HEGLAND, *supra* note 64 at 73–80, 193–204 (providing an explanatory illustration on how to conduct a friendly interview).

¹¹⁹ See generally STEVEN H. GOLDBERG & TRACY WALTERS MCCORMACK, THE FIRST TRIAL 84–110 (2d ed. 2009) (identifying various tools that lawyers should equip themselves with in preparation for trial).

¹²⁰ Cf. HOW TO REASON, *supra* note 1, at 482–83.

¹²¹ See *supra* note 40 and accompanying text.

¹²² See *supra* notes 66–67 and accompanying text.

¹²³ See *supra* notes 68–69 and accompanying text.

¹²⁴ See generally Paul Douglas Callister, *Beyond Training: Librarianship's Quest for the Pedagogy of Legal Research Education*, 95 LAW LIBR. J., 1–45 (2003) (discussing the content of legal research classes).

¹²⁵ See LUTTWAK, *supra* note 24, at 91–96 (describing attrition and relational maneuvers).

maneuver while interrupting supplies, either by destroying sources or cutting transport lines.¹²⁶ Or, is the enemy short of troops, food, weapons, air defenses, or something else? The tactics will differ depending on the type of shortage.¹²⁷ The time-honored, but brutal, method is the siege, which is ancient enough to be chronicled in epic poetry.¹²⁸

In litigation, the Rules are theoretically designed to minimize attrition as a tactic.¹²⁹ But money, time, and patience are limited just as supplies are in war.¹³⁰ The use of discovery to wage a war of attrition is familiar enough so that the Federal Rules of Civil Procedure are motivated in part by an effort to discourage it.¹³¹

And then, there is the strategy of the Rambo litigator,¹³² to whom the Rules have not yet perfectly caught up. One of Rambo's favorite tactics is to schedule depositions or other events and fail to appear, causing a waste of time and money.¹³³ In other words, this opponent works a strategy of attrition not only by pushing and tripping during discovery, but also by a simpler method: doing nothing.¹³⁴

A motion for sanctions is a poor defense to Rambo's strategy. At the hearing, if you want one, he will point out that he called your office the day before the missed event and left a message with an unnamed person to the effect that he would be skiing in Steamboat Springs.¹³⁵ Rambo often will also file a counter-motion for sanctions, finding something questionable that you have done, making you spend even more resources on defense of Rambo's motion and leaving the judge with an impression of squabbling elementary schoolers.¹³⁶

¹²⁶ See HOW TO REASON, *supra* note 1, at 484.

¹²⁷ *Id.*

¹²⁸ See DAVID CRUMP, THE AENEID: VIRGIL'S GREATEST HITS 13–21 (Quid Pro Books 2010) for a translation of the Latin epic by Virgil, specifically the story of the siege of Troy, the Trojan horse, and the aftermath.

¹²⁹ See, e.g., HOW TO REASON, *supra* note 1, at 489–91 (describing how rules may be a limit to strategy).

¹³⁰ See generally CRUMP ET AL., *supra* note 56, at 499–500 (describing abusive discovery).

¹³¹ See FED. R. CIV. P. 26(b)(1) advisory committee notes (2016) (suggesting that direction to consider “the parties’ resources” is designed to avoid “war[s] of attrition”).

¹³² See CRUMP ET AL., *supra* note 56, at A–13 to A–14.

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See id.* at A–14.

E. Command and Control, Focus, and the Culminating Point

The military organization carefully protects command and control.¹³⁷ And there should be unity of command: one chief, with clear lines of authority.¹³⁸ The focus of the commander is on the enemy's "center of gravity," or in other words, the source of the enemy's power.¹³⁹ Avoiding distractions is strategic.¹⁴⁰

The commander must also, however, avoid dysfunctional overkill.¹⁴¹ Clausewitz wrote about the "culminating point of victory," a line that the commander should not cross, even when the excitement of seeing a retreating enemy seems to invite pursuit.¹⁴² The reasons include exhaustion of troops, attenuated supply lines, surprise encounters, and improvisation in unstudied territory.¹⁴³ Both Napoleon and Adolf Hitler made this mistake, because passage of the culminating point took them deep into Russia but short of Moscow.

In litigation, there are different but analogous issues. The idea of a single trial lawyer has been mentioned above.¹⁴⁴ If there are to be more lawyers, as frequently there are in complex litigation, one of the difficulties is divided strategies.¹⁴⁵

The culminating point of victory is perhaps even more important in litigation than in war. Studies show that in most trials, there is a clear winner and a clear loser, with the suggestion that the loser has misevaluated the case.¹⁴⁶ In other words, the loser has failed to recognize the culminating point of victory in the form of a settlement offer better than the mathematical expectancy of results at trial.

And the principle appears in many guises. Irving Younger warns against "the one question too many," when the nonstrategic lawyer

¹³⁷ See HOW TO REASON, *supra* note 1, at 484.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 563–64.

¹⁴² *Id.* at 556–64.

¹⁴³ *Id.* at 556–62.

¹⁴⁴ See *supra* note 74 and accompanying text.

¹⁴⁵ *Id.*

¹⁴⁶ See, e.g., Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 7, 40–42 (1996) (presenting data based on monetary awards and expenses that distinguishes winners from losers in trial).

senses that a cross-examination is proceeding well and wades into a trap.¹⁴⁷ Younger's example, paraphrased, arises in the context of a witness who says the defendant bit off a piece of an injured man's nose but adds that he did not see the event.¹⁴⁸ The ingenu lawyer, cluelessly failing to sense the culminating point of victory, indignantly asks how the witness can know, if he did not see it happen.¹⁴⁹ The devastating reply: "I saw him spit it out."¹⁵⁰

II. COMPROMISING THE PRINCIPLES

There are many other recognized principles of strategy in warfare.¹⁵¹ For example, preservation of maneuverability and adaptation is usually advantageous.¹⁵² The commander should choose economy of force for some missions and concentrated use of force for others.¹⁵³ Purely reactive strategies, in general, are less desirable than initiative.¹⁵⁴ Various principles of timing are important.¹⁵⁵ And the choice among maneuvers of envelopment, infiltration, penetration, frontal attack, and turning movement depend upon circumstances that the commander must adequately assess.¹⁵⁶

Most of these principles are analogous to ideas that apply to litigation.

But no one principle is alone dominant.¹⁵⁷ All are to be balanced and counterbalanced in a combined strategy.¹⁵⁸ One example of this concept has already been discussed: the compromise of simplicity and other strategic objectives for the advantages of surprise.¹⁵⁹ As we have

¹⁴⁷ IRVING YOUNGER, *THE ART OF CROSS-EXAMINATION* 30–31 (1976).

¹⁴⁸ *See id.*

¹⁴⁹ *See id.* at 31.

¹⁵⁰ *Id.*

¹⁵¹ *See ON WAR*, *supra* note 5, at 496–97, 508–09, 511.

¹⁵² *Id.* at 496–97.

¹⁵³ *See HOW TO REASON*, *supra* note 1, at 483–84 (discussing both).

¹⁵⁴ *See id.* at 484 (stating this principle).

¹⁵⁵ *See id.* at 482, 484–85 (discussing this issue).

¹⁵⁶ *See id.* at 485–86 (discussing this issue).

¹⁵⁷ *See id.* at 486 (discussing tradeoffs and combination of these tactics).

¹⁵⁸ *See id.* at 486 (describing tradeoffs); *ON WAR*, *supra* note 5, at 572–74 (discussing the “interdependence” of different parts of strategy).

¹⁵⁹ *See supra* notes 79–98 and accompanying text.

seen, the Israelis are particularly known for this approach, sometimes operating under extreme conditions of friction to achieve surprise.¹⁶⁰

Maneuverability also can sometimes be strategically compromised.¹⁶¹ A flanking strategy such as that used at the Battle of Chancellorsville will inevitably make the enveloping force less adaptable, and it may expose the entire force to danger.¹⁶² One can infer that timing may force the omission of a desirable diversion. And so on.

Then, too, there are compromises or adaptations that are difficult to execute. The culminating point of victory may be hard to recognize.¹⁶³ The commander must press with determination—but just as determinedly, must stop in time.¹⁶⁴ The commander must recognize accurately the point beyond which troops, supplies, equipment, and enemy vulnerability cannot be pushed.¹⁶⁵

Similarly, litigation depends upon timing.¹⁶⁶ A successful settlement is more likely to be achieved before, rather than after, the adversary has done the heavy lifting of preparing a proposed pretrial order.¹⁶⁷ But this objective is hard to achieve, because timing, like the culminating point of victory, does not come labeled according to advantages.¹⁶⁸ Remaining adaptable is important in an endeavor in which only some of the evidence is known, not the “facts,” which exist only after the jury has found them.¹⁶⁹ There is a limit to how much secrecy can be kept or diversions created without rule violations or unethical conduct.¹⁷⁰ And so forth.

¹⁶⁰ See *supra* notes 85–91 and accompanying text.

¹⁶¹ See *supra* note 82–83 and accompanying text.

¹⁶² See *supra* note 81 and accompanying text (discussing the battle); ON WAR, *supra* note 5, at 145 (discussing how efforts at surprise can backfire).

¹⁶³ See ON WAR, *supra* note 5, at 556–58, 563 (showing how factors governing the culminating point can vary, forcing a “guess”).

¹⁶⁴ See *id.* at 556 (discussing the culminating point and when to cease).

¹⁶⁵ See *id.*; ON WAR, *supra* note 5, at 558–61 (discussing increasing weakness at the culminating point).

¹⁶⁶ See CRUMP ET AL., *supra* note 56, at 867.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See generally FED. R. CIV. P. 38(c) (stating that factual issues are triable by jury).

¹⁷⁰ See generally CRUMP ET AL., *supra* note 56, at 499–500 (discussing types of discovery abuse and sanctions).

III. WHY DOES IT MATTER? ADJUSTING THE RULES

This excursion into the realities of tactics matters, partly because it describes obstacles and potentially successful tactics that are shared by litigation as well as warfare. But that is not the only reason it matters. Rule writers ought to know the strategies that actually occur in litigation. Some kinds of tactics are very bad in a system that searches for truth.¹⁷¹ Others are expected phenomena in a process that depends on adversary methods to conduct that search for truth.¹⁷²

One example of a particularly destructive tactic is the conducting of a war of attrition. The most obvious place where this unfortunate effect occurs is in discovery. The December 2015 amendment to Federal Rule 26(b), which requires that discovery be not only “relevant,” but also and more importantly, “proportional to the needs of the case,” may help to reduce this phenomenon.¹⁷³ The Rule makes proportionality, in turn, depend upon six factors, one of which is “the parties’ resources.” The Advisory Committee’s commentary states that one reason for this factor is to prevent a “war of attrition.”¹⁷⁴

The author of this article has suggested elsewhere that this factor indeed ought to be thought of as targeted at preventing a war of attrition.¹⁷⁵ At first blush, the factor seems to encourage loading discovery costs on wealthy parties, although this approach would be contrary to the ostensible purpose of the Rule.¹⁷⁶ Wealthy parties usually are like everyone else in that they measure the value of litigation with reference to its cost, and piling costs on a party because the party is wealthy would bring about a power reversal in which the war of attrition, ironically, would be practiced in litigation with the support of the Rules.¹⁷⁷ Viewing this factor, and the Rule, as motivated by a concern about preventing wars of attrition would be helpful.

¹⁷¹ See *infra* notes 173–74 and accompanying text.

¹⁷² See *supra* Part I.

¹⁷³ See FED. R. CIV. P. 26(b)(1).

¹⁷⁴ See *id.* at advisory committee notes.

¹⁷⁵ See David Crump, *Goodbye, “Reasonably Calculated”; You’re Replaced by “Proportionality”*: *Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093 (2016).

¹⁷⁶ *Id.* at 1100.

¹⁷⁷ *Id.*

Perhaps a bigger problem, however, is the “fog of litigation.” Warnings about the vanishing trial have become commonplace, for example.¹⁷⁸ One reason for the decrease in the number of trials may be the unpredictability of the exercise.¹⁷⁹ The fog is exaggerated by large numbers of ambiguous rules about what evidence will be admissible,¹⁸⁰ together with another large number of so-called “gotcha” rules that are easy to miss,¹⁸¹ so that what will happen at trial is sometimes mysterious.¹⁸² The author has written elsewhere about the cost, delay, and confusion created by the Rules of Evidence and suggested selective abolition of those that create the most difficulty.¹⁸³

These are examples of the kinds of rule changes that could result from a focus on the strategies and tactics that lawyers actually use in litigation. One can infer that other improvements might be gained by a focus upon lawyering behavior. Dysfunctional tactics appear in pleadings, for example.¹⁸⁴ Federal Rule of Civil Procedure 8 gives a lawyer preparing a federal complaint an incentive to lengthen the document exponentially by including every known fact that he or she thinks the defendant must admit in a separate paragraph, whether important or not.¹⁸⁵ This consideration provides a justification for the general denial, which is allowed in some states¹⁸⁶ but heavily disfavored in the federal courts.¹⁸⁷ Summary judgment sometimes is used as a maneuvering tactic: the filing of a motion against a party with a complex theory of the case in an effort to require early and expensive proof of the

¹⁷⁸ See, e.g., Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005) (discussing the reasons for vanishing trials and their effects on the litigation system). A Westlaw search of the phrase “Vanishing Trial” on June 4, 2016 produced 1,167 results.

¹⁷⁹ *Id.* at 1336, 1338.

¹⁸⁰ See Crump, *supra* note 21, at 586–87 (characterizing results as “unpredictable”).

¹⁸¹ See *id.* at 590, 590 n.17.

¹⁸² *Id.* at 590.

¹⁸³ See Crump, *supra* note 21.

¹⁸⁴ See *Common Tricks Lawyers Play in Civil Litigation*, HG.ORG, <https://www.hg.org/article.asp?id=31638> (last visited Oct. 27, 2016); see also *White v. Smith*, 91 F.R.D. 607, 609 (1981) (providing an example of delaying tactics).

¹⁸⁵ Cf. *White*, 91 F.R.D. at 608–10 (1981) (describing complaint as meticulous and detailed, with all critical names and dates and ordering defendant to answer according to Rule 8 with specific denials of averments or paragraphs).

¹⁸⁶ See, e.g., TEX. R. CIV. P. 92.

¹⁸⁷ See *White*, 91 F.R.D. at 608–10.

elements.¹⁸⁸ Some kinds of jury charges violate considerations of simplicity, which would be improved by fewer questions or a general charge.¹⁸⁹

CONCLUSION

Some strategies and tactics in litigation are analogous to strategies in war, in spite of obvious differences. Considerations such as the fog of war, the advantages of simplicity, the use of deception, and the value of surprise are common to litigation too.¹⁹⁰ Other issues that litigation has in common with warfare include the gaining of intelligence, use of attrition, focus on the center of gravity, and the culminating point of victory.

These considerations should be taken into account in the promulgation of rules more carefully than they have been to date. For example, the rules of procedure ought to discourage the practice of including dozens of claims in a complaint for purpose of maneuverability and surprise.¹⁹¹ Jurisdictions that allow the general denial should find in lawyering tactics a reason to continue the practice.¹⁹² Discovery rules should be considered with an awareness both that discovery does not eliminate surprise and with attention to the Advisory Committee's expression of the purpose of preventing attrition as a tactic.¹⁹³ Similarly, the use of summary judgment to exhaust opposing parties' efforts should be a concern.¹⁹⁴ In trial, the considerations outlined in this article furnish considerations for improving the process.¹⁹⁵ In all, rulemaking and rule interpretation would be done better if they were practiced with an awareness of potential strategies in litigation that resemble strategies in warfare.

¹⁸⁸ Telephone Interview with Lonny Hoffman, *supra* note 50.

¹⁸⁹ A particularly egregious example can be found in *McLaughlin v. Fellows Gear Shaper Co.*, 786 F.2d 592, 595 (3d Cir. 1986). The jury produced two different kinds of conflicts between verdicts because of the poor construction of the charge. *Id.*

¹⁹⁰ See *supra* notes 103–04 and accompanying text.

¹⁹¹ See *supra* note 185 and accompanying text.

¹⁹² See *supra* note 186.

¹⁹³ See *supra* note 131 and accompanying text.

¹⁹⁴ See *supra* note 188 and accompanying text.

¹⁹⁵ See, e.g., *supra* note 107 and accompanying text (discussing a strategically prepared jury charge that confused the issues).