

HOW JUDGES USE WEAPONS OF INFLUENCE: THE SOCIAL PSYCHOLOGY OF COURTS

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Research on compliance has shown that people can be induced to comply with various requests by using techniques that capitalise on the human tendencies to act consistently and to reciprocate. Thus far this line of research has been applied to interactions between individuals, not to relations between institutions. We argue, however, that similar techniques are applied by courts vis-à-vis the government, the legislature and the public at large, when courts try to secure legitimacy and acceptance of their decisions. We discuss a number of known influence techniques – including ‘foot in the door’, ‘low-balling’, ‘giving a reputation to uphold’ and ‘door in the face’ – and provide examples from Israeli case law of the use of such techniques by courts. This analysis offers new insights that can further the understanding of judicial decision-making processes.

Keywords: influence techniques, judicial decision-making, strategic decisions, foot in the door, door in the face.

1. INTRODUCTION

Influencing others is often an important goal in human interaction. To achieve it, we – and, in particular, ‘compliance practitioners’ who specialise in this art (salespersons, for example) – make use of different influence techniques. These ‘weapons of influence’,¹ which people use in an effort to secure compliance with their wishes and direct the behaviour of others, can be grouped into categories, depending on their main principles. Specifically, influence tactics are effective because they take advantage of common human tendencies: people’s natural tendency to reciprocate, to be consistent, to determine what is good based on what other people do, to respond positively to people whom they like, to defer to authority, and to attach special value to anything that is scarce.² Such human tendencies are largely adaptive, enabling people to make quick and reasonable decisions given the abundance and complexity of information surrounding them and the inability to consider fully every little decision. Yet these natural tendencies can also be manipulated – consciously or subconsciously – by people who are trying to influence the decisions of others.

It would hardly be surprising to learn that professional judges – like other humans – might use the weapons of influence identified in the literature in their personal interactions with other

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¹ Robert B Cialdini, *Influence: Science and Practice* (5th edn, Pearson 2009) Ch 1.

² *ibid* Chs 2–7.

people, including fellow judges. Consider, for example, judges A and B, who are sitting on the same bench and have disagreements about the merits of a case. It is certainly plausible that A would try to convince B not only by putting forward her best arguments, but also by subtly reminding him that she sided with him in the past (thus relying on the principle of reciprocity); by trying to show how her position can be derived from his own previous judgments (relying on the principle of consistency); by pointing out that other judges support her position (relying on the principle of social proof); by being socially likeable (relying on the principle of liking); by emphasising her knowledge and credentials in the specific area under consideration (relying on the principle of authority); or by arguing that her position is unique and original and therefore likely to attract the attention of appeal court judges (relying on the principle of scarcity). Surely not all judges use such methods, but nothing in such interactions would be especially noteworthy. It is, however, much less obvious to argue that weapons of influence are also used by courts *institutionally* (that is, in their judgments). In this article we make this argument, proposing that courts may be seen as using such influence methods in their relationship vis-à-vis other institutional actors – particularly the government and the legislature – as well as the public at large.

From a formalistic (and in our opinion, naïve) viewpoint, it could be argued that courts do not try to influence anyone. They are not making requests and they are not selling anything; they have the power to make legally binding rulings unilaterally. But courts, in fact, work within a complex web of relations with the government, the legislature, the legal community and the public at large. While courts generally develop the law within the confines of their legal mandate, the boundaries of this mandate are far from clear. Moreover, formal authority aside, they frequently prefer to minimise conflict with the other branches of government, to secure broad support for their judgments and preserve legitimacy. Holding neither sword nor purse,³ courts often have to manage conflicts with the other branches – and they have limited ‘institutional capital’ to do so.⁴ It is therefore clear that courts do not simply lay down the law; rather, they need to convince the other branches to accept it with minimum resistance. Weapons of influence can thus become useful, as courts attempt to influence others or secure their support.

Our main argument in this article is that some well-known weapons of influence are employed by courts *in their judgments*, as a means of securing acceptance of those judgments and reducing resistance. Applying insights from a fascinating area of social psychology to the legal sphere, we show that courts use techniques known as ‘foot in the door’, ‘low-balling’, ‘door in the face’ and others – all based on the principles of consistency and reciprocity.⁵ We illustrate this by using examples drawn from the case law of Israeli courts. We believe that the examples provided here

³ Alexander Hamilton, ‘The Federalist No 78’, http://thomas.loc.gov/home/histdox/fed_78.html.

⁴ Jeffery J Mondak, ‘Institutional Legitimacy, Policy Legitimacy, and the Supreme Court’ (1992) 20 *American Politics Research* 457, 458.

⁵ In their judgments, judges often rely on previous decisions of the same court, on academic writings, and (more so in Israel and elsewhere than in the US) on the law in other countries. This suggests the use of two other weapons of influence: authority and social proof. However, we limit ourselves in this article to discussing the less obvious methods of influence employed by courts.

strongly suggest the judicial use of such techniques, and not in isolated or extreme circumstances. Notably, using weapons of influence is not necessarily conscious; just like salespersons, some judges may be using these techniques intuitively. Identifying the use of these tactics can provide new insight into judicial processes, however, whether or not judges were fully aware of the particular features of the technique employed.

The judicial examples of influence strategies that we have chosen for this article are taken mostly from the fields of Israeli public law and employment law, simply because these are the fields with which we are most familiar. It is highly likely that similar examples exist in other fields of law as well as in many other legal systems. We realise, of course, that the examples we put forward in this article are anecdotal, but they are very useful in explaining our argument. Our approach is novel, and our goal is therefore to demonstrate the basic phenomenon: that is, to illustrate how courts can be seen to employ various influence techniques that have been identified in the literature. Exploring the various parameters of this phenomenon (its prevalence, effectiveness, desirability, and so forth) is beyond the scope of this article. We hope that our analysis will encourage further research, theoretical as well as empirical, to examine these issues.

Even in this basic, modest form, our argument has significant implications. By showing how various judicial decisions may be understood as involving influence techniques, we offer a new tool for analysing the crafting of judicial decisions. Needless to say, this perspective does not exclude other explanations. There may be many reasons behind a judicial decision, and explanations involving influence techniques may not always be central. Nevertheless, by applying knowledge from social psychological research to law, and specifically for the interpretation of court decisions, we aim to introduce an interesting explanation, or perspective, which has not been previously considered.

There is a connection between this article and the body of research on determinants that influence judicial decision-making.⁶ As part of this endeavour it has been argued that judges sometimes behave strategically,⁷ and this has been shown to occur in three different contexts: vis-à-vis (i) their colleagues in the same court, (ii) superior courts, and (iii) other branches of government.⁸ In the last context, studies have generally shown that, in order to avoid conflict, judges sometimes adjust their decisions to accord with the preferences of Congress or the President.⁹ This article adds to this literature, which is rooted in political science, by offering a new account of such strategic behaviour, coming from social psychology. It opens the door for understanding nuances in judicial decision-making that have not yet been explored.

⁶ For a recent review see Richard A Posner, *How Judges Think* (Harvard University Press 2008).

⁷ Walter F Murphy, *Elements of Judicial Strategy* (University of Chicago Press 1964); Lee Epstein and Jack Knight, 'Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead' (2000) 53 *Political Research Quarterly* 625.

⁸ Lee Epstein and Tonja Jacobi, 'The Strategic Analysis of Judicial Decisions' (2010) 6 *Annual Review of Law and Social Science* 341.

⁹ William N Eskridge Jr, 'Overriding Supreme Court Statutory Interpretation Decisions' (1991) 101 *Yale Law Journal* 331; Mario Bergara, Barak Richman and Pablo T Spiller, 'Modeling Supreme Court Strategic Decision Making: The Congressional Constraint' (2003) 28 *Legislative Studies Quarterly* 247.

In the following sections we describe several important influence techniques, and show how each can be seen to have been applied by the courts in specific cases. Admittedly, importing this body of research from the realm of individuals into the sphere of institutions is not without difficulties. We discuss possible problems and responses in the concluding section.

2. FOOT IN THE DOOR

In a ground-breaking paper published more than four decades ago, Jonathan Freedman and Scott Fraser showed that even a small initial commitment to a cause may subsequently lead people to make unexpected decisions in support of that cause.¹⁰ For example, agreeing to an initial small request (to display a small sign that reads 'Be a Safe Driver' in one's window or car) made people much more likely to comply later with a much larger and more burdensome request (placing a huge, poorly lettered 'Drive Carefully' sign on their front lawn). Participants who were approached with the large request only (without the smaller request first) were generally reluctant to display the large and unattractive sign, with only 16.7 per cent agreeing to do so. In comparison, 76 per cent of those who had previously agreed to accept the small sign were now willing to accept the more onerous burden. The minor, trivial commitment that they made to the same cause a couple of weeks earlier has made all the difference, triggering a surprising response rate. This phenomenon has since been observed in numerous other studies in various settings.¹¹

There are a number of possible (non-exclusive) explanations for the foot-in-the-door phenomenon. Most notably, people often comply with the second request because of the tendency to act consistently with previous decisions.¹² People may want to feel or appear consistent with their commitment for a specific cause (such as safe driving), or retain consistency with a more general view of the self created by the positive response to the original request (for example, as civic-minded activists). Indeed, the original study showed that even people who were asked in the first stage to post a small sign unrelated to safe driving (a sign reading 'Keep California Beautiful') were much more likely than the comparison group to subsequently comply with the burdensome request (47.6 per cent against 16.7 per cent).¹³ Notably, research has shown that for the foot-in-the-door technique to be effective, individuals must perceive that their initial

¹⁰ Jonathan L. Freedman and Scott C. Fraser, 'Compliance Without Pressure: The Foot-In-the-Door Technique' (1966) 4 *Journal of Personality and Social Psychology* 195.

¹¹ For reviews see James Price Dillard, 'The Current Status of Research on Sequential Request Compliance Techniques' (1991) 17 *Personality and Social Psychology Bulletin* 283; Jerry M. Burger, 'The Foot-in-the-Door Compliance Procedure: A Multiple-Process Analysis and Review' (1999) 3 *Personality and Social Psychology Review* 303. Although it has been demonstrated repeatedly, the foot-in-the-door effect also depends on various conditions, and is not uniform. See Burger, *ibid*; Rosanna E. Guadagno and others, 'When Saying Yes Leads to Saying No: Preference for Consistency and the Reverse Foot-in-the-Door Effect' (2001) 27 *Personality and Social Psychology Bulletin* 859; Petia K. Petrova, Robert B. Cialdini and Stephen J. Sills, 'Consistency-Based Compliance Across Cultures' (2007) 43 *Journal of Experimental Social Psychology* 104.

¹² Cialdini (n 1) 64–67.

¹³ Freedman and Fraser (n 10) 201.

behaviour (compliance with the small request) was performed out of free choice, a reflection of their own personal preferences, rather than the result of external constraints or incentives.¹⁴

The foot-in-the-door strategy is often used successfully by people asking for donations or recruiting volunteers for a social cause,¹⁵ but it is not limited to pro-social requests: it has also proved to be successful in commercial marketing,¹⁶ in courtship,¹⁷ and in employment relations.¹⁸ Moreover, it has been shown to have useful potential as a tool in the hands of governmental agencies – for example, in an effort to curb teen smoking¹⁹ or to minimise energy consumption.²⁰ a minimal initial interaction, such as agreeing to respond to a short questionnaire, significantly increases subsequent willingness to commit to the major cause.

Thus, research to date on the foot-in-the-door technique has emphasised interpersonal interaction and psychological processes experienced by the person being approached. However, we believe that this influence tactic is also applicable in the context of influencing *institutions* – that is, it can be seen as being employed by courts vis-à-vis other branches of government and the legal community at large in at least two forms. The first form involves the common practice of courts to make statements about the law that go beyond what is necessary to decide the specific case. Common law courts have developed the doctrine of obiter dictum, according to which such incidental statements are not considered to be part of the binding precedent. Arguably, courts use these statements – which are not required for the case at hand and formally have no legal effect – as a foot in the door of sorts. Common law courts that gradually develop the law are interested in encouraging smooth acceptance of new developments. The early exposure to new ideas which they put forward as obiter dictum ensures that later, when the time comes to formally change the law, less resistance will be incurred. We thus argue that the obiter dictum may be understood – at least in some cases – as a weapon of influence employed by courts. As noted earlier, whether judges use this technique consciously or by intuition (as many salespersons do) is immaterial for current purposes.

How does the two-stage method reduce resistance to new precedents? Much as in interpersonal interactions, this institutional interaction relies on the human tendency not to resist small requests and then maintain consistency with the original decision. A new development in the law presented as obiter dictum has no formal legal effect and therefore attracts little publicity.

¹⁴ eg, Burger (n 11) 312; Petrova, Cialdini and Sills (n 11) 109.

¹⁵ eg, Bernardo J Carducci and others, 'An Application of the Foot in the Door Technique to Organ Donation' (1989) 4 *Journal of Business and Psychology* 245; Nicolas Guéguen and Céline Jacob, 'Fund-Raising on the Web: The Effect of an Electronic Foot-in-the-Door on Donation' (2001) 4 *Cyber Psychology and Behavior* 705.

¹⁶ Peter H Reingen and Jerome B Kernan, 'Compliance with an Interview Request: A Foot-in-the-Door, Self-Perception Interpretation' (1977) 14 *Journal of Marketing Research* 365.

¹⁷ Nicolas Guéguen and others, 'Foot-in-the-Door Technique Using a Courtship Request: A Field Experiment' (2008) 103 *Psychological Reports* 529.

¹⁸ Virginie Herbout, Nicolas Guéguen and Isabelle Grandjean, 'Foot-in-The-Door Application in Organization: How Employees Could be More Effective?' (2008) 21 *European Journal of Scientific Research* 729.

¹⁹ Paul N Bloom and others, 'Recruiting Teen Smokers in Shopping Malls to a Smoking-Cessation Program Using the Foot-in-the-Door Technique' (2006) 36 *Journal of Applied Social Psychology* 1129.

²⁰ Sebastien Meineri and Nicolas Guéguen, 'An Application of the Foot-in-the-Door Strategy in the Environmental Field' (2008) 7 *European Journal of Social Sciences* 71.

Even if they do not explicitly endorse it, the other branches of government do not usually feel the need to oppose it publicly. Nonetheless, once the new (potential) judge-made law appears in writing, it is discussed and recited by the legal community as the official view of the court. By the time the court finds an opportunity to turn the obiter dictum into ratio decidendi (a legally binding precedent), the new development appears as ‘old news’ – and those who have not opposed it thus far may feel that by doing so they will be acting inconsistently; or they may have become used to the idea that they are not the kind of people who actively oppose such new laws. In such a case, the personal tendencies of specific actors – lawyers, government officials, etc – influence the policies or decisions of the institutions they represent (and the public opinion/perceptions which they help to shape).

By way of example, consider a National Labour Court case dealing with whether it is possible to waive mandatory employment rights – the minimum standards set by legislation. The traditional view is that such waiver is invalid and, accordingly, employees may not waive all their rights by agreeing to be considered independent contractors. However, judges sometimes feel uncomfortable with this view when confronted with a high-level employee who has agreed to such an arrangement and enjoyed significant rewards as a result. In the case of *Buchris*²¹ at issue was an engineer who had been employed by the state as an ‘independent contractor’ even though, according to the tests developed by the courts, he was an ‘employee’. Justice Elisheva Barak-Ussoskin wrote a relatively lengthy decision explaining why she believed that ‘bad faith’ on the employee’s part should lead in some cases to inability to sue for employment rights. She then ended by noting briefly that this was not relevant in the current case as clearly no indications of bad faith were present. The entire discussion was therefore obiter dictum: it was not necessary for the decision, and it was treated as such by the other judges and the legal community. Yet the decision generated some discussion which later opened the door for an acceptance of this view, to some extent, by a majority of the Court in a subsequent case.²² Presenting the suggested development in a case in which it did not matter – that is, it made no difference – was a foot in the door of sorts. It generated less resistance from the other judges and the legal community, and a few years later the ‘door’ was indeed fully opened and the new law was accepted. The judgment in *Buchris* can thus be seen as an institutional form of foot in the door, used by the Court to ease the acceptance of a new and controversial precedent.

The second form of a two-stage development of the law which can be seen as utilising a foot-in-the-door technique involves changing the law but refusing to apply the new law in the same case. This method has often been used in Israel by former Chief Justice Aharon Barak, who is widely credited for transforming many aspects of Israeli law. When making new precedents in high-profile cases – in particular those that set new limitations on the state – Barak often went on to rule in favour of the state when applying the new law to the facts of the specific case. Giving the state this short-run victory – allowing it to win the current battle – has been instrumental in diffusing at least some of the opposition to the new development of the law.

²¹ NLC 3-145/NH *The State of Israel v Buchris* 1997 PDA 36 1.

²² NLC 3-237/97 *Shmueli v The State of Israel* 2001 PDA 36 577.

A prominent example is the case of *United Mizrahi Bank* in which the Israeli Supreme Court asserted its right (in a monumental judgment of 368 pages) to invalidate legislation, pursuant to the Basic Law: Human Dignity and Freedom of 1992, but refused to strike down the impugned legislation in the particular case.²³

This was somewhat reminiscent of the case of *Marbury v Madison*,²⁴ in which the US Supreme Court for the first time declared a piece of legislation ‘unconstitutional’, but did so in a way that resulted in victory for the government in the particular case. Another example from Israeli case law can be found in a judgment that involved a constitutional challenge to major cuts in welfare benefits, introduced by Israeli right-wing governments.²⁵ The Court ruled that the state has a positive obligation to ensure a dignified life for all its citizens. Diffusing doubts over whether positive duties may be derived from Israel’s basic laws, Chief Justice Barak made some strong statements which could open the door for future petitions. He nonetheless went on to reject the specific petition on the ground that it lacked sufficient evidence to support its factual claims. A few years later the Court relied on the previous analysis to strike down a law that withheld poverty assistance from people who own or regularly use a private car.²⁶ It was ruled that the legislation – which did not allow for exceptions in special circumstances – violated the constitutional obligation to ensure a dignified life. The Court is usually hesitant when invalidating legislation, especially where there are significant budgetary implications. Arguably, the two-stage technique made this easier, minimising resistance and confrontation with the Knesset (the legislature).

Barak’s successor as Chief Justice of the Israeli Supreme Court, Dorit Beinisch, also employed this method.²⁷ For example, faced with a petition against the constitutionality of a controversial ‘omnibus law’ – a large set of major economic reforms passed in a single piece of legislation, with minimal room for deliberation, together with the annual budget law – Beinisch introduced major developments in the law concerning judicial review of internal Knesset proceedings.²⁸ However, after making some bold new rules concerning legislative procedures, she went on to reject the claim that these rules had been violated in the specific instance. The judgment is very critical of the Knesset, which arguably suggests that the petition was not rejected on its merits but rather for strategic reasons. The Court’s fear of confrontation with the Knesset could certainly have played a role here. This judgment could therefore be understood as preferring gradual development, in order to reduce confrontation and minimise resistance to the new law. To that end the Court decided, when introducing a new law with major implications for the legislature, to hand the Knesset a victory in the specific case, thus arguably using a

²³ CA 6821/93 *United Mizrahi Bank Ltd v Migdal* 1995 PD 49(4) 221.

²⁴ *Marbury v Madison* 5 US 137 (Sup Ct 1803).

²⁵ HCJ 366/03 *Commitment for Peace and Social Justice v Minister of Finance* 2005 PD 60(3) 464.

²⁶ HCJ 10662/04 *Salah Hassan v The National Insurance Institute*, 28 February 2012.

²⁷ It is plausible that chief justices are more attuned to political considerations and to the preservation of institutional capital than are other judges and, as a result, use influence techniques more frequently. However, this suggestion is only speculative, and awaits future examination.

²⁸ HCJ 4885/03 *Organization of Poultry Breeders v The Government of Israel* 2004 PD 59(2) 14.

foot-in-the-door method to facilitate the smooth acceptance of the new law in future situations. Thus, rather than going ‘all the way’ immediately, courts sometimes prefer to put a foot forward and partially open the door first, hoping to obtain the acceptance they need from the other side and, as a result, a fully open door on the next occasion that a relevant case arises.

3. LOW-BALLING

Our inclination to act consistently with our previous decisions makes us especially susceptible to manipulation when we make some kind of commitment. This is reflected in a technique termed ‘low-balling’ – associated with the practices of some car salespersons. The idea is to offer customers a very attractive deal and, once they are committed to the deal (psychologically, not legally), to raise the price or reveal additional costs (by saying, for example, that some of the features require additional payment, or that the manager has not authorised the promised discount). Because most people at that point are already committed to the idea of buying the specific car, they will not backtrack from their decision despite the increase in the overall cost. Similarly the first study of this compliance technique showed that if one wants to recruit students for a psychology experiment which is to start at 7 am, it is much more effective to persuade the students first to commit in principle to taking part in the experiment before revealing the inconvenient time.²⁹ Although they are still free to backtrack once the additional information is revealed, many do not – apparently out of commitment to their original decision (and a tendency to act consistently with it). Interestingly, it does not appear to be a ‘blind’ commitment; rather, once the original decision (commitment) has been made, people usually come up with new justifications for it. The decision then stands on a number of grounds, thus becoming strong enough to remain standing even when one of those grounds is removed.³⁰

An interesting study shows how this technique may also be instrumental in achieving socially beneficial goals. Residents in Iowa, who used natural gas for heating, were asked to conserve gas and were given some energy-saving tips. The researchers promised one group of people that they would be named as good fuel-saving citizens in a newspaper publication if they were to succeed in these efforts. This promise had a significant impact: it produced substantial cuts in energy consumption compared with those people who were offered only tips (without the publicity), who did not change their behaviour at all. Most notably, the impact lasted even after the participants received a letter withdrawing the promise of publicity, informing them that it would not be possible after all. Indeed, not only did they continue to save gas but the savings even *increased* during the period following this letter.³¹ Apparently, once the decision to save gas had been made, new justifications were created – such as saving money, protecting the environment and

²⁹ Robert B Cialdini and others, ‘Low-Ball Procedure for Producing Compliance: Commitment then Cost’ (1978) 36 *Journal of Personality and Social Psychology* 463.

³⁰ Cialdini (n 1) 83–88.

³¹ Michael S Pallak, David A Cook and John J Sullivan, ‘Commitment and Energy Conservation’ (1980) 1 *Applied Social Psychology Annual* 235.

self-perception as ‘a good citizen’ – and the original justification (the promise of publicity) that had previously made all the difference was no longer necessary.

This influence technique also has judicial parallels. For example, a similar method arguably was used by the Israeli Supreme Court when developing the doctrine of ‘unreasonableness’. In Israel the rules of administrative law, which set limits on the actions of governmental bodies, are mostly judge-made. The basic principles, which were introduced by the Supreme Court in the early 1950s (soon after the establishment of the state), were mostly designed to ensure that government officials act within the confines of their legal authority, and that the rules of ‘natural justice’ (which mostly involve procedural fairness) are observed. There was very little interference in the *discretion* of government officials. From the late 1970s, however, the Court has developed a doctrine of ‘unreasonableness’, which allows for a much deeper inquiry into the content of governmental decisions.³² To smooth the acceptance of this development, the Court emphasised that it would intervene only when a decision suffers from *extreme* unreasonableness. It further tried to argue that there was nothing new in this doctrine in that Israeli courts had in fact already used the principle of unreasonableness in the past. Yet in the following years, after the doctrine gained broad acceptance, the Court started to use it much more liberally, invalidating numerous governmental decisions on the ground of unreasonableness. Although in theory Israeli judges still maintain that intervention is limited to cases of extreme unreasonableness, in practice they have become more active in applying this doctrine.³³

We do not argue that the Court necessarily intended to ‘throw a low ball’ in this case, but whether they consciously planned it or not the judges can be seen as having used a low-balling technique. In putting forward a new law which could potentially infuriate the government and endanger the delicate relations between the judiciary and the other branches, the Court made conscious efforts to portray it as having ‘low costs’ for the government: as a harmless and innocuous law (applied very rarely) which is not really new. Then, once the new law was accepted, the Court increased its ‘cost’ for the government by using it more liberally in the following years to justify intervention – a change which by then the government (and the public) were already compelled to accept. The ‘trick’ does not work on everyone – the new development attracted strong criticism from at least one senior official of the Attorney General’s office.³⁴ But, overall, the acceptance of the new law and its application has been quite smooth. After a few years, the value of the new doctrine became clear to most observers, as it allowed the Court to prevent various corrupt and controversial decisions of governmental bodies from coming into force. Although the doctrine of unreasonableness is still occasionally criticised,³⁵ it appears to enjoy

³² See especially HCJ 389/80 *Dapey Zahav v IBA* 1980 PD 38(1) 421.

³³ One obvious example concerns decisions that prevent the appointment to ministerial and other positions of people who have been involved in illegal actions: see, eg, HCJ 6163/92 *Eisenberg v Minister of Construction and Housing* 1993 PD 47(2) 229.

³⁴ Michal Shaked, ‘Comments on the Review of Reasonableness in Administrative Law’ (1982) 12 *Mishpatim* 102 (in Hebrew).

³⁵ Ronen Shamir, ‘The Politics of Reasonableness: Discretion as a Judicial Power’ (1994) 5 *Theory and Criticism* 7 (in Hebrew); Yoav Dotan, ‘Two Concepts of Reasonableness’ in Aharon Barak and others (eds), *Shamgar Book* (Israel Bar Press 2003) 459 (in Hebrew).

broad support. Thus, once other grounds were created for the new doctrine to stand on, the ground that was originally crucial – that of limiting intervention to ‘extreme’ situations – was no longer necessary. The judges still use the same rhetoric to this day, but it is quite obvious that their intervention is not limited to truly extreme cases. Arguably, if the Court had used a straightforward approach (rather than a two-stage or gradual low-balling technique), it would have met with considerably more resistance.

4. GIVING A REPUTATION TO UPHOLD

There is yet another method of influence based on the principle of consistency which courts appear to be using. When we present ourselves in a certain light – making, in effect, a public commitment to having certain characteristics – it has a significant impact on the way in which we view ourselves and behave. In one pertinent experiment, for example, some participants were asked to present themselves as highly sociable individuals to an interviewer, whereas others were not; the former participants subsequently appraised themselves as being more sociable and were evaluated by independent observers as actually behaving more sociably in a new situation.³⁶

Importantly, this tendency can be manipulated by others by telling us we have certain qualities, thereby not only making us feel good about ourselves but also giving us a reputation to uphold. Such statements are not merely innocent flattery – they can alter one’s self-perception and consequently affect one’s future behaviour. This has been demonstrated convincingly in studies with children. For example, children were seen to clean up more and create less litter after being told (by their teacher, for example) that they are neat and tidy people, thus giving them a reputation to uphold, compared with being told that they *should* be neat and tidy, or being told nothing on the subject.³⁷ In another illustrative study, children donated some of their earnings from a game to needy children and were then either told nothing, or were told that it was a good and nice thing to have done, or that they probably donated because they are kind individuals who like to help others when they can. The children in the latter group, who were given a positive self-image to uphold, subsequently helped and shared to a greater extent on several different tasks compared with the other children.³⁸ Studies such as these illustrate how influential it can be to label others in favourable ways or attribute positive characteristics to them.

Cialdini gives the example of Anwar Sadat, the former Egyptian president, who was considered to be a shrewd negotiator.³⁹ Apparently he would start international negotiations by

³⁶ Barry R Schienker, David W Dlugolecki and Kevin Doherty, ‘The Impact of Self-Presentations on Self-Appraisals and Behavior: The Power of Public Commitment’ (1994) 20 *Personality and Social Psychology Bulletin* 20.

³⁷ Richard L Miller, Philip Brickman and Diana Bolen, ‘Attribution versus Persuasion as a Means for Modifying Behavior’ (1975) 31 *Journal of Personality and Social Psychology* 430.

³⁸ Joan E Grusec and Erica Redler, ‘Attribution, Reinforcement, and Altruism: A Developmental Analysis’ (1980) 16 *Developmental Psychology* 525 (Experiment 1).

³⁹ Cialdini (n 1) 68.

complimenting the negotiators from the other side on the well-known cooperation and fairness of their country. Because these respective diplomats usually considered these to be positive qualities, they may have felt publicly committed to live up to this reputation.

We argue that the same technique can also be seen as being employed on occasion by courts. For example, in 1997 the Israeli National Labour Court was confronted with a blatant violation of an injunction it had issued to the Histadrut (Israel's largest labour union). This was an exceptional situation, and the Court made it clear that it would not allow such violations.⁴⁰ At the same time, the judgment emphasised the fact that over the years the Histadrut has always obeyed the Court's orders and also that its current leadership had often expressed a commitment to respect the Court's orders. The judgment concludes with a conciliatory message, in which the Court noted that it considered the incident to be a 'one-time slip'. Thus, rather than chastising the Histadrut for the violation, the Court chose to influence the union's future actions by drawing attention to its historic role and its long-time respect for the rule of law, thereby giving it a reputation to uphold. This method seems to have worked: no orders to the Histadrut have since been violated.

5. DOOR IN THE FACE

The weapons of influence considered thus far have all relied on our tendency to be consistent. The next technique relies on a different principle, that of reciprocation, which also guides us, and has even been described as a fundamental characteristic of human societies.⁴¹ This tendency refers to our desire to repay others for the benefits that we have received from them. A powerful method that builds on this principle is called the 'door in the face' technique. With this tactic, one first makes an excessive request that is inevitably rejected (metaphorically shutting the door in the requester's face), and then proceeds immediately to make a more modest request, which at this point the other person often feels compelled to accept. In the seminal study examining this technique, Robert Cialdini and his colleagues have shown its usefulness in persuading college students to volunteer to take a group of juvenile delinquents on a day trip to the zoo.⁴² While some students were presented with this request in a straightforward manner, a different group was first asked to volunteer for a much more burdensome programme: to become counsellors for young offenders and commit to two hours of counselling per week for a minimum of two years. Not surprisingly, everyone refused the extreme request, and were immediately asked to volunteer for the day trip instead. In other words, the 'real' request was presented only after the targets had figuratively 'slammed a door' in the face of the original (excessive) request. The results were striking: while the straightforward approach produced only 16.7 per cent of

⁴⁰ NLC 13-48/57 *The State of Israel v The New General Histadrut*, 22 January 1998.

⁴¹ Alvin W Gouldner, 'The Norm of Reciprocity: A Preliminary Statement' (1960) 25 *American Sociological Review* 161.

⁴² Robert B Cialdini and others, 'Reciprocal Concessions Procedure for Inducing Compliance: The Door-In-the-Face Technique' (1975) 31 *Journal of Personality and Social Psychology* 206 (Experiment 1).

positive responses, the door-in-the-face manipulation produced 50 per cent of positive responses to the same request.

Various explanations have been proposed for this technique,⁴³ but a central one appears to be people's tendency to reciprocate: once the person making the original request has retreated to a much smaller request, many people feel obliged to reciprocate this concession by accepting the second (smaller) request. The door-in-the-face procedure also takes advantage of a second phenomenon known as the 'contrast principle'.⁴⁴ Our evaluation of any given thing (such as a request, a deal or a rule) is affected by the examples that we use as comparisons (another request, deal or rule). Thus, with the door-in-the-face technique, the second request is made to appear more reasonable because it is compared with the excessive initial request; when it is presented without this anchor, the same 'modest' request might be judged to be unreasonable and therefore rejected. Contrast/anchoring alone does not account for the effect, however, as reciprocity appears to be crucial: for example, when participants were merely informed about the more burdensome option prior to the more moderate one, without their initial rejection of the burdensome request and apparent concession of the requester, compliance rates did not increase; this was also the case when the second request was made by a different person (again, no concession on the requester's part).⁴⁵ The combination of inducing the motivation to reciprocate an apparent concession, and making the second offer appear highly reasonable by comparison, makes the door in the face a very powerful technique, and one that is frequently used by various influence 'professionals' such as salespersons.⁴⁶

We argue that this influence technique is also to be found in court decisions. An illustrative example involves the Israeli case law pertaining to non-compete agreements in employment relations. Because such agreements are considered to be in restraint of trade as they limit competition as well as the worker's freedom of occupation, Israeli courts (like their counterparts in many other countries) have traditionally examined whether the restraint is 'reasonable' – otherwise invalidating it as being against 'public policy'.⁴⁷ However, this test was applied over the years in a way that allowed a rather broad (and expanding) use of non-compete covenants, to the point of being used in the late 1990s even for low-level jobs with no access to trade

⁴³ See, for example, Robert B Cialdini and Noah J Goldstein, 'Social Influence: Compliance and Conformity' (2004) 55 *Annual Review of Psychology* 591, 600–02.

⁴⁴ Cialdini (n 1) 40.

⁴⁵ Cialdini and others (n 42) Experiments 1 and 2.

⁴⁶ There is a somewhat similar method of influence, known as the 'that's not all' technique (Jerry M Burger, 'Increasing Compliance by Improving the Deal: The That's-Not-All Technique' (1986) 51 *Journal of Personality and Social Psychology* 277). Here an initial inflated offer/request is made and soon after, before the target has had an opportunity to respond, the deal is sweetened by improving the first offer (reducing its cost or increasing its benefits). This is different from the door-in-the-face technique in that no explicit rejection of the first request is made. Similar to this technique, however, the effectiveness of the that's-not-all strategy appears to be in part because of a desire to reciprocate the requester's concession, and also because of the contrast between the two offers which increases the perceived attractiveness of the second one (ibid). Interestingly, the technique has been shown to backfire if the initial offer is too extreme (see Jerry M Burger and others, 'The Effects of Initial Request Size on Compliance: More About the That's-Not-All Technique' (1999) 21 *Basic and Applied Social Psychology* 243).

⁴⁷ CA 6601/96 *AES System Inc v Sa'ar* 2000 PD 54(3) 850.

secrets.⁴⁸ At this point the National Labour Court intervened and made dramatic changes to the law, changing the default rule and creating a presumption that non-compete agreements are invalid unless the employer can prove a legitimate justification for such a contractual covenant. The Court further listed a limited number of possible legitimate justifications, making clear that they are intended only for exceptional situations.⁴⁹

Initially this shocked the business community, with some criticism in the popular media by industry leaders and lawyers.⁵⁰ For a couple of years no non-compete agreements were recognised as legal by the labour courts. After a while, however, the National Labour Court started to 'loosen the knot', gradually accepting more and more non-compete covenants which seemed to be justified in the circumstances. In effect, the Court has retreated from the original, extreme position introduced in *Frumer v Redguard*, preferring instead a more moderate and nuanced position which allows a degree of trade restraint – albeit much less than what had become common during the 1990s. The current system appears to enjoy broad support. Thus, the Court can be seen to have employed a door-in-the-face strategy vis-à-vis employers and the legal community of labour lawyers. By presenting an initial extreme view that was expected to meet (and indeed met) with much resistance, and subsequently making an apparent concession by adopting a more moderate middle-ground solution, the Court has arguably facilitated the successful reception of the new, moderate solution.

Changing the law in two stages – starting with an extreme position and then retreating to a more moderate one – was not only instrumental in securing acceptance of the new law (in its final version). If this is seen as the main goal, the strategy is very risky: it invites a serious backlash and strong resistance to the first version of the new law, only to enjoy a smoother acceptance of the final version. We believe, however, that the Court had another goal in mind: to ensure broad *compliance* with the new law. Labour and employment laws are notoriously difficult to enforce, because employees often lack the knowledge about an infringement of their rights or the resources to sue, or they fear retribution from the employer.⁵¹ As a result, laws which are not crystal clear, or otherwise leave some room for discretion, often end as prey for employers, who use any uncertainty as an excuse to evade the law or an opportunity to abuse it. In *Frumer v Redguard* the Court wanted to stop problematic yet prevalent practices, so it assumed an extreme position first – taking a very clear stance – before retreating a couple of years later to the desired solution. This strategy is likely to have been useful in minimising problems of non-compliance.

⁴⁸ See, eg, RLC (Nazareth) 3-335/57 *Tife'ret International Trade v David El'azar* (6 July 1997); RLC (Tel-Aviv) 140329/99 *Shnar Communications Ltd v Ayelet Oron* (25 April 1999).

⁴⁹ NLC 164/99 *Frumer v Redguard* 1999 PDA 34 294.

⁵⁰ Menachem Goldberg, 'Contracts Must Be Honored?', *Globes*, 22 August 2000, <http://www.globes.co.il/news/article.aspx?did=387924>; Haim Bior, 'Chamber of Commerce Deputy Chair: The Labour Court Limits the Freedom to Manage', *Ha'aretz*, 5 February 2001, <http://www.haaretz.co.il/opinions/1.988376>.

⁵¹ Guy Davidov, 'Enforcement Problems in "Informal" Labor Markets: A View from Israel' (2005) 27 *Comparative Labour Law and Policy Journal* 3; Guy Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61.

Another strategy which is sometimes used by courts can also be seen as employing the door-in-the-face technique. When grappling with novel legal questions, the courts sometimes put forward a number of possible solutions, some of which are extreme hypothetical alternatives. Former Chief Justice Barak, for example, frequently included detailed analytical discussions of this sort in his judgments. Barak typically portrayed his own view as the middle view, by starting with two extreme alternative positions, only to end up offering his own position as a balanced and moderate solution. This method appears to have been useful in securing broad acceptance of the new law. The extreme positions, which the Court considered first, were essentially an invitation for a (rhetorical) door in the face, which helped to ease acceptance of the final (more moderate) position laid down in the judgment. In many cases the extreme solutions mentioned by Barak are not supported by anyone and could be seen as irrelevant, while his own position could easily be considered radical. By contrasting his position with the other alternatives, Barak successfully presented his preferred solution as more moderate. He also appeared to offer a concession of sorts by avoiding the more extreme alternative – a key element of the door-in-the-face method.

An example of this strategy can be found in the case of *The Movement for Quality Government v The Knesset*,⁵² in which the Supreme Court had to decide whether a right to equality is constitutionally protected. Israel's Basic Laws, which give some rights an elevated constitutional status, do not include any explicit right to equality. But they do include a broad and rather vague right to the protection of one's 'human dignity', and the Court was asked to read into this term a more concrete right to equal treatment. Chief Justice Barak, writing for the majority of the Court, took the position that a right to equality is constitutionally protected to the extent that it prohibits discrimination that can be seen as offending human dignity. This new development of the law was dramatic and arguably radical, but Barak made an effort to portray it as balanced and moderate. He started by putting forward a 'narrow model' for understanding the right to human dignity, according to which only discrimination that is tantamount to *humiliation* can be seen as violating the Basic Law. In contrast, Barak added, there is a 'broad model' according to which *all* human rights are derived from the right to human dignity. Barak used these two extremes as background before providing justifications for his own 'intermediate model'. Barak can thus be seen as asking for a reciprocal concession – a smooth acceptance of the new law in return for his willingness not to go 'all the way' and adopt the far-reaching broad model. In addition, by presenting the extreme models, Barak's judgment makes use of the contrast effect: the intermediate interpretation appears to be more reasonable and less controversial when presented in comparison with these extremes rather than alone.

6. STRATEGIC CONCESSIONS

There are other influence methods, beyond the door-in-the-face technique, that rely on the principle of reciprocation. In general, any concession made by one party may be seen to create an

⁵² HCJ 6427/02 *The Movement for Quality Government in Israel v The Knesset* 2006 PD 61(1) 619.

obligation for the other party to reciprocate the favour. This principle could be used strategically, for example, by voluntarily making a relatively easy concession in order to secure much needed cooperation or receive a desired favour in return. Courts are generally considered to be insulated from the political process, and therefore might be thought of as foreign to such ‘give and take’ dealings. But a critical reading of judicial decisions suggests the use of such methods.

Consider, for example, the relationship between the Israeli Supreme Court and the Attorney General’s office concerning petitions brought by Palestinians against decisions of the military commander in charge of the Occupied Territories. The Supreme Court considers the commander to be subject to the rules of Israeli administrative law, just like any other governmental agency. Accordingly it is willing to entertain petitions arguing that the commander acted *ultra vires* (outside his legal authority) or that he has exercised his discretion in a grossly unreasonable or disproportionate way.⁵³ Yet, as a matter of practice, the Court is faced with great difficulties when performing judicial review in this context. On the one hand, it is usually inclined to prevent infringements of human rights. On the other hand, it is usually inclined to accept the position of military professionals regarding the means made necessary by security concerns.⁵⁴

Faced with this difficulty, the Court has resorted to a creative, albeit controversial solution: ‘favourable dismissals’.⁵⁵ In numerous cases it dismisses the petition, but only after ensuring that the military commander has changed his original decision at least to some extent, thereby in effect granting at least partially the requested remedy. This solution is achieved by encouraging bargaining ‘in the shadow of the court’ – leading to settlements between the Attorney General’s office and the petitioners⁵⁶ – or by pressuring the Attorney General lawyers in court to agree to some concessions in return for the dismissal of the petition.

It is important to note that this is not a regular case of judges pressuring the parties to settle; rather, when using the ‘favourable dismissal’ method, *the Court itself* is a player in the ‘game’ of reciprocations. Although there appears to be a relationship of reciprocal concessions between the petitioner and the Attorney General (representing the military commander), there is also – and arguably more importantly – a similar relationship between the Attorney General and the Court. The Court’s willingness to dismiss most petitions is desirable for the government lawyers, because it means that they rarely lose cases in the sense of a petition being formally granted.⁵⁷ This concession is relatively easy to make on the Court’s part because favourable dismissals relieve it to some extent from the difficult task of issuing judgments in such hard cases, and also from the risk of entering into conflict with the military (and the government in general)

⁵³ See, eg, H CJ 2056/04 *Beit Surik Village Council v The Government of Israel* 2004 PD 58(5) 807.

⁵⁴ Arguably, these cases are ‘hard’ cases both legally, because of the conflicting legal considerations mentioned above, and politically.

⁵⁵ Guy Davidov and Amnon Reichman, ‘Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel’ (2010) 25 *Law and Social Inquiry* 919.

⁵⁶ Yoav Dotan, ‘Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada’ (1999) 33 *Law and Society Review* 319.

⁵⁷ Dotan (*ibid*) reports that only 4.5% of Palestinian petitions against the military commander were granted between 1986 and 1995; Davidov and Reichman (n 55) 935) found similar results: 4.6% of granted petitions against the military commander between 1990 and 2005.

over such judgments. As part of this informal arrangement, the government lawyers also enjoy a heightened level of trust: their ‘stamp of approval’ on a decision of the commander is in most cases sufficient to trigger the rejection of the petition. In return, they are expected by the Court to minimise infringements of human rights in the Occupied Territories by altering decisions of the military commander. They are thus given a role as *de facto* ‘agents’ of the Court.⁵⁸ The Court is thus able to secure the assistance of the Attorney General lawyers in promoting its goal to protect human rights, by making a concession that is, in many ways, easy for it to make.

7. CONCLUSION: BETWEEN INDIVIDUALS AND INSTITUTIONS

Research has shown that so-called ‘weapons of influence’ work because the ‘targets’ have specific natural human tendencies which make them susceptible to such manipulation. Moreover, the research has focused on making requests or offering deals in situations where the target is free to accept or reject the request or offer. On the face of it, then, one might not expect the same strategies to apply in the context of judicial decisions. Judgments are often not directed at any specific person, whose tendency to act consistently or to reciprocate can be exploited. Moreover, they are legally binding, and therefore their recipients appear to lack freedom of choice in this context. Yet we have argued that these influence tactics are potentially useful in promoting judges’ goals, and that judges could be seen to employ many of these techniques in the crafting of their court decisions.

How do these techniques work when we shift from the realm of interpersonal interaction to *institutional* relations? Surprisingly perhaps, as we have illustrated, they appear to work in very similar ways. True, in the formal legal sense the recipients of judicial decisions do not have the choice to refuse them. But if we consider the need of the courts to secure broad support for their decisions, and to avoid resistance and clashes (for example, in the form of attempts to change new judge-made law by legislation), it becomes obvious that the courts’ counterparts *do* have choices to make regarding how to respond to the judgments. Judges can therefore benefit from using effective influence tactics in order to steer the other branches, the legal community and the public to respond in ways that are more desirable from the court’s perspective.

The fact that the courts’ influence attempts are not directed at specific individuals, but rather at other institutions or large groups or communities, does not preclude the application of the principles of consistency and reciprocity. Institutions and groups reflect, at least to some extent, the opinions and inclinations of the individuals comprising them. It is therefore quite plausible that institutions will respond to influence techniques in much the same way as individuals do – even if the specific individuals of which the institution is composed change from time to time or have different characteristics. Indeed, research has shown that reciprocity is not limited to interpersonal interactions between two individuals; it can involve organisations as well. For example, in the

⁵⁸ Dotan (n 56).

context of employment relations, employees tend to reciprocate fair or unfair treatment by the employing organisation or firm, which indicates that reciprocation also occurs between an individual and an organisation.⁵⁹ Moreover, individuals also feel obligated to reciprocate help that has been provided not to them directly but to someone else who is connected or important to them⁶⁰ – and this could potentially include someone from the same organisation or institution. Individuals even tend to reciprocate a favour bestowed on their behalf by one organisation onto another organisation; for example, hotel guests were more likely to reuse their towels (as requested by the hotel management) when they were told that the hotel had made a contribution to an environmental protection organisation on behalf of its guests.⁶¹ Thus, weapons of influence can be highly relevant in interactions between institutions, because members of these institutions often identify with their organisation or institution. Influence techniques employed by the courts could be useful both for tactics that rely on consistency (when members of the institution – government officials, for example – wish to act consistently with their co-workers' prior behaviour) and for techniques that rely on reciprocity (when members of the institution wish to reciprocate concessions which their colleagues/institution had previously received from the court). Empirical research to examine the responses of individuals working within institutions to the influence techniques employed by the representatives of other institutions is much needed for elucidating these interesting processes.

One might also find it perplexing that legislators and government officials – who are presumed to be sophisticated and 'repeat players' – could be affected by such influence tactics. Yet, because such weapons of influence take advantage of deeply ingrained human motivations – such as the need to remain consistent and the obligation to reciprocate – familiarity with them is often insufficient to make one immune to their effects. To be sure, the techniques are not effective with everyone or in all circumstances. But, just as these weapons of influence work on many of us even though we have been exposed to them more than once,⁶² it should not be surprising that they can affect politicians and government officials – at least in some cases (enough to explain the use of these techniques by the courts).⁶³

Given the variety of influence techniques that may be employed, it would be fascinating to explore in future research what set of circumstances makes specific strategies more likely to be used by the courts. Interestingly, the social psychological literature is not helpful in shedding light on this question, because its focus has been on the methods and processes by which

⁵⁹ Denise M Rousseau, 'Psychological and Implied Contracts in Organization' (1989) 2 *Employee Responsibilities and Rights Journal* 121; Jacqueline A-M Coyle-Shapiro and Ian Kessler, 'Exploring Reciprocity through the Lens of the Psychological Contract: Employee and Employer Perspectives' (2002) 11 *European Journal of Work and Organizational Psychology* 69.

⁶⁰ Noah J Goldstein and others, 'I'll Scratch Your Back if You Scratch My Brother's: The Extended Self and Extradynamic Reciprocity Norms' (2007) Poster presented at SPSP Conference, Memphis (as cited in Cialdini (n 1) 32).

⁶¹ Noah J Goldstein, Vladas Griskevicius and Robert B Cialdini, 'Reciprocity by Proxy: A Novel Influence Strategy for Stimulating Cooperation' (2011) 56 *Administrative Science Quarterly* 441.

⁶² Robert Cialdini, the most prominent scholar in the field of influence techniques, described how he is not immune to their influence – despite all his knowledge about such techniques. See Cialdini (n 1) 66.

⁶³ Cialdini (n 1) 27 (sophisticated politicians are not immune to influence weapons).

individuals may be influenced or manipulated to comply, rather than on when specific strategies are more likely to be selected by the influencer. It is, therefore, an open question in general, and not only in its application to judicial decisions.

Our examination of the case law from the perspective of influence tactics has led us to a few tentative hypotheses. First, the foot-in-the-door technique appears to be most relevant when courts are interested in the gradual development of the law. It is also plausible that judges prefer this method when they feel somewhat insecure about the court's status, and are concerned that too large a development would generate strong resistance. Second, in contrast to the foot-in-the-door technique, the door-in-the-face method appears to be bolder and may be employed to facilitate more rapid changes in the law, particularly when applied in two steps (as in the case of the National Labour Court's rulings regarding non-compete agreements described in Section 5 above). An initial ruling that is essentially more extreme than ultimately needed is bound to be met with resistance, and courts are therefore only likely to utilise the technique when they are confident about their political status. More research is needed in order to examine these possibilities and shed light on the factors that affect the choice of influence weapons by courts, as well as on the circumstances that make each strategy most effective.

The analysis set out in this article could also be applied to the actions of other branches of government as well as other institutions. They, too, could benefit from gaining cooperation, legitimacy and support for their actions, and are likely to employ certain weapons of influence to promote such goals. Examining judicial decisions and the operation of other institutions through the prism of influence research may help to reveal strategic considerations guiding the courts and the other branches. This analytical tool (or perspective) can thus provide important insights into judicial decision-making processes and the relations between the courts and other institutions.