Do the "Haves" Still Come Out Ahead?

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In the spring of 1998, the University of Wisconsin Law School sponsored a multidisciplinary conference to assess the impact of perhaps the most visible, widely cited, and influential article ever published in the law and society field: Marc Galanter's (1974) "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change."[1] In that article Galanter attempts to explain the outcome of trial court litigation in essentially structural terms. He discusses "the way in which the basic architecture of the legal system creates and limits the possibilities of using the system for redistributive change." Galanter divides parties into "one shotters" and "repeat players." A one shotter is a person, business, or organizational entity that deals with the legal system infrequently. The one shotter's claims are too large (relative to their size) or too small (relative to the cost of remedies) to be managed routinely and rationally, but a one shotter's interest in winning a particular case is very high.

A repeat player, on the other hand, has had, and anticipates having, repeated litigation. Repeat players have low stakes in the outcome of any particular case and have the resources to pursue their long term interests. They can anticipate legal problems and can often structure transactions and compile a record to justify their actions. They develop expertise and have access to specialists who are skilled in dealing with particular types of cases or issues. They enjoy economies of scale and encounter low start-up costs for any particular case. For example, an automobile manu-

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[1] The Social Science Citation Index (SSCI) has named it "a citation classic." SSCI lists over 630 citations to the article. Fred R. Shapiro (1996) calls it a "blockbuster," ranking it in the top 15 articles most frequently cited in legal scholarship. A LEXIS search in 1997 of law review publications yielded 231 citations. There is hardly a text or reader in the field that does not reprint, summarize, or cite it!

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facturer may anticipate challenges to a particular part or system and thus develop legal strategies and invest in research to defend itself. Legal strategies can be modified and developed from one case, or group of cases, to the next. Repeat players can also benefit from informal relations with (and "educate") institutional incumbents such as judges, hearing examiners, and court clerks. The credibility and legitimacy that flows from repeated contacts may help to sustain a repeat player's claims.

Repeat players may not settle a particular case when a one shotter would do so. If they give in too easily in one case, it may affect the demands made in the next case. Yet they can play the odds and maximize gain over a series of cases even while suffering maximum loss in some. Seldom will one case be critically important. As a result, they consider questions of precedent over the long run and are able to "play for rules." Repeat players may settle (often with low visibility) cases where they expect unfavorable verdicts or rule outcomes. They can trade symbolic defeats for tangible gains. One shotters, by definition, are necessarily more interested in immediate outcomes.

Galanter also focuses on litigation configurations. One shotters may sue one shotters. Such cases often are between parties who have some ongoing relationship and who are disputing over some indivisible good. Cost barriers will ration access to the legal system in many of these cases. Repeat players may also sue each other. The sanctions of long-term continuing relations (which they wish to maintain), however, tend to minimize such cases. Mediation, arbitration, and settlement may be better options. When repeat players are contesting issues of principle or individual rights, however, some authoritative resolution may be necessary and the risks or costs of defeat may have to be endured. Likewise, governmental units may find it difficult to settle high-visibility cases because of the unfavorable publicity likely to be generated. Of course, there are also disputes between repeat players who have no relationship to protect.

Perhaps the remaining two litigation patterns in Galanter's matrix are more interesting. Repeat players may sue one shotters. Sometimes these cases take the form of stereotyped mass processing, bearing little resemblance to full-dress, adversarial litigation. Creditors seek default judgments, attachment of wages, property title confirmations, and so on. Traffic violations are processed routinely. Only a bare few are contested. A court in such cases serves more as an administrative office registering previously determined (or highly predictable) outcomes rather than as either an adjudicator or a locus for bargaining in the shadow of the law. Criminal prosecutions and administrative sanctions also fall into this category. Plea bargains and some settlements have to be approved by a judge, but the outcome is essentially determined elsewhere. The great bulk of litigation falls into this category. No

particular case raises major public policy or legal concerns. Taken together, such cases reflect the increasingly bureaucratic attributes of a mass society set against an ideology of liberalism.

Finally, one shotters may sue repeat players. The one shotter may seek outside help to create leverage against an entity or organization with much greater power and resources. For example, a consumer is displeased with repairs to an automobile; an employee seeks redress from adverse working conditions or disputes a job termination; a tenant seeks to compel a landlord to make repairs to a dwelling. In such cases, according to Galanter, the advantages of repeat players are maximized. Although some one shotters do win such lawsuits (especially when they are supported by a third party that is itself a repeat player, such as the EEOC, tenants' union, or an environmental group or agency), the configuration of the parties and their disparate resources suggests that repeat players will prevail in a large majority of these cases.

Galanter also talks about how the nature of U.S. legal institutions increases the advantages of repeat players. Claims handling institutions are largely passive and reactive; the plaintiff or moving party must mobilize them and overcome cost barriers to access. Some of these barriers can be reduced by devices such as fee shifting and contingent fee arrangements, but access burdens still remain. Our adversarial system still assumes that the parties are endowed equally with economic resources, investigative opportunities, and legal skills, but that is rarely the case. Most U.S. legal institutions are also characterized by overload that inevitably affects the balance of advantages and favors those with resources. Overload often leads to delay, which is time consuming and discounts the value—or likelihood—of recovery. A litigant must have the resources to keep the case alive. Overload also induces institutional actors to place a high value on clearing dockets, which leads to discouraging full-dress adjudication in favor of bargaining and negotiation, settlements, routine processing, and diversion that are more likely to favor repeat players. In addition, it encourages judges, administrators, and legislators to adopt restrictive rules to discourage litigation.

On a normative level, Galanter's article suggests a number of problems in a system rationalized on the basis of individual rights. Judge Richard Posner, for example, has commented in a case where an employee alleged that he was fired because of racial discrimination:

> The practical inability of a plaintiff in a Title VII case to get past summary judgment unless he presents evidence other than what comes out of his own mouth could be thought troubling. Even with recent amendments to Title VII, the expected judgment in an employment discrimination case, especially one brought by an hourly wage worker, will rarely be large enough to repay a substantial investment in the development of evi-

> dence at the summary judgment stage, which is to say before the case ever gets to trial. And on the other hand employers have incentives to invest heavily in the defense of these cases, in order to deter the bringing of them. See Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," 9 *Law & Society Review* 95 (1974). The asymmetry puts the plaintiff at a disadvantage, as the case illustrates. There is no basis for confidence that the defendant did not discriminate against Russell on account of his race and age; it is simply that Russell has not presented enough evidence, perhaps because he could not afford to present more, to withstand the company's motion. But there is nothing within our power to do that would lighten the burden of the employee without depriving the employer of procedural rights conferred upon him by settled law. And these procedural rights are not to be thought merely irksome obstacles to truth and justice. They are necessary to distinguish the real from the spurious cases of discrimination. (*Russell v. Acme-Evans Co.* 1995:70–71)

Given these structural advantages held by repeat players, the efforts of the past decades in the name of "tort reform" raise important questions. We are told that American business suffers from an international competitive disadvantage because of its vulnerability to a litigation "explosion" and to spurious punitive damages and inflated jury awards. Proponents of this view argue that business is forced to cope with invalid or questionable claims fomented by greedy lawyers and with the excessive sympathies of juries willing to rob from the assets of business in the name of "total justice" (Friedman 1985). The tort reform movement offers a test of Galanter's assertions because it would be difficult to reconcile one with the other. Galanter himself has seen this, and he is one of the leading skeptics of tort reform.

The tort reform movement also prompts us to focus more closely on what Galanter said and what he did not say. The "Haves" article does not assert a class or power elite analysis (although it is often wrongly claimed that it does). Galanter does not say that members of the dominant class, or organizations with great wealth, always win in litigation. Rather, he focuses on the structural *advantages* of repeat players, and he concedes that one shotters without power may be able to gain many of the advantages of a repeat player if they can engage the support of organizations or lawyers who regularly handle similar cases. The contingent fee, punitive damages, and benefits of specialization and participating in networks of those who regularly handle cases of a particular type may all help one shotters acquire some of the advantages possessed by repeat players. Indeed, much that is called tort reform involves challenging the structural devices that allow individuals to hire lawyers who can supply the advantages of repeat playership.

From a law and society perspective, such observations raise questions about the distribution of legal and political power in a democratic society, the symbolic uses of law, and the impact of the structure of the litigation system on outcomes and the relationships of the legal with other social systems. Many writers, such as Joseph Gusfield (1963), have talked about law and symbolism. Law is a public affirmation of certain norms and a rejection of others. Groups often demand that law reflect and reaffirm their values. They resist arguments that such a law could not be enforced; for them, law as the symbol of their own rectitude is what is most important. In other instances, those who oppose a position accepted into the nation's laws know that they cannot repeal the offending policy, statute, or decision. Consequently, their strategy is to render the offending law ineffective or unenforceable. Galanter's analysis of the advantages of repeat players suggests some of the ways this process can take place. A one shotter may have rights but be unable to vindicate them. Stuart Scheingold's *The Politics of Rights* (1974), Gerald Rosenberg's *The Hollow Hope* (1991), and Michael McCann's *Rights at Work* (1995) suggest both the limits and the potential utility of rights-based theories of social change. Judge Posner's aforementioned analysis endorses the limits perspective.

Although Galanter's empirical focus is on the configuration of power and advantage in *litigation,* he is also sensitive to the broader implications of his work:

> Structurally, (by cost and institutional overload) and culturally (by ambiguity and normative overload) the . . . [American legal] system effects a massive covert delegation from the most authoritative rule-makers to field level officials (and their constituencies) responsive to other norms and priorities than are contained in the "higher law." . . . It permits unification and universalism at the symbolic level and diversity and particularism at the operating level. (1974:147–48)

Moreover, Galanter's concern with the structure of the functioning legal system points us toward factors, often overlooked, that affect outcomes. Each actor in the legal system faces a shifting cluster of costs and benefits apart from the policies of particular laws or constitutional provisions that are sought to be retained, modified, or eliminated. The same is true of those in other social systems who consider turning to law. Understanding law calls for attention to the text of legal norms, but also requires attention to other structures and normative systems (Blankenburg 1994). Finally, those affected by law are not passive objects. Galanter's repeat players, as he notes, can play for rules that advance their long-term interests. They can seek (from courts, administrative agencies, or legislatures) substantive or procedural rules that better protect their interests.

This kind of legal change, however, risks provoking counterattack by organized interests championing environmental protection or those long subject to discrimination, consumers, or the poor. Often, a better tactic is to seek procedural change that is technical, hard to fathom, and difficult to counter. For example, one device often employed by repeat players is arbitration. They insist that one shotters sign a standard form contract in which they bury an arbitration clause. The repeat player selects the arbitrator and the procedures. Courts have allowed such arbitrators freedom to bypass regulatory laws. Arbitration thus looks like a progressive method of dispute resolution, but too often it serves to reinforce the power of the repeat players who draft the constitution of a private government that they call a contract.

Galanter's essay, as all work, reflects its times. "Haves" was written in a era of liberal reform. Courts and legislatures were expanding individual rights. Legislatures funded legal services programs. Civil rights and consumer protection statutes provided that some of those who won cases could recover attorneys' fees. Law was thought to be a prime catalyst for social change. Thus, Galanter ends on an optimistic note by considering how legal reform could expand the advantages of repeat playing to individuals so that they can effectively vindicate their rights.

Times change. The goals became the decrease of governmental power and entitlements, increased personal responsibility, and a reduction in the regulation of wealth and property in favor of greater reliance on the market. Individual rights liberalism has been strongly challenged by civic republicanism and similar communitarian perspectives. There may have been an overemphasis on a "rights strategy" and the efficacy of rights in securing social change. Yet whatever its limits, a structure of rights is often a necessary component of change. In the United States, these rights, and judicial protection for them, are being steadily eroded by a spate of Supreme Court decisions. Rights are effectively limited; many have been "deconstitutionalized," a more conservative federal judiciary is less aggressive in protecting them, and the Court has placed important new limits on Congress' authority even to legislate in their behalf. Thus, litigation now increasingly offers only rights at a discount if they are obtainable at all.

On the other hand, the worldwide growth of democracy and the spread of constitutionalism and multinational judicial structures outside the United States seem to be leading to a greater emphasis on rights and their protection by courts. Galanter wrote in an age of American rights expansion. The configuration of parties in litigation as a dynamic of social change, however, may be of reduced significance when rights and the law are less available resources for the "have nots" (Epp 1998). It will be interesting and informative to see how these concepts work in new and ever expanding venues.

The bottom line is that since Galanter's essay was published, there have been major changes in our legal and political cultures as well as in the distribution of power and the content of political discourse. These changes do not negate the significance of Galanter's achievement, but they do require us to consider the continued relevance of this pioneering essay in a very different political climate. For example, Judge Posner, in the above passage from the *Russell* opinion, cites the "Haves" article and considers whether a lack of resources and the advantages of repeat players undercut the protections of a major civil rights law. Posner concludes that in many such cases he can do nothing or, perhaps, that nothing can be done by anyone. Galanter recognized, of course, that justice is always elusive and never perfect. Judge Posner's frustration suggests that altering the balance of power in litigation, by law, is insufficient to combat broader structures in society that work in the opposite direction. Such an observation was certainly an unwritten premise in our choice of a rhetorical title for this symposium, "Do the 'Haves' *Still* Come Out Ahead?"

At best, one can answer that question impressionistically. As Neil Vidmar (1984), Herbert Kritzer (1990), and others have noted, even identifying the winners and losers in litigation can be difficult. "Coming out ahead" is not necessarily a synonym for legal success. Often, the problem is knowing what was actually accomplished. It may be that, from the record, some outcomes look like a success, whereas in reality the winning party could have achieved the same result without resorting to costly litigation. It is difficult also to determine whether a nonlitigation outcome was in fact independent of that litigation or was something that could have been accomplished only "in the shadow of litigation" (Mnookin & Kornhauser 1979). Furthermore, litigation success must be measured both objectively and subjectively in reference to the litigant's goals and expectations. "Success" in litigation does not always produce successful outcomes. Litigation is part of a process and may not be determinative. Even those who lose in court may ultimately prevail (or at least secure some incremental advantage).

The symposium from which these papers are published could not have been expected to answer this bottom-line question authoritatively, and it did not. What the symposium and these articles, individually and collectively, do suggest is that the Galanter paradigm is most significant (and continues to be important and provocative) at the theoretical level. Perhaps, however, it must be adapted to the new political and legal terrain. It must now take account of alterations in the legal culture and normative systems that allowed Galanter to conclude on an optimistic note.

The papers and the commentaries on them can speak for themselves on these issues. They are a rich addition to our quest for understanding the social and political dynamics of the law.

They do suggest to us, however, three issues for continuing exploration. First, it appears that, far more than was the case in 1974, *government matters!* Not only are governments increasingly participants in major litigation, but governmental policies and actions shape the litigation process against which the rituals of the law are played out. If, as we assume, governments are not merely another brand of "official" repeat players, Galanter's configuration of parties needs to reflect this development. Second, as various theories of "party capability" have suggested, the relative advantages between and among litigants is more nuanced and dynamic than the terms *one shotter* and *repeat player* suggest. Finally, much more work needs to be done, as already suggested, to capture the subtleties of litigation outcomes, which are not fully explained by a dichotomous winner-loser paradigm.

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