Comment

Family Gatherings and a Dirty Little Secret of the Law and Society Association

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Whenever I attend a Law and Society Association function, I get the image of a family gathering. Whether it is the annual meeting, or a "birthday" celebration such as this symposium commemorating the 25th anniversary of Marc Galanter's classic work "Why the 'Haves' Come Out Ahead" (Galanter 1974), the occasions always take on an air of kinship, with people engaging their academic forebears, siblings, and progeny in discussions about their latest projects. Although the family embraces many diverse lineages, clearly the black sheep of the family are the economists. The few brave economists who dare to attend can usually be found off in a group, amusing themselves with some recent empirical work or the latest development in game theory.[1] In presenting our work on panels, we are often (but not always) met with polite silence or with questions asking us to defend some part of Richard Posner's work, even if our own work is critical of the traditional economic analysis of law.[2] Occasionally at

I would like to thank the organizers of this symposium for inviting me to comment on the presented papers. I would also like to thank Jeffrey Stake and Lynne Henderson for comments on this comment. Address correspondence to Kenneth G. Dau-Schmidt, Indiana University, School of Law, 211 S. Indiana Ave., Bloomington, IN 47405 (e-mail: <kdauschm@indiana.edu>).

[1] The few brave law and economics scholars who regularly attend Law and Society Association functions include Ian Ayres, David Barnes, Peter Carstensen, John Donohue, Richard McAdams, Jeffrey Stake, and myself.

[2] This statement is based on my experiences in attending the annual meetings of the Law and Society Association over the years, but especially my experience at my second meeting in 1990. The year before, I had written an article critiquing the traditional economic analysis of criminal law and suggesting that the economic model of criminal law could be usefully informed by other disciplines, including psychology, sociology, and criminology (Dau-Schmidt 1990). Accordingly, at the next Law and Society Association meeting, I organized a roundtable composed of representatives from a variety of disciplines, including psychology, sociology, and criminology, to discuss the theory of criminal law and criminal punishment in light of my article. To my surprise, only the criminologist, Phillip Parnell, seemed to have taken the time to read my article, whereas the rest of the panel arrived with the expectation that I was there to defend Posner. To be fair, there

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one of these family gatherings, someone even presents a paper that suggests it might be dangerous to associate with economists (Rostain 1998).

At this family gathering, it seems that all the progeny of Marc Galanter's famous work are well represented. We have empirical work in criminal justice and political science testing the power of his predictions in administrative processes (Kinsey & Stalans 1999), state courts (Farole 1999), federal courts (Songer et al. 1999), and even Russian commercial practices (Hendley et al. 1999). We also have empirical and theoretical work in law and sociology extending his work to the litigation process (Albiston 1999) and exploring whether people commonly know that the "haves" come out ahead in legal processes and what the implications of such knowledge are for the legitimacy, power, and durability of the law (Ewick & Silbey 1999). Finally, we have theoretical work in sociology discussing the implications of the internationalization of legal processes in organizations within the context of Galanter's work (Edelman & Suchman 1999) and an applied piece in law analyzing the efforts of public interest lawyers to represent the homeless in light of his insights (Harris 1999). The discourse among these academic siblings at this birthday party has been both productive and cordial.

As so often happens at such gatherings, however, the event is an occasion not only to talk with one's relations about work and play, but also to learn family secrets, perhaps even disturbing secrets. I would like to take the opportunity of this family gathering to share one of the dirty little secrets of the Law and Society Association: that a very good case can be made that Marc Galanter is the father of the progressive wing of the law and economics movement.

All the evidence is circumstantial, but a good case can be made for his paternity based on all the traditional indicia by which such things are judged. Certainly in his classic article, Galanter embraced fair economics at about the time the progressive wing was conceived. His work in "Why the 'Haves' Come Out Ahead" relied on optimization theory as well as a game theoretic framework to model the strategic advantages that repeat players enjoy over one-shot players (Galanter 1974:97–104). He has continued to flirt with economics throughout his career (Galanter 1987, 1988, 1996) and has even written some of his most important recent work with an economist (Galanter & Palay 1990, 1991, 1993). Finally, a convincing argument can be made that the modern scholarship of the progressive wing of the law and economics movement, with its reliance on game theory (Ayres & Gertner 1989; Dau-Schmidt 1992) looks much more like Ga-

are some members of the Law and Society family who have been more than kind to this black sheep over the years despite an apparent lack of relationship between my work and theirs, including Joyce Sterling, Lauren Edelman, and Howard Enlarger.

lanter's work in "Why the 'Haves' Come Out Ahead" than it does like the early work of any of the other candidates for paternity (Calabresi 1970; Cooter 1982).

Given their possible relation to Galanter's work, perhaps economists need not be so sheepish within the Law and Society Association.[3] "Why the 'Haves' Come Out Ahead" is a classic exercise in social science analysis that well deserves its place as a touchstone for much of the law and society literature. In the article, Galanter begins by making simplifying assumptions that are tractable yet retain the essential features of the examined problem. These assumptions include characterizations of the parties as "one shotters" or "repeat players," wealthy or poor, and assumptions about the rules of adjudication, precedent, settlement, and the courts. He then adopts a perspective of analysis, the "reverse telescope" of examining the effect of the parties on the rules. He applies reasoning to the problem: a little game theory here, a little optimization theory there, and a lot of discursive logic. Based on this analysis, he derives a host of important implications about our legal system, including its built-in tendency to favor repeat players and so the "haves" and the likely effects of various reforms that might be undertaken to effect a distributional change in favor of the "have nots." The success of "Why the 'Haves' Come Out Ahead" within the law and society literature and the larger universe of legal and sociological literature is attested to in the many articles written for this symposium.

Regardless of whether Galanter is really the father of the progressive wing of the law and economics movement, his reliance on economic analysis in his work and its success within the law and society movement should encourage those of us who endeavor to integrate economic analysis into sociolegal work and give pause to our critics who say economic analysis is reductivist, antiempirical, and inevitably conservative. Although his game theoretic analysis is undoubtedly a simplification of the real world, it seems that much more is gained than lost in descriptive and predictive force by imposing this economic view of the rational man on the examined problem. The real trick in applying any social science theory to analyze a problem, a trick performed so well by Galanter in "Why the 'Haves' Come Out Ahead," is to know which simplifying assumptions one can make in analyzing a problem and still preserve the essential features of that problem. Similarly, far from undermining the commitment of sociolegal research to empirical work, his article has reinforced and enhanced this commitment. Although the article does not present any original empirical work, it is peppered with cites to support-

[3] Indeed, in addition to the dirty little secret of Galanter's possible relation to the progressive wing of the law and economics movement, is also the ugly rumor that Willard Hurst is the grandfather of this scholarship (see, e.g., Hurst 1964). Few schools of thought can claim such a distinguished, if surreptitious, pedigree within the law and society family.

ing empirical literature and sets forth an ambitious agenda for empirical work in sociolegal scholarship for decades to come (Ewick & Silbey 1999). Finally, his resort to economic analysis in "Why the 'Haves' Come Out Ahead" does not preclude him from making an openly normative and progressive analysis of the problem. He uses his economic framework to analyze a variety of possible reforms to our legal system for the express purpose of evaluating their potential in realizing a distributional change in favor of the "have nots." Thus, it seems that in "Why the 'Haves' Come Out Ahead," he has used economic analysis to achieve precisely the kind of high-quality sociolegal scholarship that represents the best work of the law and society movement.

Having asserted the proud legacy of economics within the law and society family, let me now warn economists against hubris. As the papers in this symposium demonstrate, we can learn much from our siblings and cousins in other disciplines, both with respect to answering questions our disciplines share in common and with respect to answering important questions that cannot be usefully modeled in economics.

The empirical work in this symposium provides answers to questions economists themselves might ask. Does the repeat player advantage of the "haves" persist over time despite obvious changes in the sympathies of the federal judiciary toward "haves" and "have nots" over the examined period? Songer et al. (1999) answer this question with a resounding yes. Is the repeat player advantage the same for all "haves"? For example, is it the same for government, big business, and small business? Farole's (1999) work answers this question in the negative, demonstrating that government enjoys the biggest repeat player advantage, followed by big business. The only empirical work in this symposium that does not provide at least qualified support for Galanter's hypothesis is Hendley et al. (1999), and they examine a sample containing only repeat player "Haves" in a civil law jurisdiction with a Romanist tradition in which the value of precedent, and so repeat playing, is minimal. As a result, it is not surprising that they find little empirical support for Galanter's hypothesis. Given the common tools of statistical inference shared among the social sciences and that Galanter's work is based on optimization theory and game theory, it is not surprising that these scholars from a variety of disciplines produce empirical work that answers questions economists might develop in their own models.

The theoretical work in this symposium explores important questions that economists should consider but that might not be usefully modeled within the discipline of economics. Edelman and Suchman (1999) discuss how the "haves" have recently extended their repeat player advantage by formulating the process for adjudicating disputes through contractual provisions prescribing certain alternative dispute resolution procedures as the

initial or exclusive means of resolving disputes between the parties. This analysis raises important questions concerning the appropriate boundary between market-mediated solutions in which a party's rights are determined through private negotiations and political solutions in which a party's rights are determined by the legislature. My own inclination is that matters of procedural rights should be determined democratically and that courts should not defer to contractually mandated alternative dispute resolution methods unless they are procedurally fair.

Ewick and Silbey (1999) undertake a very interesting study in which they use interviews with 430 people to assess common conceptions about the law, including whether people perceive that "the 'haves' come out ahead," and then discuss the implications of their findings for the question of whether the law can accurately be described as an "ideology." They describe three common conceptions or "metastories" that people share about the law, including one of the law as a majestic body of rules, fixed and impervious to individual actions, and another, more consistent with Galanter's work, of the law as a game in which the "haves" tend to prevail through the deft deployment of existing rules and the creation of new rules in their favor. They conclude that the coexistence of these contradictory conceptions of the law in the populace help to maintain the power and legitimacy of the law because people can choose among their various conceptions of the law to explain divergent real life outcomes.

Ewick and Silbey's (1999) work perhaps lies the farthest from questions that would normally occur to an economist or find ready incorporation in an economic model. In general, the economic model assumes certain legal rules as given and does not explore questions of legitimacy and power. Nevertheless, these questions are obviously important, much too important to be ignored merely because they do not fit within the tractable assumptions of the neoclassical economic model. Economists can benefit from considering the results of such investigations even if they do not fit neatly into the economic matrix. Sometimes we learn the most about a problem by listening to someone who views the problem in an entirely different way.

That not all human behavior can be neatly represented within the confines of the traditional economic model has never particularly bothered me. Indeed, I take some comfort from this fact because I believe it ensures the continued success of other disciplinary perspectives and thus a heterogeneous analysis of our social problems. The current multidisciplinary enterprise in analyzing the problems of our world is far more interesting and successful than the monotonic analysis that would result from the preeminence of any one disciplinary perspective. For me, at least, the project of multidisciplinary discourse is one of understanding the connections and relationships among the various disciplines

in a way that furthers our analysis of social problems, rather than the attainment of dominance by one disciplinary perspective over others (Dau-Schmidt 1997). Although all the disciplines have their unique features and identifying characteristics, if you scratch beneath the surface—or keep your ears open at family gatherings—you might find out that they bear more relation to each other than you otherwise might think.

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