Comment

The Two Motifs of "Why the 'Haves' Come Out Ahead" and Its Heirs

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Marc Galanter's 1974 article "Why the 'Haves' Come Out Ahead" has been exceptionally influential, and for good reason. Its analytic elegance and power, particularly in its famous distinction between repeat players and one-shotters, have illuminated many aspects of the legal process. Yet the article's influence also stems at least in part, I suspect, from the tension between its two related but very different motifs. It predicted that resource-rich parties will generally fare better than other parties in the legal system, and provided a coherent theoretical account of why: because such parties are more likely to be "repeat players" that have the organizational and resource capacities to "play for rules" over the long term. The "Haves" article also, on this basis, provided a coherent theoretical account of how the fates of "have not" parties in the legal system may be improved: by upgrading their capacities for longer-term strategic action, principally through increasing the funding of legal services, improving access to legal knowledge and skills, and organizing diffuse "have not" classes as repeat players. In these and other ways, "have nots," he suggested, may achieve some of the organizational and structural advantages held by the "haves" (1974:140–44). This subtext might have had its own subtitle to "Why the 'Haves' Come Out Ahead," such as "And How the 'Have Nots' Can Organize to Come Out Less Far Behind."

Thus, the "Haves" article balanced critical realism with a basis for hopeful aspiration for something better. Its realism did not descend into fatalism, but its hope did not rise to naiveté. And in both motifs, the "Haves" article was, although largely hypothetical in nature, fiercely empirical in its orientation. Galanter relied

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on a large body of social scientific research in constructing his analysis, and his hypotheses have directed subsequent research toward studying the dynamics of the legal process rather than merely spinning out formal models or theoretical critiques.[1]

In asking whether the "haves" still come out ahead, we must have a definition of the "have nots," yet the matter is usually treated only implicitly. There are at least two possible alternative definitions. One is the truly poor. By any analysis, the truly poor still gain very little benefit from the legal system and still come out as far behind as in 1974 (and arguably come out farther behind). The other possible definition, though, is much broader, consisting of nonwealthy "one shotters" more generally. Whether individuals in this category come out less far behind in the legal system than in 1974 is a complex matter. Arguably *some* changes since then have improved the prospects for *some* one-shotters in *some* legal contexts, largely as a result of the types of organizational reforms suggested by Galanter in 1974.

The richness, variety, and sophistication of the contributions to this symposium reflect the richness of Galanter's "Haves" article. In responding to these contributions, I want to pursue two themes. One is to observe both that repeat player "haves" *do* come out ahead, but also that "have nots" (under the broader one shotter definition), have benefitted from the organizational and legal services reforms suggested by Galanter in 1974. The other is to explore the unexpected consequences of a partial diffusion of these reforms. I use the term *unexpected* with a key qualification: Galanter, in fact, predicted the main consequences in 1974.

The Empirical Evidence on the Two Motifs of the "Haves" Thesis

The relative success of repeat players has been borne out in a large body of empirical research, and is reaffirmed in several articles in this symposium. Much of the research has justifiably used *individuals* and *organizations* as proxies for one shotters and repeat players. Individuals, in contrast to organizations, only rarely are involved in a sufficient number of similar cases over time to take on the repeat player orientation, and individuals, in contrast to organizations, only rarely have sufficient resources to play strategically for rules over time. We should expect, then, as Galanter suggested, that individuals are likely to be relatively unsuccessful

[1] Nonetheless, it should also be recognized that something like a rational choice model informs parts of Galanter's analysis, although it is a model that is heavily qualified and contextualized by a recognition of the powerfully constitutive role of legal culture. The model has an affinity with rational choice analyses in assuming that parties' orientation to the legal system is largely a function of their interests and that these interests are constrained by the nature of the relationship and the nature of the parties' resource capacities.

when pitted against organizations in the legal system. Indeed, that is undoubtedly the case. Thus, the articles in this symposium by Songer et al. (1999) and Farole (1999) confirm that individual litigants fare relatively poorly against organizational and governmental litigants. The research reported in these two articles fits within a larger literature on "party capability," which has compiled one of the most consistently observed and remarkably stable patterns of observations in Law and Society research.[2] Similarly, as Albiston (1999) suggests, the process by which judicial precedents regarding remedial statutes are developed is likely to benefit the legal policies favored by repeat player organizations, even when their one-shot opponents win in particular disputes.

Although much evidence is thus consistent with the first face of the "haves" thesis, it is also clear that the structural advantages of organizational "haves" may be undermined under particular (and limited) conditions. Foremost, the "have nots" may benefit (at the least, they may come out less far behind) by restructuring their fragmented, individual character along the lines of repeat players. A large empirical literature confirms this aspect of Galanter's original thesis. McCann's landmark study (1994) of legal strategies in the pay equity movement showed that "have nots," through strategic organizing, may bend the law to their purposes and thus may substantially influence the meaning and application of policies. Similarly, Lawrence's work (1990) on the Office of Economic Opportunity's Legal Services Program showed that organizational representation was a necessary condition for placing legal issues related to poverty on the judicial agenda. Kritzer (1998) showed that individual claimants in administrative adjudication are substantially benefited by seasoned representation—whether or not the representative is a lawyer—and that this fact may be put to use in providing low-cost representation for one shotters in many settings. In this symposium, Harris's research (1999) on the influence of legal services lawyers in developing a right to housing in some states, typically against significant odds, powerfully demonstrates that strategic action by organized representatives of the "have nots" can lead to improvements in their conditions.

Ironically, the use of representation by the "haves" (which is, of course, a common occurrence) may erode their advantages in some very limited contexts. Kinsey and Stalans (1999) observe that "haves" who behave like repeat players by using legal representation during tax audits surprisingly fare worse than had they

[2] The continuing difficulty facing these studies is that, almost of necessity, researchers lack the data to develop more finely tuned measures of resource capabilities than party type. We also lack data on the stakes in cases, which may vary nonrandomly. For instance, perhaps achieving delay or publicity is the purpose for litigating a case, and even if the litigant playing for delay or publicity eventually, as expected, loses, he or she has accomplished the primary goal. Gathering additional data on the stakes in a large number of cases drawn from official court records would, of course, be very difficult.

proceeded without representation. Although organizational "haves," *as expected,* are more likely than others to orient themselves in a legally sophisticated way toward a tax audit (particularly by retaining expert counsel), this orientation ill serves them because the use of a representative wipes out the benefits of trust and deference that otherwise would accrue to them as a result of their cultural status. Thus, repeat player taxpayers seem to make a crucial mistake: they mistakenly assume that tactics that generally work in the legal system also are likely to work in a setting in which adjudicatory discretion is especially broad and the adjudicator is asked to rely on the claimant's good faith. That repeat player tactics backfire in this instance does not undermine the general structural theory underlying Galanter's thesis.

The expected advantages of the "haves" may be undermined as well by adjudicators bent on aiding the "have nots." Galanter recognized this possibility, observing that the "preferences and prudences of the decision-makers" may at times constrain the more general success of the "haves" (1974: 102–3). Building on this insight, Dotan (1999) observes in his contribution to this symposium that judges in ideologically "activist" high courts may, if they choose, reverse the usual imbalance in favor of the "haves" and instead may systematically aid the "have nots." This observation is consistent with the results of other studies on national high courts (Haynie 1995; Sheehan et al. 1992). We now know, based on these studies, that the "preferences and prudences of the decision-makers" exert a more significant influence in national high courts than elsewhere, largely because judges in these courts enjoy broader policy-making discretion than judges in lower courts. This observation, however, also raises significant questions about the capacity of the "have nots" to enforce their high court victories in lower courts (see, e.g., Songer et al. 1999; Farole 1999).

The contribution by Hendley et al. (1999) on Russia qualifies the "haves" thesis in another relatively minor way: in the context of economic disruptions and the absence of stable business relationships, as in present-day Russia, the "haves" do not act like repeat players. In particular, large Russian businesses resolve many of their contractual disputes with similar businesses through litigation, in apparent inconsistency with Galanter's prediction that large organizations tied to similar organizations by long-term relationships should tend to administer their disputes outside of the regular court system. The observations about Russian businesses, however, at least in general terms, are not wholly unique and perhaps should not be unexpected in light of other Galanterian research showing that economic disruptions contribute to litigation among repeat players precisely because such disruptions undermine reasonable expectations that business relationships will continue for the long term (see, e.g., Galanter &

Rogers 1991). In addition, of course, the research on Russia suggests that the repeat player condition is as much a learned social technology as it is an inevitable result of the structural characteristics of "have" organizations.

In sum, under some conditions, the structural disadvantages of the "have nots," or the structural advantages of the "haves," may be ameliorated. The critical, realist face of Galanter's article predicted that most such ameliorations are likely to be temporary and unstable, but the article's aspirational face suggested that some ameliorations of the structural imbalance may contribute to more lasting, systemic improvements in the fates of one-shot "have nots." The former is composed of mere rule changes or changes in the "preferences or prudences" of adjudicators alone; the latter consists of improvements in the organizational capacities, resources, skill, and knowledge of the one-shot "have nots."

Galanterian Reforms and Their Consequences

As Galanter wrote the "Haves" article, two broad developments were sweeping the U.S. legal environment (and indeed the legal environments of many societies). One development has tended to enhance the capacities of one-shot "have nots," and the other, partly in response to the first, has tended to enhance the capacities of organizational "haves."

The first has been the diffusion of technical legal knowledge, skills, and organizational resources—the prerequisites for legal claims making and litigation—among a far broader population than in the past. Although some sections of the population have not participated in or benefited from this diffusion (particularly due to cuts in legal aid), these resources were once confined to a relatively narrow elite, which is no longer the case. The tremendous growth in the lawyer population has contributed to this diffusion of legal knowledge and skills. More people, and a broader cross section of the population, now have legal skills and knowledge by virtue of formal legal training, and those who know a lawyer or are related to one make up an even larger and broader population. The diffusion of knowledge and skills, however, is even more fundamental than that simple development, for it is reflected in a phenomenon that Kritzer (1998:216–23) has aptly labeled "postprofessionalism," by which he means the declining monopoly by the professions, in particular the legal profession, over specialized knowledges and skills. Various quasi-professions now claim expertise and provide consultation and even representation in things legal. In addition, computerized legal databases have expanded access to technical legal knowledge. Access to legal knowledge and skills, as a consequence of these and other developments, is not as tightly constrained as in the past. In a parallel development, where once the universe of organized in-

terest groups consisted largely of producer groups, in recent decades there has been significant growth in the number and diversity of nonproducer advocacy groups claiming to represent the interests of one shotters. As a result of these various developments, *some* kinds of "have nots" have gained *some* of the structural prerequisites for repeat playing once held nearly exclusively by a narrow category of organizational repeat players, and thus these "have nots" have come out less far behind. For instance, in this symposium, Harris's research (1999) describes a highly significant instance of the influence of repeat player resources in providing some benefits to a particularly vulnerable class of "have nots," homeless families.

Although Galanter suggested specific reforms aimed at improving the organizational capacities and legal knowledge of "have nots," he also made two highly prescient predictions about the likely consequences of such reforms: "Relationships among strangers (casual, episodic, non-recurrent) would be legalized; more dense (recurrent, inclusive) relationships between parties would be candidates for the development of private systems" (1974:145). These predictions are not far off the mark.

Indeed, in policy areas in which "one-shotters" have gained the greatest capacity to threaten organizational "haves"—particularly employment discrimination—the organizational "haves" increasingly have internalized the disputing process. Thus, large organizations, as Edelman and Suchman (1999) persuasively argue in their contribution to this symposium, increasingly have built internal, unofficial legal systems. As organizations have become increasingly legalized internally, their capacity to structure their legal environment and their relationships with one shotters undoubtedly has been heightened. Many implications of these developments for the fate of one-shot "have nots" and for the values of democracy and civil rights are highly troubling. As Edelman and Suchman eloquently argue, large organizations can be especially effective at absorbing external pressures and exerting internal social control, and the aspects of legalization that have been internalized by these organizations may take fundamentally antidemocratic forms.

These two broad developments—the growth of organizational dominance of the legal field and the diffusion of legal knowledge, skills, and organizational representation of "have not" causes—are in tension with each other. As a scholarly community, we still have much to learn about the implications of these tensions for the law and legal process. Certainly, the structural incentives and interests constituted within the new organizational forms seem to skew the playing field even further against the interests of one shotters than is the case in the official legal system. For instance, with regard to the processing of employment discrimination claims within organizations, Edelman and

Suchman (1999) observe that mediators, who are drawn almost exclusively from management levels, have powerful incentives to represent the interests of management rather than the interests of individual complainants. As in the official legal system, however, there are countervailing pressures, too. Edelman and Suchman observe that organizations have a strong incentive to maintain at least a modicum of fairness in the dispute resolution process so as to maintain some degree of legitimacy. This situation is likely to be especially true where individuals within these organizations have benefited from the diffusion of legal knowledge, skills, and organizational resources.

Thus, we still have much to learn about micropolitics within this general context, because we simply do not yet know much about how the diffusion of legal knowledge, skills, and capacities interacts with the increasing legal sophistication of large organizations. Although the organizational constraints in the new legal environment are undoubtedly powerful, there is surely room for maneuver for strategically oriented "have not" actors. I can see two alternative kinds of "have not" responses. One kind of response amounts to "poaching," or the pursuit of individualized, tactical resistances outside formalized procedures of redress. Ewick and Silbey's (1998) fascinating study of stories about law identified stories of poaching as one of three main types of stories or "frames" that are widely held by Americans. Although they observe that most individuals share stories of poaching along with other stories about legality, it may be that individuals are more likely to poach in some contexts than others. For instance, in particularly revealing research, Gilliom (1997) found that welfare recipients in Appalachia understand "law" mainly in terms of domination, and they respond to law perceived in this way mainly by poaching. They do so precisely because they have few of the organizational capacities, resources, and skills and little of the knowledge that might enable them to pursue more regularized recourses, and because they perceive that law is not open to regularized influence by their efforts. Similarly, we might expect to find that individuals caught within the new intraorganizational legal systems will be more likely to poach than pursue regularized recourses (for instance, mediation) to the extent that the regularized recourses are perceived to be largely illegitimate and abusive. Alternatively, to the extent that internal legal systems are perceived to be, like the official legal system, affording a rule of law that binds officials as well as others or open to strategic play by any party with the necessary skill, knowledge, and resources, then we should expect "have nots" within organizations sometimes (at least) to eschew poaching for more regularized avenues of influence and redress.

Getting at these matters directly is likely to be difficult, but we might learn much by comparing stories about law within orga-

nizations with stories about law in other contexts. At the extreme, the stories from within organizations might be largely in the vein of what Ewick and Silbey have called "against the law" (1998:165–220): of lone individuals poaching as best they can against a foreign and dominating power. Indeed, it would be highly significant if we found that workers have virtually no perception of intraorganizational law as a neutral authority that binds both those in power and those under power (which is akin to what Ewick and Silbey [ibid., pp. 57–107] have called "before the law") or virtually no perception of that law as a game in which ordinary individuals may gain advantage through strategic action and resourcefulness (which they have called "with the law" [ibid., pp. 108–64]). Then we would have confirmed a reasonable but troubling expectation: that organizational legal systems are indeed fundamentally more grim, more oppressive, and more manipulative realms than is the case of the "public" legal system. On the other hand, researchers might discover something much more mundane but no less significant: that stories and perceptions about organizational law are not dramatically different from those about ordinary law. I suspect that there may be a bit of both: that intraorganizational law probably is seen as less fair, less neutral, and more amenable to serving the interests of domination than is official law, but that intraorganizational law also has some of the characteristics of official law. Whatever the results of such a study, however, they would be highly significant for our understanding of the construction of law within the new intraorganizational legal systems.

In addition, we know very little as yet about how (if at all) individuals within organizations are organized for their relationship with intraorganizational legal processes and how any such collective, strategic action affects these legal processes. The extent of unionization within organizations, for example, may significantly influence the character of organizational legalization and the extent to which it acts as a uniformly oppressive and antidemocratic force within organizations. Similarly, although rights advocacy groups, as Edelman and Suchman (1999) observe, have not commonly targeted private organizations, there are instances of such pressure, particularly by environmental organizations and civil rights organizations. Again, to what extent does such pressure matter for the character of organizational legal systems? Finally, are there any new models of an organized "have not" response to the new organizational legal systems, and if so, to what extent and how are they influential? Do any systems of seasoned expert representation for one shotters exist within the organizational legal process, and if so, what are their effects?

My point is a mundane one, but I think it is squarely within the research tradition inspired by Galanter's 1974 article: rules, even the internal organizational rules that constitute the new or-

ganizational legalization, have variable effects that cannot be fully understood except through empirical research on participants' knowledge, resources, modes of strategic organizing, and patterns in the attrition and processing of disputes.

Conclusion

As Ewick and Silbey (1999) perceptively argue in their contribution to this symposium, "law" is constructed in the gap between formal ideal and the multiple and varied experiences of individuals. Although law is widely experienced as a dominating force, precisely because experiences of law and stories about law *also* include examples of law's control over the "haves" as well as the "have nots," "law" has not become simply another term for "power" or "domination." Thus, there have been many kinds of efforts by nonwealthy one shotters over the last several decades to construct law for their benefit, particularly through the strategic construction of legal rights. As Silbey and Ewick (1999) argue, however, this lively tension between formal ideal and mundane, multiple experiences is not inevitable. The tension may be eroded, as they suggest, if the sacred becomes irrelevant to the profane, if everyday experiences contain no element of the formal ideal. Gilliom's 1997 research on Appalachian welfare mothers clearly demonstrates that in a context in which legal authorities are perceived as nearly uniformly oppressive and controlling and in which the "have not" population is largely bereft of legal skills, knowledge, and organizing opportunities, "law" is perceived mainly as "power," and the "have nots" resort not to rights but to tactical poaching. A key challenge for the next generation of research in the Galanterian tradition will be to examine how law is constructed in the new intraorganizational legal systems and the increasingly organizationally dominated legal environment. Will the fate of one shotters increasingly be that of isolated poachers? Or, will it be that of strategic players *within* the legal game, albeit operating in a more fluid context of "post-professionalism," and widely diffused legal knowledge and skills? The answers are not yet clear. There is no doubt, however, that any such research should be informed by Galanter's illuminating theoretical framework, with its identification of organizational capacity, knowledge, and skill as key factors affecting the fate of both the "haves" and the "have nots" in the legal system. Galanter's rich and insightful framework has thus endured beyond its original context.

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