

CLASS HANDOUT - GALANTER'S WHY THE HAVES COME OUT AHEAD

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Marc Galanter, "Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change"

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A Typology of Parties

Because of differences in their size, differences in the state of the law, and differences in their resources, some of the actors in the society have many occasions to utilize the courts (in the broad sense) to make (or defend) claims; others do so only rarely. We might divide our actors into those claimants who have only occasional recourse to the courts ([which I will call] one-shotters or OSs) and repeat players (RPs) who are engaged in many similar litigations over time. The spouse in a divorce case, the auto-injury claimant, the criminal accused are OSs; the insurance company, the prosecutor, the finance company are RPs. Obviously this is an oversimplification; there are intermediate cases such as the professional criminal.¹ So we ought to think of OS-RP as a continuum rather than as a dichotomous pair. Typically, the RP is a larger unit and the stakes in any given case are smaller (relative to total worth). OSs are usually smaller units and the stakes represented by the tangible outcome of the case may be high relative to total

* [Note by Prof. Waits] Further edited from excerpt in COVER & FISS, THE STRUCTURE OF PROCEDURE. To improve readability, I have not indicated where material has been omitted. Most footnotes are omitted, and those that are included are renumbered.

I realize this is not an easy article to understand. Please do your best.

¹ [This and all subsequent footnotes are by Galanter.] Even the taxpayer and the welfare client are not pure OSs, since there is next year's tax bill and next month's welfare check. Our concept of OS conceals the difference between pure OSs — persons such as the accident victim who get in the situation only once — and those who are in a continuing series of transactions (welfare clients or taxpayers) but whose resources permit at most a single crack at litigation.

worth, as in the case of injury victim or the criminal accused. Or, the OS may suffer from the opposite problem: his claims may be so small and unmanageable (the consumer [who has been shortweighted at the grocery store] or the holder of performing rights) that the cost of enforcing them outruns any promise of benefit.

Let us refine our notion of the RP into an "ideal type" if you will — a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests. (This does not include every real-world repeat player; that most common repeat player, the alcoholic derelict, enjoys few of the advantages that may accrue to the RP. His resources are too few to bargain in the short run or take heed of the long run.) An OS, on the other hand, is a unit whose claims are too large (relative to his size) or too small (relative to the cost of remedies) to be managed routinely and rationally.

We would expect an RP to play the litigation game differently from an OS. Let us consider some of his advantages:

- (1) RPs, having done it before, have advance intelligence; they are able to structure the next transaction and build a record. It is the RP who writes the form contract, requires the security deposit, and the like.
- (2) RPs develop expertise and have ready access to specialists.² They enjoy economies of scale and have low start-up costs for any case.
- (3) RPs have opportunities to develop facilitative informal relations with [people, like judges and clerks, who have institutional power].
- (4) The RP must establish and maintain credibility as a combatant. His interest in his "bargaining reputation" serves as a resource to establish "commitment" to his bargaining positions. With no bargaining reputation to maintain, the OS has more difficulty in convincingly committing himself in bargaining.³

² Ironically, RPs may enjoy access to competent paraprofessional help that is unavailable to OSs. Thus the insurance company can, by employing adjusters, obtain competent and experienced help in routine negotiations without having to resort to expensive professionally qualified personnel.

³ An offsetting advantage enjoyed by some OSs deserves mention. Since he does not anticipate continued dealings with his opponent, an OS can do his damndest without fear of reprisal next time around or on other issues. (The advantages of those who enjoy the luxury of
(continued...)

- (5) RPs can play the odds. The larger the matter at issue looms for OS, the more likely he is to adopt a minimax strategy (minimize the probability of maximum loss). Assuming that the stakes are relatively smaller for RPs, they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases.
- (6) RPs can play for rules as well as immediate gains. [I]t pays an RP to expend resources in influencing the making of the relevant rules by such methods as lobbying. (And his accumulated expertise enables him to do this persuasively.)
- (7) RPs can also play for rules in litigation itself, whereas an OS is unlikely to. That is, there is a difference in what they regard as a favorable outcome. The larger the stake for any player and the lower the probability of repeat play, the less likely that he will be concerned with the rules which govern future cases of the same kind. On the other hand, the player with small stakes in the present case and the prospect of a series of similar cases may be more interested in the state of the law.

[If we were to assume] that the institutional facilities for litigation were overloaded and settlements were prevalent, [w]e would then expect RPs to "settle" cases where they expected unfavorable rule outcomes. Since they expect to litigate again, RPs can select to adjudicate (or appeal) those cases which they regard as most likely to produce favorable rules. On the other hand, OSs should be willing to trade off the possibility of making "good law" for tangible gain. Thus, we would expect the body of "precedent" cases — that is, cases capable of influencing the outcome of future cases — to be relatively skewed toward those favorable to RPs.

- (8) RPs, by virtue of experience and expertise, are more likely to be able to discern which rules are likely to "penetrate" [i.e., really influence behavior] and which are likely to remain merely symbolic commitments. RPs may be able to concentrate their resources on rule-changes that are likely to make a tangible difference. They can trade off symbolic defeats for tangible gains.

(...continued)

singlemindedness are evidenced by some notorious examples in the legislative arena, for instance, the success of prohibitionists and of the gun lobby.) Thus there may be a bargaining advantage to the OS who (a) has resources to damage his opponent; (b) is convincingly able to threaten to use them. An OS can burn up his capital, but he has to convince the other side he is really likely to do so. Thus an image of irrationality may be a bargaining advantage. An OS may be able to sustain such an image in a way that an RP cannot.

- (9) Since penetration depends in part on the resources of the parties (knowledge, attentiveness, expert services, money), RPs are more likely to be able to invest the resources necessary to secure the penetration of rules favorable to them.

What this analysis does is to define a position of advantage [for RPs] in the configuration of contending parties. This position of advantage is one of the ways in which a legal system formally neutral as between "haves" and "have-nots" may perpetuate and augment the advantages of the former.

We may think of litigation as typically involving various combinations of OSs and RPs. We can then construct a matrix such as Figure 1 and fill in the boxes with some well-known if only approximate American examples. (We ignore for the moment that the terms OS and RP represent ends of a continuum, rather than a dichotomous pair.)

FIGURE 1

**A TAXONOMY OF LITIGATION BY STRATEGIC
CONFIGURATION OF PARTIES**

<p style="text-align: center;">I OS vs. OS</p> <p>Parent v. Parent (Custody) Spouse v. Spouse (Divorce) Family v. Family Member (Insanity Commitment) Family v. Family (Inheritance) Neighbor v. Neighbor Partner v. Partner</p>	<p style="text-align: center;">II RP vs. OS</p> <p>Prosecutor v. Accused Finance Co. v. Debtor Landlord v. Tenant I.R.S. v. Taxpayer Condemnor v. Property Owner</p>
<p style="text-align: center;">III OS vs. RP</p> <p>Welfare Client v. Agency Auto Dealer v. Manufacturer Injury Victim v. Insurance Company Tenant v. Landlord Bankrupt Consumer v. Creditors Defamed v. Publisher</p>	<p style="text-align: center;">IV RP vs. RP</p> <p>Union v. Company Movie Distributor v. Censorship Board Developer v. Suburban Municipality Purchaser v. Supplier Regulatory Agency v. Firms of Regulated Industry</p>

On the basis of our incomplete and unsystematic examples, let us conjecture a bit about the content of these boxes:

Box I: OS vs. OS

The most numerous occupants of this box are divorces and insanity hearings. Most (over 90 per cent of divorces, for example) are uncontested. A large portion of these are really pseudo-litigation, that is, a settlement is worked out between the parties and ratified in the guise of adjudication. When we get real litigation in Box I, it is often between parties who have some intimate tie with one another, fighting over some unsharable good, often with overtones of "spite" and "irrationality." Courts are resorted to where an ongoing relationship is ruptured; they have little to do with the routine patterning of activity. The law is invoked ad hoc and instrumentally by the parties. There may be a strong interest in vindication, but neither party is likely to have much interest in the long-term state of the law (of, for instance, custody or nuisance). There are few appeals, few test cases, little expenditure of resources on rule-development. Legal doctrine is likely to remain remote from everyday practice and from popular attitudes.

Box II: RP vs. OS

The great bulk of litigation is found in this box — indeed every really numerous kind except personal injury cases, insanity hearings, and divorces. The law is used for routine processing of claims by parties for whom the making of such claims is a regular business activity. Often the cases here take the form of stereotyped mass processing with little of the individuated attention of full-dress adjudication. Even greater numbers of cases are settled "informally" with settlement keyed to possible litigation outcome (discounted by risk, cost, delay).

The state of the law is of interest to the RP, though not to the OS defendants. Insofar as the law is favorable to the RP it is "followed" closely in practice (subject to discount for RP's transaction costs). Transactions are built to fit the rules by creditors, police, draft boards and other RPs. Rules favoring OSs may be less readily applicable (since OSs do not ordinarily plan the underlying transaction) or less meticulously observed in practice, since OSs [usually don't invest in making sure that rules favoring them "penetrate"].

Box III: OS vs. RP

All of these are rather infrequent types except for personal injury cases which are distinctive in that free entry to the arena is provided by the contingent fee.⁴ In auto injury claims, litigation is routinized and settlement is closely geared to possible litigation outcome. Outside the personal injury area, litigation in Box III is not routine. It usually represents the attempt of some OS to invoke outside help to create leverage on an organization with which he has been having dealings but is now at the point of divorce (for example, the discharged employee or the canceled franchisee). The OS claimant generally has little interest in the state of the law; the RP defendant, however, is greatly interested.

Box IV: RP vs. RP

Let us consider the general case first and then several special cases. We might expect that there would be little litigation in Box IV, because to the extent that two RPs play with each other repeatedly, the expectation of continued mutually beneficial interaction would give rise to informal bilateral controls. This seems borne out by studies of dealings among businessmen and in labor relations. Official agencies are invoked by unions trying to get established and by management trying to prevent them from getting established, more rarely in dealings between bargaining partners. Units with mutually beneficial relations do not adjust their differences in courts. Where they rely on third parties in dispute-resolution, it is likely to take a form (such as arbitration or a domestic tribunal) detached from official sanctions and applying [rules individually tailored to their specific situation, such as in a collective bargaining agreement, rather than broad "official" rules generally applicable throughout society].

However, there are several special cases. First, there are those RPs who seek not furtherance of tangible interests, but vindication of fundamental cultural commitments. An example would be the organizations [like the ACLU] which sponsor much church-state litigation. Where RPs are contending about value differences (who is right) rather than interest conflicts (who gets what) there is less tendency to settle and less basis for developing a private system of dispute-settlement.

⁴ Perhaps high volume litigation in Box III is particularly susceptible to transformation into relatively unproblematic administrative processing when RPs discover that it is to their advantage and can secure a shift with some gains (or at least no losses) to OSs. Cf. the shift from tort to workman's compensation in the industrial accident area and the contemporary shift to no-fault plans in the automobile injury area.

Second, government is a special kind of RP. Informal controls depend upon the ultimate sanction of withdrawal and refusal to continue beneficial relations. To the extent that withdrawal of future association is not possible in dealing with government, the scope of informal controls is correspondingly limited. The development of informal relations between regulatory agencies and regulated firms is well known. And the regulated may have sanctions other than withdrawal which they can apply; for instance, they may threaten political opposition. But the more inclusive the unit of government, the less effective the withdrawal sanction and the greater the likelihood that a party will attempt to invoke outside allies by litigation even while sustaining the ongoing relationship. This applies also to monopolies, units which share the government's relative immunity to withdrawal sanctions. RPs in monopolistic relationships will occasionally invoke formal controls to show prowess, to give credibility to threat, and to provide satisfactions for other audiences. Thus we would expect litigation by and against government to be more frequent than in other RP vs. RP situations. There is a second reason for expecting more litigation when government is a party. That is, that the notion of "gain" (policy as well as monetary) is often more contingent and problematic for governmental units than for other parties, such as businesses or organized interest groups. In some cases courts may, by proffering authoritative interpretations of public policy, redefine an agency's notion of gain. Hence government parties may be more willing to externalize decisions to the courts. And opponents may have more incentive to litigate against government in the hope of securing a shift in its goals.

A somewhat different kind of special case is present where plaintiff and defendant are both RPs but do not deal with each other repeatedly (two insurance companies, for example). The large one-time deal that falls through — [this is a] staple source of litigation.

Where there is litigation in the RP vs. RP situation, we might expect that there would be heavy expenditure on rule-development, many appeals, and rapid and elaborate development of the doctrinal law. Since the parties can invest to secure implementation of favorable rules, we would expect practice to be closely articulated to the resulting rules.

Lawyers

What happens when we introduce lawyers? Parties who have lawyers do better. Lawyers are themselves RPs. Does their presence equalize the parties, dispelling the advantage of the RP client? Or does the existence of lawyers amplify the advantage of the RP client? We might assume that RPs (tending to be larger units) who can buy legal services more steadily, in larger quantities, in bulk (by retainer) and at higher rates, would get services of better quality. They would have better information (especially where restrictions on information about legal services are present). Not only would the RP get more talent to begin with, but he would on the whole get

greater continuity, better record-keeping, more anticipatory or preventive work, more experience and specialized skill in pertinent areas, and more control over counsel.

What about the specialization of the bar? Might we not expect the existence of specialization to offset RP advantages by providing OS with a specialist who in pursuit of his own career goals would be interested in outcomes that would be advantageous to a whole class of OSs? Does the specialist become the functional equivalent of the RP? We may divide specialists into (1) those specialized by field of law (patent, divorce, etc.), (2) those specialized by the kind of party represented (for example, house counsel), and (3) those specialized by both field of law and "side" or party (personal injury plaintiff, criminal defense, labor). Divorce lawyers do not specialize in husbands or wives, nor real-estate lawyers in buyers or sellers. But labor lawyers and tax lawyers and stockholders-derivative-suit lawyers do specialize not only in the field of law but in representing one side. Such specialists may represent RPs or OSs. Figure 2 provides some well-known examples of different kinds of specialists:

FIGURE 2
A TYPOLOGY OF LEGAL SPECIALISTS

	Lawyers Specialized by Party	Lawyers Specialized by Field and Party	Lawyers Specialized by Field
RP CLIENTS	"House Counsel" or General Counsel for Bank, Insurance Co., etc. Corporation Counsel for Government Unit	Prosecutor Personal Injury Defendant Staff Counsel for NAACP Tax Labor/Management Collections	Patent
OS CLIENTS	"Poverty Lawyers" Legal Aid	Criminal Defense Personal Injury Plaintiff	Bankruptcy Divorce

Most specializations cater to the needs of particular kinds of RPs. Those specialists who service OSs have some distinctive features:

First, they tend to make up the "lower echelons" of the legal profession. (Of course the correlation is far from perfect; some lawyers who represent OSs do not have these characteristics and some representing RPs do.)

Second, specialists who service OSs tend to have problems of mobilizing a clientele (because of the low state of information among OSs) and encounter "ethical" barriers imposed by the profession which forbids solicitation, advertising, referral fees, advances to clients, and so forth.

Third, the episodic and isolated nature of the relationship with particular OS clients tends to elicit a stereotyped and uncreative brand of legal services.

Fourth, while they are themselves RPs, these specialists have problems in developing optimizing strategies. What might be good strategy for an insurance company lawyer or prosecutor — trading off some cases for gains on others — is branded as unethical when done by a criminal defense or personal injury plaintiff lawyer. It is not permissible for him to play his

series of OSs as if they constituted a single RP.

Conversely, the demands of routine and orderly handling of a whole series of OSs may constrain the lawyer from maximizing advantage for any individual OS.

The existence of a specialized bar on the OS side should overcome the gap in expertise, allow some economies of scale, provide for bargaining commitment and personal familiarity. But this is short of overcoming the fundamental strategic advantage of RPs — their capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy.

Specialized lawyers may, by virtue of their identification with parties, become lobbyists, moral entrepreneurs, proponents of reforms on the parties' behalf. But lawyers have a cross-cutting interest in preserving complexity and mystique so that client contact with this area of law is rendered problematic. Lawyers should not be expected to be proponents of reforms which are optimum from the point of view of the clients taken alone. Rather, we would expect them to seek to optimize the clients' position without diminishing that of lawyers.

Institutional Facilities

We see then that the strategic advantages of the RP may be augmented by advantages in the distribution of legal services. Both are related to the advantages conferred by the basic features of the institutional facilities for the handling of claims: passivity and overload.

These institutions are passive, first, in the sense that [they are] "reactive" — they must be mobilized by the claimant — giving advantage to the claimant with information, ability to surmount cost barriers, and skill to navigate restrictive procedural requirements. The presiding official acts as umpire, while the development of the case, collection of evidence and presentation of proof are left to the initiative and resources of the parties. Parties are treated as if they were equally endowed with economic resources, investigative opportunities and legal skills. Where, as is usually the case, they are not, the broader the delegation to the parties, the greater the advantage conferred on the wealthier, more experienced and better organized party.

In several ways overload creates pressures on claimants to settle rather than to adjudicate:

- (a) by causing delay (thereby discounting the value of recovery);
- (b) by raising costs (of keeping the case alive);

- (c) by inducing institutional incumbents to place a high value on clearing dockets, discouraging full-dress adjudication in favor of bargaining, stereotyping and routine processing;
- (d) by inducing the forum to adopt restrictive rules to discourage litigation.

Thus, overload increases the cost and risk of adjudicating and shields existing rules from challenge, diminishing opportunities for rule-change. This tends to favor the beneficiaries of existing rules.

Second, by increasing the difficulty of challenging going practice, overload also benefits those who reap advantage from the neglect (or systematic violation) of rules which favor their adversaries.

Third, overload tends to protect the possessor — the party who has the money or goods — against the claimant. For the most part, this amounts to favoring RPs over OSs, since RPs typically can structure transactions to put themselves in the possessor position.

Finally, the overload situation means that there are more commitments in the formal system than there are resources to honor them — more rights and rules "on the books" than can be vindicated or enforced. There are, then, questions of priorities in the allocation of resources. We would expect judges, police, administrators and other managers of limited institutional facilities to be responsive to the more organized, attentive and influential of their constituents. Again, these tend to be RPs.

Thus, overloaded and passive institutional facilities provide the setting in which the RP advantages in strategic position and legal services can have full play.

Strategies for Reform

Our categorization of [RP] advantage suggests a typology of strategies for "reform" (taken here to mean equalization — conferring relative advantage on those who did not enjoy it before). We then come to four types of equalizing reform:

- (1) rule-change,
- (2) improvement in institutional facilities,
- (3) improvement of legal services in quantity and quality,

- (4) improvement of strategic position of have-not parties.

[Here Professor Galanter sketches some of the possible ramifications of change on each of these four levels. Included below is only the discussion relating to the improvements of the strategic position of the "have-not parties."]

The reform envisaged here is the organization of "have-not" parties (whose position approximates OS) into coherent groups that have the ability to act in a coordinated fashion, play long-run strategies, benefit from high-grade legal services, and so forth.

Once can imagine various ways in which OSs might be aggregated into RPs. They include (1) the membership association-bargaining agent (trade unions, tenant unions); (2) the assignee-manager of fragmentary rights (performing rights associations like ASCAP); (3) the interest group-sponsor (NAACP, ACLU, environmental action groups). All of these forms involve upgrading capacities for managing claims by gathering and utilizing information, achieving continuity and persistence, employing expertise, exercising bargaining skill and so forth. These advantages are combined with enhancement of the OS party's strategic position either by aggregating claims that are too small relative to the cost of remedies (consumers, breathers of polluted air, owners of performing rights); or by reducing claims to manageable size by collective action to dispel or share unacceptable risks (tenants, migrant workers). A weaker form of organization would be (4) a clearinghouse which established a communication network among OSs. This would lower the costs of information and give RPs a stake in the effect OSs could have on their reputation. A minimal instance of this is represented by the "media ombudsman" — the "action line" type of newspaper column. Finally, there is governmentalization — utilizing the criminal law or the administrative process to make it the responsibility of a public officer to press claims that would be unmanageable in the hands of private grievants.

An organized group is not only better able to secure favorable rule changes, in courts and elsewhere, but is better able to see that good rules are implemented. It can expend resources on surveillance, monitoring, threats, or litigation that would be uneconomic for an OS. Such new units would in effect be RPs. Their encounters with opposing RPs would move into Box IV of Figure 1. Neither would enjoy the strategic advantages of RPs over OSs. One possible result, as we have noted in our discussion of the RP v. RP situation, is delegalization, that is, a movement away from the official system to a private system of dispute-settlement; another would be more intense use of the official system.

Many aspects of "public interest law" can be seen as approximations of this reform. (1) The class action is a device to raise the stakes for an RP, reducing his strategic position to that of an OS by making the stakes more than he can afford to play the odds on, while moving the

claimants into a position in which they enjoy the RP advantages without having to undergo the outlay for organizing. (2) Similarly, the "community organizing" aspect of public interest law can be seen as an effort to create a unit (tenants, consumers) which can play the RP game. (3) Such a change in strategic position creates the possibility of a test-case strategy for getting rule-change. Thus "public interest law" can be thought of as a combination of community organizing, class action and test-case strategies, along with increase in legal services.

Implications for Reform: The Role of Lawyers

To what extent might reforms of the legal system dispel [the RPs'] advantages? Our analysis suggests that change at the level of substantive rules is not likely in itself to be determinative of redistributive outcomes. Rule change is in itself likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels. Programs of equalizing reform which focus on rule-change can be readily absorbed without any change in power relations. The system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages. Indeed rule-change may become a symbolic substitute for redistribution of advantages.

[Galanter thinks that rule-changes] which relate directly to the strategic position of the parties by facilitating organization, increasing the supply of legal services (where these in turn provide a focus for articulating and organizing common interests) and increasing the costs of opponents — for instance authorization of class action suits, award of attorneys' fees and costs, award of provisional remedies — these are the most powerful fulcrum for change. The intensity of the opposition to class action legislation and autonomous reform-oriented legal services such as California Rural Legal Assistance indicates the "haves" own estimation of the relative strategic impact of the several levels.

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QUESTIONS ON GALANTER

1. Summarize what you consider to be Galanter's main points.
2. How does his analysis help you understand:
 - a. The behavior of the parties in the cases we've looked at so far?
 - b. Other litigation you've been involved in or are aware of?
3. Based on Galanter's analysis, what type of party (OS or RP) is going to be most interested in the development of **procedural** law?
4. Based on Galanter's article and his proposed solution to the problems OSs face, what would you guess are his political beliefs — is he probably liberal, conservative, radical? Do you agree with his analysis and solution? Why/why not? (I think your answer will inevitably incorporate a consideration of your own political views.)
5. Note that this article was written in 1974. How have the legal system and the delivery of legal services changed since then? Have these changes affected the relative balance of power between RPs and OSs? If so, how?
6. Cover & Fiss, from whom I adapted the Galanter article, comment on it as follows:

Do the characteristic advantages of RPs flow from their position in a structure for litigation, or from their position in a predominantly extra-adjudicatory distributive order? Are very well-to-do OSs in a very much different position from a typical RP? Or are poor RPs in a different position from the typical OS? If not, is there any significance whatsoever in the OS/RP distinction? Perhaps organizing RP units out of have-not OSs works, when it does work, not by virtue of changing the group's strategic position with respect to litigation, but rather by changing its relative power in the largely extra-adjudicatory political and economic orders.

Do you agree?