Comment

Farther Along

Marc Galanter

> *The universal spirit of Laws, in all countries is to favor the strong in opposition to the weak, and to assist those who have possessions against those who have none. This inconveniency is inevitable, and without exception.*
>
> Jean Jacques Rousseau (1762)

The "Haves" paper was written in a different age. Its core was composed in the fall of 1970 when I was a fellow at the Yale Law School's remarkably fruitful soft-money Program in Law and Modernization. This was before the ascent of law and economics, before the emergence of critical legal studies and its progeny, before the promotion of alternative dispute resolution, before the arrival of the new legal journalism and the informational opening of legal world in 1979. The Law and Society Association, founded in 1964, was largely a support group dedicated to publishing the *Law & Society Review* (then in volume 5) and had not yet held a national meeting.

The paper was conceived in an age of hopefulness that saw the triumph of civil rights movements, the proliferation of public interest law, and many experiments in access to justice. It was the high point of legal services to the poor, the time of California

This piece is a revised version of my remarks at the conference on "Do the 'Haves' Still Come Out Ahead" held at the Institute for Legal Studies at the University of Wisconsin, 1–2 May 1998. I want to express my gratitude to Joel Grossman, who had the idea of doing something for the 25th birthday of the "Haves" paper; to Stewart Macaulay, Bert Kritzer, and Peter Carstensen, who joined him in organizing the event; to Joy Roberts and the institute staff for arrangements; and to the participants who made it a most singular and stimulating occasion. I would also like to take this occasion to mention my teachers Max Rheinstein and Karl Llewellyn who, I continually discover, anticipated many of the things I have managed to say, including the term *haves,* which Llewellyn used as long ago as 1933. He was not the first; the *Oxford English Dictionary* traces the term to 1836. Finally, I would like to salute my wife, Eve, whose experience in the consumer movement was the vivid example that brought these questions home to me, literally. Address correspondence to Marc Galanter, Universtiy of Wisconsin Law School, Madison, WI 53706 (e-mail: <msgalant@facstaff.wisc.edu>).

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Rural Legal Assistance and Nader's Raiders. Women had just arrived in law schools in large numbers. Although establishment lawyers found the ferment worrisome, it was a heady time for those who ardently wished to transform law from an instrument of oppression into a tool of liberation. As a visitor at Yale Law School, I received a complimentary copy of the new issue of the *Yale Law Journal* (May 1970), which included Edgar and Jean Cahn's "Power to People or the Profession?" Stephen Wexler's "Practicing Law for Poor People," a 90-page student survey of "The New Public Interest Lawyers," and assessments of "Legal Theory and Legal Education" and "Legal Ethics and Professionalism" in the light of "the current call for a legal profession and a legal education dedicated to such values as the public interest and social justice." The world seemed to be opening up; law was being transformed. Judges like J. Skelly Wright and Frank Johnson were leading the way, prodded by dedicated lawyers who devised arguments to show judges how they might dismantle oppressive structures and find new paths to substantive justice.

I was very much a newcomer to American law. Since my graduation from law school 14 years earlier, I had been occupied with research on Indian law and with teaching general social science courses at the College of the University of Chicago.[1] When I arrived at Yale in 1970, it was first time in a dozen years that I had been around a law school.

At that point, the legal system I knew best was India. I had rediscovered U.S. law a few years earlier, after reconnecting with Lawrence Friedman and Stewart Macaulay. I shifted my teaching in this direction, assisted by collaboration with June Tapp and Mark Haller, and eagerly consumed everything "social sciency" I could find about the U.S. legal system. The bookshelf of law and society work was not empty, but was quite thin compared with today. Leading works included Harry Kalven and Hans Zeisel's *The American Jury* (1966), Jerome Skolnick's *Justice without Trial: Law Enforcement in a Democratic Society* (1966), H. Laurence Ross's *Settled Out of Court* (1970), Jerome Carlin's *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (1962) and *Legal Ethics: A Survey of the New York City Bar* (1966), and Stewart Macaulay's *Law and the Balance of Power: The Automobile Manufacturers and Their Dealers* (1966) as well as some now forgotten works like Kenneth M. Dolbeare's *Trial Courts in Urban Politics: State Court Policy Impact and Functions in a Local Political System* (1967) and Richard F. Babcock's *The Zoning Game: Municipal Practices and Policies* (1969). The "Haves" article drew on these works along with articles by Lawrence Friedman and Joel Handler. The real foundation of the "Haves" paper, however, was my work in India, par-

[1] On the carryover from the mindset of the Chicago social science curriculum to law and society, see Galanter 1992.

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ticularly my analysis of the Untouchability Offences Act, India's national civil rights statute, which I had published in 1969 (see Galanter 1969).

The "Haves" paper was a challenge to the judicial triumphalism that was the received wisdom of the progressive wing of the U.S. legal academy.[2] In effect, it attempted to show that, examined from the bottom up, the United States displayed in a subtle form many of the contradictions that rendered grand programs of reform largely symbolic in their results. These contradictions were glaringly evident in the Indian setting to an outsider with the benefit of no allegiance to the prevailing myths.[3] Writing the "Haves" was the return trip, a journey greatly facilitated by the Ross (1970) and Macaulay (1966) books, with their bottom-up focus on litigant strategies. The "Haves" begins with a familiar "man from Mars" conceit. If I wasn't a genuine Martian, I was a genuine outsider to the U.S. legal system in both my innocence of detail and my relative detachment.

The surging faith in law that the "Haves" challenged was soon attacked from a very different quarter. Starting in the mid-1970s, important sections of American elites, including its legal establishment, were overtaken by a sense of surfeit. Instead of "too little justice," it was "too much law" that was bothersome and disturbing (Galanter 1994). If this "turning away from law" (Trubek 1984:824) began with prominent judges and lawyers,[4] it was soon taken up by business and political elites, who were offended and outraged by the shrinking of the leeways and immunities that the system had always afforded them and who now found themselves

[2] This fact may account for the great difficulty in getting it published. It was rejected by a dozen or so law reviews and a couple of political science journals as well. In the mid-1980s, I met a prominent scholar who told me appreciatively how he assigned this paper to his students every year. He was disbelieving when I reminded him that as articles editor of a renowned law review, he had rejected it. Most law review rejections are quite cursory, but this one was memorable because it gave reasons: the paper was "fascinating and well written" but controverted "what we can observe" about the legal system, in which "have nots" "increasingly come to look to courts for the protection and articulation of their goals."

I was about to take over as editor of the *Law & Society Review*. Although I would have preferred that the paper appear independently of my editorship, I knew the *Review* would be a good place for it and wondered how I might include it. My friend and then dean, Richard Schwartz, solved the puzzle by suggesting that I invite a guest editor to organize a symposium into which this paper would fit. The symposium on litigation and dispute processing that resulted (*Law & Society Review*, vol. 9, nos. 1 and 2) turned out to be pathbreaking and influential in focusing research in that area.

[3] One curious sidelight: The issue of the *Law & Society Review* (vol. 9, no. 1) that included the "Haves" paper contained four articles. Two of these, by Charles Morrison and by Robert Kidder, were descriptions of fieldwork in India. A third was by Bill Felstiner, who had also worked in India and was then immersing himself in Indian village studies. In short, the whole issue could be regarded as an examination of India through American eyes and, in a more indirect and abstract way, of the U.S. legal system through eyes informed by Indian experience.

[4] Its onset can be conveniently dated from the 1976 Pound Conference organized by Chief Justice Burger (National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 1976).

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the targets of an onerous new accountability. The recoil by society's managers and authorities against the enlargement of accountability and of remedy for "have nots" is an important component of the movements for deregulation and tort reform. Although the rhetoric is often expansive, indicting all lawyers and the entire legal system, the proposals that emerge from this recoil are more patterned: the features of the system under attack are legal services for the poor, contingency fees, the "American rule" on costs (i.e., no "loser pays"), "trial lawyers," class actions, punitive damages, awards for pain and suffering, and the civil jury. We have seen a 20-year barrage of attacks on rules and devices that give some clout to "have nots" and nothing that impairs in the slightest the capacity of corporate entities to use the legal system either defensively or offensively.

The enlargement of rights and the heightened expectation of protection and remedy that is under attack is one of the master trends of law in the twentieth century. Yet another, equally important but less visible, master trend is implicated in the recoil against law—the increasing corporatization of legal life and the related legalization of organizational life described by Edelman and Suchman (1999). If I were writing the "Haves" now, I would try to go beyond the configuration of litigants to the organizational characteristics of the legal actors.

More and more of our encounters and relations are with corporate entities rather than natural persons. More and more of our common life is pursued under the auspices of "artificial persons." With them has come a pervasive legalization of life. The sheer amount of law in American society has increased enormously since 1970 and with it the total amount of legal services provided by a much larger and more proficient body of lawyers. To take just a single summary indicator, the portion of the gross domestic product consisting of legal services rose from 0.6% in 1967 to 1.6% in 1993 (U.S. Bureau of the Census).[5] As the size of the legal services "pie" has increased, a greater and greater share of that pie has been consumed by business and government organizations and a shrinking share by individuals. In 1967, individuals bought 55% of the product of the legal services industry and businesses bought 39%. With each subsequent 5-year period, the business portion has increased and the share consumed by individuals has declined. By 1992, the share bought by businesses increased (from 39%) to 51% and the share bought by individuals dropped to 40% (from 55%) (U.S. Department of the Census

[5] In the"Census of Service Industries: Legal Services," the legal services category includes all law practices that have a payroll, which means virtually all lawyers in private practice.

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1972:Table 4; 1977:Table 9; 1982:Table 30; 1987:Table 42; 1992:Table 49).[6]

The increasing predominance of organizations as users of law is displayed in Heinz and Laumann's (1982) replication of *Chicago Lawyers*. They found law practice in 1975 divided into

> lawyers who represent large organizations (corporations, labor unions, or government) and those who represent individuals. The two kinds of law practice are two hemispheres of the profession. Most lawyers reside exclusively in one hemisphere or the other and seldom, if ever, cross the equator. (Heinz & Laumann 1982:319)

They estimated that in 1975, "more than half (53%) of the total effort of Chicago's bar was devoted to the corporate client sector, and a smaller but still substantial proportion (40%) is expended on the personal client sector" (ibid., p. 42). When the study was replicated 20 years later, the researchers found that there were roughly twice as many lawyers working in Chicago (Heinz et al. 1998). In 1995, however, about 61% of the total effort of all Chicago lawyers was devoted to the corporate client sector and only 29% to the personal/small business sector (ibid., Table 3). Because the number of lawyers in Chicago had doubled, the total effort devoted to the personal sector had increased by 45%, yet the corporate sector grew by 126%. To the extent that lawyers serving the corporate sector were able to command more staff and support services with their effort, these figures understate the gap in services delivered.

The increasing presence of these organizational players—and I include governments and associations as well as corporations—means more occasions to deploy the structural advantages that are discussed in the "Haves" paper.[7] In addition to these structural advantages, artificial persons enjoy "cultural" advantages in the legal forum. U.S. courts have been very receptive to the notion that corporate actors are persons with rights of their own rather than merely instruments of natural persons. Corporations have won, in a string of contemporary Supreme Court opinions, significant Bill of Rights protections involving double jeopardy, search and seizure, and free speech protection on corporate political spending and advertising. One commentator characterized these opinions as symbolic of "the transformation

[6] For 1967, only total receipts are available from the U.S. Census. Percentages for classes of clients are taken from Sander and Williams (1989:441).

[7] When I say corporations and other artificial persons are on the whole more capable players of the law game, I am not attributing to them a preternatural competence and freedom from error. Corporations blunder just as do individuals, and the level of blundering is a reflection of the internal organizational features of corporations: their problems of coordination, the necessity of acting through agents with their own limited perspectives, and separate ambitions. I would argue, however, that on the whole, the corporate entity's incremental increase in capability as a legal actor outweighs these distractions.

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of our constitutional system from one of individual freedoms to one of organizational prerogatives" (Mayer 1990:578).

Although they enjoy an array of rights, corporations are largely immune from criminal punishment (Coffee 1981). They cannot be imprisoned, and fines are typically minimal from a corporate vantage, because they are designed with natural persons in mind. On the other hand, corporate actors are frequent and successful users of the criminal justice system to punish offenses against themselves (Hagan 1982). We tend to be forgiving of corporate folly. Rather than chastening, many of the blunders of corporations are deemed worthy of solace in the form of tax deductions (Abelson 1996).

Corporations enjoy a relative impunity to moral condemnation for single-minded pursuit of advantage that would be condemned as unworthy if done by natural persons (for example, changing residence or status to secure tax advantages, locating assets to avoid liability). Although individuals who invoke the legal system arouse suspicion and reproach (Engel 1984; Hans 1989, 1996), corporate actors are rarely condemned for aggressively using litigation in pursuit of their interests (Cheit 1991). Compare the outrage at the McDonald's coffee spill case with the sanguine response to the Texaco-Pennzoil award. A couple of years ago, I found that about 95% of a very skeptical class of Wisconsin undergraduates were outraged at the McDonald's coffee spill verdict, but after my persuasive briefing about the facts and the context, this fine dropped to no more than 92%.[8] At the same time, they were quite sanguine about the Texaco-Pennzoil award, which they saw as unexceptionable protection of business interests.

A similar cultural slant is found within the legal profession itself. Heinz and Laumann report that the prestige ranking of legal fields mirrors the structural division of the profession, "with fields serving big business clients at the top and those serving individual clients (especially clients from lower socioeconomic groups) at the bottom" (1982:127). In other words, "The higher a specialty stands in its reputation for being motivated by altruistic (as opposed to profitable) considerations, the lower it is likely to be in the prestige order" (Laumann & Heinz 1977:202).

The emergence of the notion that legal action is appropriate for corporate bodies but not for individuals is obscure.[9] As many of you know, I have been occupying my time examining lawyer

[8] On the reaction to the McDonald's case, see Galanter 1998b; Haltom and McCann 1998.

[9] This distinctive response to corporate actors surfaces in differential treatment by juries. Studies of actual juries show a disparity in patterns of awards: higher damages. Experimental studies conclude that this result is not a "deep pocket"effect (Hans 1989, 1996; MacCoun 1996). One plausible alternative hypothesis is that jurors regard corporations as equipped with greater capacity to foresee and prevent harm.

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jokes and their history.[10] From this source, I have a sense that several generations back, corporations drew more moral condemnation for their misdeeds. Jokes about lawyers, as about many things, are usually long-lived, but some do drop out of the joke corpus. One cluster of such dropouts is jokes about corporate manipulation of law. These jokes flourished beginning in the 1910s but are pretty much gone by the end of World War II. Here are three examples.

1. *The big business magnate entered the famous lawyers's office wearing a worried frown. "That law I spoke to you about is stopping a big deal of mine," he said, "and I'd like to know if you can prove it unconstitutional?" "Very easily," declared the lawyer. "All right; then get busy and familiarize yourself with the law," he was instructed. "No need to," replied the lawyer. "It's that same law you had me prove constitutional a couple of years ago."* (Esar 1945:260)[11]
2. *The eminent trust magnate was going over the books with his new system expert.*
   "Whew! Whistled the s[ystem] e[xpert] "Your legal department costs you a heap. Still, I suppose you have to maintain it?"
   "Well, I don't know. Sometimes I think it would be cheaper to obey the law." (Johnston 1922:item 1136; Ernst 1930:210)
3. *A New York Lawyer tells of a conversation that occurred in his presence between a bank president and his son who was about the leave for the West, there to engage in business on his own account.*
   "Son," said the father, "on this, the threshold of your business life, I desire to impress one thought upon your mind. Honesty, ever and always is the policy that is best."
   "Yes, father," said the young man.
   "And, by the way," added the gray beard, "I would advise you to read up a little on corporation law. It will amaze you to discover how many things you can do in a business way and still be honest." (Mosher [1922] 1932:72)[12]

These stories express not only a generic suspicion of corporations, but distinct notions about law: (1) that despite its air of solidity and majesty, law is malleable; (2) that despite its avowed link to morality, law can be used to circumvent morality; and (3) that despite their pretension to magisterial dignity, lawyers are hired guns who manipulate the law for their clients. Does the demise of these jokes indicate that people no longer believe these things? I think there is solid evidence that they continue to believe these things, perhaps even more intensely than before.

[10] On the opportunities for using jokes to examine legal culture, see Galanter 1998a.

[11] See also Edwards [1915] 1993:item 183; Mosher [1922] 1932:295; Milburn 1927:14.

[12] See also Johnson et al. 1936:116; Williams 1938:194; Esar 1945:63; Droke 1956:item 885 (identical to Mosher [1922] 1932); Humes [1975] 1985:item 197; Pendleton [1979] 1981:22.

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Although wide publics buy into much of the "litigation explosion" lore promulgated by corporate, media, and political elites, there is a widespread and abiding popular perception that the law's departure from justice is not random, but that it systematically favors the rich and powerful. That those with superior fiscal and organizational resources enjoy advantages in litigation has been appreciated by most observers (not just on the left) for a long time.[13] Although survey researchers seem to avoid asking questions about organizational potency, the responses to their questions about treatment of rich and poor reveal a sanguine public estimation that the legal system is biased in favor of the "haves." Twenty years ago, 59% of a national sample agreed that "the legal system favors the rich and powerful over everyone else" (Curran 1977:234). Ten years ago, when asked whether "the justice system in the United States mainly favors the rich" or "treats all Americans as equally as possible," 57% of respondents chose the "favored the rich" response and only 39% the "equally" response.[14] In a 1995 survey conducted by *U.S. News & World Report,* fully three-quarters of the respondents thought that the U.S. legal system affords less access to justice to "average Americans" than to rich people, and four out of five of these thought "much less."[15] In August 1998, only 33% of respondents to a national survey agreed with the statement, "Courts try to treat poor peo-

[13] As then-ex-President William Howard Taft said in 1908 to the Virginia Bar Association,

> Everything which tends to prolong or delay litigation . . . is a great advantage for that litigant who has the longer purse. The man whose all is involved in the decision of the lawsuit is much prejudiced in a fight through the courts, if his opponent is able, by reason of his means, to prolong the litigation and keep him for years out of what really belongs to him. The wealthy defendant can almost always secure a compromise or yielding of lawful rights because of the necessities of the poor plaintiff. . . .
>
> The complaints that the courts are made for the rich and not for the poor have no foundation in fact in the attitude of the courts upon the merits of any controversy which may come before them, for the judges of this country are as free from prejudice in this respect as it is possible to be. But the inevitable effect of the delays incident to the machinery now required in the settlement of controversies in judicial tribunals is to oppress and put at a disadvantage the poor litigant and give great advantage to his wealthy opponent. (Taft 1908:33, 35)

In contemporary work, Taft's notion of "rich" parties has been elaborated by what some have called "party capability theory," which analyzes the systemic advantages enjoyed by parties that have greater resources, are recurrent players, and are organizations. Abundant citations to this literature may be found in the several contributions to this special symposium issue.

[14] ABC News/*Washington Post* survey 1985 (USACWP.196.R24) (on file with author).

[15] *U.S. News & World Report,* news release, 21 Jan. 1995 (on file with author).The same survey shows the public placing responsibility for this imbalance squarely on lawyers. Respondents were asked: "Here are some things that people say about lawyers. Which one of the following comes closest to your views? Lawyers have an important role to play in holding wrongdoers accountable and helping the injured. Lawyers use the legal system to protect the powerful and get rich." Fifty-six percent affirmed the "protect the powerful and get rich" response; only 35% the "helping" response.

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ple and wealthy people alike" but 90% agreed that "wealthy people or companies often wear down their opponents by dragging out the legal proceedings" (American Bar Association 1999).[16] Half a year later in another national survey, 80% of respondents thought that the "wealthy" receive better treatment from the courts than do other people, and two-thirds agreed with the statement, "When a person sues a corporation, the courts generally favor the corporation over the person" (National Center for State Courts 1999:Figs. 23 and 24).

There seems to be no shortage of cynical knowledge. It is no secret that the "haves" come out ahead. (Were we, scholars of the legal system, the last to know?) How do we square these views with the response to the claims of Stella Liebeck (the McDonald's coffee claimant) and of Pennzoil? Maybe people believe at some level that the "haves" ought to come out ahead. They are supposed to; that is the proper shape of things. Perhaps that is why verdicts for plaintiffs in product liability cases are 12 times more likely to attract newspaper coverage than are verdicts for defendants (Galanter 1998b:744–47). David beating Goliath is still a good story, one that is both reassuring and upsetting.

Another possible explanation for the demise of the "haves" jokes is that we are so suffused with cynical knowledge that the notions in the jokes (the malleability of law, its use for immoral purposes, lawyers as whores) are no longer sufficiently surprising (or difficult to acknowledge) to support a punchline. Our doubts about the high expectations of law and lawyers against which the deviance portrayed in the jokes is measured no longer require the indirection of the joke form.

We arrive at a tangle of questions about the relationship between our growing knowledge about the legal world, public perceptions of that world, and the way people act in that world. Does our knowledge affect the working of the legal world? Does the effective functioning of legal institutions require the support of myths about the law's moral grandeur? How much cynical knowledge can the public—or scholars—absorb? How do we manage to have both myths of legality and cynical knowledge (see Ewick & Silbey 1998)? One of the curiosities of our current situation is that the more established and advantaged sections of the population, those who know more about the system and benefit most from its working, tend to be the most disconsolate and angry with it. The "haves" sponsor campaigns against the legal system, trying to persuade the public that it is "demented" and "spun out of control" (Galanter 1998b). Some people are never satisfied!

[16] This 90% response, quite uniform across demographic groups, is the closest to unanimity of any response to any item in a lengthy survey, outranking complaints about delay, expense, and leniency toward criminals.

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