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

by

Marc Galanter

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WHY THE "HAVES" COME OUT AHEAD: SPECULATIONS ON THE LIMITS OF LEGAL CHANGE*

MARC GALANTER

This essay attempts to discern some of the general features of a legal system like the American by drawing on (and rearranging) commonplaces and less than systematic gleanings from the literature. The speculative and tentative nature of the assertions here will be apparent and is acknowledged here wholesale to spare myself and the reader repeated disclaimers.

I would like to try to put forward some conjectures about the way in which the basic architecture of the legal system creates and limits the possibilities of using the system as a means of redistributive (that is, systemically equalizing) change. Our question, specifically, is, under what conditions can litigation[1] be redistributive, taking litigation in the broadest sense of the presentation of claims to be decided by courts (or court-like agencies) and the whole penumbra of threats, feints, and so forth, surrounding such presentation.

For purposes of this analysis, let us think of the legal system as comprised of these elements:

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An earlier version was issued as a working paper of the Law and Modernization Program: yet another version of the first part is contained in the proceedings (edited by Lawrence Friedman and Manfred Rehbinder) of the Conference on the Sociology of the Judicial Process, held at Bielefelt, West Germany in September, 1973.

[1]"Litigation" is used here to refer to the pressing of claims oriented to official rules, either by actually invoking official machinery or threatening to do so. Adjudication refers to full-dress individualized and formal application of rules by officials in a particular litigation.

A body of authoritative normative learning–for short, RULES

A set of institutional facilities within which the normative learning is applied to specific cases–for short, COURTS

A body of persons with specialized skill in the above–for short, LAWYERS

Persons or groups with claims they might make to the courts in reference to the rules, etc.–for short, PARTIES

Let us also make the following assumptions about the society and the legal system:

It is a society in which actors with different amounts of wealth and power are constantly in competitive or partially cooperative relationships in which they have opposing interests.

This society has a legal system in which a wide range of disputes and conflicts are settled by court-like agencies which purport to apply pre-existing general norms impartially (that is, unaffected by the identity of the parties).

The rules and the procedures of these institutions are complex: wherever possible disputing units employ specialized intermediaries in dealing with them.

The rules applied by the courts are in part worked out in the process of adjudication (courts devise interstitial rules, combine diverse rules, and apply old rules to new situations). There is a living tradition of such rule-work and a system of communication such that the outcomes in some of the adjudicated cases affect the outcome in classes of future adjudicated cases.

Resources on the institutional side are insufficient for timely full-dress adjudication in every case, so that parties are permitted or even encouraged to forego bringing cases and to "settle" cases,–that is, to bargain to a mutually acceptable outcome.

There are several levels of agencies, with "higher" agencies announcing (making, interpreting) rules and other "lower" agencies assigned the responsibility of enforcing (implementing, applying) these rules. (Although there is some overlap of function in both theory and practice, I shall treat them as distinct and refer to them as "peak" and "field level" agencies.)

Not all the rules propounded by "peak" agencies are effective at the "field level," due to imperfections in communication, shortages of resources, skill, understanding, commitment

and so forth. (Effectiveness at the field level will be referred to as "penetration."[2])

I. A TYPOLOGY OF PARTIES

Most analyses of the legal system start at the rules end and work down through institutional facilities to see what effect the rules have on the parties. I would like to reverse that procedure and look through the other end of the telescope. Let's think about the different kinds of parties and the effect these differences might have on the way the system works.

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 (one-shotters or OS) and repeat players (RP) who are engaged in many similar litigations over time.[3] 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.[4] 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 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

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[2]Cf. Friedman (1969:43) who defines penetration as "the number of actors and spheres of action that a particular rule . . . actually reaches."

[3]The discussion here focuses on litigation, but I believe an analogous analysis might be applied to the regulatory and rule-making phases of legal process. OSs and RPs may be found in regulatory and legislative as well as adjudicative settings. The point is nicely epitomized by the observation of one women's movement lobbyist:

> By coming back week after week . . . we tell them not only that we're here, but that we're here to stay. We're not here to scare anybody. . . . The most threatening thing I can say is that we'll be back. *New York Times*, Jan. 29, 1974, p. 34, col. 7-8.

For an interesting example of this distinction in the regulatory arena, see Lobenthal's (1970:20 ff.) description of the regulation of parking near a pier, contrasting the "permanent" shipping company and longshoreman interests with the OS pier visitors, showing how regulation gravitates to the accommodation of the former. This is, of course, akin to the "capture by the regulated" that attends (or afflicts) a variety of administrative agencies. See, e.g., Bernstein (1955); Edelman (1967).

[4]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.

shortweighted consumer or the holder of performing rights) that the cost of enforcing them outruns any promise of benefit. See Finklestein (1954:284-86).

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.[5] (This does not include every real-world repeat player; that most common repeat player, the alcoholic derelict, enjoys a few of the advantages that may accrue to the RP [see below]. His resources are too few to bargain in the short run or take heed of the long run.[6]) 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.[7] They enjoy economies of scale and have low start-up costs for any case.[8]

(3) RPs have opportunities to develop facilitative informal relations with institutional incumbents.[9]

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[5]Of course a Repeat Player need not engage in adjudication (or even in litigation). The term includes a party who makes or resists claims which may occupy any sector of the entire range of dispute processing mechanisms discussed in section V below. Perhaps the most successful RPs are those whose antagonists opt for resignation.

[6]On the "processing" of these parties and their limited strategic options, see Foote (1956); Spradley (1970: Chap. 6).

[7]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. See Ross (1970:25) on the importance of the insurance adjuster in automobile injury settlements.

[8]An intriguing example of an RP reaping advantage from a combination of large scale operations and knowledgeability is provided by Skolnick's (1966:174 ff.) account of professional burglars' ability to trade clearances for leniency.

[9]See, for example, Jacob's (1969:100) description of creditor colonization of small claims courts:

. . . the neutrality of the judicial process was substantially compromised by the routine

(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.[10]

> relationships which developed between representatives of frequent users of garnishment and the clerk of the court. The clerk scheduled cases so that one or two of the heavy users appeared each day. This enabled the clerk to equalize the work flow of his office. It also consolidated the cases of large creditors and made it unnecessary for them to come to court every day. It appeared that these heavy users and the clerk got to know each other quite well in the course of several months. Although I observed no other evidence of favoritism toward these creditors, it was apparent that the clerk tended to be more receptive toward the version of the conflict told by the creditor than disclosed by the debtor, simply because one was told by a man he knew and the other by a stranger.

The opportunity for regular participants to establish relations of trust and reciprocity with courts is not confined to these lowly precincts. Scigliano (1971:183-84) observes that:

> The Government's success in the Supreme Court seems to owe something . . . to the credit which the Solicitor General's Office has built up with the Court . . . in the first place, by helping the Court manage its great and growing burden of casework. . . . He holds to a trickle what could be a deluge of Government appeals. . . . In the second place by ensuring that the Government's legal work is competently done. So much so that when the Justices or their clerks want to extract the key issues in a complicated case quickly, they turn, according to common reports, to the Government's brief.
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> [Third.] The Solicitor General gains further credits . . . by his demonstrations of impartiality and independence from the executive branch.

[10]See Ross (1970:156 ff.); Schelling (1963:22 ff., 41). An offsetting advantage enjoyed by some OSs deserves mention. Since he does not anticipate continued dealings with his opponent, an OS can do his damnedest without fear of reprisal next time around or on other issues. (The advantages of those who enjoy the luxury of 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. See Ross (1970:170n.); Schelling (1963:17). An OS may be able to sustain such an image in a way that an RP cannot. But cf. Leff (1970a:18) on the role of "spite" in collections and the externalization to specialists of "irrational" vengeance.

(5) RPs can play the odds.[11] 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[12] in some cases.[13]

(6) RPs can play for rules as well as immediate gains. First, it pays an RP to expend resources in influencing the making of the relevant rules by such methods as lobbying.[14] (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. Because his stakes in the immediate outcome are high and because by definition OS is unconcerned with the outcome of similar litigation in the future, OS will have little interest in that element of the outcome which might influence the disposition of the decision-maker next time around. For the RP, on the other hand, anything that will favorably influence the outcomes of future cases is a worthwhile result. 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. Consider two parents contesting the custody of their only child, the prizefighter vs. the IRS for tax arrears, the convict facing the death penalty. On the other hand, the player with small stakes in the present case and the prospect of a series of similar cases (the IRS, the adoption agency, the prosecutor) may be more interested in the state of the law.

Thus, if we analyze the outcomes of a case into a tangible component and a

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[11]Ross (1970:214) notes that in dealing with the injury claimant, the insurance adjuster enjoys the advantage of "relative indifference to the uncertainty of litigation . . . the insurance company as a whole in defending large numbers of claims is unaffected by the uncertainty with respect to any one claim. . . . from the claimant's viewpoint [litigation] involves a gamble that may be totally lost. By taking many such gambles in litigating large numbers of cases the insurance company is able to regard the choice between the certainty and the gamble with indifference."

[12]That is, not the whole of RPs' worth, but the whole matter at issue in a single claim.

[13]Cf. the overpayment of small claims and underpayment of large claims in automobile injury cases. Franklin, Chanin and Mark (1961); Conard, *et al.* (1964). If small claim overpayment can be thought of as the product of the transaction costs of the defendants (and, as Ross [1970:207] shows, organizational pressures to close cases), the large claim underpayment represents the discount for delay and risk on the part of the claimant. (Conard, *et al.* 1964:197-99).

[14]Olson's analysis (1965:36ff. 127) suggests that their relatively small number should enhance the capacity of RPs for coordinated action to further common interests. See note 127.

rule component,[15] we may expect that in case 1, OS will attempt to maximize tangible gain. But if RP is interested in maximizing his tangible gain in a series of cases 1 . . . n, he may be willing to trade off tangible gain in any one case for rule gain (or to minimize rule loss).[16] We assumed that the institutional facilities for litigation were overloaded and settlements were prevalent. We would then expect RPs to "settle" cases where they expected unfavorable rule outcomes.[17] 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.[18] On the other hand, OSs should be willing to trade

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[15]This can be done only where institutions are simultaneously engaged in rule-making and dispute settling. The rule-making function, however, need not be avowed; all that is required is that the outcome in Case 1 influence the outcome in Case 2 in a way that RP can predict.

[16]This is not to imply that rule loss or gain is the main determinant of settlement policy. First, the RP must litigate selectively. He can't fight every case. Second, rules are themselves the subject of dispute relatively rarely. Only a small fraction of litigation involves some disagreement between the parties as to what the rules are or ought to be. Dibble (1973).

In addition, the very scale that bestows on RPs strategic advantages in settlement policy exposes them to deviations from their goals. Most RPs are organizations and operate through individual incumbents of particular roles (house counsel, claims adjuster, assistant prosecutor) who are subject to pressures which may lead them to deviate from the optimization of institutional goals. Thus Ross (1970:220-21) notes that insurance companies litigate large cases where, although settlement would be "rational" from the overall viewpoint of the company, it would create unacceptable career risk to incumbents. Newman (1966:72) makes a similar observation about prosecutors' offices. He finds that even where the probability of conviction is slim "in cases involving a serious offense which has received a good deal of publicity . . . a prosecutor may prefer to try the case and have the charge reduction or acquittal decision made by the judge or jury."

[17]The assumption here is that "settlement" does not have precedent value. Insofar as claimants or their lawyers form a community which shares such information, this factor is diminished–as it is, for example, in automobile injury litigation where, I am told, settlements have a kind of precedent value.

[18]Thus the Solicitor General sanctions appeal to the Supreme Court in one-tenth of the appealable defeats of the Government, while its opponents appeal nearly half of their appealable defeats. Scigliano points out that the Government is more selective because:

> In the first place, lower-court defeats usually mean much less to the United States than they do to other parties. In the second place, the government has, as private litigants do not, an independent source of restraint upon the desire to litigate further (1971:169).

Appellants tend to be winners in the Supreme Court–about two-thirds of cases are decided in their favor. The United States government wins about 70% of the appeals it brings.

What sets the government apart from other litigants is that it wins a much higher percentage

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 RP.[19]

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of cases in which it is the appellee (56% in 1964-66). (1971:178).

Scigliano assigns as reasons for the government's success in the Supreme Court not only the "government's agreement with the court on doctrinal position" but the "expertise of the Solicitor General's Office" and "the credit which the Solicitor General has developed with the Court." (1971:182).

More generally, as Rothstein (1974:501) observes:

> The large volume litigant is able to achieve the most favorable forum; emphasize different issues in different courts; take advantage of difference in procedure among courts at the state and federal level; drop or compromise unpromising cases without fear of heavy financial loss; stall some cases and push others; and create rule conflicts in lower courts to encourage assumption of jurisdiction in higher courts. Cf. Hazard (1965:68).

[19]Macaulay (1966:99-101) in his study of relations between the automobile manufacturers and their dealers recounts that the manufacturers:

> . . . had an interest in having the [Good Faith Act] construed to provide standards for their field men's conduct. Moreover they had resources to devote to the battle. The amount of money involved might be major to a canceled dealer, but few, if any cases involved a risk of significant liability to the manufacturers even if the dealer won. Thus the manufacturers could afford to fight as long as necessary to get favorable interpretations to set guidelines for the future. While dealers' attorneys might have to work on a contingent fee, the manufacturers already had their own large and competent legal staffs and could afford to hire trial and appellate specialists. . . . an attorney on a contingent fee can afford to invest only so much time in a particular case. Since the manufacturers were interested in guidelines for the future, they could afford to invest, for example, $40,000 worth of attorneys' time in a case they could have settled for $10,000. Moreover, there was the factor of experience. A dealer's attorney usually started without any background in arguing a case under the Good Faith Act. On the other hand, a manufacturer's legal staff became expert in arguing such a case as it faced a series of these suits. It could polish its basic brief in case after case and even influence the company's business practices–such as record keeping–so that it would be ready for any suit.
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> . . . While individual dealers decide whether or not to file a complaint, the manufacturer, as any fairly wealthy defendant facing a series of related cases, could control the kinds of cases coming before the courts in which the Good Faith Act could be construed. It could defend and bring appeals in those cases where the facts are unfavorable to the dealer, and it could settle any where the facts favor the dealer. Since individual dealers were more interested in money than establishing precedents . . . the manufacturers in this way were free to control the cases the court would see.

Of course it is not suggested that the strategic configuration of the parties is the sole or major determinant of rule-development. Rule-development is shaped by a relatively autonomous learned tradition, by the impingement of intellectual currents from outside, by the preferences and prudences of the decision-makers. But courts are passive and these factors operate only when the process is triggered by parties. The point here is merely to note the superior opportunities of the RP to trigger promising cases and prevent the triggering of unpromising ones. It is not incompatible with a course of rule-development favoring OSs (or, as indicated below, with OSs failing to get the benefit of those favorable new rules).

In stipulating that RPs can play for rules, I do not mean to imply that RPs pursue rule-gain as such. If we recall that not all rules penetrate (i.e., become effectively applied at the field level) we come to some additional advantages of RPs.

(8) RPs, by virtue of experience and expertise, are more likely to be able to discern which rules are likely to "penetrate" 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.

(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 matching resources necessary to secure the penetration of rules favorable to them.

It is not suggested that RPs are to be equated with "haves" (in terms of power, wealth and status) or OSs with "have-nots." In the American setting most RPs are larger, richer and more powerful than are most OSs, so these categories overlap, but there are obvious exceptions. RPs may be "have-nots" (alcoholic derelicts) or may act as champions of "have-nots" (as government does from time to time); OSs such as criminal defendants may be wealthy. What this analysis does is to define a position of advantage in the configuration of contending parties and indicate how those with other advantages tend to occupy this position of advantage and to have their other advantages reinforced and augmented thereby.[20] This position of advantage is one of the ways in which a legal

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> The net effect . . . was to prompt a sequence of cases favorable to the manufacturers.

[20]Of course, even within the constraints of their strategic position, parties may fare better or worse according to their several capacities to mobilize and utilize legal resources. Nonet (1969: Chap. IV) refers to this as "legal competence"–that is, the capacity for optimal use of the legal process to pursue one's interests, a capacity which includes information, access, judgment, psychic readiness and so forth.

An interesting example of the effects of such competence is provided by Rosenthal (1970: Chap. 2) who notes the superior results obtained by "active" personal injury plaintiffs. ("Active"

system formally neutral as between "haves" and "have-nots" may perpetuate and augment the advantages of the former.[21]

Digression on Litigation-mindedness

We have postulated that OSs will be relatively indifferent to the rule-outcomes of particular cases. But one might expect the absolute level of interest in rule-outcomes to vary in different populations: in some there may be widespread and intense concern with securing vindication according to official rules that overshadows interest in the tangible outcomes of disputes; in others rule outcomes may be a matter of relative indifference when compared to tangible outcomes. The level and distribution of such "rule mindedness" may affect the relative strategic position of OSs and RPs. For example, the more rule minded a population, the less we would expect an RP advantage in managing settlement policy.

But such rule mindedness or appetite for official vindication should be distinguished from both (1) readiness to resort to official remedy systems in the first place and (2) high valuation of official rules as symbolic objects. Quite apart from relative concern with rule-outcomes, we might expect populations to differ in their estimates of the propriety and gratification of litigating in the first place.[22] Such attitudes may affect the strategic situation

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clients are defined as those who express special wants to their attorneys, make follow-up demands for attention, marshall information to aid the lawyer, seek quality medical attention, seek a second legal opinion, and bargain about the fee.) He finds such "active" clients drawn disproportionately from those of higher social status (which presumably provides both the confidence and experience to conduct themselves in this active manner).

The thrust of the argument here is that the distribution of capacity to use the law beneficially cannot be attributed solely or primarily to personal characteristics of parties. The personal qualities that make up competence are themselves systematically related to social structure, both to general systems of stratification and to the degree of specialization of the parties. The emphasis here differs somewhat from that of Nonet, who makes competence central and for whom, for example, organization is one means of enhancing competence. This analysis views personal competence as operating marginally within the framework of the parties' relations to each other and to the litigation process. It is submitted that this reversal permits us to account for systematic differentials of competence and for the differences in the structure of opportunities which face various kinds of parties when personal competence is held constant.

[21]The tendency for formal equality to be compatible with domination has been noted by Weber (1954:188-91) and Ehrlich (1936:238), who noted "The more the rich and the poor are dealt with according to the same legal propositions, the more the advantage of the rich is increased."

[22]Cf. Hahm (1969); Kawashima (1963) for descriptions of cultural settings in which litigation carries high psychic costs. (For the coexistence of anti-litigation attitudes with high rates of litigation, see Kidder [1971].) For a population with a greater propensity to litigate consider the following

account (*New York Times*, Oct. 16, 1966) of contemporary Yugoslavia:

> Yugoslavs often complain of a personality characteristic in their neighbors that they call inat, which translates roughly as "spite." . . . One finds countless examples of it chronicled in the press. . . . the case of two neighbors in the village of Pomoravije who had been suing each other for 30 years over insults began when one "gave a dirty look" to the other's pet dog.
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> Last year the second district court in Belgrade was presented with 9000 suits over alleged slanders and insults. . . . . Often the cases involve tenants crowded in apartment buildings. In one building in the Street of the October Revolution tenants began 53 suits against each other. Other cases of "spite" suits . . . included "a bent fence, a nasty look." Business enterprises are not immune and one court is handling a complaint of the Zastava Company of Knic over a debt of 10 dinars (less than 1 cent).
>
> In the countryside spite also appears in such petty forms as a brother who sued his sister because she gathered fruit fallen from a tree he regarded as his own. . . .
>
> Dr. Mirko Barjakterevic, professor of ethnology at Belgrade University . . . remarked that few languages had as many expressions for and about spite as Serbian and that at every turn one hears phrases like, "I'm going to teach him a lesson," and "I don't want to be made a fool of."

Consider, too, Frake's ("Litigation in Lipay: A Study in Subanum Law" quoted in Nader [1965:21]) account of the prominence of litigation among the Lipay of the Philippines:

> A large share, if not the majority, of legal cases deal with offenses so minor that only the fertile imagination of a Subanum legal authority can magnify them into a serious threat to some person or to society in general. . . . A festivity without litigation is almost as unthinkable as one without drink. If no subject for prosecution immediately presents itself, sooner or later, as the brew relaxes the tongues and actions, someone will make a slip.
>
> In some respects a Lipay trial is more comparable to an American poker game than to out legal proceedings. It is a contest of skill, in this case of verbal skill, accompanied by social merry-making, in which the loser pays a forfeit. He pays for much the same reason we pay a poker debt: so he can play the game again. Even if he does not have the legal authority's ability to deal a verbalized "hand," he can participate as a defendant, plaintiff, kibitzer, singer, and drinker. No one is left out of the range of activities associated with litigation.
>
> Litigation nevertheless has far greater significance in Lipay than this poker-game analogy implies. For it is more than recreation. Litigation together with the rights and duties it generates, so pervades Lipay life that one could not consistently refuse to pay fines and remain a functioning member of society. Along with drinking, feasting, and ceremonializing, litigation provides patterned means of interaction linking the independent nuclear families of Lipay into a social unit, even though there are no formal group ties of comparable extent. The importance of litigation as a social activity makes understandable its prevalence among the peaceful and, by our

of the parties. For example, the greater the distaste for litigation in a population, the greater the barriers to OSs pressing or defending claims, and the greater the RP advantages, assuming that such sentiments would affect OSs, who are likely to be individuals, more than RPs, who are likely to be organizations.[23]

It cannot be assumed that the observed variations in readiness to resort to official tribunals is directly reflective of a "rights consciousness" or appetite for vindication in terms of authoritative norms.[24] Consider the assertion that the low rate of litigation in Japan flows from an undeveloped "sense of justiciable rights" with the implication that the higher rate in the United States flows from such rights-consciousness.[25] But the high rate of settlements

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standards, "law-abiding" residents of Lipay.

[23]Generally, sentiments against litigation are less likely to affect organizations precisely because the division of labor within organizations means that litigation will be handled impersonally by specialists who do not have to conduct other relations with the opposing party (as customers, etc.). See Jacob (1969:78 ff.) on the separation of collection from merchandizing tasks as one of the determinants of creditor's readiness to avail of litigation remedies. And cf. the suggestion (note 16 above) that in complex organizations resort to litigation may be a way to externalize decisions that no one within the organization wants to assume responsibility for.

[24]Cf. Zeisel, Kalven & Buchholz (1959: Chap. 20). On the possibility of explaining differences in patterns of litigation by structural rather than cultural factors, see Kidder's (1971: Chap. IX) comparison of Indian and American litigation.

[25]Henderson (1968:488) suggests that in Japan, unlike America,

> . . . popular sentiment for justiciable rights is still largely absent. And, if dispute settlement is the context from which much of the growth, social meaning and political usefulness of justiciable rights derive–and American experience suggests it is–then the traditional tendency of the Japanese to rely on sublegal conciliatory techniques becomes a key obstacle in the path toward the rule-of-law envisioned by the new constitution.

He notes that

> In both traditional and modern Japan, conciliation of one sort or another has been and still is effective in settling the vast majority of disputes arising in the gradually changing social context.

Finding that Californians resorted to litigation about 23 times as often as Japanese, he concludes (1968:453) that traditional conciliation is employed to settle most "disputes that would go to court in a country with a developed sense of justiciable right."
Henderson (1968:454) seems to imply that "in modern society [people] must comport thereselves according to reasonable and enforceable principles rather than haggling, negotiating and jockeying about to adjust personal relationships to fit an ever-shifting power balance among individuals."
Cf. Rabinowitz (1968: Part III) for a "cultural" explanation for the relative unimportance of law in

and the low rate of appeals in the United States suggest it should not be regarded as having a population with great interest in securing moral victories through official vindication.[26] Mayhew (1973:14, Table I) reports a survey in which a sample of Detroit area residents were asked how they had wanted to see their "most serious problem" settled. Only a tiny minority (0% of landlord-tenant problems; 2% of neighborhood problems; 4% of expensive purchase problems; 9% of public organization problems; 31% of discrimination problems) reported that they sought "justice" or vindication of their legal rights: "most answered that they sought resolution of their problems in some more or less expedient way."

Paradoxically, low valuation of rule-outcomes in particular cases may co-exist with high valuation of rules as symbolic objects. Edelman (1967: chap. 2) distinguishes between remote, diffuse, unorganized publics, for whom rules are a source of symbolic gratification and organized, attentive publics directly concerned with the tangible results of their application. Public appetite for symbolic gratification by the promulgation of rules does not imply a corresponding private appetite for official vindication in terms of rules in particular cases. Attentive RPs on the other hand may be more inclined to regard rules instrumentally as assets rather than as sources of symbolic gratification.

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.)

Japanese society. (Non-ego-developed personality, non-rational approach to action, extreme specificity of norms with high degree of contextual differentiation.)

[26]For an instructive example of response to a claimant who wants vindication rather than a tidy settlement, see Katz (1969:1492):

> When I reported my client's instructions not to negotiate settlement at the pretrial conference, the judge appointed an impartial psychiatrist to examine Mr. Lin.

FIGURE 1
A TAXONOMY OF LITIGATION BY STRATEGIC CONFIGURATION OF PARTIES

Defendant	*Initiator, Claimant*	
	One-Shotter	Repeat Player
One-Shotter	Parent v. Parent (Custody) Spouse v. Spouse (Divorce) Family v. Family Member (Insanity Commitment) Family v. Family (Inheritance) Neighbor v. Neighbor Partner v. Partner OS vs OS I	Prosecutor v. Accused Finance Co. v. Debtor Landlord v. Tenant I.R.S. v. Taxpayer Condemnor v. Property Owner RP vs OS II
Repeat Player	Welfare Client v. Agency Auto Dealer v. Manufacturer Injury Victim v. Insurance Company Tenant v. Landlord Bankrupt Consumer v. Creditors Defamed v. Publisher OS vs RP III	Union v. Company Movie Distributor v. Censorship Board Developer v. Suburban Municipality Purchaser v. Supplier Regulatory Agency v. Firms of Regulated Industry RP vs RP IV

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.[27] 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

[27]For descriptions of divorce litigation, see Virtue (1956); O'Gorman (1963); Marshall and May (1932).

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.[28]

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.[29] 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[30] (subject to discount for RP's

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[28]For an estimate of the discrepancy between the law and popular attitudes in a "Box I" area, see Cohen, Robson and Bates (1958).

[29]Available quantitative data on the configuration of parties to litigation will be explored in a sequel to this essay. For the moment let me just say that the speculations here fit handily with the available findings. For example, Wanner (1974), analyzing a sample of 7900 civil cases in three cities, found that business and governmental units are plaintiffs in almost six out of ten cases; and that they win more, settle less and lose less than individual plaintiffs. Individuals, on the other hand, are defendants in two thirds of all cases and they win less and lose more than do government or business units. A similar preponderance of business and governmental plaintiffs and individual defendants is reported in virtually all of the many studies of small claims courts. E.g., Pagter et al. (1964) in their study of a metropolitan California small claims court find that individuals made up just over a third of the plaintiffs and over 85% of defendants. A later survey of four small-town California small claims courts (Moulton 1969:1660) found that only 16% of plaintiffs were individuals–but over 93% of defendants.

[30]The analysis here assumes that, when called upon, judges apply rules routinely and relentlessly to RPs and OSs alike. In the event, litigation often involves some admixture of individuation, kadi-justice, fireside equities, sentimentality in favor of the "little guy." (For a comparison of two small claims courts in one of which the admixture is stronger, see Yngvesson (1965)). It also involves some offsetting impurities in favor of frequent users. See Note 9 above and Note 59 below.

transaction costs).[31] Transactions are built to fit the rules by creditors, police, draft boards and other RPs.[32] 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 are unlikely to be as ready or able as RPs to invest in insuring their penetration to the field level.[33]

Box III: OS vs. RP

All of these are rather infrequent types except for personal injury cases which are distinctive

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[31]Cf. Friedman (1967:806) on the zone of "reciprocal immunities" between, for example, landlord and tenant afforded by the cost of enforcing their rights. The foregoing suggests that these immunities may be reciprocal, but they are not necessarily symmetrical. That is, they may differ in magnitude according to the strategic position of the parties. Cf. Vaughan's (1968:210) description of the "differential dependence" between landlord and low-income tenant. He regards this as reflecting the greater immediacy and constancy of the tenant's need for housing, the landlord's "exercise of privilege in the most elemental routines of the relationship," greater knowledge, and the fact that the landlord, unlike the tenant, does not have all his eggs in one basket (i.e., he is, in our terms, an RP).

> Whereas each tenant is dependent upon one landlord, the landlord typically diffuses his dependency among many tenants. As a result, the owner can rather easily retain an independent position in each relationship.

A similar asymmetry typically attends relations between employer and employee, franchiser and franchisee, insurer and insured, etc.

[32]See note 74 below. Cf. Skolnick's (1966:212ff) description of police adjustment to the exclusionary rule.

[33]Similarly, even OSs who have procured favorable judgments may experience difficulty at the execution stage. Even where the stakes loom large for OSs, they may be too small to enlist unsubsidized professional help in implementation. A recent survey of consumers who "won" in New York City's Small Claims Court found that almost a third were unable to collect. Marshalls either flatly refused to accept such judgments for collection or "conveyed an impression that, even if they did take a small claims case, they would regard it as an annoyance and would not put much work into it." *New York Times*, Sept. 19, 1971. A subsequent survey (Community Service Society 1974:16) of 195 successful individual plaintiffs in two Manhattan Small Claims Courts revealed that "only 50% of persons who received *judgments* were able to collect these through their own efforts or through use of sheriffs and marshalls." (Plaintiffs who received settlements were more successful, collecting in 82% of the cases.) Cf. the finding of Hollingsworth, et al (1973: Table 16) that of winning small claims plaintiffs in Hamilton County only 31% of individiuals and unrepresented proprietorships collected half or more of the judgment amount; the corresponding figure for corporations and represented proprietorships was 55%.

in that free entry to the arena is provided by the contingent fee.[34] 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 cancelled franchisee).[35] 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,[36] the expectation of continued mutually beneficial interaction would give rise to informal bilateral controls.[37] This seems borne out by studies of dealings among businessmen[38] and in labor

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[34]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 (Friedman and Ladinsky [1967]) and the contemporary shift to no-fault plans in the automobile injury area.

[35]Summers (1960:252) reports that

> more than ¾ of the reported cases in which individuals have sought legal protection of their rights under a collective agreement have arisen out of disciplinary discharge.

The association of litigation with "divorce" is clear in Macaulay (1963, 1969) and other discussions of commercial dealings. (Bonn 1972b:573 ff.). Consumer bankruptcy, another of the more numerous species of litigation in Box III, might be thought of as representing the attempt of the OS to effectuate a "divorce."

[36]For example, Babcock (1969:52-54) observes that what gives the suburb its greatest leverage on any one issue is the builder's need to have repeated contact with the regulatory powers of the suburb on various issues.

[37]The anticipated beneficial relations need not be with the identical party but may be with other parties with whom that party is in communication. RPs are more likely to participate in a network of communication which cheaply and rapidly disseminates information about the behavior of others in regard to claims and to have an interest and capacity for acquiring and storing that information. In this way RPs can cheaply and effectively affect the business reputation of adversaries and thus their future relations with relevant others. Leff (1970a:26 ff.); Macaulay (1963:64).

[38]. . . why is contract doctrine not central to business exchanges?
Briefly put, private, between-the-parties sanctions usually exist, work and do not involve the costs of using contract law either in litigation or as a ploy in negotiations.

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.[39] 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 domestic rather than official rules.

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 which sponsor much church-state litigation.[40] 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.[41]

Second, government is a special kind of RP. Informal controls depend upon the ultimate sanction of withdrawal and refusal to continue beneficial relations.[42] To the extent that withdrawal

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> . . . most importantly, there are relatively few one-shot, but significant, deals. A businessman usually cares about his reputation. He wants to do business again with the man he is dealing with and with others. Friedman and Macaulay (1967:805).

[39]Aspin (1966:2) reports that 70 to 75% of all complaints to the NLRB about the unfair labor practices of companies are under the single section [8(a)(3)] which makes it an unfair labor practice for employers to interfere with union organizing. These make up about half of *all* complaints of unfair labor practices.

[40]In his description of the organizational participants in church-state litigation, Morgan (1968: chap. 2) points out the difference in approach between value-committed "separationist purists" and their interest-committed "public schoolmen" allies. The latter tend to visualize the game as non-zero-sum and can conceive of advantages in alliances with their parochial-school adversaries. (1968:58n).

[41]Cf. Aubert's (1963:27 ff.) distinction between conflict careers based upon conflicts of interest and those arising from conflicts of value.

[42]This analysis is illuminated by Hirschman's distinction between two modes of remedial action by customers or members disappointed with the performance of organizations: (1) exit (that is, withdrawal of custom or membership); and (2) voice ("attempts at changing the practices and policies and outputs of the firm from which one buys or the organizations to which one belongs") [1970:30]. Hirschman attempts to discern the conditions under which each will be employed and will be effective in restoring performance. He suggests that the role of voice increases as the opportunities for exit decline, but that the possibility of exit increases the effectiveness of the voice mechanism. (1970:34, 83). Our analysis suggests that it is useful to distinguish those instances of voice which are "internal," that is, confined to expression to the other party, and those which are external, that is, seek the intervention of third parties. This corresponds roughly to the distinction between two-party and three-party dispute settlement. We might then restate the assertion to suggest

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.[43] RPs in monopolistic relationships will occasionally invoke formal controls to show prowess, to give credibility to threats, 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 profferring 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). In the government/monopoly case, the parties were so inextricably bound together that the force of informal controls was limited; here they are not sufficiently bound to each other to give informal controls their bite; there is nothing to withdraw from! The large one-time deal that falls through, the marginal enterprise–these are staple sources 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.

On the basis of these preliminary guesses, we can sketch a general profile of litigation and the factors associated with it. The great bulk of litigation is found in Box II; much less in Box III. Most of the litigation in these Boxes is mass routine processing of disputes between parties who are

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that internal voice is effective where there is a plausible threat of sanction (including exit and external voice).

[43]The potency of the monopolistic character of ties in promoting resort to third parties is suggested by the estimate that in the Soviet Union approximately one million contract disputes were arbitrated annually in the early 1960's. (Loeber, 1965:128, 133). Cf. Scott's (1965:63-64) suggestion that restricted mobility (defined in terms of job change) is associated with the presence of formal appeal systems in business organizations.

strangers (not in mutually beneficial continuing relations) or divorced[44]–and between whom there is a disparity in size. One party is a bureaucratically organized "professional" (in the sense of doing it for a living) who enjoys strategic advantages. Informal controls between the parties are tenuous or ineffective; their relationship is likely to be established and defined by official rules; in litigation, these rules are discounted by transaction costs and manipulated selectively to the advantage of the parties. On the other hand, in Boxes I and IV, we have more infrequent but more individualized litigation between parties of the same general magnitude, among whom there are or were continuing multi-stranded relationships with attendant informal controls. Litigation appears when the relationship loses its future value; when its "monopolistic" character deprives informal controls of sufficient leverage and the parties invoke outside allies to modify it; and when the parties seek to vindicate conflicting values.

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[44]That is, the relationship may never have existed, it may have "failed" in that it is no longer mutually beneficial, or the parties may be "divorced." On the incompatibility of litigation with ongoing relations between parties, consider the case of the lawyer employed by a brokerage house who brought suit against his employer in order to challenge New York State's law requiring fingerprinting of employees in the securities industry.

> They told me, "Don, you've done a serious thing: you've sued your employer." And then they handed me [severance pay] checks. They knew I had to sue them. Without making employer a defendant, it's absolutely impossible to get a determination in court. It was not a matter of my suing them for being bad guys or anything like that and they knew it.
>
> . . . the biggest stumbling block is that I'm virtually blacklisted on Wall Street. . . .

His application for unemployment compensation was rejected on the ground that he had quit his employment without good cause, having provoked his dismissal by refusing to be fingerprinted. *New York Times*, March 2, 1970. It appears that, in the American setting at any rate, litigation is not only incompatible with the maintainance of continuing relationships, but with their subsequent restoration. On the rarity of successful reinstatement of employees ordered reinstated by the NLRB, see Aspin (1966). Bonn (1972:262) finds this pattern even among users of arbitration, which is supposedly less lethal to continuing relations than litigation. He found that in 78 cases of arbitration in textiles, "business relations were resumed in only fourteen." Cf. Golding's (1969:90) observation that jural forms of dispute-settlement are most appropriate where parties are not involved in a continuing relationship. But the association of litigation with strangers is not invariate. See the Yugoslav and Lipay examples in note 22 above. Cf. the Indian pattern described by Kidder (1971) and by Morrison (1974:39) who recounts that his North Indian villagers "commented scornfully that GR [a chronic litigant] would even take a complete stranger to law–proof that his energies were misdirected."

II. LAWYERS

What happens when we introduce lawyers? Parties who have lawyers do better.[45] 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).[46] 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.

One might expect that just how much the legal services factor would accentuate the RP advantage would be related to the way in which the profession was organized. The more members of the profession were identified with their clients (i.e., the less they were held aloof from clients by their loyalty to courts or an autonomous guild) the more the imbalance would be accentuated.[47] The more close and enduring the lawyer-client relationship, the more the primary loyalty of lawyers is to

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[45]For example, Ross (1970:193) finds that automobile injury claimants represented by attorneys recover more frequently than unrepresented claimants; that among those who recover, represented claimants recover significantly more than do unrepresented claimants with comparable cases. Claimants represented by firms recovered considerably more than claimants represented by solo practitioners; those represented by negligence specialists recovered more than those represented by firm attorneys. Similarly, Mosier and Soble (1973:35 ff) find that represented tenants fare better in eviction cases than do unrepresented ones. The advantages of having a lawyer in criminal cases are well-known. See, for instance, Nagel (1973).

[46]As it happens, the information barriers vary in their restrictiveness. The American Bar Association's Code of Professional Responsibility

> permits advertising directed at corporations, banks, insurance companies, and those who work in the upper echelons of such institutions . . . [while proscribing] most forms of dissemination of information which would reach people of "moderate means" and apprise them of their legal rights and how they can find competent and affordable legal assistants to vindicate those rights. (Burnley 1973:77).

On the disparate effect of these restrictions, cf. note 51.

[47]The tension between the lawyer's loyalties to the legal system and to his client has been celebrated by Parsons (1954:381 ff.) and Horsky (1952: chap. 3). But note how this same deflection of loyalty from the client is deplored by Blumberg (1967) and others. The difference in evaluation seems to depend on whether the opposing pull is to the autonomous legal tradition, as Parsons (1954) and Horsky (1952) have it, or to the maintenance of mutually beneficial interaction with a particular local institution whose workings embody some admixture of the "higher law" (see note 82 below) with parochial understandings, institutional maintenance needs, etc.

clients rather than to courts or guild, the more telling the advantages of accumulated expertise and guidance in overall strategy.[48]

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

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[48]Although this is not the place to elaborate it, let me sketch the model that underlies this assertion. (For a somewhat fuller account, see International Legal Center, 1973:4ff.). Let us visualize a series of scales along which legal professions might be ranged:

		A	*B*
1.	Basis of Recruitment	Restricted _____	Wide
2.	Barriers to Entry	High _____	Low
3.	Division of Labor		
	a. Coordination	Low _____	High
	b. Specialization	Low _____	High
4.	Range of Services and Functions	Narrow _____	Wide
5.	Enduring Relationships to Client	Low _____	High
6.	Range of Institutional Settings	Narrow _____	Wide
7.	Identification with Clients	Low _____	High
8.	Identification with Authorities	High _____	Low
9.	Guild Control	Tight _____	Loose
10.	Ideology	Legalistic _____	Problem-solving

It is suggested that the characteristics at the A and B ends of the scale tend to go together, so that we can think of the A and B clusters as means of describing types of bodies of legal professionals, for example, the American legal profession (Hurst 1950; Horsky 1952: Pt. V.; Carlin 1962, 1966; Handler 1967; Smigel 1969) would be a B type, compared to British barristers (Abel-Smith and Stevens 1967) and French *avocats* (Le Paulle 1950); Indian lawyers (Galanter 1968-69), an intermediate case. It is suggested that some characteristics of Type B professions tend to accentuate or amplify the strategic advantages of RP parties. Consideration of, for instance, the British bar, should warn us against concluding that Type B professions are necessarily more conservative in function than Type A. See text, at footnote 145.

husbands or wives,[49] 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

Client \ Lawyer	Specialized by Party	Specialized by Field and Party	Specialized by Field
RP	"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	"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. Compared to the lawyers who provide services to RPs, lawyers in these specialties tend to be drawn from lower socio-economic origins, to have attended local, proprietary or part-time law schools, to practice alone rather than in large firms, and to possess low prestige within the profession.[50] (Of course the correlation is far from perfect; some lawyers who represent OSs do not have these characteristics and some representing RPs do. However, on the whole the difference in professional standing is massive).

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[49]Which is not to deny the possibility that such "side" specialization might emerge. One can imagine "women's liberation" divorce lawyers–and anti-alimony ones–devoted to rule-development that would favor one set of OSs.

[50]On stratification within the American legal profession see Ladinsky (1963); Lortie (1959); Carlin (1966). But cf. Handler (1967).

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.[51]

Third, the episodic and isolated nature of the relationship with particular OS clients tends to elicit a stereotyped and uncreative brand of legal services. Carlin and Howard (1965:385) observe that:

> The quality of service rendered poorer clients is . . . affected by the non-repeating character of the matters they typically bring to lawyers (such as divorce, criminal, personal injury): this combined with the small fees encourages a mass processing of cases. As a result, only a limited amount of time and interest is usually expended on any one case–there is little or no incentive to treat it except as an isolated piece of legal business. Moreover, there is ordinarily no desire to go much beyond the case as the client presents it, and such cases are only accepted when there is a clear-cut cause of action; i.e., when they fit into convenient legal categories and promise a fairly certain return.

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.[52] It is not permissible for him to play his series of OSs as if they constituted a single RP.[53]

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. Rosenthal (1970:172) shows

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[51]See Reichstein (1965); Northwestern University Law Review (1953). On the differential impact of the "Canons of Ethics" on large law firms and those lawyers who represent OSs, see Carlin (1966); Schuchman (1968); Christianson (1970:136).

[52]". . . the canons of ethics would prevent an attorney for a [one-shotter] . . . from trying to influence his client to drop a case that would create a bad precedent for other clients with similar cases. On the other hand, the canons of ethics do not prevent an attorney from advising a corporation that some of its cases should not be pursued to prevent setting a bad precedent for its other cases." (Rothstein 1974:502).

[53]Ross (1970:82) observes the possibility of conflict between client and

> the negligence specialist, who negotiates on a repeated basis with the same insurance companies. [H]is goal of maximizing the return from any given case may conflict with the goal of maximizing returns from the total series of cases he represents.

For a catalog of other potential conflicts in the relationship between specialists and OS clients, see O'Connell (1971:46-47).

that "for all but the largest [personal injury] claims an attorney loses money by thoroughly preparing a case and not settling it early."

For the lawyer who services OSs, with his transient clientele, his permanent "client" is the forum, the opposite party, or the intermediary who supplies clients. Consider, for example, the dependence of the criminal defense lawyer on maintaining cooperative relations with the various members of the "criminal court community."[54] Similarly, Carlin notes that among metropolitan individual practitioners whose clientele consists of OSs, there is a deformation of loyalty toward the intermediary.

> In the case of those lawyers specializing in personal injury, local tax, collections, criminal, and to some extent divorce work, the relationship with the client . . . is generally mediated by a broker or business supplier who may be either another lawyer or a layman. In these fields of practice the lawyer is principally concerned with pleasing the broker or winning his approval, more so than he is with satisfying the individual client. The source of business generally counts for more than the client, especially where the client is unlikely to return or to send in other clients. The client is then expendable: he can be exploited to the full. Under these conditions, when a lawyer receives a client . . . he has not so much gained a client as a piece of business, and his attitude is often that of handling a particular piece of merchandise or of developing a volume of a certain kind of merchandise.[55]

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 advantages of RPs–their capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy.

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[54]Blumberg (1967:47) observes

> [defense] counsel, whether privately retained or of the legal aid variety, have close and continuing relations with the prosecuting office and the court itself. Indeed, lines of communication, influence and contact with those offices, as well as with the other subsidiary divisions of the office of the clerk and the probation division and with the press are essential to the practice of criminal law. Accused persons come and go in the court system, but the structure and its personnel remain to carry on their respective careers, occupational, and organizational enterprises. . . . The accused's lawyer has far greater professional, economic, intellectual, and other ties to the various elements of the court system than to his own client.

Cf. Skolnick (1967); Battle (1971). On the interdependence of prosecutor and public defender, see Sudnow (1965:265, 273).

[55]Carlin (1962:161-62). On the "stranger" relationship between accident victim client and lawyer, see Sudnow (1965:265, 273).

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.[56] 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. Therefore, specialized lawyers have an interest in a framework which keeps recovery (or whatever) problematic at the same time that they favor changes which improve their clients' position within this framework. (Consider the lobbying efforts of personal injury plaintiffs and defense lawyers.) Considerations of interest are likely to be fused with ideological commitments: the lawyers' preference for complex and finely-tuned bodies of rules, for adversary proceedings, for individualized case-by-case decision-making.[57] Just as the culture of the client population affects strategic position, so does the professional culture of the lawyers.

III. 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 Black refers to as "reactive"–they must be mobilized by the claimant–giving advantage to the claimant with information, ability to surmount

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[56]Cf. Consumer Council (1970:19). In connection with the lawyer's attachment to (or at least appreciation of) the problematic character of the law, consider the following legend, carried at the end of a public service column presented by the Illinois State Bar Association and run in a neighborhood newspaper:

> No person should ever apply or interpret any law without consulting his attorney. Even a slight difference in the facts may change the result under the law. (*Woodlawn Booster*, July 31, 1963).

Where claims become insufficiently problematic they may drop out of the legal sphere entirely (such as social security). In high-volume and repetitive tasks which admit of economies of scale and can be rendered relatively unproblematic, lawyers may be replaced by entrepreneurs–title companies, bank trust departments–serving OSs on a mass basis (or even serving RPs, as do collection agencies). Cf. Johnstone and Hopson (1967:158 ff).

[57]Stumpf, *et al.* (1971:60) suggest that professional responses to OEO legal services programs require explanation on ideological ("the highly individualized, case-by-case approach . . . as a prime article of faith") as well as pecuniary grounds. On the components of legalism as an ideology, see Shklar (1964:1-19). Of course this professional culture is not uniform but contains various subcultures. Brill's (1973) observations of OEO poverty lawyers suggest that crucial aspects of professional ideology (e.g., the emphasis on courts, rules and adjudication) are equally pronounced among lawyers who seek far-reaching change through the law.

cost barriers, and skill to navigate restrictive procedural requirements.[58] They are passive in a further sense that once in the door the burden is on each party to proceed with his case.[59] 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.[60] Parties are treated as if they were equally

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[58]Black (1973:141) observes the departures from the passive or "reactive" stance of legal institutions tend to be skewed along class lines:

> . . . governments disproportionately adopt proactive systems of legal mobilization when a social control problem primarily involves the bottom of the social-class system. . . . . The common forms of legal misconduct in which upper status citizens indulge, such as breach of contract and warranty, civil negligence, and various forms of trust violation and corruption, are usually left to the gentler hand of a reactive mobilization process.

[59]The passivity of courts may be uneven. Cf. Mosier and Soble's (1973:63) description of Detroit landlord-tenant court:

> If a tenant was unrepresented, the judge ordinarily did not question the landlord regarding his claims, nor did the judge explain defenses to the tenant. The most common explanation given a tenant was that the law permitted him only ten days to move and thus the judge's hands were tied. In addition, judges often asked tenants for receipts for rent paid and corroboration of landlord-breach claims. In contrast, the court supplied complaint and notice forms to the landlords and clerks at the court helped them to fill out the forms if necessary. In addition, the in-court observers noticed during the beginning of the study that the court would not dismiss a nonappearing landlord's case until completion of the docket call, which took approximately forty-five minutes (which the tenant sat and waited), but extended no similar courtesy to tardy tenants. However, once the surprised observers questioned the court personnel about the practice, it was changed; thereafter, tenants had thirty minutes after the call within which to appear.
>
> The disparities in help given to landlords and tenants and the treatment of the late landlords and tenants are an indication of the perhaps inevitable bias of the court toward the landlord. Most of the judges and court personnel have a middle-class background and they have become familiar with many landlords and attorneys appearing regularly in the court. The court had years of experience as a vehicle for rent collection and eviction where no defenses could be raised. The judges and clerks repeatedly hear about tenants who fail to pay rent or did damage to the premises, while they probably never have the opportunity to observe the actual condition of the housing that the landlords are renting.

[60]Homberger (1970:31-31). For a description of more "active" courts see Kaplan, *et al.* (1958:1221 ff); Homberger (1970). Our description is of courts of the relatively passive variety typical of "common law" systems, but should not be taken as implying that "civil law" systems are ordinarily or typically different in practice. Cf. Merryman (1969:124). The far end of a scale of

endowed with economic resources, investigative opportunities and legal skills (Cf. Homberger [1971:641]). Where, as is usually the case, they are not, the broader the delegation to the parties, the greater the advantage conferred on the wealthier,[61] more experienced and better organized party.[62]

The advantages conferred by institutional passivity are accentuated by the chronic overload which typically characterizes these institutions.[63] Typically there are far more claims than there are institutional resources for full dress adjudication of each. 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;[64]

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institutional "activism" might be represented by institutions like the Soviet Procuracy (Berman 1963:238 ff). And, of course, even among common law courts passivity is relative and variable. Courts vary in the extent to which they exercise initiative for the purpose of developing a branch of the law (the "Lord Mansfield Syndrome"–see Lowry 1973) or actively protecting some class of vulnerable parties.

[61]As Rothstein (1974:506) sums it up, counsel fees and

> [c]ourt costs, witness fees (especially for experts), investigation costs, court reporters fees, discovery costs, transcript costs, and the cost of any bond needed to secure opponents' damages, all make litigation an expensive task, thereby giving the advantage to those with large financial resources.

[62]A further set of institutional limitations should be mentioned here: limitations on the scope of matters that courts hear; the kind of relief that they can give; and on their capacity for systematic enforcement are discussed below. (pp. 136 ff).

[63]On the limited supply of institutional facilities, consider Saari's (1967) estimate that in the early 1960's total governmental expenditures for civil and criminal justice in the United States ran about four to five billion dollars annually. (Of this, about 60% went for police and prosecution, about 20% for corrections, and 20% for courts.) This amounted to about 2.5% of direct expenditures of American governments. In 1965-66 expenditures for the judiciary represented 1/17 of 1% of the total federal budget; 6/10 of 1% of state budgets; something less than 6% of county and 3% of city budgets.

[64]The substitution of bargaining for adjudication need not be regarded as reflecting institutional deficiency. Even in criminal cases it may seem providential:

(d) by inducing the forum to adopt restrictive rules to discourage litigation.[65]

Thus, overload increases the cost and risk of adjudicating and shields existing rules from challenge, diminishing opportunities for rule-change.[66] 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.[67] For the most part, this amounts to favoring RPs over OSs, since RPs typically can structure transactions to put themselves in the possessor position.[68]

> It is elementary, historically and statistically, that systems of courts–the number of judges, prosecutors and courtrooms–have been based on the premise that approximately 90 percent of all [criminal] defendants will plead guilty, leaving only 10 percent, more or less, to be tried. . . . . The consequences of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. . . . in Washington, D.C. . . . the guilty plea rate dropped to 65 percent . . . [T]welve judges out of fifteen in active service were assigned to the criminal calendar and could barely keep up. . . . [T]o have this occur in the National Capital, which ought to be a model for the nation and show place for the world, was little short of disaster (Burger, 1970:931).

[65]On institutional coping with overload, see Friedman (1967:798 ff).

[66]Cf. Foote (1956:645) on the rarity of appeal in vagrancy cases. Powell and Rohan (1968:177-78) observe that the ordinary week-to-week or month-to-month rental agreement

> is tremendously important sociologically in that occupancy thereunder conditions the home life of a very substantial fraction of the population. On the other hand, the financial smallness of the involved rights results in a great dearth of reported decisions from the courts concerning them. Their legal consequences are chiefly fixed in the 'over the counter' mass handling of 'landlord and tenant' cases of the local courts. So this type of estate, judged sociologically is of great importance, but judged on the basis of its jurisprudential content is almost negligible.

[67]In the criminal process, too, the "possessor" (i.e., of defendant's mobility) enjoys great advantages. On the higher likelihood of conviction and of severe sentencing of those detained before trial, see Rankin (1964) and Wald (1964). Engle (1971) finds that among those convicted pre-trial status explains more of the variation in sentencing severity than any of 23 other factors tested.

[68]See Leff (1970a:22) on the tendency of RP creditors to put themselves in the possessor position, shifting the costs of "due process" to the OS debtor. There are, however, instances where

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.[69] 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.[70]

IV. RULES[71]

We assume here that rules tend to favor older, culturally dominant interests.[72] This is not

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OSs may use overload to advantage: for instance, the accused out on bail may benefit from delay. Cf. Engle's (1971) observation of the "weakening effect of time on the prosecutor's position." Rioters or rent-strikers may threaten to demand jury trials, but the effectiveness of this tactic depends on a degree of coordination that effectuates a change of scale.

[69]For example, the court studied by Zeisel, *et al.* (1959:7) "had chosen to concentrate all of its delay in the personal injury jury calendar and to keep its other law calendars up to date, granting blanket preferment to all commercial cases . . . and to all non-jury personal injury cases." (Recovery in the latter was about 20% lower than jury awards in comparable cases [1959:119].)

[70]This analysis has not made separate mention of corruption, that is, the sale by incumbents of system outcomes divergent from those prescribed by authoritative norms. Insofar as such activities are analytically distinguishable from favorable priorities and "benign neglect" it should be noted that, since such enterprise on any considerable scale is confined to the organized, professional and wealthy, this provides yet another layer of advantage to some classes of "haves."

[71]I would like to emphasize that the term "rules" is used here as shorthand for all the authoritative normative learning. It is unnecessary for the purpose at hand to take a position on the question of whether all of that learning consists of rules or whether principles, policies, values, and standards are best understood as fundamentally different. It is enough for our purposes to note that this learning is sufficiently complex that the result in many cases is problematic and unknowable in advance.

[72]Even assuming that every instance of formulating rules represented a "fair" compromise among "have" and "have-not" interests, we should expect the stock of rules existing at any given time to be skewed toward those which favor "haves." The argument (cf. Kennedy 1973:384-5) goes like this: At the time of its formulation, each rule represents a current consensus about a just outcome as among competing interests. Over time the consensus changes, so that many rules are out of line with current understandings of fairness. Rule-makers (legislative, administrative and judicial) can attend to only some of all the possible readjustments. Which ones they will attend to depends in large

meant to imply that the rules are explicitly designed to favor these interests,[73] but rather that those groups which have become dominant have successfully articulated their operations to pre-existing rules.[74] To the extent that rules are evenhanded or favor the "have-nots," the limited resources for their implementation will be allocated. I have argued, so as to give greater effect to those rules which protect and promote the tangible interests of organized and influential groups. Furthermore, the requirements of due process, with their barriers or protections against precipitate action, naturally tend to protect the possessor or holder against the claimant.[75] Finally, the rules are sufficiently

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measure on the initiative of those affected in raising the issue and mobilizing support to obtain a declaration of the more favorable current consensus. "Haves" (wealthy, professional, repeat players) enjoy a superior ability to elicit such declarations (cf. p. 100 ff); they are thus likely to enjoy the timely benefits of shifts of social consensus in their favor. OSs, on the other hand, will often find it difficult to secure timely changes in the rules to conform to a new consensus more favorable to them. Thus RPs will be the beneficiaries of the time-lag between crystallized rules and current consensus. Thus, even with the most favorable assumptions about rule-making itself, the mere fact that rules accrue through time, and that it requires expenditure of resources to overcome the lag of rules behind current consensus, provides RPs with a relatively more favorable set of rules than the current consensus would provide.

[73]This is sometimes the case: consider, for instance, the rules of landlord-tenant. Ohlhausen (1936) suggests that rules as to the availability of provisional remedies display a pronounced pattern of favoring claims of types likely to be brought by the "well to do" over claims of types brought by the impecunious.

[74]Thus the modern credit seller-lender team have built their operation upon the destruction of the purchaser's defenses by the holder in due course doctrine originally developed for the entirely different purpose of insuring the circulation of commercial paper. See Rosenthal (1971:377ff). Shuchman (1971:761-62) points out how in consumer bankruptcies:

> Consumer creditors have adjusted their practices so that sufficient proof will be conveniently available for most consumer loans to be excepted from discharge under section 17a(2). They have made wide use of renewals, resetting, and new loans to pay off old loans, with the result that the consumers' entire debt will often be nondischargeable. Section 17a(2) constitutes, in effect, an enabling act–a skeletal outline that the consumer creditor can fill in to create nondischargeable debts–that operated to defeat the consumer's right to the benefits of a discharge in bankruptcy.

Similarly, Shuchman (1969) shows how RP auto dealers and financial institutions have developed patterns for resale of repossessed automobiles that meet statutory resale requirements but which permit subsequent profitable second sale and in addition produce substantial deficiency claims. More generally, recall the often-noted adaptive power of regulated industry which manage, in Hamilton's (1957: chap. 2) terms, to convert "regulations into liberties" and "controls into sanctions."

[75]For some examples of possessor-defendants exploiting the full panoply of procedural devices to raise the cost to claimants, see Schrag (1969); Macaulay (1966:98). Large (1972) shows how the

complex[76] and problematic (or capable of being problematic if sufficient resources are expended to make them so) that differences in the quantity and quality of legal services will affect capacity to derive advantages from the rules.[77]

Thus, we arrive at Figure 3 which summarizes why the "haves" tend to come out ahead. It points to layers of advantages enjoyed by different (but largely overlapping) classes of "haves"–advantages which interlock, reinforcing and shielding one another.

FIGURE 3
WHY THE "HAVES" TEND TO COME OUT AHEAD

Element	Advantages	Enjoyed by
PARTIES	– ability to structure transaction – specialized expertise, economies of scale – long-term strategy – ability to play for rules – bargaining credibility – ability to invest in penetration	– repeat players large, professional*)
LEGAL SERVICES	– skill, specialization, continuity	– organized professional* wealthy

doctrines of standing, jurisdiction and other procedural hurdles, effectively obstruct application of favorable substantive law in environmental litigation. Facing these rules in serial array, the environmentalists win many skirmishes but few battles.

[76]Cf. the observation of Tullock (1971:48-49) that complexity and detail–the "maze" quality of legal rules–in itself confers advantages on "people of above average intelligence, with literary and scholarly interests"–and by extension on those who can develop expertise or employ professional assistance.

[77]For an example of the potency of a combination of complexity and expertise in frustrating recovery, see Laufer (1970). Of course, the advantage may derive not from the outcome, but from the complexity, expense and uncertainty of the litigation process itself. Borkin (1950) shows how, in a setting of economic competition among units of disparate size and resources, patent litigation may be used as a tactic of economic struggle. Cf. Hamilton (1957:75-76).

INSTITUTIONAL FACILITIES	– passivity – cost and delay barriers – favorable priorities	– wealthy, experienced, organized – holders, possessors – beneficiaries of existing rules – organized, attentive
RULES	– favorable rules – due process barriers	– older, culturally dominant – holders, possessors

* in the simple sense of "doing it for a living"

V. ALTERNATIVES TO THE OFFICIAL SYSTEM

We have been discussing resort to the official system to put forward (or defend against) claims. Actually, resort to this system by claimants (or initiators) is one of several alternatives. Our analysis should consider the relationship of the characteristics of the total official litigation system to its use *vis-a-vis* the alternatives. These include at least the following:

(1) Inaction–"lumping it," not making a claim or complaint. This is done all the time by "claimants" who lack information or access[78] or who knowingly decide gain is too low, cost too high (including psychic cost of litigating where such activity is repugnant). Costs are raised by lack of information or skill, and also include risk. Inaction is also familiar on the part of official complainers (police, agencies, prosecutors) who have incomplete information about violations, limited resources, policies about *de minimus*, schedules of priorities, and so forth.[79]

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[78]On the contours of "inaction," see Levine and Preston (1970); Mayhew and Riess (1969); Ennis (1967); Republican Research, Inc. (1970); Hallauer (1972).

[79]See Rabin (1972), and Miller (1969) (prosecutors); LaFave (1965) and Black (1971) (police); and generally, Davis (1969). Courts are not the only institutions in the legal system which are chronically overloaded. Typically, agencies with enforcement responsibilities have many more authoritative commitments than resources to carry them out. Thus "selective enforcement" is typical and pervasive; the policies that underlie the selection lie, for the most part, beyond the "higher law." On the interaction between enforcement and rule-development, see Gifford (1971).

(2) "Exit"–withdrawal from a situation or relationship by moving, resigning, severing relations, finding new partners, etc. This is of course a very common expedient in many kinds of trouble. Like "lumping it," it is an alternative to invocation of any kind of remedy system–although its presence as a sanction may be important to the working of other remedies.[80] The use of "exit" options depends on the availability of alternative opportunities or partners (and information about them), the costs of withdrawal, transfer, relocation, development of new relationships, the pull of loyalty to previous arrangements–and on the availability and cost of other remedies.[81]

(3) Resort to some unofficial control system–we are familiar with many instances in which disputes are handled outside the official litigation system. Here we should distinguish (a) those dispute-settlement systems which are normatively and institutionally appended to the official system (such as settlement of auto-injuries, handling of bad checks) from (b) those settlement systems which are relatively independent in norms and sanctions (such as businessmen settling disputes *inter se*, religious groups, gangs).

What we might call the "appended" settlement systems merge imperceptibly into the official litigation system. We might sort them out by the extent to which the official intervention approaches the adjudicatory mode. We find a continuum from situations where parties settle among themselves with an eye to the official rules and sanctions, through situations where official intervention is invoked, to those in which settlement is supervised and/or imposed by officials, to full-dress adjudication. All along this line the sanction is supplied by the official system (though not always in the manner prescribed in the "higher law")[82] and the norms or rules applied are a version of the official rules, although discounted for transaction costs and distorted by their selective use for the purposes of the parties.

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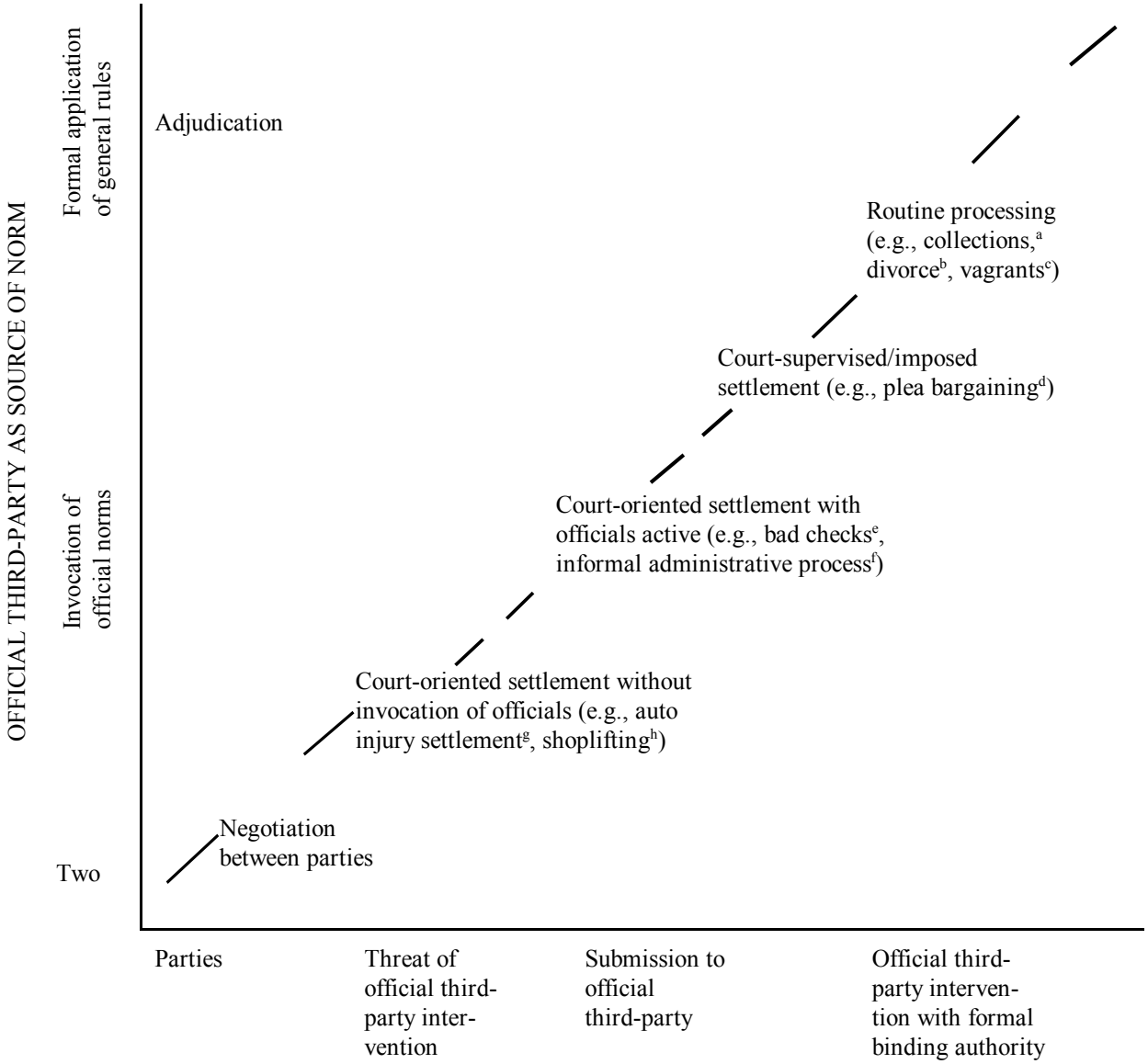
[80]On exit or withdrawal as a sanction, see note 42 and text there. For an attempt to explore propensities to choose among resignation, exit, and voice in response to neighborhood problems, see Orbell and Uno (1972). "Exit" would seem to include much of what goes under the rubric of "self-help." Other common forms of self-help, such as taking possession of property, usually represent a salvage operation in the wake of exit by the other party. Yet other forms, such as force, are probably closer to the dispute settlement systems discussed below.

[81]There are, of course, some cases (such as divorce or bankruptcy) in which exit can be accomplished only by securing official certification or permission: that is, it is necessary to resort to an official remedy system in order to effectuate exit.

[82]This term is used to refer to the law as a body of authoritative learning (rules, doctrines, principles) as opposed to the parochial embodiments of this higher law, as admixed with local understandings, priorities, and the like.

FIGURE 4
"APPENDED" DISPUTE-SETTLEMENT SYSTEMS



a. Jacob (1969).
b. O'Gorman (1963); Virtue (1956).
c. Foote (1956); Spradley (1970).
d. Newman (1966: chap. 3); McIntyre and Lippman (1970).
e. Beutel (1957:287 ff.); cf. the operation of the Fraud and Complaint Department at McIntyre (1968:470-71).
f. Woll (1960); cf. the "formal informal settlement system" of the Motor Vehicles Bureau, described by Macaulay (1966:153 ff.).
g. Ross (1970).
h. Cameron (1964:32-36).

From these "appended" systems of discounted and privatized official justice, we should distinguish those informal systems of "private justice" which invoke other norms and other sanctions. Such systems of dispute-settlement are typical among people in continuing interaction such as an organized group, a trade, or a university.[83] In sorting out the various types according to the extent and the mode of intervention of third parties, we can distinguish two dimensions: the first is the degree to which the applicable norms are formally articulated, elaborated, and exposited, that is the increasingly organized character of the norms. The second represents the degree to which initiative and binding authority are accorded to the third party, that is, the increasingly organized character of the sanctions. Some conjectures about the character of some of the common types of private systems are presented in Figure 5.

Our distinction between "appended" and "private" remedy systems should not be taken as a sharp dichotomy but as pointing to a continuum along which we might range the various remedy systems.[84] There is a clear distinction between appended systems like automobile injury or bad check

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[83]"Private" dispute settlement may entail mainly bargaining or negotiation between the parties (dyadic) or may involve the invocation of some third party in the decision-making position. It is hypothesized that parties whose rules in a transaction or relationship are complementaries (husband-wife, purchaser-supplier, landlord-tenant) will tend to rely on dyadic processes in which group norms enter without specialized apparatus for announcing or enforcing norms. Precisely because of the mutual dependence of the parties, a capacity to sanction is built into the relationship. On the other hand, parties who stand in a parallel position in a set of transactions, such as airlines or stockbrokers *inter se*, tend to develop remedy systems with norm exposition and sanction application by third parties. Again, this is because the parties have little capacity to sanction the deviant directly. This hypothesis may be regarded as a reformulation of Schwartz' (1954) proposition that formal controls appear where informal controls are ineffective and explains this finding of resort to formal controls on an Israeli moshav (cooperative settlement) but not in a kibbutz (collective settlement). In this instance, the interdependence of the kibbutzniks made informal controls effective, while the "independent" moshav members needed formal controls. This echos Durkheim's (1964) notion of different legal controls corresponding to conditions of organic and mechanical solidarity. A corollary to this is suggested by re-analysis of Mentschikoff's (1961) survey of trade association proclivity to engage in arbitration. Her data indicate that the likelihood of arbitration is strongly associated with the fungibility of goods (her categories are raw, soft and hard goods). Presumably dealings in more unique hard goods entail enduring purchaser-supplier relations which equip the parties with sanctions for dyadic dispute-settlement sanctions which are absent among dealers in fungible goods. Among the latter, sanctions take the form of exclusion from the circle of traders, and it is an organized third party (the trade association) that can best provide this kind of sanction.

[84]The distinction is not intended to ignore the overlap and linkage that may exist between "appended" and "private" systems. See, for example, Macaulay's (1966:151 ff.) description of the intricate interweaving of official, appended and private systems in the regulation of manufacturer-dealer relations; Randall's (1968: Chap. 8) account of the relation between official and industry

settlements and private systems like the internal regulation of the mafia (Cressey, 1969: Chaps. VIII, IX; Ianni, 1972), or the Chinese community.[85] The internal regulatory aspects of universities, churches and groups of businessmen lie somewhere in between.[86] It is as if we could visualize a scale stretching from the official remedy system through ones oriented to it through relatively independent systems based on similar values to independent systems based on disparate values.[87]

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censorship; Aker's (1968:470) observation of the interpenetration of professional associations and state regulatory boards.

[85]On internal regulation in Chinese communities in the United States, see Doo (1973); Light (1972, chap. 5, especially 89-94); Grace (1970).

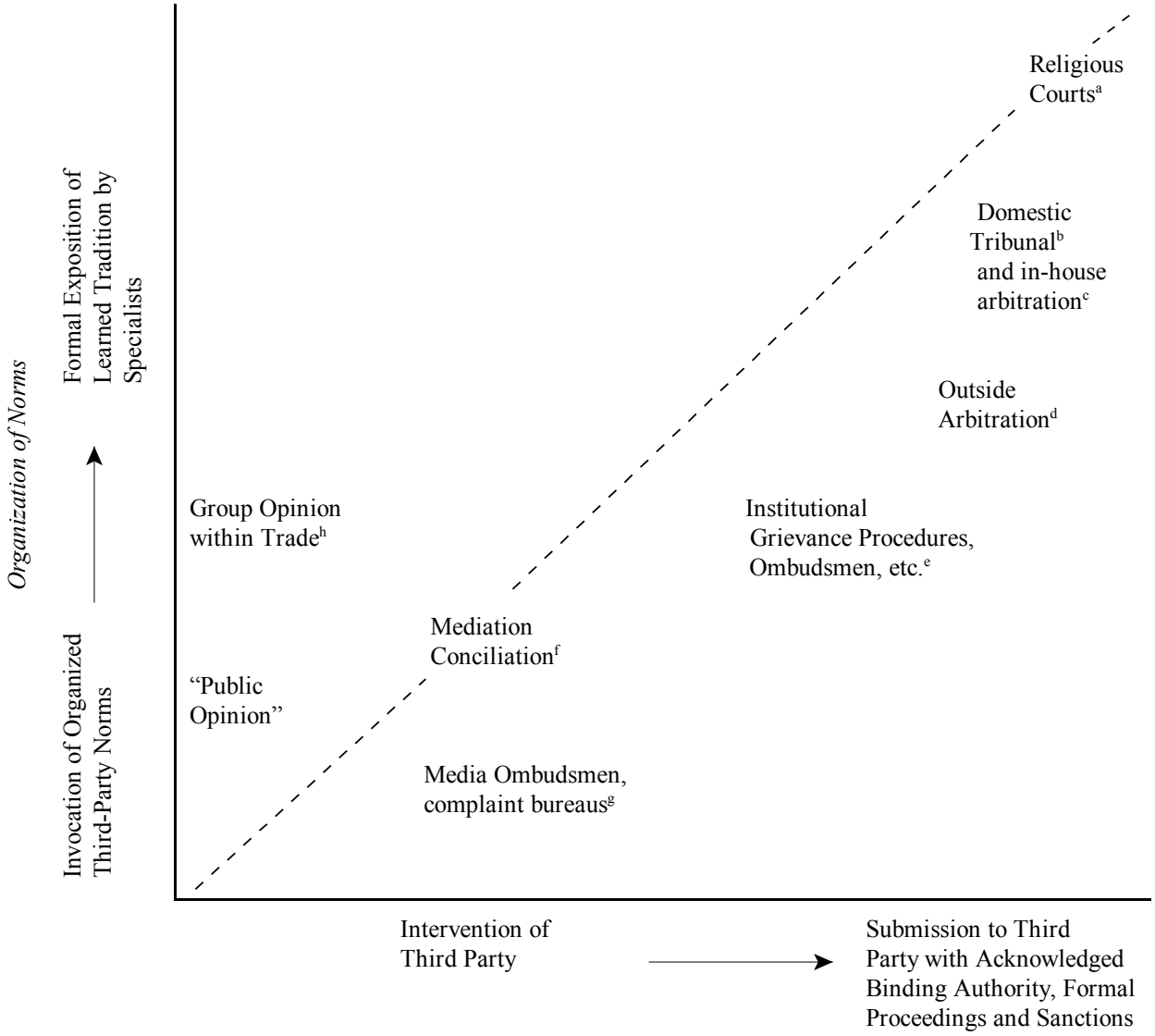
[86]Cf. Mentschikoff's (1961) discussion of various species of commercial arbitration. She distinguishes casual arbitrations conducted by the American Arbitration Association which emphasize general legal norms and standards and where the "ultimate sanction . . . is the rendering of judgment on the award by a court. . . ." (1961:858) from arbitration within

> self-contained trade groups [where] the norms and standards of the group itself are being brought to bear by the arbitrators (1961:857)

and the ultimate sanction is an intra-group disciplinary proceeding.

[87]The dotted extension of the scale in Table 6 is meant to indicate the possibility of private systems which are not only structurally independent of the official system but in which the shared values comprise an oppositional culture. Presumably this would fit, for example, internal dispute settlement among organized and committed criminals and revolutionaries. Closer to the official might be the subcultures of delinquent gangs. Although they have been characterized as deviant sub-cultures, Matza (1964: chap. 2, esp. 59 ff.) argues that in fact the norms of these groups are but variant readings of the official legal culture. Such variant readings may be present elsewhere on the scale; for instance, businessmen may not recognize any divergence of their notion of obligatory business conduct from the law of contract.

FIGURE 5
"PRIVATE" REMEDY SYSTEMS



Organization of Sanctions

a. Columbia J. of Law and Social Problems (1970, 1971); Shriver (1966); Ford (1970:457-79).
b. E.g., The International Air Transport Association (Gollan 1970); professional sports leagues and associations (Goldpaper 1971).
c. Mentschikoff (1961:859).
d. Bonn (1972); Mentschikoff (1961:856-57).
e. Gellhorn, 1966; Anderson (1969: chaps IV, V).
f. E.g., labor-management (Simkin [1971: chap. 3]); MacCallum (1967).
g. E.g., newspaper "action-line" columns, Better Business Bureaus.
h. Macaulay (1963:63-64); Leif (1970a:29 ff).

Presumably it is not accidental that some human encounters are regulated frequently and influentially by the official and its appended systems while others seem to generate controls that make resort to the official and its appended systems rare. Which human encounters are we likely to find regulated at the "official" end of our scale and which at the "private" end? It is submitted that location on our scale varies with factors that we might sum up by calling them the "density" of the relationship. That is, the more inclusive in life-space and temporal span a relationship between parties,[88] the less likely it is that those parties will resort to the official system[89] and more likely that the relationship will be regulated by some independent "private" system.[90] This seems plausible because we would expect inclusive and enduring relationships to create the possibility of effective sanctions;[91] and we would expect participants in such relationships to share a value consensus[92] which

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[88]Since dealings between settlement specialists such as personal injury and defense lawyers may be more recurrent and inclusive than the dealings between parties themselves, one might expect that wherever specialist intermediaries are used, the remedy-system would tend to shift toward the private end of our spectrum. Cf. Skolnick (1967:69) on the "regression to cooperation" in the "criminal court community."

[89]Not only is the transient and simplex relationship more likely to be subjected to official regulation, it is apparently more amenable to formal legal control. See, for example, the greater success of anti-discrimination statutes in public accommodation than in housing and in housing than in employment (success here defined merely as a satisfactory outcome for the particular complainant). See Lockard (1968:91, 122, 138). Mayhew (1968:245 ff; 278 ff.) provides an interesting demonstration of the greater impact of official norms in housing than in employment transactions in spite of the greater evaluative resistance to desegregation in the latter.

[90]The capacity of continuing or "on-going" relationships to generate effective informal control has been often noted (Macaulay 1963:63-64; Yngvesson 1973). It is not temporal duration *per se* that provides the possibility of control, but the serial or incremental character of the relationship, which provides multiple choice points at which parties can seek and induce adjustment of the relationship. The mortgagor-mortgagee relationship is an enduring one, but one in which there is heavy reliance on official regulation, precisely because the frame is fixed and the parties cannot withdraw or modify it. Contrast landlord-tenant, husband-wife or purchaser-supplier, in which recurrent inputs of cooperative activity are required, the withholding of which gives the parties leverage to secure adjustment. Schelling (1963:41) suggests a basis for this in game theory: threats intended to deter a given act can be delivered with more credibility if they are capable of being decomposed into a number of consecutive smaller threats.

[91]Conversely, the official system will tend to be used where such sanctions are unavailable, that is, where the claimee has no hope of any stream of benefits from future relations with the claimant (or those whose future relation with claimee will be influenced by his response to the claim). Hence the association of litigation with the aftermath of "divorce" (marital, commercial or organizational) or the absence of any "marriage" to begin with (e.g., auto injury, criminal). That is,

provided standards for conduct and legitimized such sanctions in case of deviance.

FIGURE 6
A SCALE OF REMEDY SYSTEMS FROM OFFICIAL TO PRIVATE

REMEDY SYSTEMS						
OFFICIAL		APPENDED			PRIVATE	
Adjudication	Routine Processing	Structurally Interstitial (Officials Participating)	Oriented to Official	Articulated to Official	Independent	Oppositional
	Collections Divorce	Plea bargaining, bad check recovery	Auto injury settlement	Businessmen	Churches, Chinese community	Gangs Mafia, Revolutionaries

EXAMPLES

The prevalence of private systems does not necessarily imply that they embody values or norms which are competing or opposed to those of the official system. Our analysis does not impute the plurality of remedy systems to cultural differences as such. It implies that the official system is utilized when there is a disparity between social structure and cultural norm. It is used, that is, where interaction and vulnerability create encounters and relationships which do not generate shared norms (they may be insufficiently shared or insufficiently specific) and/or do not give rise to group structures which permit sanctioning these norms.[93]

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government is the remedy agent of last resort and will be used in situations where one party has a loss and the other party has no expectation of any future benefit from the relationship.

[92]This does not imply that the values of the participants are completely independent of and distinct from the officially authoritative ones. More common are what we have referred to (note 87 above) as "variant readings" in which elements of authoritative tradition are re-ordered in the light of parochial understandings and priorities. For example, the understanding of criminal procedure by the police (Skolnick [1966:219 ff.]) or of air pollution laws by health departments (Goldstein and Ford [1971:20 ff.]). Thus the variant legal cultures of various legal communities at the field or operating level can exist with little awareness of principled divergence from the higher law.

[93]This comports with Bohannan's (1965:34 ff.) notion that law comprises a secondary level of social control in which norms are re-institutionalized in specialized legal institutions. But where Bohannan implies a constant relationship beween the primary institutionalization of norms and their reinstitutionalization in specialized legal institutions, the emphasis here is on the difference in the extent to which relational settings can generate self-corrective remedy systems. Thus it suggests that the legal level is brought into play where the original institutionalization of norms is incomplete, either

Figure 7 sketches out such relationships of varying density and suggests the location of various official and private remedy systems.

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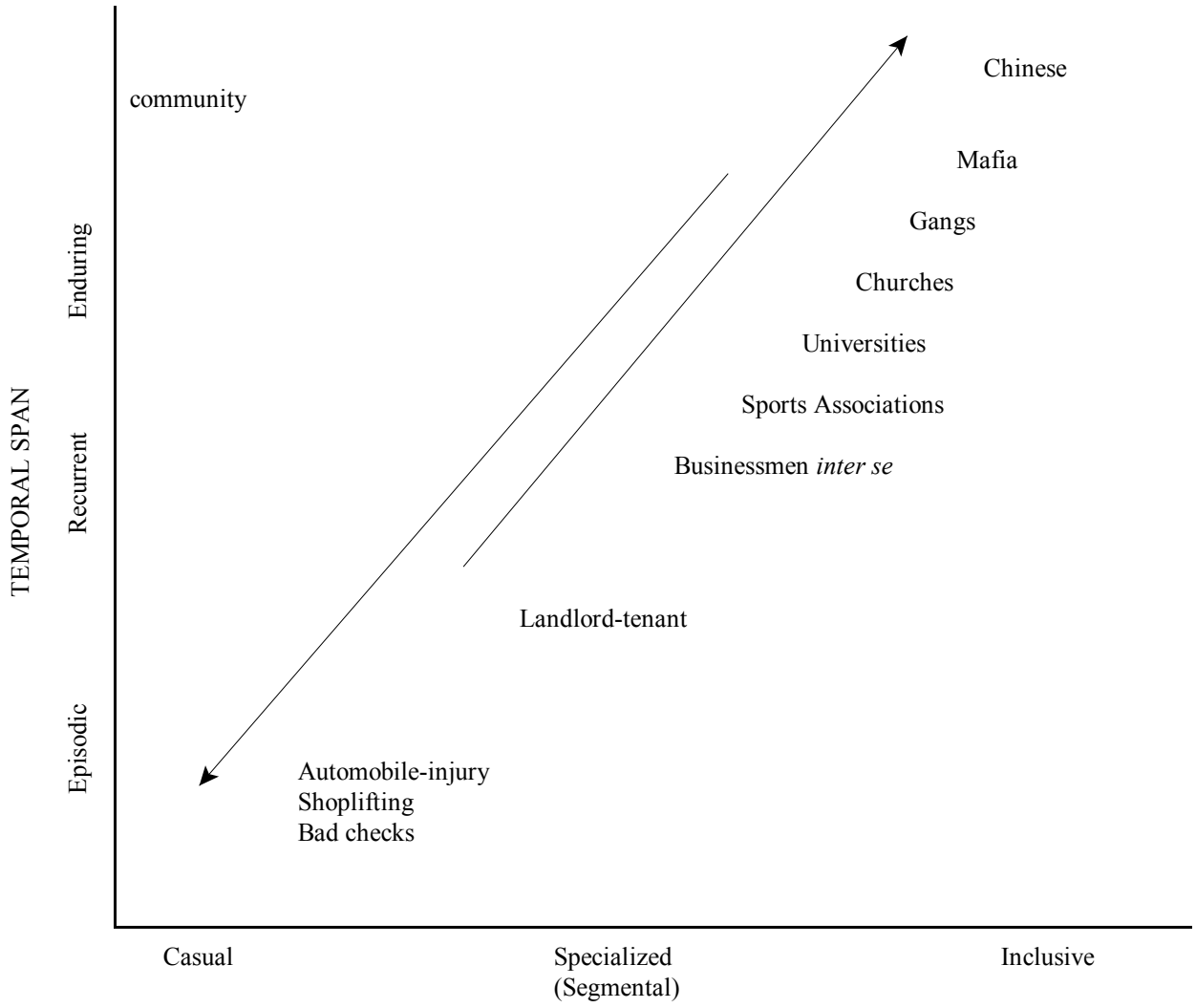
in the norms or the institutionalization.

Bohannan elaborates his analysis by suggesting (1965:37 ff.) that the legal realm can be visualized as comprising various regions of which the "Municipal systems of the sort studied by most jurists deal with a single legal culture within a unicentric power system." (In such a system, differences between institutional practice and legal prescription are matters of phase or lag.) Divergences from unity (cultural, political, or both) define other regions of the legal realm: respectively, colonial law, law in stateless societies and international law.

The analysis here suggests that "municipal systems" themselves may be patchworks in which normative consensus and effective unity of power converge only imperfectly. Thus we might expect a single legal system to include phenomena corresponding to other regions of his schema of the legal realm. The divergence of the "law on the books" and the "law in action" would not then be ascribable solely to lag or "phase" (1965:37) but rather would give expression to the discontinuity between culture and social structure.

FIGURE 7
RELATIONSHIP BETWEEN DENSITY OF SOCIAL
RELATIONSHIPS AND TYPE OF REMEDY SYSTEM



It restates our surmise of a close association between the density of relationships and remoteness from the official system.[94] We may surmise further that on the whole the official and appended systems

[94]The association postulated here seems to have support in connection with a number of distinct aspects of legal process:
Presence of legal controls: Schwartz (1954) may be read as asserting that relational density (and the consequent effectiveness of informal controls) is inversely related to the presence of legal controls (defined in terms of the presence of sanction specialists).
Invocation (mobilization) of official controls: Black (1971:1097) finds that readiness to invoke police

flourish in connection with the disputes between parties of disparate size which give rise to the litigation in Boxes II and III of Figure I. Private remedy systems, on the other hand, are more likely to handle disputes between parties of comparable size.[95] The litigation in Boxes I and IV of Figure 1, then, seems to represent in large measure the breakdown (or inhibited development) of private remedy systems. Indeed, the distribution of litigation generally forms a mirror image of the presence of private remedy systems. But the mirror is, for the various reasons discussed here, a distorting one.

From the vantage point of the "higher law" what we have called the official system may be visualized as the "upper" lawyers of a massive "legal"[96] iceberg, something like this:

Adjudication
Litigation
Appended Settlement Systems
Private Settlement Systems
Exit Remedies/Self Help
Inaction ("lumping it")

The uneven and irregular layers are distinct although they merge imperceptibly into one another.[97] As we proceed to discuss possible reforms of the official system, we will want to consider the kind

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and insistence of complainants on arrest is associated with "relational distance" between the parties. Cf. Kawasnuma's (1963:45) observation that in Japan, where litigation was rare between parties to an enduring relationship regulated by shared ideals of harmony, resort to officials was common where such ties were absent, as in cases of inter-village and insurer-debtor disputes.
Elaboration of authoritative doctrine: Derrett (1959:54) suggests that the degree of elaboration of authoritative learned doctrine in classical Hindu law is related to the likelihood that the forums applying such doctrine would be invoked, which is in turn dependent on the absence of domestic controls.

[95]There are, of course, exceptions, such as the automobile manufacturers' administration of warranty claims described by Whitford (1968) or those same manufacturers' internal dealer relations tribunals described by Macaulay (1966).

[96]The iceberg is not properly a legal one, hence the quotation marks. That is, I do not mean to impute any characteristics that might define the "legal" (officials, coercive sanctions, specialists, general rules) to all the instances in the iceberg. It is an iceberg of potential claims or disputes and the extent to which any sector of it is legalized is problematic. Cf. Abel (1974).

[97]Contrast the more symmetrical "great pyramid of legal order" envisioned by Hart and Sacks (1958:312). Where the Hart and Sacks pyramid portrays private and official decision-making as successive moments of an integrated normative and institutional order, the present "iceberg" model suggests that the existence of disparate systems of settling disputes is a reflection of cultural and structural discontinuities.

of impact they will have on the whole iceberg.

We will look at some of the connections and flows between layers mainly from the point of view of the construction of the iceberg itself, but aware that flows and connections are also influenced by atmospheric (cultural) factors such as appetite for vindication, psychic cost of litigation, lawyers' culture and the like.

VI. STRATEGIES FOR REFORM

Our categorization of four layers of advantage (Figure 3) 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

I shall attempt to sketch some of the possible ramifications of change on each of these levels for other parts of the litigation system and then discuss the relationship between changes in the litigation system and the rest of our legal iceberg. Of course such reforms need not be enacted singly, but may occur in various combinations. However, for our purposes we shall only discuss, first, each type taken in isolation and then, all taken together.

A. Rule-change

Obtaining favorable rule changes is an expensive process. The various kinds of "have-nots" (Figure 3) have fewer resources to accomplish changes through legislation or administrative policy-making. The advantages of the organized, professional, wealthy and attentive in these forums are well-known. Litigation, on the other hand, has a flavor of equality. The parties are "equal before the law" and the rules of the game do not permit them to deploy all of their resources in the conflict, but require that they proceed within the limiting forms of the trial. Thus, litigation is a particularly tempting arena to "have-nots," including those seeking rule change.[98] Those who seek change through the courts tend to represent relatively isolated interests, unable to carry the day in more political forums.[99]

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[98]Hazard (1970:246-47) suggests that the attractions of the courts include that they are open as of right, receptive to arguments based on principle and offer the advocate a forum in which he bears no responsibility for the consequences of having his argument prevail.

[99]Dolbeare (1967:63). Owen (1971:68, 142) reports the parallel finding that in two Georgia counties "opinion leaders and influentials seldom use the court, except for economic retrieval." Cf. Howard's (1969:346) observation that ". . . adjudication is preeminently a method for individuals,

Litigation may not, however, be a ready source of rule-change for "have-nots." Complexity, the need for high inputs of legal services and cost barriers (heightened by overloaded institutional facilities) make challenge of rules expensive. OS claimants, with high stakes in the tangible outcome, are unlikely to try to obtain rule changes. By definition, a test case–litigation deliberately designed to procure rule-change–is an unthinkable undertaking for an OS. There are some departures from our ideal type: OSs who place a high value on vindication by official rules or whose peculiar strategic situation makes it in their interest to pursue rule victories.[100] But generally the test-case involves some organization which approximates an RP.[101]

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small groups and minorities who lack access to or sufficient strength within the political arena to mobilize a favorable change in legislative coalitions."

[100]There are situations in which no settlement is acceptable to the OS. The most common case, perhaps, is that of the prisoner seeking post-conviction remedies. He has "infinite" costless time and nothing further to lose. Other situations may be imagined in which an OS stands only to gain by a test case and has the resources to expend on it. Consider, for example, the physician charged with ten counts of illegal abortion. Pleading guilty to one count if the state dropped the others and agreeing to a suspended sentence would still entail the loss of his license. Every year of delay is worth money, win or lose: the benefits of delay are greater than the costs of continued litigation.

When the price of alternatives becomes unacceptably high, we may find OSs swimming upstream against a clear rule and strategic disadvantage. (Cf. the explosion of selective service cases in the 1960's.) Such a process may be facilitated by, for example, the free entry afforded by the contingent fee. See Friedman and Ladinsky's (1967) description of the erosion of the fellow servant rule under the steady pounding of litigation by injured workman with no place else to turn and free entry.

[101]See Vose (1967) on the test-case strategy of the NAACP in the restrictive covenant area. By selecting clients to forward an interest (rather than serving the clients) the NAACP made itself an RP with corresponding strategic advantages over the opposite parties (neighborhood associations). The degree of such organizational support of interest groups in litigation affecting municipal powers is described in Vose (1966); but Dolbeare (1967:40), in his study of litigation over public policy issues in a suburban county, found a total absence of interest-group sponsorship and participation in cases at the trial court level. Vose (1972:332) concludes a historical review by observing that:

> Most constitutional cases before the Supreme Court . . . are sponsored or supported by an identifiable voluntary association . . . [This] has been markedly true for decades.

But Hakman (1966, 1969) found management of Supreme Court litigation by organized groups pursuing coherent long-range strategies to be relatively rare. But see Casper (1970) who contends that civil liberties and civil rights litigation in the Supreme Court is increasingly conducted by lawyers who are "group advocates" (that is, have a long-term commitment to a group with whose aims they identify) or "civil libertarians" (that is, have an impersonal commitment to the vindication of broad principles) rather than advocates. He suggests that the former types of representation lead to the posing of broader issues for decision.

The architecture of courts severely limits the scale and scope of changes they can introduce in the rules. Tradition and ideology limit the kinds of matters that come before them; not patterns of practice but individual instances, not "problems" but cases framed by the parties and strained through requirements of standing, case or controversy, jurisdiction, and so forth. Tradition and ideology also limit the kind of decision they can give. Thus, common law courts for example, give an all-or-none,[102] once-and-for-all[103] decision which must be justified in terms of a limited (though flexible) corpus of rules and techniques.[104] By tradition, courts cannot address problems by devising new regulatory or administrative machinery (and have no taxing and spending powers to support it); courts are limited to solutions compatible with the existing institutional framework.[105] Thus, even the most favorably inclined court may not be able to make those rule-changes most useful to a class of "have-nots."

Rule-change may make use of the courts more attractive to "have-nots." Apart from increasing the possibility of favorable outcomes, it may stimulate organization, rally and encourage litigants. It may directly redistribute symbolic rewards to "have-nots" (or their champions). But tangible rewards do not always follow symbolic ones. Indeed, provision of symbolic rewards to "have-nots" (or crucial groups of their supporters) may decrease capacity and drive to secure redistribution of tangible benefits.[106]

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[102]Although judicial decisions do often embody or ratify compromises agreed upon by the parties, it is precisely at the level of rule promulgation that such splitting the difference is seen as illegitimate. On the ideological pressures limiting the role of compromise in judicial decision see Coons (1964).

[103]Cf. Kalven (1958:165). There are, of course, exceptions, such as alimony, to this "once and for all" feature.

[104]Hazard (1970:248-50) points out that courts are not well-equipped to address problems by devising systematic legal generalization. They are confined to the facts and theories presented by the parties in specific cases; after deciding the case before them, they lose their power to act; they have little opportunity to elicit commentary until after the event; and generally they can extend but not initiate legal principles. They have limited and rapidly diminishing legitimacy as devisers of new policy. Nor can courts do very much to stimulate and maintain political support for new rules.

[105]See generally Friedman (1967:esp. 821); Hazard (1970:248-50). The limits of judicial competence are by no means insurmountable. Courts do administer bankrupt railroads, recalcitrant school districts, offending election boards. But clearly the amount of such affirmative administrative re-ordering that courts can undertake is limited by physical resources as well as by limitations on legitimacy.

[106]See Lipsky (1970:176 ff.) for an example of the way in which provision of symbolic rewards to more influential reference publics effectively substituted for the tangible reforms demanded by rent-strikers. More generally, Edelman (1967: chap. 2) argues that it is precisely unorganized and diffuse

Rule-changes secured from courts or other peak agencies do not penetrate automatically and costlessly to other levels of the system, as attested by the growing literature on impact.[107] This may be especially true of rule-change secured by adjudication, for several reasons:

(1) Courts are not equipped to assess systematically the impact or penetration problem. Courts typically have no facilities for surveillance, monitoring, or securing systematic enforcement of their decrees. The task of monitoring is left to the parties.[108]

(2) The built-in limits on applicability due to the piecemeal character of adjudication. Thus a Mobilization for Youth lawyer reflects:

> . . . What is the ultimate value of winning a test case? In many ways a result cannot be clearcut . . . if the present welfare-residency laws are invalidated, it is quite possible that some other kind of welfare-residency law will spring up in their place. It is not very difficult to come up with a policy that is a little different, stated in different words, but which seeks to achieve the same basic objective. The results of test cases are not generally self-executing. . . . It is not enough to have a law invalidated or a policy declared void if the agency in question can come up with some variant of that policy, not very different in substance but sufficiently different to remove it from the effects of the court order.[109]

(3) The artificial equalizing of parties in adjudication by insulation from the full play of political pressures–the "equality" of the parties, the exclusion of "irrelevant" material, the

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publics that tend to receive symbolic rewards, while organized professional ones reap tangible rewards.

[107]For a useful summary of this literature, see Wasby (1970). Some broad generalizations about the conditions conducive to penetration may be found in Grossman (1970:545 ff.); Levine (1970:599 ff.).

[108]Cf. Howard's (1969:365 ff) discussion of the relative ineffectualness of adjudication in voter registration and school integration (as opposed to subsequent legislative/administrative action) as flowing from judicial reliance on party initiative.

[109]Rothwax (1969:143). An analogous conclusion in the consumer protection field is reached by Leff (1970b:356). ("One cannot think of a more expensive and frustrating course than to seek to regulate goods or 'contract' quality through repeated law-suits against inventive 'wrongdoers.'") Leff's critique of Murray's (1969) faith in good rules to secure change in the consumer marketplace parallels Handler's (1966) critique of Reich's (1964a, 1964b) prescription of judicial review to secure change in welfare administration. Cf. Black's (1973:137) observation that institutions which are primarily reactive, requiring mobilization by citizens, tend to deal with specific instances rather than general patterns and, as a consequence, have little preventive capacity.

"independence" of judges–means that judicial outcomes are more likely to be at variance with the existing constellation of political forces than decisions arrived at in forums lacking such insulation. But resources that cannot be employed in the judicial process can reassert themselves at the implementation stage, especially where institutional overload requires another round of decision making (what resources will be deployed to implement which rules) and/or private expenditures to secure implementation. Even where "have-nots" secure favorable changes at the rule level, they may not have the resources to secure the penetration of these rules.[110] The impotence of rule-change, whatever its source, is particularly pronounced when there is reliance on unsophisticated OSs to utilize favorable new rules.[111]

Where rule-change promulgated at the peak of the system does have an impact on other levels, we should not assume any isomorphism. The effect on institutional facilities and the strategic position of the parties may be far different than we would predict from the rule change. Thus, Randall's study of movie censorship shows that liberalization of the rules did not make censorship boards more circumspect; instead, many closed down and the old game between censorship boards and distributors was replaced by a new and rougher game between exhibitors and local government-private group coalitions.[112]

B. Increase in Institutional Facilities

Imagine an increase in institutional facilities for processing claims such that there is timely full-dress adjudication of every claim put forward–no queue, no delay, no stereotyping. Decrease in delay would lower costs for claimants, taking away this advantage of possessor-defendants. Those relieved of the necessity of discounting recovery for delay would have more to spend on legal services. To the extent that settlement had been induced by delay (rather than insuring against the risk of unacceptable loss), claimants would be inclined to litigate more and settle less. More litigation without stereotyping would mean more contests, including more contesting of rules and more rule change. As discounts diminished, neither side could use settlement policy to prevent rule-loss. Such

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[110]Consider for example the relative absence of litigation about schoolroom religious practices clearly in violation of the Supreme Court's rules, as reported by Dolbeare and Hammond (1971). In this case RPs who were able to secure rule-victories were unable or unwilling to invest resources to secure the implementation of the new rules.

[111]See, for example, Mosier and Soble's (1973:61-64) study of the Detroit Landlord-Tenant Court, where even after the enactment of new tenant defenses (landlord breach, retaliation), landlords obtained all they sought in 97% of cases. The new defenses were raised in only 3% of all cases (13% of the 20% that were contested) although, the authors conclude, "many defendants doubtless had valid landlord-breach defenses."

[112]Randall (1968: chap. 7). Cf. Macaulay's (1966:156) finding that the most important impact of the new rules was to provide leverage for the operation of informal and private procedures in which dealers enjoyed greater bargaining power in their negotiations with manufacturers.

reforms would for the most part benefit OS claimants, but they would also improve the position of those RP claimants not already in the possessor position, such as the prosecutor where the accused is free on bail.

This assumes no change in the *kind* of institutional facilities. We have merely assumed a greater quantitative availability of courts of the relatively passive variety typical of (at least) "common law" systems in which the case is "tried by the parties before the court. . . ." (Homberger, 1970:31). One may imagine institutions with augmented authority to solicit and supervise litigation, conduct investigations, secure, assemble and present proof; which enjoyed greater flexibility in devising outcomes (such as compromise or mediation); and finally which had available staff for monitoring compliance with their decrees.[113] Greater institutional "activism" might be expected to reduce advantages of party expertise and of differences in the quality and quantity of legal services. Enhanced capacity for securing compliance might be expected to reduce advantages flowing from differences in ability to invest in enforcement. It is hardly necessary to point out that such reforms could be expected to encounter not only resistance from the beneficiaries of the present passive institutional style, but also massive ideological opposition from legal professionals whose fundamental sense of legal propriety would be violated.[114]

C. Increase in Legal Services

The reform envisaged here is an increase in quantity and quality of legal services to "have-nots" (including greater availability of information about these services).[115] Presumably this would lower costs, remove the expertise advantage, produce more litigation with more favorable outcomes

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[113]Some administrative agencies approximate this kind of "activist" posture. Cf. Nonet's (1969:79) description of the California Industrial Accident Commission:

> When the IAC in its early days assumed the responsibility of notifying the injured worker of his rights, of filing his application for him, of guiding him in all procedural steps, when its medical bureau checked the accuracy of his medical record and its referees conducted his case at the hearing, the injured employee was able to obtain his benefits at almost no cost and with minimal demands on his intelligence and capacities.

In the American setting, at least, such institutional activism seems unstable; over time institutions tend to approximate the more passive court model. See Nonet (1969: chaps. 6-7) and generally Bernstein (1955: chap. 7) on the "judicialization" of administrative agencies.

[114]Perhaps the expansive political role of the judiciary and the law in American society is acceptable precisely because the former is so passive and the latter so malleable to private goals. Cf. Selznick's (1969:225 ff) discussion of the "privatization" and "voluntarization" of legal regulation in the United States.

[115]This would, of course, require the relaxation of barriers on information flow now imposed under the rubric of "professional ethics." See notes 46 and 51 above.

for "have-nots," perhaps with more appeals and more rule challenges, more new rules in their favor. (Public defender, legal aid, judicare, and pre-payment plans approximate this in various fashions.) To the extent that OSs would still have to discount for delay and risk, their gains would be limited (and increase in litigation might mean even more delay). Under certain conditions, increased legal services might use institutional overload as leverage on behalf of "have-nots." Our Mobilization for Youth attorney observes:

> . . . if the Welfare Department buys out an individual case, we are precluded from getting a principle of law changed, but if we give them one thousand cases to buy out, that law has been effectively changed whether or not the law as written is changed. The practice is changed; the administration is changed; the attitude to the client is changed. The value of a heavy case load is that it allows you to populate the legal process. It allows you to apply remitting pressure on the agency you are dealing with. It creates a force that has to be dealt with, that has to be considered in terms of the decisions that are going to be made prospectively. It means that you are not somebody who will be gone tomorrow, not an isolated case, but a force in the community that will remain once this particular case has been decided.
>
> As a result . . . we have been able, for the first time to participate along with welfare recipients . . . in a rule-making process itself. . . . (Rothwax, 1969:140-41).

The increase in quantity of legal services was accompanied here by increased coordination and organization on the "have-not" side, which brings us to our fourth level of reform.

D. Reorganization of 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.

One 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).[116] 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);

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[116]For some examples of OSs organizing and managing claims collectively see Davis and Schwartz (1967) and various pieces in Burghardt (1972) (tenant unions); McPherson (1972) (Contract Buyers League); Shover (1966) (Farmers Holiday Association–mortgagors); Finklestein (1954) (ASCAP–performing rights); Vose (1967) (NAACP); Macaulay (1966) (automobile dealers).

or by reducing claims to manageable size by collective action to dispel or share unacceptable risks (tenants, migrant workers).[117] A weaker form of organization would be (4) a clearing-house 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.[118]

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[117]A similar enhancement of prowess in handling claims may sometimes be provided commercially, as by collection agencies. Nonet (1969:71) observes that insurance coverage may serve as a form of organization:

> When the employer buys insurance [against workman's compensation claims], he not only secures financial coverage for his losses, but he also purchases a claims adjustment service and the legal defense he may need. Only the largest employers can adequately develop such services on their own. . . . Others find in their carrier a specialized claims administration they would otherwise be unable to avail themselves of . . . to the employer, insurance constitutes much more than a way of spreading individual risks over a large group. One of its major functions is to pool the resources of possibly weak and isolated employers so as to provide them with effective means of self-help and legal defense.

[118]On criminalization as a mode of aggregating claims, see Friedman (1973:258). This is typically a weak form of organization, for several reasons. First, there is so much law that officials typically have more to do than they have resources to do it with, so they tend to wait for complaints and to treat them as individual grievances. For example, the Fraud and Complaint Bureau described by McIntyre (1968) or the anti-discrimination commission described by Mayhew (1968). Cf. Selznick's (1969:225) observations on a general "tendency to turn enforcement agencies into passive recipients of privately initiated complaints. . . . The focus is more on settling disputes than on affirmative action aimed at realizing public goals." Second, enforcers have a pronounced tendency not to employ litigation against established and respectable institutions. Consider, for instance, the patterns of air pollution enforcement described by Goldstein and Ford (1971) or the Department of Justice position that the penal provisions of the Refuse Act should be brought to bear only on infrequent or accidental polluters, while chronic ones should be handled by more conciliatory and protracted administrative procedures. (1 Env. Rptr. Cur. Dev. No. 12 at 288 [1970]). Compare the reaction of Arizona's Attorney General to the litigation initiated by the overzealous chief of his Consumer Protection Division, who had recently started an investigation of hospital pricing policies.

> I found out much to my shock and chagrin that anybody who is anybody serves on a hospital board of directors and their reaction to our hospital injury was one of defense and protection.
>
> My policy concerning lawsuits . . . is that we don't sue anybody except in the kind of emergency situation that would involve [a business] leaving town or sequestering money or records. . . . I can't conceive any reason why hospitals in this state are

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.[119] 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.[120] Their encounters with opposing RPs would move into Box IV of Figure I. 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,[121] 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

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going to make me sue them.
(*New York Times*, 1973).

[119]On the greater strategic thrust of group-sponsored complaints in the area of discrimination, see Mayhew (1968:168-73).

[120]Paradoxically, perhaps, the organization of OSs into a unit which can function as an RP entails the possibility of internal disputes with distinctions between OSs and RPs reappearing. On the re-emergence of these disparities in strategic position within, for example, unions, see Atleson (1967:485 ff.) (finding it doubtful that Title I of the LMRDA affords significant protection to "single individuals"). Cf. Summers (1960); Atleson (1971) on the poor position of individual workers *vis-a-vis* unions in arbitration proceedings.

[121]As an outspoken opponent of class actions puts it:

> When a firm with assets of, say, a billion dollars is sued in a class action with a class of several million and a potential liability of, say $2 billion, it faces the possibility of destruction. . . . The potential exposure in broad class actions frequently exceeds the net worth of the defendants, and corporate management naturally tends to seek insurance against whatever slight chance of success plaintiffs may have (Simon, 1972:289-90).

He then cites "eminent plaintiffs' counsel" to the effect that:

> I have seen nothing so conducive to settlement of complex litigation as the establishment by the court of a class . . . whereas, if there were no class, it would not be disposed of by settlement.

strategic position creates the possibility of a test-case strategy for getting rule-change.[122] 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.[123]

VII. REFORM AND THE REST OF THE ICEBERG

The reforms of the official litigation system that we have imagined would, taken together, provide rules more favorable to the "have nots." Redress according to the official rules, undiscounted by delay, strategic disability, disparities of legal services and so forth could be obtained whenever either party found it to his advantage. How might we expect such a utopian upgrading of the official machinery to affect the rest of our legal iceberg?

We would expect more use of the official system. Those who opted for inaction because of information or cost barriers and those who "settled" at discount rates in one of the "appended" systems would in many instances find it to their advantage to use the official system. The appended systems, insofar as they are built on the costs of resort to the official system, would either be abandoned or the outcomes produced would move to approximate closely those produced by adjudication.[124]

On the other hand, our reforms would, by organizing OSs, create many situations in which *both* parties were organized to pursue their long-run interest in the litigation arena. In effect, many of the situations which occupied Boxes II and III of Figure 1 (RP v. OS, OS v. RP)–the great staple sources of litigation–would now be moved to Box IV (RP v. RP). We observed earlier that RPs who anticipate continued dealings with one another tend to rely on informal bilateral controls. We might

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[122]The array of devices for securing judicial determination of broad patterns of behavior also includes the "public interest action" in which a plaintiff is permitted to vindicate rights vested in the general public (typically by challenging exercises of government power). (Homberger, 1974). Unlike the class action, plaintiff does not purport to represent a class of particular individuals (with all the procedural difficulties of that posture) and unlike the classic test case he is not confined to his own grievance, but is regarded as qualified by virtue of his own injury to represent the interests of the general public.

[123]However, there may be tensions among these commitments. Wexler (1970), arguing for the primacy of "organizing" (including training in lay advocacy) in legal practice which aims to help the poor, points to the seductive pull of professional notions of the proper roles and concerns of the lawyer. Cf. Brill's (1973) portrayal of lawyers' professional and personal commitment to "class action" cases (in which the author apparently includes all "test cases") as undercutting their avowed commitment to facilitate community organization. On the inherent limits of "organizing" strategies, see note 127.

[124]That is, the "reciprocal immunities" (Friedman 1967:806) built on transaction costs of remedies would be narrowed and would be of the same magnitude for each party.

expect then that the official system would be abandoned in favor of private systems of dispute-settlement.[125]

Thus we would expect our reforms to produce a dual movement: the official and its appended systems would be "legalized"[126] while the proliferation of private systems would "de-legalize" many relationships. Which relationships would we expect to move which way? As a first approximation, we might expect that the less "inclusive" relationships currently handled by litigation or in the appended systems would undergo legalization, while relationships at the more inclusive end of the scales (Figure 7) would be privatized. 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.

Our earlier analysis suggests that the pattern might be more complex. First, for various reasons a class of OSs may be relatively incapable of being organized. Its size, relative to the size and distribution of potential benefits, may require disproportionately large inputs of coordination and organization.[127] Its shared interest may be insufficiently respectable to be publicly acknowledged (for instance, shoplifters, homosexuals until very recently). Or recurrent OS roles may be staffed by shifting population for whom the sides of the transaction are interchangeable.[128] (For instance, home

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[125]This is in Boxes II and III of Figure 1, where both parties are now RPs. But presumably in some of the litigation formerly in Box I, one side is capable of organization but the other is not, so new instances of strategic disparity might emerge. We would expect these to remain in the official system.

[126]That is, in which the field level application of the official rules has moved closer to the authoritative "higher law" (see note 82).

[127]Olson (1965) argues that capacity for coordinated action to further common interests decreases with the size of the group: ". . . relatively small groups will frequently be able voluntarily to organize and act in support of their common interests, and some large groups normally will not be able to do so." (1965:127) Where smaller groups can act in their common interest, larger ones are likely to be capable of so acting only when they can obtain some coercive power over members or are supplied with some additional selective incentives to induce the contribution of the needed inputs of organizational activity. (On the reliance of organizations on these selective incentives, see Salisbury [1969] and Clark and Wilson [1961].) Such selective incentives may be present in the form of services provided by a group already organized for some other purpose. Thus many interests may gain the benefits of organization only to the extent that those sharing them overlap with those with a more organizable interest (consider, for instance, the prominence of labor unions as lobbyists for consumer interests).

[128]Cf. Fuller's (1969:23) observation that the notion of duty is most understandable and acceptable in a society in which relationships are sufficiently fluid and symmetrical so that duties "must in theory and practice be reversible."

buyers and sellers, negligent motorists and accident victims.)[129] Even where OSs are organizable, we recall that not all RP v. RP encounters lead to the development of private remedy systems. There are RPs engaged in value conflict; there are those relationships with a governmental or other monopoly aspect in which informal controls may falter; and finally there are those RPs whose encounters with one another are nonrecurring. In all of these we might expect legalization rather than privatization.

Whichever way the movement in any given instance, our reforms would entail changes in the distribution of power. RPs would no longer be able to wield their strategic advantages to invoke selectively the enforcement of favorable rules while securing large discounts (or complete shielding by cost and overload) where the rules favored their OS opponents.

Delegalization (by the proliferation of private remedy and bargaining systems) would permit many relationships to be regulated by norms and understandings that departed from the official rules. Such parochial remedy systems would be insulated from the impingement of the official rules by the commitment of the parties to their continuing relationship. Thus, delegalization would entail a kind of pluralism and decentralization. On the other hand, the "legalization" of the official and appended systems would amount to the collapse of species of pluralism and decentralization that are endemic in the kind of (unreformed) legal system we have postulated. The current prevalence of appended and private remedy systems reflects the inefficiency, cumbersomeness and costliness of using the official system. This inefficient, cumbersome and costly character is a source and shield of a kind of decentralization and pluralism. It permits a selective application of the "higher law" in a way that gives effect at the operative level to parochial norms and concerns which are not fully recognized in the "higher law" (such as the right to exclude low status neighbors,[130] or police dominance in

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[129]Curiously these relationships have the character which Rawls (1958:98) postulates as a condition under which parties will agree to be bound by "just" rules; that is, no one knows in advance the position he will occupy in the proposed "practice." The analysis here assumes that while high turnover and unpredictable interchange of roles may approximate this condition in some cases, one of the pervasive and important characteristics of much human arranging is that the participants have a pretty good idea of which role in the arrangement they will play. Rawls (1971:136 ff) suggests that one consequence of this "veil of ignorance" (". . . no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength and the like") is that "the parties have no basis for bargaining in the usual sense" and concludes that without such restriction "we would not be able to work out any definite theory of justice at all." "If knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies." If we posit knowledge of particulars as endemic, we may surmise that a "definite theory of justice" will play at most a minor role in explaining the legal process.

[130]On exclusion of undesirable neighbors, see Babcock (1969); of undesirable sojourners, see the banishment policy described in Foote (1956).

encounters with citizens[131]). If the insulation afforded by the costs of getting the "higher law" to prevail were eroded, many relationships would suddenly be exposed to the "higher law" rather than its parochial counterparts. We might expect this to generate new pressures for explicit recognition of these "subterranean" values or for explicit decentralization.

These conjectures about the shape that a "reformed" legal system might take suggest that we take another look at our unreformed system, with its pervasive disparity between authoritative norms and everyday operations. A modern legal system of the type we postulated is characterized structurally by institutional unity and culturally by normative universalism. The power to make, apply and change law is reserved to organs of the public, arranged in unified hierarchic relations, committed to uniform application of universalistic norms.

There is, for example, in American law (that is, in the higher reaches of the system where the learned tradition is propounded) an unrelenting stress on the virtues of uniformity and universality and a pervasive distaste for particularism, compromise and discretion.[132] Yet the cultural attachment to universalism is wedded to and perhaps even intensifies diversity and particularism at the operative level.[133]

The unreformed features of the legal system then appear as a device for maintaining the partial dissociation of everyday practice from these authoritative institutional and normative commitments. Structurally, (by cost and institutional overload) and culturally (by ambiguity and normative overload) the unreformed system effects a massive covert delegation from the most authoritative rule-makers to field level officials (and their constituencies) responsive to other norms and priorities than are

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[131]See the anguished discovery (Seymour 1974:9) of this by a former United States Attorney in his encounter with local justice:

> When the police officer had finished his testimony and left the stand, I moved to dismiss the case as a matter of law, pointing out that the facts were exactly the same as in the case cited in the annotation to the statute. I asked the judge to please look at the statute and read the case under it. Instead he looked me straight in the eye and announced, "Motion denied."

[132]It seems hardly necessary to adduce examples of this pervasive distaste of particularism. But consider Justice Frankfurter's admonition that "We must not sit like a kadi under a tree dispensing justice according to conditions of individual expediency." *Terminiello v. Chicago*, 337 U.S. 1, 11 (1948). Or Wechsler's (1959) castigation of the Supreme Court for departing from the most fastidiously neutral principles.

[133]As Thurman Arnold observed, our law "compels the necessary compromises to be carried on *sub rosa*, while the process is openly condemned. . . . Our process attempts to outlaw the 'unwritten law.'" (1962:162). On the co-existence of stress on uniformity and rulefulness with discretion and irregularity, see Davis (1969).

contained in the "higher law."[134] By their selective application of rules in a context of parochial understandings and priorities, these field level legal communities produce regulatory outcomes which could not be predicted by examination of the authoritative "higher law."[135]

Thus its unreformed character articulates the legal system to the discontinuities of culture and social structure; it provides a way of accommodating cultural heterogeneity and social diversity while propounding universalism and unity; of accommodating vast concentrations of private power while upholding the supremacy of public authority; of accommodating inequality in fact while establishing equality at law; of facilitating action by great collective combines while celebrating individualism. Thus "unreform"–that is, ambiguity and overload of rules, overloaded and inefficient institutional facilities, disparities in the supply of legal services, and disparities in the strategic position of parties–is the foundation of the "dualism"[136] of the legal system. It permits unification and universalism at the symbolic level and diversity and particularism at the operating level.[137]

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[134]Cf. Black's (1973:142-43) observations on "reactive" mobilization systems as a form of delegation which perpetuates diverse moral subcultures as well as reinforces systems of social stratification (141).

[135]Some attempts at delineating and comparing such "local legal cultures" are found in Jacob (1969); Wilson (1968); Goldstein and Ford (1971). It should be emphasized that such variation is not primarily a function of differences at the level of rules. All of these studies show considerable variation among localities and agencies governed by the same body of rules.

[136]I employ this term to refer to one distinctive style of accommodating social diversity and normative pluralism by combining universalistic law with variable application, local initiative and tolerated evasion. (Cf. the kindred usage of this term by Rheinstein [1972: chaps. 4, 10] to describe the divorce regime of contemporary western nations characterized by a gap between "the law of the books and the law in action;" and by ten Broek [1964a, 1965] to describe the unacknowledged co-existence of diverse class-specific bodies of law.) This dualistic style might be contrasted to, among others, (a) a "millet" system in which various groups are explicitly delegated broad power to regulate their own internal dealings through their own agencies (cf. Reppetto, 1970); (b) official administration of disparate bodies of "special law" generated by various groups (for example, the application of their respective "personal laws" to adherents of various religions in South Asian countries. See Galanter [1968]). Although a legal system of the kind we have postulated is closest to dualism, it is not a pure case, but combines all three. For some observations on changes in the relation of government law to other legal orderings, see Weber (1954: 16-20, 140-49).

[137]The durability of "dualism" as an adaptation is reinforced by the fact that it is "functional" not only for the larger society, but that each of its "moieties" gives support to the other: the "higher law" masks and legitimates the "operating level"; the accommodation of particularistic interests there shields the "higher law" from demands and pressures which it could not accommodate without sacrificing its universalism and semblance of autonomy. I do not suggest that this explains why some societies generate these "dual" structures.

VIII. IMPLICATIONS FOR REFORM: THE ROLE OF LAWYERS

We have discussed the way in which the architecture of the legal system tends to confer interlocking advantages on overlapping groups whom we have called the "haves." To what extent might reforms of the legal system dispel these advantages? Reforms will always be less total than the utopian ones envisioned above. Reformers will have limited resources to deploy and they will always be faced with the necessity of choosing which uses of those resources are most productive of equalizing change. What does our analysis suggest about strategies and priorities?

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. In a setting of overloaded institutional facilities, inadequate costly legal services, and unorganized parties, beneficiaries may lack the resources to secure implementation; or an RP may restructure the transaction to escape the thrust of the new rule. (Leff, 1970b; Rothwax, 1969:143; Cf. Grossman, 1970.) Favorable rules are not necessarily (and possibly not typically) in short supply to "have-nots;" certainly less so than any of the other resources needed to play the litigation game.[138] 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[139] or distribution of tangible advantages. (See, for example, Lipsky, 1970: chap. 4, 5.) Indeed rule-change may become a symbolic substitute for redistribution of advantages. (See Edelman, 1967:40.)

The low potency of substantive rule-change is especially the case with rule-changes procured from courts. That courts can sometimes be induced to propound rule-changes that legislatures would not make points to he limitations as well as the possibilities of court-produced change. With their relative insulation from retaliation by antagonistic interests, courts may more easily propound new rules which depart from prevailing power relations. But such rules require even greater inputs of other resources to secure effective implementation. And courts have less capacity than other rule-makers to create institutional facilities and re-allocate resources to secure implementation of new rules. Litigation then is unlikely to shape decisively the distribution of power in society. It may serve to secure or solidify symbolic commitments. It is vital tactically in securing temporary advantage or protection, providing leverage for organization and articulation of interests and conferring (or

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[138]Indeed the response that reforms must wait upon rule-change is one of the standard ploys of targets of reform demands. See, for example, Lipsky's (1970:94-96) housing officials' claim that implementation of rent-strikers' demands required new legislation, when they already had the needed power.

[139]Compare Dolbeare and Hammond's (1971:151) observation, based on their research into implementation of the school prayer decisions, that "images of change abound while the status quo, in terms of the reality of people's lives, endures."

withholding) the mantle of legitimacy.[140] The more divided the other holders of power, the greater the redistributive potential of this symbolic/tactical role. (Dahl, 1958:294.)

Our analysis suggests that breaking the interlocked advantages of the "haves" requires attention not only to the level of rules, but also to institutional facilities, legal services and organization of parties. It suggests that litigating and lobbying have to be complemented by interest organizing, provisions of services and invention of new forms of institutional facilities.[141]

The thrust of our analysis is that changes at the level of parties are most likely to generate changes at other levels. If rules are the most abundant resource for reformers, parties capable of pursuing long-range strategies are the rarest. The presence of such parties can generate effective demand for high grade legal services–continuous, expert, and oriented to the long run–and pressure for institutional reforms and favorable rules. This suggests that we can roughly surmise the relative strategic priority of various rule-changes. 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.[142] The intensity of the opposition to class action legislation and autonomous reform-oriented legal services[143] such as California Rural Legal Assistance indicates the "haves" own estimation of the relative strategic impact

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[140]On litigation as an organizational tool, see the examples given by Gary Bellow in *Yale Law Journal* (1970:1087-88).

[141]Cf. Cahn and Cahn's (1970:1016 ff.) delineation of the "four principal areas where the investment of . . . resources would yield critically needed changes: the creation (and legitimation) of new justice-dispensing institutions, the expansion of the legal manpower supply . . . the development of a new body of procedural and substantive rights, and the development of forms of group representation as a means of enfranchisement," and the rich catalog of examples under each heading.

[142]The reformer who anticipates "legalization" (see text at note 126 above) looks to organization as a fulcrum for expanding legal services, improving institutional facilities and eliciting favorable rules. On the other hand, the reformer who anticipates "de-legalization" and the development of advantageous bargaining relationships/private remedy system may be indifferent or opposed to reforms of the official remedy system that would make it more likely that the official system would impinge on the RP v. RP relationship.

[143]It is clear e.g. that what Agnew (1972:930) finds objectionable is the redistributive thrust of the legal services program:

> . . . the legal services program has gone way beyond the idea of a governmentally funded program to make legal remedies available to the indigent. . . . We are dealing, in large part, with a systematic effort to redistribute societal advantages and disadvantages, penalties and rewards, rights and resources.

of the several levels.[144]

The contribution of the lawyer to redistributive social change, then, depends upon the organization and culture of the legal profession. We have surmised that court-produced substantive rule-change is unlikely in itself to be a determinative element in producing tangible redistribution of benefits. The leverage provided by litigation depends on its strategic combination with inputs at other levels. The question then is whether the organization of the profession permits lawyers to develop and employ skills at these other levels. The more that lawyers view themselves exclusively as courtroom advocates, the less their willingness to undertake new tasks and form enduring alliances with clients and operate in forums other than courts, the less likely they are to serve as agents of redistributive change. Paradoxically, those legal professions most open to accentuating the advantages of the "haves" (by allowing themselves to be "captured" by recurrent clients) may be most able to become (or have room for, more likely) agents of change, precisely because they provide more license for identification with clients and their "causes" and have a less strict definition of what are properly professional activities.[145]

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[144]Summed up neatly by the head of OEO programs in California, who, defending Governor Reagan's veto of the California Rural Legal Assistance program, said:

> What we've created in CRLA is an economic leverage equal to that of a large corporation. Clearly that should not be.

Quoted at Stumpf, et al. (1971:65).

[145]Cf. Note 48 above. It is submitted that legal professions that approximate "Type B" will not only accentuate the "have" advantages, but will also be most capable of producing redistributive change.

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