

PN-ABI-465

Isn 72340

Please do not quote, reproduce,  
or distribute in any form.

Why the "Haves" Come Out Ahead: Speculations on the...

347.97 Yale Law School. Program in Law and Moderniza-  
0163 tion.

WUdb Why the "Haves" Come Out Ahead: Speculations  
on the Setting and Limits on Legal Change.

Marc Galanter. June 1972.

16597-1 v.

p554

Bibliography: p. 1-1x.

Do not quote, reproduce, or distribute.

Contract AID/csd-2485.

Proj. 931-11-995-112.

1. Law - Sociology. 2. Social change. I. Contract. II.  
Galanter, Marc. III. Title.

I  
PN

WHY THE "HAVES" COME OUT AHEAD:

SPECULATIONS ON THE SETTING AND

LIMITS OF LEGAL CHANGE

Marc Galanter

Working Paper No. 7

June, 1972

AID/csd-2485

This is the seventh in a series of papers reporting works in progress by persons associated with the Yale Law School Program in Law and Modernization. Marc Galanter is on the Faculty of Law and Jurisprudence at the State University of New York at Buffalo.

Third Draft  
November, 1971

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

Marc Galanter

The paper 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, tentative and unsubstantiated 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 change. Our question, specifically, is, under what conditions can litigation<sup>1</sup> 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 panumbra of threats, feints, etc., surrounding such presentation.

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

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

- a society in which wealth and power are widely but unevenly distributed. There are units with different amounts of these. Such units 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 (i.e., 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 (interstitial rules, application to new situations, way in which different rules combined). 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/encouraged to forego bringing cases and to "settle" cases--i.e., bargain to a mutually acceptable outcome.

#### 1. 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 units in the society have many occasions to utilize the courts (in the broad sense) to make (or defend) claims; some only rarely. We might divide our units into those claimants who have only occasional recourse to the courts (one-shotters or OS) and repeat players (RP) who are engaged in a large number of similar litigations over time. The spouse in a divorce case, the auto-injury claimant, the criminal accused are OSs; the insurance company, the prosecutor, the finance company are RPs. Obviously this is an oversimplification--there are intermediate cases (e.g., the professional criminal). 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. So we ought to think of these as continua rather than as dichotomies. 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 his total worth (e.g., the injury victim, criminal accused, etc.) or, the OS may suffer from the opposite problem: his claims may be so small and unmanageable that the cost of enforcing them outruns any promise of benefit (e.g., the shortweighted consumer or the holder of performing rights.)

Let us refine our notion of the RP into an "ideal type" if you will-- a unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests. This does not include every real-world repeat player--e.g., that most common repeat player, the alcoholic derelict enjoys few of the advantages that may accrue to the RP (see below). His resources too few to bargain within the short run or take heed of the long-run. An OS 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, build a record, etc. It is the RP who writes the form contract, requires the security deposit, etc.
- (2) RPs develop expertise, can employ specialists, enjoy economies of scale and have low start-up costs for any case.<sup>2</sup>

- (3) RPs have opportunities to develop facilitative informal relations with institutional incumbents.<sup>3</sup>
- (4) The RP must necessarily 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.<sup>4</sup>
- (5) RPs can play the odds. The larger the matter at issue looms for OS, the more likely he is to adopt a minimax strategy (i.e., minimize the probability of maximum loss). Assuming that the stakes are relatively smaller for RPs, they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases.<sup>5</sup>
- (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 lobbying, etc. (And this 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 favourable 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 any concern with the rules which govern future cases

of this kind. Consider, two parents contesting the custody of their 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 may be more interested in the state of the law. (E.g., the IRS, the adoption agency, the prosecutor).

Thus, if we analyze the outcome of a case into a tangible component and a rule component,<sup>6</sup> 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 case for rule gain (or to minimize rule loss). 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 unfavourable rule outcomes.<sup>7</sup> 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.<sup>8</sup> On the other hand, OSs should be willing to trade off the possibility of making "good law" for tangible gain. Thus, we would expect the body of "precedent" cases--i.e., cases capable of influencing the outcome of future cases--to be relatively skewed toward those favorable to RP.<sup>9</sup> (I do not contend court-developed rules always favor the RP, only that where his opponent is OS, there is a tilt which should make doctrinal development in favor of RPs swifter, that in favor of OSs slower).

Digression on Litigation-mindedness

We have postulated that OSs will be relatively indifferent to the rule-outcomes of particular cases. Beyond relative interest in rule-outcomes and tangible outcomes, populations differ in their estimates of the propriety and gratification of litigating in the first place. The greater the distaste for litigation in a population, the greater the barriers to OSs pressing or defending claims, 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.

Where psychic barriers to litigation are overcome, we might expect that interest in rule outcomes would vary in different populations. The more "rule-minded" the population, the less RP advantage in managing settlement policy ([7] above). But a high valuation of rule-outcomes in specific cases--i.e., appetite for vindication by official processes--should be distinguished from both readiness to resort to official remedy systems and from high valuation of rules as symbolic objects.

It cannot be assumed that variations in readiness to resort of official tribunals is directly reflective of a "rights consciousness" or appetite for vindication in terms of authoritative norms.<sup>11</sup> 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.<sup>12</sup> But the high rate of settlements and the low rate of appeals suggest that the United States should not be regarded as having a population with great interest in securing moral victories through official vindication.<sup>13</sup>

Paradoxically, low valuation of rule-outcomes in particular cases may

co-exist with high valuation of rules as symbolic objects. Edelman 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.<sup>14</sup> One of the consequences of being an attentive RP may be that rules are regarded instrumentally as assets rather than as sources of symbolic gratification. 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.

\*\*\*\*\*

We may think of litigation as typically involving various combinations of OSs and RPs. We can then construct Table 1 and fill in the boxes with some well-known if only approximate examples. (We ignore for the moment that the axes of our table represent continua).

---

TABLE 1

---

TABLE 1

A TAXONOMY OF LITIGATION BY STRATEGIC  
CONFIGURATION OF PARTIES

Initiator, Claimant

One-Shotter

Repeat-Player

<p>Parent v. Parent (Custody) Spouse v. Spouse (Divorce) Neighbor v. Neighbor Family v. Family-Member (Insanity Commitment) Family v. Family (Inheritance)</p> <p>OS vs OS I</p>	<p>Prosecutor v. Accused (Amateur) Finance Co. v. Debtor Landlord v. Tenant I.R.S. v. Taxpayer Condemnor v. Property Owner Prosecutor v. Accused (Prof'l.)</p> <p>RP vs OS II</p>
<p>Welfare Client v. Agency Auto Dealer v. Manufacturer Builder v. Zoning Board Injury Victim v. Insurance Company Tenant v. Landlord Bankrupt Consumer v. Creditors Defamed v. Publisher</p> <p>OS vs RP III</p>	<p>Union v. Company Movie Distributor v. Censorship Board Purchaser v. Supplier Regulatory Agency v. Firms of Regulated Industry</p> <p>RP vs RP IV</p>

One-Shotter

Repeat-Player

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

There is relatively little real litigation here. The most numerous occupants of this box are divorces and insanity hearings. Most (over 90 per cent) are uncontested. They are really pseudo-litigation--i.e., we have a settlement worked out between the parties being ratified in the guise of adjudication. Where we get real litigation in Box I, it is between parties who have some intimate tie with one another, fighting over some unsharable good, often with overtones of "spite" and "irrationality". Courts are resorted to where an ongoing relationship is ruptured; they have little to do with the routine patterning of activity. The law is invoked ad hoc and instrumentally by the parties. There may be a strong interest in vindication, but neither is likely to have much interest in the long-term state of the law (of, e.g., custody or nuisance). There are few appeals, few test cases, little expenditure of resources on rule-development. The law is not highly developed formally and remains remote from everyday practice.

Box II: RP vs OS

The great bulk of litigation is found in this box--indeed every really numerous kind except automobile injury cases, insanity hearings, and divorces. The law is used for routine processing of claims by parties for whom making of such claims is a regular business activity. Often it takes the form of stereotyped mass processing with little of the individuated attention of full-dress adjudication. Even larger 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<sup>15</sup> (subject to discount for RP's transaction costs):<sup>16</sup> transactions are built to fit the rules by creditors, police, draft boards and other RPs. The rules favoring OS may be less readily applicable, since OSs don't ordinarily plan the underlying transaction, or less meticulously observed in practice, since OSs are unlikely to be as ready to invest in insuring their penetration to the field level.<sup>17</sup>

Box III: OS vs RP

All of these are rather infrequent types except for automobile injury cases which are distinctive in that free entry to the arena is provided by the contingent fee.<sup>18</sup> In auto injury, litigation is routinized and settlement is closely geared to possible litigation outcome. Outside the personal injury area, litigation is not routine. It usually represents the attempt of some OS to invoke outside help to compel an organization with which he has been having dealings and from which he cannot get redress.<sup>19</sup> The OS claimant generally has little interest in the state of the law, while the RP defendant 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,<sup>20</sup> the expectation of continued mutually beneficial interaction would give rise to informal bilateral controls.<sup>21</sup> This seems borne out by dealings among businessmen<sup>22</sup> and in labor relations. (The courts are invoked by unions trying to get established and by management trying to prevent them from getting established, more rarely in dealings between bargaining partners). Units with mutually

beneficial relations do not adjust their differences in courts. Where they rely on third parties in dispute-resolution, it is likely to take a form (e.g., arbitration, 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--e.g., the organizations which sponsor much church-state litigation.<sup>23</sup> Where RPs are contending about value differences (i.e., who is right) rather than interest conflicts (i.e., who gets what) there is less tendency to settle and less basis for developing a private system of dispute settlement.<sup>24</sup>

Second, government is a special kind of RP. Informal controls depend upon the ultimate sanction of withdrawal and cutting off beneficial relations. To the extent that withdrawal of future beneficial 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 other sanctions than withdrawal which they can apply--political opposition, etc. But the more inclusive the unit of government, the less effective the withdrawal sanction and the greater the likelihood of attempting to invoke outside allies by litigation even while sustaining the ongoing relationship. This applies also to monopolies--i.e., units which share the government's relative immunity to withdrawal sanctions. RPs in these monopolistic relationships will occasionally invoke formal controls to show prowess, give credibility to threats, provide satisfactions for other audiences. Thus we would expect more litigation by and against government than in other RP vs. RP situations.

A somewhat different kind of special case is present where P and D are RPs but do not deal with each other repeatedly. P disputes with many Ds; D with many Ps (e.g., two insurance companies.) In the government/monopoly case, the parties were so inextricably bound together that the force of informal controls was limited; here they are not bound to each other enough to give informal controls their bite. I.e., there is nothing to withdraw from! The large one-time deal that falls through, the marginal enterprise--these are staple sources of litigation.

We might also expect that where there is litigation in the RP vs. RP situation, there would be heavy expenditure on rule-development, many appeals, 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. Most litigation is found in Boxes II and III; it is mass routine processing of disputes between parties who are strangers (i.e., not in mutually beneficial multiplex continuing relations)<sup>25</sup> and between whom there is a disparity in size. One party is a bureaucratically organized "professional" (i.e., 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

attendent 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; when the parties seek to vindicate conflicting values.

## 2. Lawyers

What happens when we introduce lawyers? 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? If legal services are available on a market, we might assume that the RPs (who tend to be larger units) who can buy them in larger quantities, in bulk (by retainer, too), more steadily, and at higher rates would get services of better quality. They would have better information (especially where restrictions on information about legal services are present). Not only would RP get more talent to begin with, but he would get greater continuity, better record-keeping, more experience and specialized skill in pertinent areas.

One might expect that the freer the market and the fewer the artificial equalizers, the more the legal profession would accentuate the RP advantage. Just how much would be related to the way in which the profession was organized. The more that 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.<sup>26</sup> The more close and enduring the lawyer-client relationship, the more the primary loyalty of lawyers is to clients rather than to courts or guild, the more telling the advantages of accumulated expertise and guidance in overall strategy.<sup>27</sup>

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 type of law (patent, divorce, etc.) and (2) those specialized by type of law plus "side" or party (personal injury plaintiff, criminal defendant, labor, etc.). Divorce lawyers don't specialize in husbands or wives,<sup>28</sup> 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. Table 2 provides some well-known examples of different kinds of specialists;

---

TABLE 2

---

TABLE 2

## A TYPOLOGY OF LEGAL SPECIALISTS

## Lawyer

	Specialized by Field and Party	Specialized by Field	Unspecialized
RP	Prosecutor Personal Injury Defendant Tax Labor/Management Collections	Patent	E.g. general practitioner doing variety of work for bank
OS	Criminal Defense Personal Injury Plaintiff	Bankruptcy Divorce	E. g., general practitioner representing buyer/seller in home sale

Most specialists cater to the demands of particular kinds of RPs. Specialists who service OSs have some peculiarities:

- (1) They tend to possess low prestige within the profession.
- (2) They tend to have problems of mobilizing a clientele (because of low state of information among OSs) and encounter "ethical" barriers and stigma.
- (3) While they are themselves RPs, they have problems in developing optimizing strategies as such. 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. I.e., he is not permitted to play his series of OSs as if it were an RP.<sup>29</sup>

(4) Conversely, the demands of routine and orderly handling of the whole series of OSs may constrain him from maximizing advantage for any individual OS. Consider, for example, the observations of the criminal defense lawyer's dependence on the court community as his reference group.<sup>30</sup> That is, the permanent "client" of a specialist who services OSs is the forum or opposite party.

(5) 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.

(6) Specialized lawyers may, by virtue of their identification with parties, become lobbyists, moral entrepreneurs, proponents of reforms on their 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.<sup>31</sup> 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 reforms 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. Just as the culture of the client population affects strategic position, so does the professional culture of the lawyers.

### 3. Institutional Overload

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 fact of overload in the institutional facilities for the handling of claims. First, in various ways overload creates pressure on claimants to settle rather than to adjudicate:

- (a) by causing delay (thereby discounting recovery);
- (b) by raising costs (of keeping case alive);
- (c) by inducing institutional incumbents to place a high value on clearing dockets, discouraging full-dress adjudication in favor of stereotyping and routine processing;
- (d) by inducing the forum to adopt restrictive rules to discourage litigation

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

Second, overload tends to protect the possessor--the guy who has the money or goods--against the claimant. For the most part, this amounts to favoring RPs over OSs, since RPs typically can structure transactions to put themselves in the possessor position.<sup>32</sup>

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

Thus, overload of institutional facilities provides the setting in which the RP advantages in strategic position and legal services can have full play.

#### 4. Rules

We assume here that substantive rules tend to favor older, culturally dominant interests. I don't mean to imply that the rules are necessarily intended to favor these interests, but that those groups which have become dominant have successfully articulated their operations to the pre-existing rules. 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 the barriers or protections

against precipitate action, naturally tend to protect the possessor or holder against the claimant.<sup>32A</sup> Finally, the rules are sufficiently complex and problematic (or capable of being problematic if sufficient resources are expended in making them so) that differences in the quantity and quality of legal services will affect capacity to derive advantage from the rules.<sup>32B</sup>

Thus, we arrive at Table 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.

---

TABLE 3

---



### 5. 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--i.e., not making a claim or complaint. This is done all the time by "claimants" who lack information or access<sup>33</sup> 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, skill, 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, etc.<sup>34</sup>

(2) 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 those dispute-settlement systems which are normatively and institutionally appended to the official system (e.g., settlement of auto-injuries, handling of bad checks) from those settlement systems which are relatively independent in norms and sanctions (e.g., businessmen settling disputes inter se, religious groups, gangs, etc.).

What we might call the "appended" settlement systems merge imperceptibly into the official litigation system. We might sort them out by 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

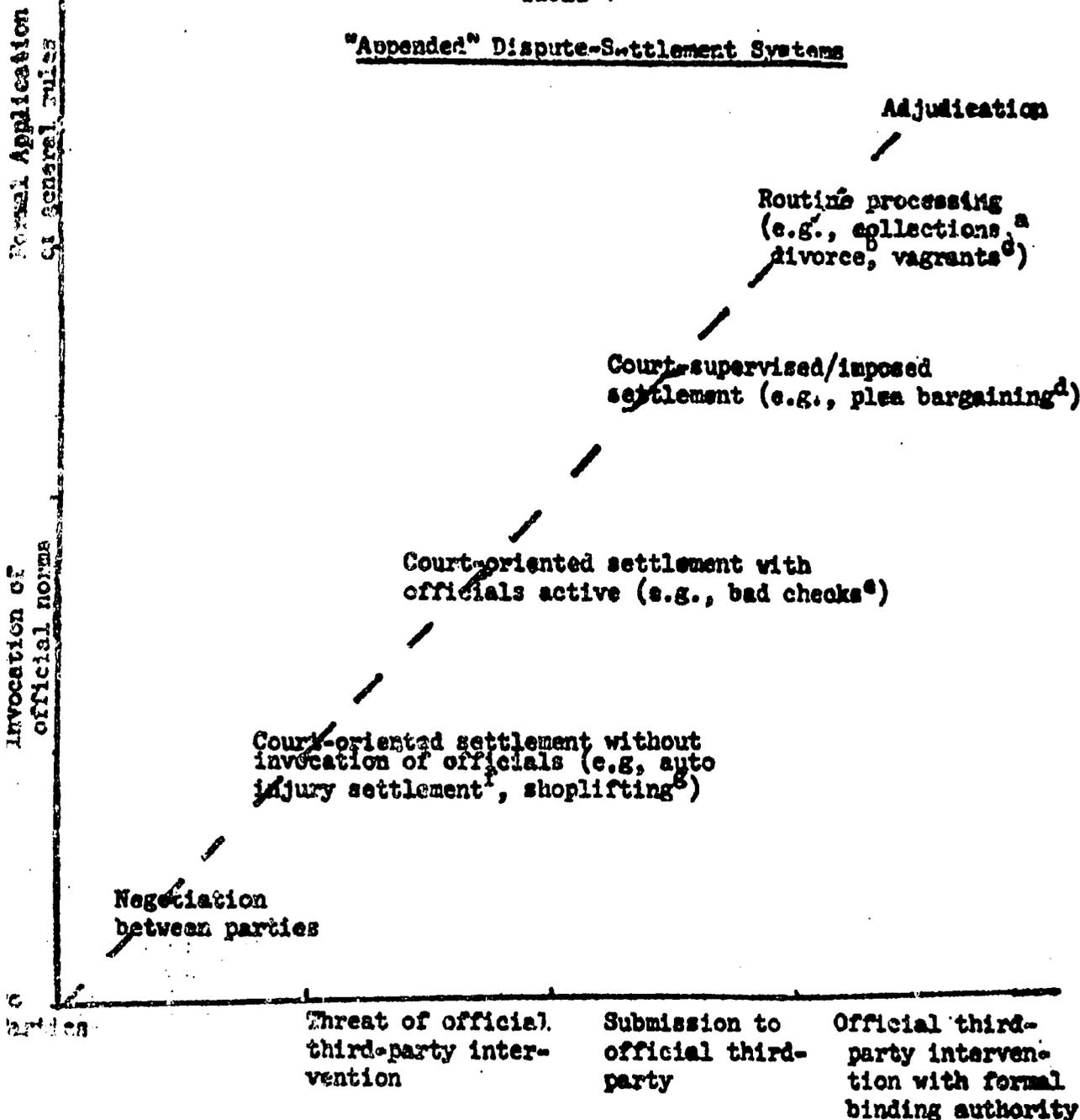
intervention is invoked, to those in which settlement is supervised/imposed by officials, to full-dress adjudication. All along this line the sanction is supplied by the official system (though not always in the manner prescribed in the higher law) and the norms or rules applied are a version of the official rules, although discounted for transaction costs and distorted by their selective use for the purposes of the parties.

---

TABLE 4

---

"Appended" Dispute-Settlement Systems



OFFICIAL THIRD-PARTY AS SOURCE OF SANCTION

Examples

- a. Jacob 1969
- b. O'Garzan 1963
- c. Poste 1936
- d. HAWARD 1956:chap 3; McIntyre and Lippman 1970
- e. Beutel 1957:287 ff. Cr. Div. operation of the Fraud and Complaint Department at McIntyre 1968:470-71
- f. Ross 1970
- g. 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--e.g., in an organized group or a trade, a university, etc. In sorting out the various types according to the extent and the mode of intervention of third parties, we can trace two paths (which in practice may be entwined). One represents the degree to which the applicable norms are formally articulated, elaborated, and expositied--i.e., the increasingly organized character of the norms. The second path represents the degree to which initiative and binding authority are accorded to the third party--i.e., the increasingly organized character of the sanctions.

---

TABLE 5

---

"Private" Dispute-Settlement Systems

Domestic  
Tribunals

Formal Application  
of General rules

Invocation of third-party norms

Two  
parties

Threat of  
third-party  
intervention

Submission to  
third-party

Submission to  
third-party with  
acknowledge/binding  
authority

Threat of  
exposure to  
group opinion<sup>a</sup>

Mediation

"Casual" arbitration<sup>d</sup>

Group opinion  
within a trade<sup>b</sup>

Arbitration within  
self-contained trade  
association<sup>c</sup>

THIRD-PARTY AS SOURCE OF SANCTION

Examples

- a. Leff 1970a:25ff.
- b. Leff 1970a:29ff.; Macaulay 1963:63-64
- c. Mantschikoff 1961:859
- d. Mantschikoff 1961:856-57

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. There is a clear distinction between appended systems like automobile injury or bad check settlements and private systems like the internal regulation of the mafia or the chinese community. The internal regulatory aspects of universities, churches and groups of businessmen lie somewhere in between.<sup>35</sup> 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.<sup>36</sup>

---

TABLE 6

A Scale of Remedy Systems from Official to Private

---

Table 6

A Scale of Remedy Systems from Official to Private

REMEDY SYSTEMS

OFFICIAL	APPENDED	PRIVATE					
Adjudication	Routine Processing	Structurally Interstitial	Oriented to Official	Articulated to Official	Independent	Oppositional	
	Collections	Plea bargaining, bad check recovery	Auto injury settlement	Businessmen	Churches, Chinese community	Gangs	Mafia, Revolutionaries
EXAMPLES							

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, the less likely it is that those parties will resort to the official system and more likely that the relationship will be regulated by some independent "private" system.<sup>37</sup> This seems plausible because we would expect inclusive and enduring relationships to create the possibility of effective sanctions; and we would expect participants in such relationships to share a value consensus<sup>38</sup> which provided standards for conduct and legitimized such sanctions in case of deviance. 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. 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.<sup>39</sup>

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

---

TABLE 7

---

Table 7  
 Relationship between Density of Social Relationships  
 and Type of Remedy System

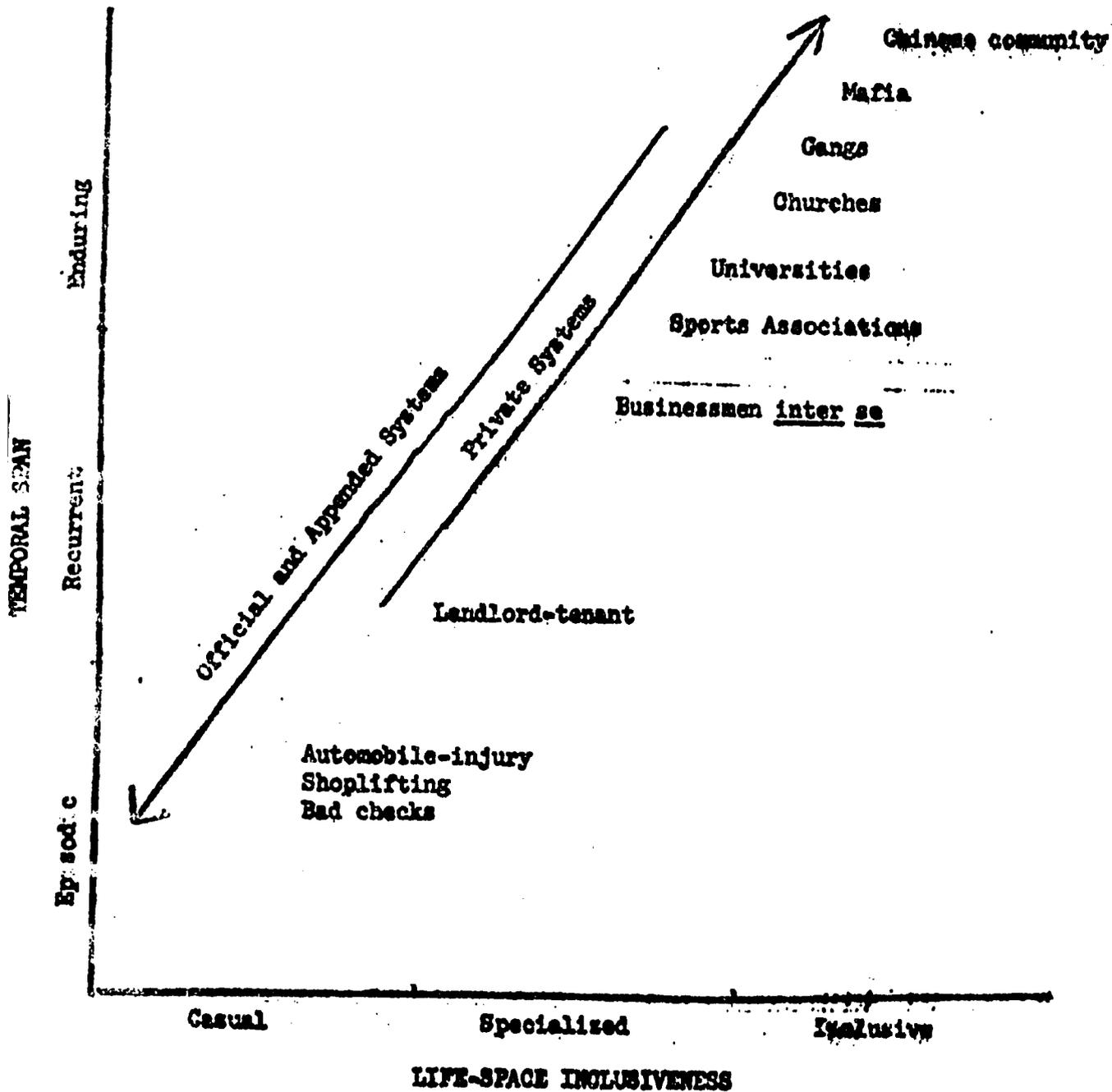


Table 7 restates our surmise of a close association between the density of relationships and remoteness from the official system. We may surmise further that on the whole the official and appended systems flourish in connection with the situations which give rise to the litigation in Boxes II and III of Table 1. The litigation in Boxes I and IV of Table 1, on the other hand, represents in large measure the breakdown (or inhibited development) of private remedy systems.<sup>40</sup>

From the vantage point of the "higher law"<sup>41</sup> what we have called the official litigation system may be visualized as the "upper" layers of a massive legal iceberg, something like this:

Adjudication  
Litigation  
Appended Settlement Systems  
Private Settlement Systems  
Inaction

The uneven and irregular layers are distinct although they merge imperceptibly into one another.<sup>42</sup> As we proceed to discuss possible reforms of the official system, we will want to consider the kind of impact they will have on the whole iceberg. Thus 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--e.g., appetite for vindication, psychic cost of litigation, lawyers' culture, etc.

#### 6. Strategies for reform

Our categorization of four layers of advantage (Table 3) suggests a typology of strategies for "reform". (Taken here to mean equalization--i.e., conferring relative advantage on those who did not enjoy it before.) We then come to four types of equalizing reform:

- (1) rule-change
- (2) increase in supply of institutional facilities
- (3) improvement of legal services in quantity and quality
- (4) improvement of strategic position of have-not litigants.

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 as well. However, for our present purposes we shall discuss only the reforms taken in isolation.)

#### A. Rule-change

Obtaining favorable rule changes is an expensive process. The various kinds of "have-nots" (Table 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 only to proceed within the limiting forms of the trial. Thus, litigation is a particularly tempting arena to "have-nots", including those seeking rule change. (Dolbeare shows that those who use the courts tend to be the more isolated interests that could not carry the day in more political forums.)<sup>43</sup>

Litigation may not, however, be a ready source of rule-change for "have-not." 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--i.e., 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.<sup>44</sup> But generally the test-case involves some organization which approximates an RP.<sup>45</sup>

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--i.e., not "problems" but cases--and the kind of decision they can give. Thus, common law courts (e.g.) give an all-or-none, once-and-for-all decision which must be justified in terms of a limited (though flexible) corpus of rules and techniques. By tradition, courts cannot address problems by devising new regulatory or administrative machinery (and have no taxing and spending powers to support it); they are limited to solutions compatible with the existing institutional framework.<sup>47</sup> 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 supporters) may decrease capacity and drive to secure redistribution of tangible benefits.<sup>48</sup>

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.<sup>49</sup> 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, securing systematic enforcement of their decrees. The task of monitoring is left to the parties.

(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 clear-cut... 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.<sup>50</sup>

(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 "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 court level, they may not have the resources to secure the penetration of these rules.<sup>51</sup>

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, Randell's study of movie censorship shows that liberalization of the rules did not make censorship boards more circumspect; instead, they folded 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.<sup>52</sup>

#### 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-- i.e., 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 contesting of rules, more rule change. Settlement outcomes would more closer to litigation outcomes as neither side could use settlement policy to prevent rule-loss.

(This assumes no change in the kind of institutional facilities. One might also imagine instead an increase in investigatory or enforcement staff connected with courts.)

While such reforms would benefit some OS claimants, they would also improve the position of those RP claimants not already in the possessor position. (E.g., the prosecutor where the accused is free on bail.)

### C. Increase in legal services

The reform envisaged here is an increase in quantity and quality of legal services to "have-nots". Presumably this would lower costs, remove the expertise advantage, produce more litigation with more favorable outcomes for have-nots, perhaps with more appeals and more rule challenges, more new rules in their favor. (Public defender, legal aid, judicare, pre-payment plans approximate this in various fashions.) To the extent that OSs 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 unremitting 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....<sup>53</sup>

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. Re-organization 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 co-ordinated fashion, play long-run strategies, benefit from high-grade legal services, etc.<sup>54</sup> An organized group is not only better able to secure favorable rule change. (in courts and elsewhere) but is better able to see that good rules are implemented. It can expend resources on surveillance, monitoring, threats, litigation that would be uneconomic for an OS.

Such new units would in effect be RPs.<sup>55</sup> Their encounters with opposing RPs would move into Box IV of Table I. Neither would enjoy the strategic advantages of RPs over OSs. One possible result, as we have noted in our discussion of the RP vs RP situation, is de-legalization--i.e., 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) Class action is a device to raise the stakes for an RP, reducing his position to that of OS by making the stakes more than he can afford to play the odds on, while moving the claimants as an organized group into an RP position. (2) Similarly the "community organizing" aspect of public interest law can be seen as attempting to create a unit (tenants, consumers) which can play the RP game. (3) Such a change in strategic position creates the possibility of a test-case strategy for getting rule-change. Thus "public interest law" can be thought of as a combination of community organizing, class action and test-case strategies, along with increase in legal services.

### 7. 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, etc., 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 "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.<sup>56</sup>

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 Table I (RP vs OS, OS vs RP)--the great staple sources of litigation--would now be moved to Box IV (RP vs RP). We observed earlier that RPs who anticipate continued dealings with one another tend to rely on informal bilateral controls. We might expect then that the official system would be abandoned in favor of private systems of dispute-settlement.<sup>57</sup>

Thus we would expect our reforms to produce a dual movement: The official and its appended systems would be "legalized"<sup>58</sup> 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 scale (Table 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. Their shared interest may be insufficiently respectable to be publically acknowledged (e.g., shoplifters, homosexuals until very recently). Or recurrent OS roles may be staffed by a shifting population for whom the sides of the transaction are interchangeable.<sup>59</sup> (E.g., home buyers and sellers, negligent motorists and accident victims). Even where OSs are organizable, we recall that not all RP vs RP encounters lead to the development of private remedy systems. There are RPs engaged in value conflict; those relationships with a governmental or other monopoly aspect in which informal controls may falter; and finally those RPs whose encounters with one another are non-recurring. In all of these we might expect legalization rather than privatization.

Litigation (actual or threatened) might be replaced by "settlement" (explicit or tacit) with opponents who had capacity to induce mutually advantageous dispositions. Or litigation might approximate full-dress adjudication in which every element of the rules of advantage to either side would be invoked and applied (while RPs would lose their relative advantage in influencing rule making in both legislative and court settings). Which ever 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" (e.g., the right to exclude low status neighbors, police dominance in encounters with citizens). 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 suggests 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.<sup>60</sup> Yet the cultural attachment to universalism is wedded to and perhaps even intensifies diversity and particularism at the operative level.<sup>61</sup>

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 contained in "higher law". By their selective application of rules in a context of parochial understanding and priorities, these field level legal communities produce regulatory outcomes which could not be predicted by examination of the authoritative "higher law".<sup>62</sup>

Thus its unreformed character articulates the legal system to the discontinuities of culture and social structure: it provides a way of accomodating cultural heterogeneity and social diversity while propounding universalism and unity; of accomodating 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"-- i.e., 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" of the legal system. It permits unification and universalism at the symbolic level and diversity and particularism at the operating level.<sup>63</sup>

#### 8. 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 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; an RP may re-structure the transaction to escape the thrust of the new rule.<sup>64</sup> Favorable rules are typically not in short supply to have-nots; certainly less so than any of the other resources needed to play the litigation game.<sup>65</sup> Programs of

equalizing reform which focus on rule-change can be readily absorbed without any change in power relations. The system has a capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice<sup>66</sup> or distribution of tangible advantages.<sup>67</sup> Indeed rule-change may become a symbolic substitute for redistribution of advantages.<sup>68</sup>

The low potency of 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 the 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.<sup>69</sup> And courts have less capacity than other rule-makers to create institutional facilities and re-allocate resources to secure the implementation of the 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 withholding) the mantle of legitimacy. The more divided the other holders of power, the greater the redistributive potential of this symbolic/tactical role.<sup>70</sup>

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.<sup>71</sup>

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 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 facilitate organization of parties and the delivery of legal services (where these in turn provide a focus for articulating and organizing common interests) are the most powerful fulcrum of change.<sup>72</sup> The intensity of the opposition to class action legislation and autonomous reform-oriented legal services (e.g., California Rural Legal Assistance) is the indication of the "haves" own estimation of the relative strategic impact of the several levels.

The contribution of the lawyer to bringing about redistributive social change, then, depends upon the organization and culture of the legal profession. We have surmised that court-produced 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 willingness to undertake new tasks and form enduring alliances with clients and operate in other forums 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.<sup>73</sup>

\*This paper was originally prepared for the Seminar on the Legal Profession and Social Change at Yale Law School, Autumn, 1970, while the author was Senior Fellow in the Law and Modernization Program.

I would like to acknowledge the helpful comments of Guido Calabresi, Vernon Dibble, William L.F. Felstiner, Lawrence Friedman, Geoffrey Hazard, Quintin Johnstone and Arthur Leff on an earlier draft, and to confer on them the usual dispensation.

#### FOOTNOTES

1. In the sequel "litigation" is used 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 application of rules by officials in a particular litigation. The discussion here focuses on litigation, but I believe an analagous analysis might be applied to the rule-making and regulatory phases of the legal process.
2. A curious 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.
3. See, e.g., Jacob's (1969:100) description of creditor colonization of small claims courts:

. . . the neutrality of the judicial process was substantially compromised by the routine 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 courst 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 that disclosed by the debtor, simply because one was told by a man he knew and the other by a stranger

- 46 -

The opportunity for regular participants to establish relations of trust and reciprocity with courts is not confined to these lowly precincts. Siciliano (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 Justice or their clerks want to extract the key issues in a complicated case quickly, they turn, according to common report, to the government's brief. [Third] The Solicitor General gains further credit . . . by his demonstrations of impartiality and independence from the executive branch.

4. See Ross (1970:156 ff.); Schelling (1963:22 ff., 41). An offsetting advantage enjoyed by some OSs deserves mention. Since he doesn't anticipate continued dealings with his opponent, an OS can do his damndest without fear of reprisal next time around or on other issues. 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. Thus an image of irrationality may be a bargaining advantage. See Ross (1970:170n); Schelling (1963:170n); an OS may be able to sustain such an image in a way that RP cannot. But cf. Leff 1970a:18 on the role of "spite" in collections.
5. Cf. the overpayment of small claims and underpayment of large claims in automobile injury cases. Franklin, Chanin and Mark (1961: ); Conard (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 1964:197-99).
6. 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.
7. 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, e.g., in automobile injury litigation where, I am told, settlements have a kind of precedent value.

8. 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 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)

9. A vivid example is provided in Macaulay (1966:96 ff., esp. 101).
10. 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 creditors' readiness to avail of litigation remedies. Ross (1970:220 ff.) suggests 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.
11. Cf. Zeisel, Kalvan & Buchholz 1959:chap. 20.
12. Henderson (1968:448) 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 sub-legal conciliatory techniques becomes a key obstacle in the path toward the rule-of-law envisioned by the new constitution.

FOOTNOTES (continued)

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. (1968:449)

Finding that Californians resorted to litigation about 23 times as often as Japanese, he concludes that traditional conciliation is employed to settle most "disputes that would go to court in a country with a developed sense of justiciable right." (1968:453)

Henderson seems to imply that "in modern society [people] must comport themselves 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." (1968:454)

Cf. Rabinowitz 1968:Part III for a "cultural" explanation for the relative unimportance of law in Japanese society. (Non-ego developed personality, non-rational approach to action, extreme specificity of norms with high degree of contextual differentiation.)

13. For an instructive example of what happens 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 pre-trial conference, the judge appointed an impartial psychiatrist to examine Mr. Lin.

Compare the case of India, where both litigation and appeal rates are high and settlement is practically non-existent. See Kidder 1971.

14. Edelman 1967:chap. 2.
15. The analysis here postulates logical formal rationality in the adjudicator-- i.e., that judges apply rules routinely and relentlessly to RPs and OSs alike. In the event, litigation often involves some admixture of individuation, khadi-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.
16. Cf. Friedman 1967:806 on the zone of "reciprocal immunities: between, e.g., 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.
17. Similarly, even OSs who have procured favorable judgments may experience difficulty at the execution stage. Even where the stakes loom large

for the OS, 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, 19 September 1971.

18. 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.
19. 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 stumgling 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.

20. E.g., Babcock (1969:53-54) observes that the necessity of the builder to have repeated contact with the regulatory powers of the suburb on various issues affords the suburb its greatest leverage on any one issue.
21. 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. Thus RPs can cheaply and effectively affect the business reputation of their adversaries and thus their future relations with relevant others. (Leff 1970a:26 ff.; Macaulay 1963:64)

22. . . . 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 ply in negotiations. . . . 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.
23. 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)
24. Cf. Aubert's (1963:27 ff.) distinction between conflict careers based upon conflicts of interest and those arising from conflicts of value.
25. I.e., the relationship may be single stranded or it may have 'failed' in that it no longer is mutually beneficial.
26. 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 compromising of loyalty to 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" with parochial understandings, institutional maintenance needs, etc.
27. Although this is not the place to elaborate it, let me sketch the model that underlies this assertion. Let us visualize a series of scales along which legal professions might be ranged:

	<u>A</u>	<u>B</u>
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 be associated, so that we can think of A and B types of bodies of legal professionals -- e.g., the American legal profession would be a B type, British barristers and French advocates A types, Indian lawyers an intermediate case. It is suggested that some of the characteristics of Type B professionals tend to accentuate or amplify the strategic advantages of RP parties.

28. Which is not to deny the possibility that such "side" specializations 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.
29. No Note.
30. Blumberg (1967); Skolnick (1967). On the interdependence of prosecutor and public defender, see Sudnow (1965:265,273).
31. 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 (e.g. 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 RPs-collection agencies).

32. 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 OSs may use overload to advantage--e.g., the accused out on bail may benefit from delay. 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.
- 32(a) 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).
- 32(b) For an example of the potency of a combination of complexity and expertise in frustrating recovery, see Laufer (1970).
33. On the contours of "inaction," see Levine and Preston (1970); Mayhew and Riess (1969); Ennis (1967).
34. Davis (1969); LaFave (1965); Black (1971). 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).
35. 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.

36. 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, e.g., internal dispute settlement among organized and committed criminals or revolutionaries. Closer to the official might be the sub-cultures of delinquent gangs. Although they have been characterized as deviant sub-cultures, Matza (1964: chap.2, esp. 59ff.) 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 -- e.g., businessmen may not recognize any divergence of their notion of obligatory business conduct from the law of contract.
37. Since dealings between settlement specialists (e.g., 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 settlement would tend to shift to the more private end of our spectrum. Cf. Skolnick (1967:69) on the "regression to cooperation" in conflict situations.
- 37(a) The capacity of continuing or 'on-going' relationships to generate effective informal control has been often noted (Macaulay 1963: 63-64; Yngvesson 1971 ). 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 and whose withholding gives the parties leverage to secure adjustment.
38. 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 36 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. Thus the variant legal cultures of various legal communities at the field or operating level exist with little awareness of principled divergence from the higher law.
39. This comports with Bohannon'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 Bohannon implies a constant relationship between 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

54

institutionalization of norms is incomplete -- either in the norms or the institutionalization.

Bohannon 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." (Thus differences between institutional practice and legal prescription are matters of phase or lag.) Divergences from unity, normative, 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 incorporate instances from 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.

40. 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) finds that readiness to invoke police and insistence of complainants on arrest is associated with 'relational distance' between the parties. Cf. Kawashima's (1962:45) 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 -- e.g., in cases of inter-village and user-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.

41. 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, etc.
42. 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

55

- present "iceberg" model suggests that the existence of disparate systems of settling disputes is a reflection of cultural and structural discontinuities.
43. Dolbeare 1967:63.
  44. There may be rare situations in which no settlement is acceptable to the OS. He stands only to gain by the test case whatever the outcome and has the money to pay for it. E.g., wiretap decision on the physician charged with abortion. Pleading guilty to one count if state dropped 10 others and DA agreed to suspended sentence would still lose his license -- so every year of delay worth money, win or lose. I.e., the benefits of delay are greater than the costs of continued litigation.
  45. See Vose (1967) on the test-case strategy of NAACP - by choosing clients to forward an interest (rather than serving the clients) NAACP made itself an RP with corresponding advantages over the opposite parties (neighborhood associations). On the relative rarity of such management of litigation by organized groups pursuing coherent long range strategies, see Hakman (1966, 1969).
  46. Although judicial decisions do often embody or ratify compromises agreed upon by the parties, it is precisely in the area of rule promulgation that such splitting the difference is seen as illegitimate.
  47. See generally, Friedman (1967, esp 821). 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.
  48. 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 publics that tend to receive symbolic rewards, while organized professional ones reap tangible rewards.
  49. That rule changes do not penetrate costlessly to other levels of the system is richly documented in the "impact" literature. 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 (1970:559 ff.).
  50. 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 lawsuits against inventive 'wrongdoers'.") Leff's critique of Murray's

36

- (1969) faith in good rules to secure change in the consumer marketplace parallels Handler's (1966) critique of Reigh's (1964a, 1964b) prescription of judicial review to secure change in welfare administration.
51. 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 interested and able to secure rule-victories were unable or unwilling to invest resources to secure the implementation of the new rules.
  52. 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.
  53. Rothwax 1969:140-41.
  54. One can imagine various ways in which OSs might be aggregated into RPs. They include (1) the bargaining agent (e.g., trade unions, tenant unions); (2) the assignee-- manager of fragmentary rights (e.g., performing rights associations like ASCAP); (3) the interest group sponsor (NAACP, ACLU, environmental action groups). All of these forms involve upgrading capacities for managing claims, gathering and utilizing information, continuity, persistence, employment of expertise, bargaining skill, combined with enhancement of their strategic position, which may involve either aggregating claims that are too small relative to the cost of remedies (consumers, breathers of polluted air, owners of performing rights) or reducing claims to manageable size by collective action to dispel or share unacceptable risks (tenants, migrant workers). A weaker form of organization would be (4) the clearing-house which established a communication network among OSs which would lower the costs of information and give RPs a stake in the effect OSs could have on their reputation. A minimal form of this represented by the 'action line' type of column or program.
  55. Paradoxically, perhaps, the organization of OSs into a unit which can function as an RP entails the possibility of internal disputes within which distinctions between OSs and RPs reappear -- e.g., in unions, ASCAP.
  56. I.e., 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.
  57. This is in boxes II and III of Table 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.

51

58. That is, in which the field level application of the official rules has moved closer to the authoritative "higher law" (see Note 41).
59. 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 -- i.e., no one knows in advance the position he will occupy the proposed "practice." The analysis here suggests that while high turnover and unpredictable interchange of roles may approximate this condition in some cases, the assumption is radically non-descriptive. That is, 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 depicts practices as if they proceeded directly from elementary human qualities, unmediated by pre-existing social roles and identities.
60. 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.
61. As Thurman Arnold observed, our law "compels the necessary compromises to be carried on sub rosa, while the process is openly condemned.... Our process attempted to outlaw the 'unwritten law.'" (1962:162) On the co-existence of stress on uniformity and rulefulness with discretion and irregularity, see Davis (1969).
62. Some attempts at delineating and comparing such "local legal cultures" are found in Jacob (1969); Wilson (1968).
63. I employ this term to refer to one distinctive style of accomodating social diversity and normative pluralism by combining universalistic law with variable application, local initiative and tolerated evasion. 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; (b) "co-optation" in which the official institutions are committed to apply rules generated by various groups. Although a legal system of the kind we have postulated is perhaps closest to dualism, it is not a pure case, but combines all three.
64. Leff (1970b); Rothwax (1969:143); cf. Grossman (1970).
65. Indeed the response that reforms must wait upon rule-change is one of the standard ploys of targets of reform demands. Lipsky (1970: 94-96) provides an example of housing officials claiming that implementation of rent-strikers' demands required new legislation, when they already had the needed power. Cf. the unwillingness of the Department of Justice to enforce the 1899 Clean Water Act, etc.

66. 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."
67. See, e.g., Lipsky 1970:chap. 4, 5.
68. See Edelman 1967:40.
69. No Note.
70. Dahl, 1958:294.
71. Cf. Cahn and Cahn's (1970:1916 ff.) delineation of the "four principle 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.
72. The reformer who anticipates "legalization" (see text at Note 58 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.
73. Cf. Note 27 above. It is submitted that legal professions that approximate "Type B" will not only accentuate the 'have' advantages, but will be most likely to be capable of producing redistributive change.

## REFERENCES CITED

ARNOLD, THURMAN

- 1962 The symbols of government. New York, Harcourt Brace and World, (First publication, 1935).

AUBERT, VILHELM

- 1963 Competition and Dissensus: two types of conflict resolution. Journal of Conflict Resolution 7:26-42.

BABCOCK, RICHARD S.

- 1969 The Zoning Game: Municipal Practices and Policies. Madison, University of Wisconsin Press.

BEUTEL, FREDERICK K.

- 1957 Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science. Lincoln, University of Nebraska Press.

BLACK, DONALD J.

- 1970 Production of Crime Rates. American Sociological Review 35:733-48.  
1971 The Social Organization of Arrest. Stanford Law Review 23:1087-1111.

BLUMBERG, ABRAHAM

- 1967 The Practice of Law as a Confidence Game. Law and Society Review 1:15-40.

BOHANNON, PAUL

- 1965 The Differing Realms of the Law in The Ethnography of Law (Laura Nader, ed.) - Part 2 of American Anthropologist, Volume 67, No. 6.

CAHN, EDGAR S. AND JEAN CAMPER CAHN

1970 Power to the People or the Profession? - The Public Interest  
in Public Interest Law. Yale Law Journal 79:1005-48.

CAMERON, MARY OWEN

1964 The Booster and the Snitch: Department Store Shoplifting.  
New York, Free Press of Glencoe.

CONRAD, ALFRED F., JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES F. VOLTA,  
AND ROBERT L. BOMBAUGH

1964 Automobile Accident Costs and Payments: Studies in the  
Economies of Injury Reparation. Ann Arbor: University of  
Michigan Press.

CONSUMER COUNCIL

1970: Justice Out of Reach: A Case For Small Claims Courts.  
London: Her Majesty's Stationery Office.

DAHL, ROBERT A.

1958 Decision-making in a Democracy: The Supreme Court as a  
National Policy-maker. Journal of Public Law 6:279-95.

DAVIS, KENNETH CULP

1969 Discretionary Justice: A Preliminary Inquiry. Baton Rouge:  
Louisiana State University Press.

DERRET, J. DUNCAN M.

1959 Sir Henry Maine and Law in India. Juridical Review 1959:  
(Part I) 40-55.

DOLBEARE, KENNETH M.

1967 Trial Courts in Urban Politics: State Court Policy Impact  
and Function in a Local Political System. New York, John Wiley.

DOLBEARE, KENNETH, AND PHILLIP E. HAMMOND

1971 The School Prayer Decisions: From Court Policy to Local

- 61 -

EDELMAN, MURRAY

1967 The Symbolic Uses of Politics. Urbana, University of Illinois Press.

ENNIS, PHILLIP H.

1967 Criminal Victimization in the United States: A Report of a National Survey. (President's Commission on Law Enforcement and Administration of Justice, Field Survey II). Washington, Government Printing Office.

FOOTE, CALEB

1956 Vagrancy-type Law and Its Administration. University of Pennsylvania Law Review. 104:603-50.

FRANK, JEROME

1930 Law and the Modern Mind. New York: Coward-McCann.

FRANKLIN, MARC, ROBERT H. CHAWIN, and IRVING MARK

1961 Accidents, Money and the Law. A Study of the Economics of Personal Injury Litigation. Columbia Law Review 61:1-39.

FRIEDMAN, LAWRENCE M. and JACK LADINSKY

1967 Social Change and the Law of Industrial Accidents. Columbia Law Review 67:50-82.

FRIEDMAN, LAWRENCE M. and STEWART MACAULEY

1967 Contract Law and Contract Teaching: Past, Present, and Future. Wisconsin Law Review 1967:805-21.

GIFFORD, DANIEL J.

1971 Communication of Legal Standards, Policy Development and Effective Conduct Regulation. Cornell Law Review:56:409-68.

GROSSMAN, JOEL

- 1970 The Supreme Court and Social Change: A Preliminary Inquiry.  
American Behavioral Scientist 13:535-51.

HAKMAN, NATHAN

- 1966 Lobbying the Supreme Court -- An Appraisal of Political  
Science Folklore. Fordham Law Review 35:15-50.
- 1969 The Supreme Court's Political Environment: The Processing  
of Noncommercial Litigation in Frontiers of Judicial Research  
(J. Grossman and J. Tanahauss, eds.) New York, John Wiley  
and Sons.

HANDLER, JOEL

- 1966 Controlling Official Behavior in Welfare Administration,  
in The Law of the Poor. (Jacobus Tenbroek, et al., eds.)  
San Francisco, Chandler Publishing Company.

HART, HENRY M., JR. and ALBERT M. SACKS

- 1958 The Legal Process: Basic Problems in the Making and Application  
of Law. Cambridge, Tentative Edition. (Mimeographed).

HENDERSON, DAN FENNO

- 1968 Law and Political Modernization in Japan in Political  
Development in Modern Japan. (Robert E. Ward, ed.) Princeton  
University Press, pgs. 387-456.

HORSKY, CHARLES

- 1952 The Washington Lawyer. Boston, Little Brown Company.

JACOB, HERBERT

- 1969 Debtors in Court: The Consumption of Government Services.  
Chicago, Rand McNally.

**KATZ, MARVIN**

- 1969 Mr. Lin's Accident Case: A Working Hypothesis on the Oriental Meaning of Face in International Relations and the Grand Scheme. Yale Law Journal 78:149-94.

**KAWASHIMA, TAKEYOSHI**

- 1963 Dispute Resolution in Contemporary Japan, in Law in Japan: The Legal Order in a Changing Society, (A.T. von Mehren, ed.) Cambridge: Harvard University Press.

**KIDDER, ROBERT**

- 1971 The Dynamics of Litigation: A Study of Civil Litigation in South Indian Courts. Unpublished Dissertation, Northwestern University.

**LAFAVE, WAYNE R.**

- 1965 Arrest: The Decision to Take a Suspect into Custody. Boston, Little Brown Company.

**LAUFER, JOSEPH**

- 1970 Embattled Victims of the Uninsured: In Court with New York's MVAIC, 1959-69. Buffalo Law Review 19:471-513.

**LEFF, ARTHUR A.**

- 1970a Injury, Ignorance, and Spite - The Dynamics of Coercive Collection. Yale Law Journal 80:1-46.
- 1970b Unconscionability and the Crowd-Consumers and the Common-Law Tradition. University of Pittsburgh Law Review 31: 349-358.

64

LEVINE, FELICE J. and ELIZABETH PRESTON

- 1971 Community Resource Orientation Among Low Income Groups.  
Wisconsin Law Review 1970:80-113.

LEVINE, JAMES P.

- 1970 Methodological Concerns in Studying Supreme Court Efficacy.  
Law and Society Review 4:583-611.

LIPSKY, MICHAEL

- 1970 Protest in City Politics: Rent Strikes, Housing, and the  
Power of the Poor. Chicago, Rand McNally and Company.

MACAULEY, STEWART

- 1963 Non-Contractual Relations in Business. A Preliminary Study.  
American Sociological Review. 28:55-67.
- 1966 Law and the Balance of Power: The Automobile Manufacturers  
and Their Dealers. New York, Russell Sage Goundation.

MCINTYRE, DONALD M.

- 1968 A Study of Judicial Dominance of the Charging Process.  
Journal of Criminal Law, Criminology and Police Science  
59:463-90.

MCINTYRE, DONALD M. and DAVID LIPPMAN

- 1970 Prosecutors and Early Disposition of Felony Cases. American  
Bar Association Journal 56:1154-59.

MATZA, DAVID

- 1964 Delinquency and Drift. New York, John Wiley.

MAYHEW, LEON and ALBERT J. REISS, JR.

- 1969 The Social Organization of Legal Contacts. American Socio-  
logical Review 34:309-18.

65

MENTSCHIKOFF, SOIA

1961 Commercial Arbitration. Columbia Law Review 51:846-69.

MORGAN, RICHARD S.

1968 The Politics of Religious Conflict: Church and State in America. New York, Pegasus.

MURPHY, WALTER

1959 Lower Court Checks on Supreme Court Power. American Political Science Review 53:1017-31.

MURRAY, JOHN E. JR.

1969 Unconscionability: Unconscionability. University of Pittsburgh Law Review 31:1-80.

O'GORMAN, HUBERT

1963 Lawyers and Matrimonial Cases: A Study of Informal Pressures in Private Professional Practice. New York, Free Press.

PARSONS, TALCOTT

1954 A Sociologist Looks at the Legal Profession in Essays in Sociological Theory. New York, Free Press. pp. 370-385/

RABINOWITZ, RICHARD W.

1968 Law and The Social Process in Japan. From the Transactions of the Asiatic Society of Japan. Third Series, Volume X, Tokyo.

RANDALL, RICHARD S.

1968 Censorship of the Movies: Social and Political Control of a Mass Medium. Madison, University of Wisconsin Press.

REICH, CHARLES

1964 The New Property. Yale Law Journal 73:733-787.

66

VOSE, CLEMENT E.

1967   Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases. Berkeley: University of California Press.

WASBY, STEPHEN L.

1970   The Impact of the United States Supreme Court: Some Perspectives. Homewood, Illinois, The Dorsey Press.

WECHSLER, HERBERT

1959   Toward Neutral Principles of Constitutional Law. Harvard Law Review 73:1-35.

WILSON, JAMES Q.

1968   Varieties of Police Behavior: The Management of Law and Order in Eight Communities. Cambridge, Harvard University Press.

YNGVESSON, BARBARA

1965   The Berkeley-Albany and Oakland-Piedmont Small Claims Courts: A comparison of role of the Judge and social function of the courts. Unpublished paper.

1971   The Berkeley Comparative Village Law Project. Mimeographed draft.

ZEISEL, HANS, HARRY KALVEN, JR., AND BERNARD BUCHHOLZ

1959   Delay in the Court. Boston, Little Brown Company.

YALE LAW SCHOOL

PROGRAM IN LAW AND MODERNIZATION

Working Paper Series

- No. 1 - Heller, Thomas C., Conflict, Lawyers and Economic Change (Chapter 3), 59p.
- No. 2 - Snyder, Francis G., A Problem of Ritual Symbolism and Social Organization Among the Diola-Bandial, 40p.
- No. 3 - Felstiner, William L.F., Forms and Social Settings of Dispute Processing, 35p.
- No. 4 - Santos, Boaventura de Sousa, Law Against Law, 130p.
- No. 5 - Abel, Richard L., Introduction to Theories of Law and Society: The Anthropology of Law (Syllabus and Bibliography of a Course), 20p.
- No. 6 - Abel, Richard L., The Development of a Modern African Legal System: A Case Study of Kenya (Syllabus for a Seminar), 29p.
- No. 7 - Galanter, Marc, Why the "Haves" Come Out Ahead: Speculations on the Setting and Limits of Legal Change, 59p.
- No. 8 - Pozen, Robert C., Public Corporations in Ghana: A Study in Legal Importation, 77p.
- No. 9 - Guben, Jerold, "The England Problem" and The Theory of Economic Development, 15p.
- No. 10 - Trubek, David M., A Critique of the "Law and Development" Literature, 22p.
- No. 11 - Brockman, Rosser H., Customary Contract Law in Late Traditional Taiwan, 197p.
- No. 12 - Trubek, David M., Max Weber on Law and the Rise of Capitalism, 45p.
- No. 13 - Abel, Richard L., Toward a Comparative Social Theory of the Dispute Process, 120p.
- No. 14 - The Relevance of Legal Anthropology to Comparative Social Research in Law, Proceedings of a Conference, November 21-22, 1971, Yale Law School, 250p.

Copies of the above may be secured by writing: Administrative Assistant  
Program in Law and Modernization  
Yale Law School  
127 Wall Street  
New Haven, Connecticut 06520

68