

1-1-2006

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Recommended Citation

Meir Dan-Cohen, *In (Faint) Praise of the Large APs: Comments on Marc Galanter, Planet of the APs*, 53 *Buff. L. Rev.* 1427 (2006).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol53/iss5/4>

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In (Faint) Praise of the Large APs: Comments on Marc Galanter, “Planet of the APs”

MEIR DAN-COHEN†

Some thirty years ago Prof. Galanter published an article provocatively entitled *Why the “Haves” Come Out Ahead*,¹ which has been described as “perhaps the most visible, widely cited, and influential article ever published in the law and society field.”² Perhaps other than the “perhaps,” this description is exactly on the mark. In that article, Galanter put on the scholarly agenda a vital and troubling topic: the systematic advantages that those who are well-off enjoy in adjudication. In today’s lecture Prof. Galanter revisited this fertile ground, providing us with much new data that corroborates and amplifies his initial insights. Yet today’s lecture involves not only an update and an amplification of the older piece, but also a significant shift of focus.³ At the heart of the lecture lies the observation that the haves that dominate litigation tend to be increasingly not individual human beings but artificial persons, or APs, as Galanter whimsically calls them. The advantages that organizations enjoy in litigation are in part due to their greater resources. But they are also due to organizational factors, such as being repeat-players, having a rule-governed formal structure that finds the legal environment particularly congenial, and the availability of

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1. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974).

2. Joel B. Grossman, Herbert M. Kritzer, & Stewart Macaulay, *Do the “Haves” Still Come Out Ahead?*, 33 *LAW & SOC’Y REV.* 803, 803 (1999).

3. See Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 *BUFF. L. REV.* 1369 (2006).

a permanent legal staff. My aim here is to assess this new observation about the ascendance in adjudication of organizations, in light of the older claim that the haves come out ahead. My question is this: Relative to the baseline established by the older article, is today's claim good news or bad? Should the realization that adjudication tends increasingly to be dominated by artificial rather than by natural persons exacerbate our distress about the unfair advantage enjoyed by haves or mitigate it?

I don't presume in these brief comments to present a balanced view or reach a confident conclusion. Instead I list a number of considerations that support what I shall call *the mitigation hypothesis*: the organizational identity of many present-day litigants may partially off-set or alleviate the unfairness of the legal advantages wealth secures. The tentative "may" must be doubly stressed, however. First, whether the ascendance of organizations has mitigating effects depends on various facts, many of which are unavailable or unclear. Secondly, in some instances the facts as we know them do not support the mitigation hypothesis. In these instances the main significance of the considerations I mention is in suggesting an unrealized potential in our coming to terms with "the organizational revolution"⁴ and perhaps in hinting at the direction of some ameliorative steps.

I. THE HETEROGENEITY OF APs

Let me start by highlighting the relevance to my mitigation hypothesis of one aspect of the ascendancy of APs that was stressed in today's lecture: their heterogeneity. In the organizational arena, we commonly associate the haves with business corporations. But as Prof. Galanter himself reminds us, not all organizations belong to this category: there are also nonprofit organizations, voluntary associations, trade unions, governmental or semi-governmental agencies, and the like. These APs do not always possess great wealth or cater to the interests of those who do. All the same, they bring to litigation many of the advantages that the wealthier, corporate APs have.

4. See KENNETH E. BOULDING, *THE ORGANIZATIONAL REVOLUTION: A STUDY IN THE ETHICS OF ECONOMIC ORGANIZATION* (1953).

These non-corporate organizations should be able to extract some of the gains that would have otherwise supposedly accrued to wealthy litigants. Non-corporate organizations can exert within litigation a countervailing power which effectively cancels out at least to some degree the relative advantages of business corporations, as well as those of wealthy individuals.

In retrospect, this has been one of Prof. Galanter's main messages from the start. This message is somewhat disguised by the title of his article which focuses on the litigation advantages of wealth. But part of the novelty of that article was to draw attention to another and independent set of variables which secure such advantages, namely those having to do with organizational structure. Indeed the main mechanism Galanter identified as responsible for the distortions he discussed, that of being a repeat-player, is more directly associated with organization than with wealth. This insight also underlies the main normative suggestions of the old piece, namely that organizational advantages can be harnessed and strategically deployed to advance the interests of the have-nots. If anything, the developments that occupy today's lecture increase the relevance of those suggestions, perhaps with an added twist. The increased relevance comes from the fact that the more business corporations occupy center stage, the stronger the argument for enhancing the role of other, countervailing organizations. The twist concerns the changed role of government in this. The countervailing power imagery harks back to a vision of society as composed of individuals who seek shelter in the bosom of "intermediate institutions" from the alienating brutality of the state. But in the Planet of the APs, populated as it is by corporations and other organizations, government agencies may themselves assume the role of intermediate institutions designed this time to protect individuals against the alienating excesses of corporate power.⁵ Some of the legal developments Prof. Galanter reports seem to fit this pattern, though, judging by his data, all too feebly and hesitantly. Still, the potential for a realignment of

5. For a fuller development of this theme, see Meir Dan-Cohen, *Between Selves and Collectivities: Toward a Jurisprudence of Identity*, 61 U. CHI. L. REV. 1213 (1994).

organizational forces is there, giving new vitality to some of Prof. Galanter's old recommendations.

II. ARE CORPORATIONS "HAVES"?

I turn now to business corporations, the prime contenders for the position of today's haves. My second point is that even they don't quite qualify as "haves" in the sense relevant to the title of Prof. Galanter's older article. *Why the "Haves" Come Out Ahead* is doubtlessly meant to deliver a strong rhetorical punch. This punch draws its force from at least two different sources, and it is important for present purposes to clearly distinguish them. The first concerns matters of commutative justice. Seen in these terms, Prof. Galanter's title pertains to a perturbing reality in which some legal decisions are allegedly reached not just on the merits but are instead influenced by extrinsic, immaterial considerations. Here the appeal is to the injustice of any biased or arbitrary judicial decision-making in contravention of the law. Any failure to decide cases exclusively on the merits amounts to a breach of commutative justice and is deplorable for this reason alone. But this construal of the question's rhetorical force, though valid, does not engage the rather striking language in which the question is posed. In particular, the expression "haves" adds measurably to the question's rhetorical force. How? As we all know, "haves" is regularly used in conjunction with and in juxtaposition to "have-nots." The title of Prof. Galanter's article is a deliberately provocative allusion to this disturbing polarity. But why is the polarity disturbing? The answer obviously resides in our sensibility toward distributive unfairness. As an affective matter, the label "haves" evokes such emotions as envy, and "have-nots" compassion. More importantly, the polarity triggers considerations of distributive justice. Though, depending on one's theory of justice and on the details of the economic situation, a stark division between haves and have-nots may not necessarily condemn a society as unjust, yet the division does at least present a *prima facie* problem and so demands a justification.

To distinguish more clearly the commutative justice and the distributive justice misgivings induced by Galanter's title, consider a restricted segment of

adjudication, consisting of tied cases. By a *tied case* I mean one in which the result reached by the best application of the relevant legal materials is indeterminate, so that legal experts would divide evenly on the correct result or agree that none is prescribed.⁶ Now in a tied case neither party has, or at any rate can establish, a right to win, so any result would seem to comport with commutative justice concerns. Nonetheless, I take it that we would be more perturbed to learn that wealthy litigants win the preponderance of these cases than if the outcomes turned out to be randomly distributed. If so, then there is something offensive in legal decisions tracking wealth that goes beyond concerns of commutative justice; considerations of distributive justice would seem to plausibly come into play. What are they? This is not the place for a thorough inquiry into this large topic, but two suggestions can be briefly made. One is that insofar as we find the initial division between haves and have-nots disturbing or at least suspect, a pattern of judicial decisions that favors the wealthy exacerbates the problem simply by increasing the gap.

Though this interpretation of the rhetorical force of Galanter's usage is plausible, its edge is bound to be blunted in a capitalist system in which people are accustomed to seeing wealth generate more wealth. In other words, though this interpretation does address the use of the expression "haves," it does not take account of the judicial context of Galanter's original complaint. Why is it particularly objectionable when wealth produces more wealth in the context of adjudication? My second suggestion does accordingly address the special link between distributive concerns and adjudication. It does so by highlighting the central role that a single core value, human dignity, plays in both. The distributive significance

6. Compare John E. Coons, *Approaches to Court Imposed Compromise—the Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964), in which the author recommends court mandated compromises in a number of "tie" situations which he identifies. See in particular the category of "doubt-compromise" and his related "argument from indeterminacy." *Id.* at 754-73. Despite Ronald Dworkin's well-known and highly contested argument to the contrary (e.g., in RONALD DWORIN, *Can Rights be Controversial?*, in *TAKING RIGHTS SERIOUSLY* 279 (1977)), most lawyers probably believe that indeterminate cases exist and indeed abound; but for the sake of the present thought experiment we need not enter the fray but can simply stipulate their existence.

of dignity can be best expressed in Ronald Dworkin's felicitous phrase: people's equal moral worth entitles them to be treated with *equal concern and respect*.⁷ The actual distributive implications will of course depend on how the italicized expression is unpacked. But even if great disparities in wealth do not by themselves offend against human dignity, they create a suspicion and shift the burden of persuasion, especially so in light of the higher social status associated with wealth: though rites of differential social deference are perhaps consistent with a strict observance of equal moral respect, the line is not always clearly visible or easy to draw. The connection between dignity and adjudication is familiar too. As others have argued, by complying with the requirements of the rule of law, with its insistence on rational justification and impartiality, courts publicly affirm the equal moral worth of every human being.⁸ We can now link the two observations, the one about distributive justice and the one about adjudication, by treating in the present context *wealth* as—to borrow the terminology of anti-discrimination law—a “suspect category”: a pattern of judicial decisions that favors the haves carries particularly invidious expressive implications. Taking place as it does within the very sanctuary of human dignity, such a pattern will have the connotations or overtones of a public proclamation that the rich occupy a higher *moral* plane.⁹

If these comments are on the right track, they not only explain why a pattern of disproportionate litigation gains by wealthy individuals is troublesome, but also why a similar pattern pertaining to business corporations is less so. To begin with, distributive justice is concerned with the welfare of natural, not artificial persons; business corporations are simply not its proper subjects, and so the accumulations of capital they represent are not by themselves in the nature of distributive aberrations. To be

7. E.g., in RONALD DWORKIN, *Liberalism*, in A MATTER OF PRINCIPLE 181 (1985).

8. See, e.g., JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (1979).

9. For recent discussions of the importance of the expressive aspect of law, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) and Cass Sunstein, *The Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

envious of a wealthy corporation is akin to begrudging a car (rather than its owner) its large engine, and to have egalitarian anxieties with regard to corporate wealth is no lesser a category mistake than having moral compunctions about the unequal treatment of different cars. As long as we think of the corporation as a separate entity, such responses as we may have to excessive individual wealth are out of place. Now if corporate wealth does not raise issues of distributive justice in the first place, an increase in that wealth through law suits does not *by itself* raise such issues either.

As the italicized words in the last sentence signal, this conclusion is limited, but it is significant nonetheless. It is a caveat against the familiar but still common anthropomorphic fallacy of transferring to organizations attitudes and norms that originate in interpersonal human relationships. Though the fallacy is easy to diagnose, it is apparently more difficult to remedy. Its entrenchment can be perhaps traced to the fact that it is sustained by two opposing views regarding corporations, and provides a point of convergence for otherwise warring camps: those who consider organizations as single entities and therefore *as* individual persons, and those who deny any independent reality to organizations and treat them as *simple aggregates* of individual persons. The challenge rather is to maintain a cognitive grip on the unity of the corporation as a *distinctive* entity without anthropomorphizing it in either way. I take it that this is the conception of corporations that Prof. Galanter's APs imagery is meant to espouse. If so, he would probably agree that the resources at the disposal of these entities are not the moral equivalent of excessive *individual* wealth. When Ms. Rich wins a law suit against Mr. Poor, the distributive results are clear. Not so in the case of a corporate victory. To assess the distributive effects of Mr. Poor's loss to, say, AT&T, we must ask a further question: Who exactly benefits from AT&T's legal gains? I intend to take here full advantage of the commentator's prerogative of raising questions without answering them, but I do wish to highlight the difficulty of answering this question: tracing corporate gains to the eventual individual beneficiaries is no simple matter; there simply is no straightforward and necessary connection between a corporation's fortunes and any particular distributive pattern. It all depends on such factors as how widely the

shareholding is dispersed; how effective the mechanisms of translating corporate gains into shareholders' benefits are; who the institutional investors are and whose interests do they serve (as, e.g., in the case of pension funds or insurance companies), and so on. This is not all. Though effects on shareholders are the most direct and conspicuous, they are not the only ones. There are other stakeholders in the corporation, such as employees and consumers, to whose advantage the corporation's increased assets may also redound.

Since corporate wealth is in principle consistent with indefinite distributive patterns, corporate gains in courts may not have the dilatory material effects of increasing the disparities of wealth among individuals or the invidious expressive effects of treating some individuals with lesser concern and respect than others. Obviously, both of these mitigating factors are matters of degree. The more widely dispersed the effects of corporate gains, the less significant the material outcome of a corporation's advantages and the more muted the negative message sent.¹⁰

III. CORPORATE NORMATIVE VULNERABILITY

Even if corporations are to be seen as haves in the relevant critical sense, they represent a *normatively vulnerable* breed of haves. What I mean by this can be best gleaned from Prof. Galanter's observation that "American courts have been receptive to the notion that corporate actors are persons or entities with rights of their own rather than merely creatures of the state or instruments of NPs."¹¹ Significantly, this observation is intended as a *criticism*, and equally significantly, no such criticism could be voiced with regard to the law's treatment of wealthy individuals: a complaint that the law treats, say, Bill Gates or Donald Trump as a person rather than as a mere instrument would not cut much ice. The Kantian overtones are not

10. But lest this conclusion be the occasion for premature or excessive rejoicing, it must be also recognized that its practical significance rides entirely on the crucial "in principle" proviso and on the actual facts. For a recent study of the dispersion of shares in American corporations, see Yoser Gadhoum, Larry H.P. Lang & Leslie Young, *Who Controls Us?*, 11 EUR. FIN. MGMT. 339 (2005), available at <http://ssrn.com/abstract=399801>.

11. Galanter, *supra* note 3, at 1404.

adventitious here. It has become common ground to view individuals' autonomy and dignity as the source of their categorical rights. These rights are categorical in the sense that they prohibit sacrificing certain individual interests even when doing so would promote the aggregate welfare of society as a whole. Such rights accordingly constrain what the government can do to individuals in carrying out its policies, no matter how socially desirable.¹² Extending to corporations individual rights, as Prof. Galanter indicates courts often do, is another instance of the anthropomorphic fallacy I have already mentioned. To take corporations' organizational form seriously, as Prof. Galanter has soundly done today, is precisely to acknowledge their distinctive nature as *instruments* whose legitimacy and legal status derive from the human purposes they serve, and thus to remove them from the domain of categorical rights appropriate to individuals conceived as ends in themselves. As I have argued at greater length elsewhere, doing so does not strip corporations of their legal rights.¹³ Protecting such rights may advance society's aggregate welfare, or help secure indirectly the interests of some individuals. But in neither case do corporate rights have the scope or the categorical force of the corresponding individual rights; consequently, the legal rights of corporations can be circumscribed more narrowly and curtailed more readily than those of individuals. Protected by more narrowly circumscribed and weaker rights, corporations can be envisaged as shielded by a thinner normative armour than individuals. Hence their greater normative vulnerability.

I will not try to replicate here in detail the arguments for this conclusion, but their gist can be briefly indicated. Consider a case in which an individual's legal right runs up against social policy, so that upholding the right in the

12. This formulation of the role of rights is mostly based on ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26 (1974) and on RONALD DWORKIN, *Taking Rights Seriously*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 6, at 184. "Common ground" is not to be understood as unanimity, of which none is to be expected in these matters.

13. See MEIR DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (1986). For a detailed application of the approach I outline here to a particular right, freedom of speech, see my *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229 (1991).

particular case would involve a significant toll in aggregate welfare. Arguably, the right ought to be upheld nonetheless. Letting the policy override the right would amount to sacrificing the individual to the community at large and hence be a failure to respect the individual as an end in herself. By contrast, overriding a corporation's right under similar circumstances does not have such invidious meaning. The right bearer in this case is the corporate entity itself, an entity which on the ends/means divide falls distinctly on the latter side. To be sure, a decision that curtails the corporation's alleged right is likely to indirectly affect the interests of numerous individuals. But because the individuals so affected are numerous, remain anonymous, and the effect on them is indirect, their claims in the instant case do not have greater moral force than that of all the other individuals that would supposedly benefit from the policy the decision promotes.

The upshot of these considerations is that law has much greater elbow room in dealing with corporations than with individuals. There is, of course, a lively debate concerning the desirable level of control by government, including the judiciary, over corporations. My present aim is not to enter this debate but only to point out that its terms are, or at any rate ought to be, very different from those that define the government's and the courts' reach in respect to individuals. Similar reasons to those just mentioned in my previous comment and which reduce the moral significance of corporate legal gains also attenuate the significance of their losses. Being social instruments par excellence, corporations can be subjected, when the social interest so demands, to more exacting standards and to stricter regulation than would be appropriate in the case of the law's individual subjects, be they indigent or wealthy.

IV. APs AND ACCESS TO JUSTICE

The allegation that the haves, or organizations, come out ahead conjures up an imagery of a race to justice in which some are unfairly beaten to the finishing line. But another theme in today's lecture concerns the *displacement* of individuals by organizations in court: as the number of organizational litigants increases, that of individual litigants declines. In terms of the race-to-justice metaphor this point is not so much about being beaten to the finishing

line as not even making it to the starting line. We are faced, in other words, with an instance of the troubling issue of *access to justice*. Now once again, my aim is not to assess the displacement of individuals in the courts; I take it for granted that individuals' reduced access is deplorable. My question is a narrower one: Does the fact that the displacement is by organizations rather than by wealthy individuals offer some offsetting advantages? And here too I raise some considerations that suggest an affirmative answer.

The main basis for this answer was provided in today's lecture when Prof. Galanter drew our attention to a salient phenomenon. Sometimes referred to as "legalization," it is the process by which organizations internalize legal standards, structures, and procedures, thereby turning into mini-legal-systems themselves.¹⁴ This is in part simply a matter of the proximity between the imperatives of bureaucracy and those of legality famously noted by Weber.¹⁵ But legalization is also a response by organizations to more specific demands that the external legal environment places on them. Prof. Galanter quotes a number of studies that document this development in some detail, but for most of us this development is known first hand as a matter of daily experience. For an example outside of the corporate world we don't need to look very far. Just think of the processes and procedures governing almost every aspect of university life. But the same is true of business corporations as well. As a humdrum example, consider the typical experience of dealing with an insurance company. You *file* a claim; the claim is *reviewed* by an *official* who evaluates it in light of strict *rules* and *policies*. The money to be paid out does not belong to the claims representative. She may be motivated by excessive loyalty or identification with the company, but she cannot be

14. For a helpful overview and update, see Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 946-48 (1999). The source of this line of thinking is MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1947). The modern locus classicus for the notion of *legalization* in the organizational context is PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969). See also Lon L. Fuller, who derives the principles of the rule of law from what he takes to be the imperatives of governance, in *THE MORALITY OF LAW* (rev. ed. 1969).

15. See WEBER, *supra* note 14.

motivated by *greed*. She acts in an impersonal manner both in the sense that her own interests are not at stake, and in the sense that she treats you as a "claimant" in abstraction from your other properties and traits. These common experiences form the relevant backdrop or baseline for assessing the normative significance of increased organizational dominance in the courts. How, in terms of access to justice, do individuals of all socio-economic stripes fair in the Planet of the APs compared to their prospects in the older planet, in which natural persons predominated?¹⁶

In reflecting on this issue we should beware of the expression that is commonly used to label it. Prof. Galanter has documented today individuals' reduced access to the courts. Labeling it a matter of access to *justice* begs some important questions worth pondering, such as why exactly is access to the courts desirable and important, and how good are the courts in dispensing justice, in absolute terms or in comparison with other potential providers? These are widely debated questions, and all I can do here is offer a few brief notes in the margin of this debate. To somewhat simplify matters, I focus exclusively on civil litigation, which is anyway the main terrain covered by Prof. Galanter's report. A good starting point, and one that is continuous with my pervious remarks, is to inquire about the justice courts are expected to secure. We commonly distinguish between substantive and procedural justice, and since courts are thought to serve both, our inquiry must proceed along two lines. First, then, what is the substantive justice courts serve in civil cases? A plausible, if not uncontested answer (nothing at all in this area is uncontested) is that the rules and standards that guide court decisions in these cases are just in as much as they have adequate democratic credentials. One thing that contributes to the plausibility of this answer is its vagueness, since its key notion of "adequate democratic support" is not well defined. Nonetheless, the answer does shift primary attention from the courts to legislatures, the main forums in which political accommodations are democratically hammered out. Though courts do not just mechanically apply statutory provisions, the substantive

16. For some pertinent reflections on the difficulties of answering this question, see Richard Lempert, *A Classic at 25: Reflections on Galanter's "Haves" Article and Work It has Inspired*, 33 LAW & SOC'Y REV. 1099 (1999).

legitimacy of their judgments does to a large extent derive from their subservience to legislative control.

But if so, our satisfaction with the substantive justice meted out by APs should also depend on the degree to which the rules and standards that guide their interactions with individuals have adequate democratic support. There is much talk about democratization of corporations, and this mostly refers to increasing the power of shareholders and perhaps other constituencies such as employees as well. I don't mean to downplay the potential of such reforms to advance genuine *internal* democratization and of their ability to make the norms that guide corporations fairer and more just. But I'd like to point out that there is also room for what we may think of as *external* democratization, which comes in the form of greater legislative and administrative control over the rules and standards that guide corporate relationships with individuals. Here my present comment links up with the previous one concerning the normative vulnerability of organizations. To see the point, consider contracts as an example. When contracts are envisaged as agreements among individuals, there is a strong argument for government to stay its hand. It is at least plausible to consider such contracts as occasions for the exercise and affirmation of individual autonomy, which mandatory contractual terms dictated by the state are likely to compromise. But in the case of contracts of adhesion generated by an impersonal organizational bureaucracy, this argument against government intervention does not apply. Rather than being the products of the reciprocal adjustment of the parties' free will, these contracts resemble more closely the unilateral generation of binding norms by administrative agencies and by legislatures themselves. They might as well be subject to close scrutiny and modification by institutions and processes that enjoy a broad democratic mandate.

The extent to which such scrutiny and modification do in fact take place is primarily a matter of legislative and administrative action or inaction. It is, in other words, a political matter. So if there is too little democratic oversight of the norms that guide organizations in their relations with individuals, and consequently a substantive justice deficit, the political process is to blame. This blame may be born by many factors, but one of them is likely to be corporations' political leverage and the degree to which it

allows them to displace individuals in the political arena. Such displacement, insofar as it takes place, is doubtlessly a subversion and an aberration of democracy. But this is no longer a matter of individuals' reduced access to the courts but a matter of their losing democratic control over the legislatures and the administration.

The procedural justice expected of courts is for the most part subsumed under the rule of law ideal. The ideal is broad and somewhat vague, but its gist is that decisions that bear directly on people's rights and interests ought to be made in an impartial and non-arbitrary way, but rather in light of preexisting general rules and standards. So to assess the displacement of individuals by organizations in respect of procedural justice we must ask: What are the contemporary sites of the rule of law? Where are its virtues present and its ideals realized? Has it shrunk or expanded? I don't pretend to have a confident answer, but the data recounted in the lecture and the first-hand anecdotal experience to which I've alluded suggest that the answers to these questions point to organizations and their internal processes and procedures. The inevitable conclusion is that the ascendance of organizations involves intra-organizational gains in rule of law terms that offset in part or in whole the losses that result from the displacement of natural persons from the courts.

Assessing the ascendance of organizational justice beyond this minimal conclusion is a difficult matter that requires considerable further study. The main question to be explored is, how do individuals, and specifically the have-nots, fair overall in the new, organizational regime compared with how they fared or would have fared in a world in which procedural justice is the exclusive domain of courts? What complicates the assessment is the general impression that many more individuals have access to organizational procedural justice than they had or would have had to the courts, but that the justice to which they have access appears to be shakier and of a more dubious quality. The new sites of rule of law virtues may be making up in volume what they lack in thoroughness or depth; but the proper rate of exchange between quality and quantity is at this point anyone's guess. Beyond thus suggesting directions for further study and reflection, today's lecture has implications for policy and reform. If large business corporations and other organizations are here to stay in

roughly their present shape, it may make more sense to improve the quality of justice they provide than to try to expand individuals' access to the courts.

The suggestion that the main locus of rule of law values has migrated from courts to organizations may be greeted with skepticism for a number of reasons. Let me mention two. One concerns impartiality. Recall my example of the typical handling of an insurance claim. How can we speak of impartiality when an insurance company's claims officer is in charge? Isn't the organization necessarily the partial decision maker in its own case? That the answer is in principle negative can be seen by contemplating the case of the state, the original home of the rule of law. After all, if we think of the state as an entity, which we commonly do as much as of any collective entity, then the state would be by necessity the prime offender against the rule of law in all cases to which it is a party. But this is not quite how we view matters. Though courts are state institutions, they can enjoy a measure of independence that allows them to serve rather than subvert the rule of law even in cases which directly involve the state.¹⁷ The general lesson is that organizational unity is a matter of degree, and that within what we take to be a single organization there can exist semi-independent sub-units which march to a different drum from other units in the same outfit. This possibility is sometimes a source of organizational dysfunction leading to what organization theorists call "goal displacement."¹⁸ But the same phenomenon may also be harnessed to serve impartiality, thus removing the air of paradox from the idea of an organization being impartial with regard to its own affairs.

17. This, though, is a matter both of degree and of controversy. There is considerable literature maintaining that courts are in fact partial when the state is involved, and that they only rule against the state to the extent needed to preserve its legitimacy. For a fairly recent survey of and contribution to this literature, see Ronen Shamir, "Landmark Cases" and the Production of Legitimacy: the Case of Israel's High Court of Justice, 24 *LAW & SOC'Y REV.* 781 (1990), and sources cited therein.

18. *E.g.*, W. Keith Warner & A. Eugene Havens, *Goal Displacement and the Intangibility of Organizational Goals*, 12 *ADMIN. SCI. Q.* 539, 545 (1968); Charles Perrow, *The Analysis of Goals in Complex Organizations*, 26 *AM. SOC. REV.* 854 (1961).

The insurance claim example will also serve to illustrate the second skeptical response. Dealings with insurance companies—and with bureaucracies more generally—can be quite frustrating, and this frustration may make us scoff at the association between these experiences and such a high minded ideal as the rule of law. It can be said in response that, though the list of the virtues of the rule of law varies somewhat, freedom from frustration has never been on it; and that dealing with the courts isn't on the whole a relaxing experience either.

My final point, however, one which somewhat qualifies the upbeat tone of my remarks, is a reminder that the virtues of the rule of law, like those of bureaucracy which it resembles, though real enough, are cold virtues; and to this extent the positive aspects of the ascendance of APs that I've listed, even if true, can offer us only cold comfort.

CONCLUSION

I have mentioned at the outset a connection between Prof. Galanter's earlier article and today's talk. I'd like to conclude by pointing out another link between the two, having to do with their titles. *The Planet of the APs* is a gripping metaphor which, just as the article's provocative title has done, helps fix in our minds a bit of social reality so pervasive that it is for that very reason all too easy to overlook or ignore. For the most part today's lecture was concerned with describing this reality and analyzing it, but such description and analysis have inescapably, and I'm sure intentionally, normative ramifications as well. Whether eagerly or gingerly we find ourselves asking: Are the transformations of the legal scene that form the subject matter of today's lecture good or bad? In pursuing this question, my comments drew on and were meant to highlight a striking feature of the corporate economy. Vesting the ownership of capital in an impersonal entity introduces a separation between the imperatives of an efficient allocation of resources and those of a just distribution of wealth. This makes it *in principle* possible to combine the advantages of a competitive market and of large and highly coordinated ventures on the one side with a more egalitarian distribution of *individual* wealth and of the fair and even-handed treatment of *individual* rights and interests than we could otherwise attain, on the other.

At least some of the worries associated with the advantages corporations enjoy in court may be mitigated in light of these options.

But the mitigation depends on the extent to which these options are taken advantage of and realized. This in turn depends on the workings of the political process. It is here that the increasing dominance of APs, especially business corporations, is of greatest concern. This is so not only because of the distortion of democracy that corporate political influence involves, but also because that influence may block the way for those very changes and reforms that could make the ascendancy of APs more welcome and benign. So perhaps the most urgent question raised by today's talk is whether the golem is already out of hand, and whether taming it for the benefit of individuals is still an option.

