AFTERWORD: EXPLAINING LITIGATION*

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In my contribution to the first part of this collection I suggested that the character and impact of litigation might be best understood if, rather than starting from consideration of rules or of institutional processes, we began by looking at the parties and their relation to dispute institutions. I introduced a simple distinction between those actors in society who have many occasions to utilize the courts (in the broad sense) to make (or defend) claims and those parties who do so only rarely. Parties who have only occasional recourse to the courts I called one-shotters (henceforth, OS) and parties engaged in a large number of similar litigations over time repeat-players (RPs). I then argued that an RP might be expected to play the litigation game differently from an OS and that the RP would enjoy a number of advantages in the litigation process. Briefly, these advantages include: ability to structure the transaction; expertise, economies of scale, low start-up costs; informal relations with institutional incumbents; bargaining credibility; ability to adopt optimal strategies; ability to play for rules in both political forums and in litigation itself by litigation strategy and settlement policy; and ability to invest to secure penetration of favorable rules.

We may visualize litigation in terms of various combinations of OSs and RPs as depicted in Figure 1. On the basis of our notions about the cluster of advantages enjoyed by RPs, we might speculate that RPs, equipped with these advantages, would be more successful in their encounters with OSs; on the other hand, we would expect OSs to be less successful. They face a costly and risky uphill battle in using courts to vindicate claims against RPs. We would expect litigation by RPs against OSs to be relatively frequent, that by OSs against RPs to be relatively

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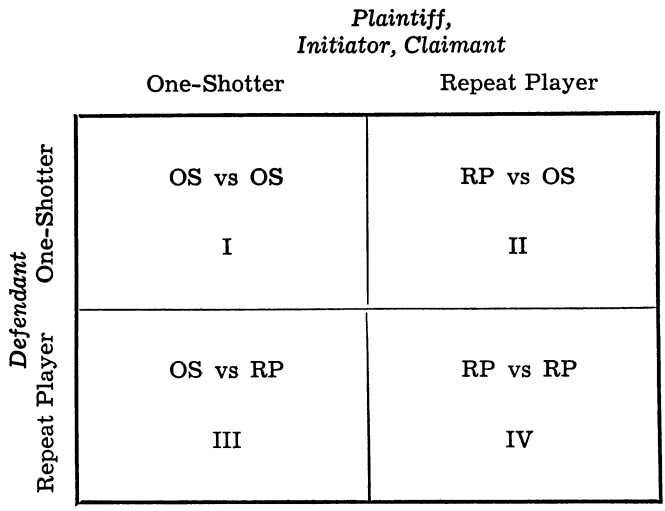
Figure 1

A Taxonomy of Litigation by Strategic Configuration of Parties



infrequent.[1] In this Afterword I would like to consider these expectations in the light of data made available by the other papers in this collection and elsewhere and to relate the kind of inquiry into litigation patterns suggested by my essay (1974) to some of the other kinds of inquiry undertaken in these issues.

WHO SUES WHOM?

Usable quantitative data on the configuration of parties to litigation are scarce. But the data that are available seem to confirm our surmises about the distribution of litigation. Figures from a variety of courts suggest that plaintiffs are predomnantly business or governmental units, while defendants are overwhelmingly individuals. Table 1 (*overleaf*) summarizes the data available at this writing.

The most ample data are to be found in Wanner's study (1974, 1975) of civil courts of general jurisdiction in three large American cities. He found that business and governmental units were plaintiffs in 58% of the cases filed in these courts, but defendants in only 33%. If we assume that in the American setting individuals roughly fit our notion of OSs and that organizations roughly correspond to RPs,[2] we can represent his data on "who

1. Litigation among OSs (Box I) and among RPs (Box IV) would be explained by other factors than these relative advantages. For this and numerous other qualifications, see Galanter (1974).
2. Curran and Spalding (1974: 66-67) asked a national sample of individuals (n=2064) how often various legal problems had been encoun-

sues whom" in terms of our boxes.[3]

Table 2

Configuration of Parties in Civil Courts of General Jurisdiction in Three American Cities

Defendants	*Plaintiffs*		
	Individuals	Organizations	
Individuals	I 28% (1988)	II 40% (2854)	68%
Organizations	III 14% (1000)	IV 19% (1337)	33%
	42%	59%	N = 7179

Source: Wanner, 1974a, table 6.

Note: The figure in Box IV is an overstatement (and that in Box II correspondingly an understatement) since it includes garnishment in which the employer is technically the defendant, but in which the real party of interest is an individual.

The only other American courts of general jurisdiction for which comparable data are available are the Clarke and Oconee County, Georgia courts studied by Owen (1971). The raw totals suggest a somewhat different pattern of court use. But if we omit the cases related to marital breakup we find a pattern of party configuration remarkably similar to that found in Wanner's three city courts.

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tered in their lifetimes. The number having encountered any problem four or more times was miniscule except for acquiring real property (10.3%) and receiving traffic citations (9.9%).

3. The need for further refinement of the RP and OS notions is discussed below. Even if it is not unreasonable to use individuals and organizations to operationalize these notions, one might, for example, divide individuals acting in their occupational capacity from those in more diffuse or intermittent capacities as citizens, taxpayers, householders, accident victims, consumers, bystanders, etc. And it should be possible to distinguish degrees of organization.

Table 1

Distribution of Parties in Various Civil Courts

Type of Court	Location	Plaintiffs		Defendants		N	Nature of Population	Source
		Ind.	Org.	Ind.	Org.			
Civil Courts of General Jurisdiction	Baltimore, Cleveland, Milwaukee	42% (34%)*	58% (65%)*	67% (62%)*	33% (37%)*	7254 (6454)	*Excludes divorce-related cases	Wanner (1974:431)
	Clarke County, Georgia	71% (43%)*	29% (57%)*	84% (69%)*	16% (31%)*	1987** (1034)	*Excludes marital breakup cases	Owen (1971:67)
	Oconee County, Georgia	43% (23%)*	57% (77%)*	88% (83%)*	12% (17%)*	322** (240)	*Excludes marital breakup cases	Owen (1971:66)
Justice of the Peace	Arizona	34%	66%	86%	14%	556		Bruff (1973:13)
Small Claims	Alameda County, California	35%	65%	86%	14%	386		Pagter, *et al.* (1964:893)
	California, 4 Small Towns	16%	84%	93%	7%	400		Moulton (1969:166)
	Champaign County, Illinois	14%	86%*	87%	13%	498	*Includes landlords	Smith (1971:15, 18)
	Two Florida Counties	14%	85%	85%	14%	427		Levar (1973)
	Cambridge, Massachusetts	43%*	57%	79%	21%	1578	*Includes doctors, dentists, landlords, etc.	Small Claims Study Group (1972:127)
	Worcester, Massachusetts	22%*	78%	94%	6%	125	*Includes doctors, dentists, landlords, etc.	" "

	Sacramento, California	55%*	45%	78%	22%	445	*Includes doctors, dentists, landlords, etc.	" "
	Hamilton County, Ohio	26%	74%	78%	22%	400		Hollingsworth, et al. 19—: 509)
	Clermont County, Ohio	11%	89%	85%	15%	100		"
	Boston, Massachusetts	51%	49%*	44%	56%*	1260	*Includes professionals	NICJ (1972:378)
	Ann Arbor, Michigan	57%	43%*	62%	38%*	226**	*Includes professionals, landlords, etc.	NICJ (1972:630)
Foreign	Amtsgericht, Freiburg	36%	64%	72%	28%	489*	*Excludes cases concerning rent, housing and child support.	Blankenburg, *et al.* (1972:82)
	Six English County Courts	9%	91%	71%	29%	1238*	*Excludes suits for possession of land or premises.	Consumer Council (1970:13-14)
	Five English County Courts	25%	75%	87%	13%	451*	*Excludes judgment summonses.	Zander and Glasser (1967:815)

**Whole population, not a sample.

Table 3

Configuration of Parties, Clarke County, Georgia 1967-9
Civil Court of General Jurisdiction

Defendants	*Plaintiffs*	
	Individuals	Organizations
Individuals	I 62% (1235)	II 22% (432)
Organizations	III 8.3% (166)	IV 7.6% (154)

84%		
16%		
71%	29%	N = 1987

Source: Derived from Owen (1971), tables 3-4 and 3-9.
Note: Excluded as non-adversary or unencodable: 529 cases (corporate charters 356; corporate charter mergers 4; change of name 30, miscellaneous 23; adoption 89; habeas corpus (child custody) 21; equitable petition (estate) 6.) It seems likely that the last three would go to swell the total in Box I.

Table 4

Configuration of Parties, Oconee County, Georgia 1967-69
Civil Court of General Jurisdiction

Defendants	*Plaintiffs*	
	Individuals	Organizations
Individuals	I 40% (128)	II 48% (154)
Organizations	III 3% (10)	IV 9% (30)

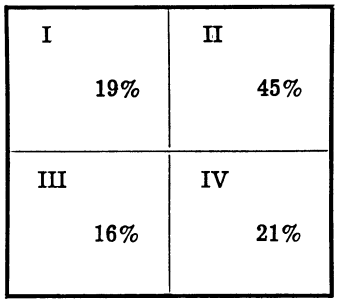
88%		
12%		
43%	57%	N = 322

Source: Derived from Owen (1971), tables 3-4, 3-8.
Note: Excluded as non-adversary or unencodable: 29 cases (corporate charters 12, adoption 12; change of name 1; habeas corpus (child custody) 3; equitable petition (estate) 1.)

Table 5

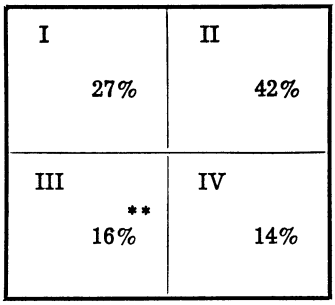
Party Configurations in Courts of General Jurisdiction
Excluding Marital Breakup Cases

Wanner: three cities (excluding 800 cases he codes as divorce-related) *



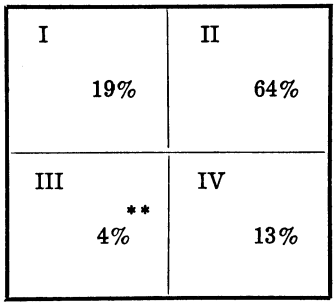
N = 6379

Owen: Clarke County (excluding 953 cases of divorce, support, child support, annulment and alimony)



N = 1034

Owen: Oconee County (excluding 82 cases of divorce, support and alimony)



N = 240

* I am unable to determine the precise location of the 869 cases Wanner calls divorce-related. Of these, 862 were brought by individual plaintiffs; there were individual defendants in 807, organizational defendants in 38 and unencodable defendants in 24. If we assume that *all* the organizational and unencodable defendants were paired with individual plaintiffs, this would leave 800 of these cases in Box I. For purposes of this computation, I have subtracted the 800 divorce-related cases from Box I and from the total N and then recomputed the percentages of cases in each box. That is, there are still 69 divorce-related cases somewhere (probably mostly in Box III) in the Table. With further information we would be able to make the needed adjustments in the other boxes but the number of cases involved could not affect the overall pattern.

** The number of cases in these boxes may be understated (and the number in their respective Box Is overstated) by inclusion of cases in which the real party in interest is an insurer, not the named defendant. Wanner has adjusted his data for this.

Small claims courts handle a very substantial portion of the total civil caseload in American courts.[4] Yngvesson and Hennessy's (1975) review of the literature leaves little doubt that the typical configuration of parties in these courts is organizational plaintiff versus individual defendant. Of all the small claims studies only Levar's study of two Florida counties and the NICJ studies of Boston and Ann Arbor provide data that can be arranged in our boxes. The Florida data present an exaggerated version of our expected pattern. Figures (in Table 1) for other courts suggest that such a pronounced concentration of cases in Box II is characteristic of most small claims courts. The Boston and Ann Arbor data are from two of the small number of studies that record deviations from this pattern.[5]

Table 6

Configuration of Parties in Small-Claims Courts in two Florida Counties

Defendants	*Plaintiffs*: Individuals	*Plaintiffs*: Business, Government	
Individuals	I 9% (40)	II 75% (322)	84%
Business, Government	III 5% (21)	IV 10% (44)	15%
	14%	85%	N = 427

Source: Levar (1973).

4. For example, in the General Courts of North Carolina almost 65% of all civil cases were small claims cases (1973); as were 27% of the civil cases in the Massachusetts District Courts (1970-71) and almost 20% of all civil proceedings in the (state) courts in New York City (1972-73). North Carolina Judicial Department, 1973; Massachusetts, Office of the Chief Justice of the District Courts, 1971; New York State Judicial Conference, 1974.

5. The Ann Arbor figures are from the first year of operation of a very small court located in a middle-class community in which university students are a dominant element in the population (NICJ, 1972: 625-26); no comparable explanation for the deviance of the Boston court suggests itself.

Table 7

Configuration of Parties in Boston Small Claims Court

Defendants	*Plaintiffs*: Individuals	*Plaintiffs*: Professionals, Businesses, Corporations	
Individuals	15% (183)	29% (368)	44%
Professionals, Businesses, Corporations	36% (452)	20% (257)	56%
	51%	49%	N = 1260

Source: NICJ, 1972:378.

Table 8

Configuration of Parties in Small Claims Court of Ann Arbor, Michigan

Defendants	*Plaintiffs*: Private Individual Tenant, Employee	*Plaintiffs*: Small Business, Large Business, Professional Person, Landlord, Employer	
Private Individual Tenant, Employees	20% (46)	42% (96)	62%
Small Business, Large Business, Professional Person, Landlord, Employer	37% (83)	— (1)	37%
	57%	42%	N = 226

Source: NICJ, 1972:630.

Note: this is not a sample, but the entire population of cases, excluding four which could not be classified.

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If we take into account that criminal courts handle a vastly larger number of cases than do the civil courts and that criminal cases[6] fall almost entirely into Box II,[7] we can guess that in something in excess of two-thirds of all litigation in American courts the strategic configuration of the parties is RP v. OS.

There is reason to think that this pattern may not be distinctively American. Blankenburg, *et al.* (1972) classified a sample of 489 civil cases in the Amtsgericht [lower civil court] Freiburg in a similar fashion. The results bear a remarkable resemblance to the American data. Some fragmentary British data again reveal a similar pattern (see Table 1).

6. For example, in 1972-73 approximately 310 thousand civil cases were filed in the various state courts in New York City while the criminal courts had a caseload of over 700 thousand; the North Carolina General Court had 404 thousand non-traffic criminal cases and 179 thousand civil (1973); the Massachusetts District Courts had 247 thousand civil and 740 thousand (minus 252 thousand parking, leaving 488 thousand non-parking) criminal cases in 1970-71. North Carolina Judicial Department, 1973; Massachusetts, Office of the Chief Justice of the District Courts, 1971; New York State Judicial Conference, 1974.

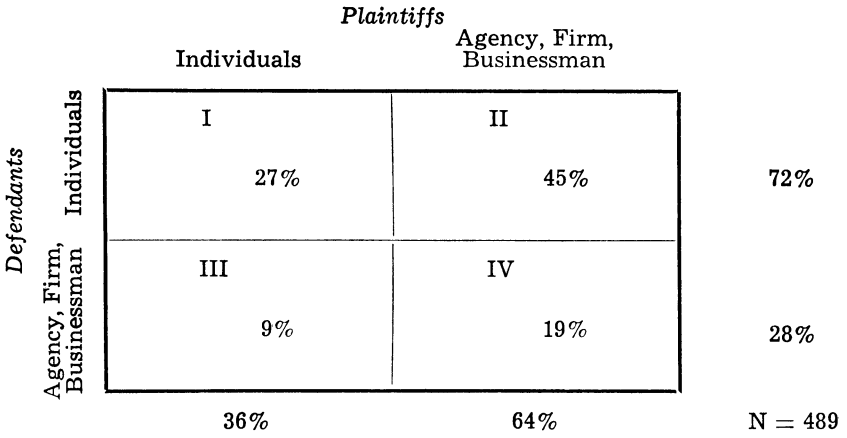
7. Roughly we may think of criminal cases as belonging in Box II: typically an experienced professional who does it (litigates) for a living is pitted against a party for whom it is a more or less unique occurrence involving high personal stakes—i.e., an emergency. But if this is the modal criminal case, we must recognize that the character of either "claimant" or defendant, or both, may vary in such a way as to locate the case in another of our boxes. Among defendants we would, of course, distinguish such repeat players as the professional criminal, the corporate violator, etc. On the claimant side, too, we should distinguish those cases in which the moving party is really a one-shot complaining witness from that in which the case is managed by the prosecutor for whom the complaining witness is just one more resource to be managed. Criminal litigation might then be thought of as reproducing all the types in our taxonomy:

Defense \ *Prosecution*	OS	RP
OS	Complaining Witness v. "Amateur" Defendant	Prosecutor Police v. "Amateur" Defendant
RP	Complaining Witness v. "Professional" Defendant	Prosecutor Police v. "Professional" Defendant

I am indebted to a comment by Jack Robertson of the University of Wisconsin for this point.

Table 9

Configuration of Parties in Amtsgericht Freiburg



Source: Blankenburg, *et al.*, 1972:82.
Note: suits concerning rent, housing and child-support excluded. (Blankenburg, 1975)

WHO WINS?

Data on patterns of outcomes by types of parties are even scarcer. What data are available suggest that RPs fare better. Wanner (1975) found that business and government plaintiffs win more often (1975:Table 5) and more quickly (1975:Tables 8, 9) than do individual plaintiffs. Not only are they more successful overall, which might be attributed to differences in the kinds of cases they bring, but they are more successful in almost every one of the heavily litigated categories of cases. (Wanner, 1975:Table 9). This general pattern is confirmed in Owen's (1971) study of the two Georgia courts: individual plaintiffs win less often and individual defendants lose more often than do their organizational counterparts.

In all of the studies reviewed here, the courts are overwhelmingly plaintiffs' forums and the cases are mostly of a routine nature. Dolbeare (1969) analyzed a sample of much more problematic cases, those in which Federal District Courts in twenty cities were faced with claims about urban public policy. In these cases plaintiffs were successful much less frequently. But his data suggest that organizations fared somewhat better than individuals.[8]

8. Cf. Mayhew's (1968:220, table 27) finding of the greater success of group-sponsored complaints to the Massachusetts anti-discrimination commission.

Table 10

Success Rates of Types of Parties

Percentage of Cases in Which Plaintiff Wins Completely, Mostly or by Default

		Clarke County	Oconee County
Plaintiff	Individual	25%	20%
	Organization	36%	46%
Defendant	Individual	35%	44%
	Organization	23%	20%

Source: derived from Owen, 1971: tables 4-5, 4-6, 4-7, 4-8.
Note: marital breakup cases excluded. Populations are those analyzed in Table 5.

Table 11

"Success Ratios" of Various Kinds of Plaintiffs in Urban Public Policy Litigation in Federal District Courts in 20 Large Cities 1960-67

Type of Plaintiff	"Success Ratio"	N
Negro Groups	42%	12
Businesses	24%	21
White Groups	17%	6
Organizations	(28%)	(39)
Negro Individuals	14%	16
State Prisoners	14%	125
White Individuals	11%	46
Individuals	(13%)	(187)

Source: derived from Dolbeare, 1969:398

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The combination of organizational capacity and individual incapacity produces a pattern of success which corresponds to that suggested by our analysis. Organizations are more successful as plaintiffs and as defendants than are individuals. They enjoy greater success against individual antagonists than against other organizations; individuals fare less well contending against organizations than against other individuals.

Table 12

Success of Plaintiffs in Different Party Configurations in Wanner's Three Courts

Defendants	*Plaintiffs*: Individuals	*Plaintiffs*: Organizations
Organizations	3.846	4.370
Individuals	3.092	3.906

Source: Wanner, 1975: table 7.
Note: the five-point plaintiff success sale scale (1 = verdict for the defendant, etc.; 2 = dismissal where defendant not found; 3 = dismissal for lack of prosecution, etc.; 4 = formal settlement; 5 = judgment for plaintiff, or "full satisfaction" recorded) is explained at Wanner, 1975: 296*ff*.

Wanner reports[9] that business and government plaintiffs enjoy complete victory in 65% of the cases they bring against individuals, but the latter enjoy complete victory in only 20% of the cases they bring against business or government defendants. If we combine these success ratios with Wanner's earlier (1974) findings about frequency of cases, we may sum up by saying that for every hundred filings in these courts, 26 lead to complete victories for organizational plaintiffs over individuals, but only a tenth of that number (2.8) lead to complete victories by individuals over organizational defendants.

We conclude then that our earlier analysis was correct in its basic outline. Litigation is undertaken mainly by organiza-

9. Private communication.

tions. They enjoy greater success at it. These data, assembled by various authors for quite different purposes, lend some plausibility to our surmises about the profile of litigation and the general tilt of the judicial forum. We cannot escape the conclusion that in gross the courts in the United States are forums which are used by organizations to extract from and discipline individuals.

CONCLUSION

What are we to make of this profile of the incidence and outcome of litigation? Certainly no definitive answers can be teased out of the haphazard collection of data that are at hand. But there is enough there to provide some suggestive leads for a serious test of alternative explanations. Among the general explanations that suggest themselves are several clusters of hypotheses.

(1) First, there is the notion that certain kinds of parties, like our RPs, enjoy a set of strategic advantages. We may call this the party capability theory.[10] Although the available data fit neatly, there is no direct evidence that the patterns observed result from such advantages. We shall return to party capability after examining some alternatives.

(2) Second, there is the notion that individuals fare less well because they or their causes are the target of judicial bias, conscious or unconscious. There may be some categories of cases which are explainable in terms of such bias, although persuasive demonstrations of systematic bias are few and far between (cf. Hagan, 1974). Individual propensities running counter to established role requirements of impartiality are difficult to credit as an explanation for a pattern as widespread and uniform as the one in question. There is not enough evidence of systematic judicial bias to make it a leading suspect.

(3) The differences observed may be an artifact of the selection of cases brought by RPs and OSs. That is, the courts may serve all parties in the same fashion, but organizational parties bring more cases of the kinds that are easiest to win, such as debt collections. The overall pattern then results from their well selected portfolio rather than from any difference in the

10. The party capability notion bears an affinity to the concept of legal competence stressed by Carlin, *et al.* (1961:61ff) and Nonet (1969: chap. IV). The emphasis here is less on competence as a personal quality of the actor than as a characteristic conferred by the party's position in the dispute process. Nor does the notion of party capability as used here imply that its exercise is conducive to realization of the rule of law.

rate of return. There seems to be some measure of truth in this, but it does not explain all the observed variation between individuals and organizations. Wanner (1975:Table 9) finds that organizations do better than individuals in almost every kind of frequently-litigated case. And organizations do strikingly better not only as plaintiffs, but also as defendants. (Wanner, 1975: Table 7).

(4) A more refined version of this selection hypothesis would say that organizations not only bring different kinds of cases, but better cases—cases in which the evidence is stronger and the claim is more firmly located within accepted lines of recovery; as defendants, their defenses are more ironclad, etc. They can avoid bad cases as plaintiffs by forbearance to bring suit or by readily accepting a low settlement. As defendants they settle the more meritorious claims against them—perhaps before filing. This version, too, awaits testing. We need to explore whether this kind of selectivity does operate. I would suggest that to some extent this is a restatement of our party capability cluster. Stronger evidence, more cut and dried claims, and unassailable defenses are the result of advance planning and good record keeping, as well as of the intrinsic merit of the claim. A calculating settlement policy reflects their skill as litigants as much as the virtues of their conduct in the underlying transaction. What I am suggesting is that in good measure "case merit" is not an alternative explanation, but a specification of one of the ways in which party capability affects the profile of litigation.

(5) Differences in legal services. Perhaps the differences observed between organizations and individuals are explainable in terms of quantity and quality of legal services. There is evidence (*e.g.* Ross, 1970:193) that legal representation makes for a massive difference both in likelihood of recovery and in amount recovered. Again, the influence of this factor needs to be tested. Let me mention a few points that suggest that much of the difference attributed to legal services is again traceable to difference in party capabilities. When we talk of differences in amount of preventive work, continuity of attention, specialized expertise, economies of scale, shrewd investment in rule development—we are talking about legal services provided to certain kinds of parties. Legal professionals in the United States can be roughly dichotomized into those who service OSs on an episodic basis and those who serve RPs on a continuing basis. Although there are many exceptions, there is a massive difference in education, skill and status between these groups. There is also a massive

difference in the range and quality of services provided: the profession is organized to provide a wide range of services to RPs and a much narrower range to OSs. Fitzgerald's (1975) study of the Contract Buyers provides a dramatic example of change in the organizational state of parties bringing in its train dramatic changes in the amount, character and quality of legal services. Organization need not follow from improved legal services, but it seems likely that improved legal services ordinarily will result from organization.

Thus legal services are surely one vehicle through which differences in party capability have effect. But there are several reasons why I think it is useful to retain the broader notion of party capability. First, legal competence is not something supplied exclusively by professionals and entirely separable from the parties. Parties themselves may have different levels of capacity to utilize legal services. For example, Rosenthal (1974) finds superior results obtained by "active" personal injury plaintiffs; Mouton (1969:1662) finds that in a California small claims court in which lawyers are not permitted to appear, businesses that are frequent users "form a class of professional plaintiffs who have significant advantages over the individual." Second, it seems that major distinctions in party competence can exist quite apart from disparities in legal services. The reports of Kidder (1973, 1974) and Morrison (1974) on litigation in India suggest a distinction between the "experienced" or "chronic" litigant and the naive and casual one that seems to be quite independent of the organization of legal services.

Why am I so insistent on retaining the RP-OS distinction? Are we not just picking up differences in wealth and organization? Would it not be simpler to say merely organizations[11]

11. A temptation to substitute the notion of organization for that of Repeat Player is supplied by a recent and interesting little book by James S. Coleman (1974). Coleman bases his analysis on a distinction (1974:13-14) between "two major kinds of persons:" natural persons and corporate actors. These latter are "the primary actors in the social structure of modern Society." They are endowed with a special capacity for calculated pursuit of narrow and intense interests that makes for a pronounced asymmetry in their dealings with natural persons. He provides very neat examples (university admissions being one) of the way in which

> . . . the size or power disparity . . . between producer and consumer . . . creates the possibility of extracting greater value from the transaction. For this disparity determines who controls the conditions surrounding the transaction, particularly information relevant to the transaction. (1974: 60)

For Coleman, the agenda for reform is to find ways of redressing the balance between corporate 'haves' and 'have-not' natural persons. If we concede that corporate actors often enjoy the advantages we have associated with RPs, it remains unclear that the corporate/

or the wealthy? Why treat the RP-OS distinction as fundamental? Basically this distinction is between the casual participant for whom the game is an emergency and the party who is equipped to do it as part of his routine activity. The sailor overboard and the shark are both swimmers, but only one is in the swimming business. The distinction overlaps, at least in the American setting, with two other distinctions—that between individuals and organizations and that between the poor and the wealthy. It is generally organizations that can be repeat players —because law in America is a complex and expensive activity requiring employment of full-time specialists. Organizations can use the law routinely because, compared to the cost of remedies, organizations are the right size and almost all individuals are too poor to play. But, as the Indian studies show, in other settings the distinction between habitual and "one-shot" users may be entirely independent of distinctions between organizations and individuals.

Hence, the RP-OS distinction seems to hold some promise of usefulness for comparative purposes. The OS-RP distinction commends itself for yet another reason. It points to an antinomy that strikes me as a fundamental feature of legal life. Presumably law is corrective and remedial in intent; it is designed to restore or promote a desired balance. But as it becomes differentiated, complex and maze-like in order to do this with increasing autonomy and precision, the law itself becomes a source of new imbalances. Some users become adept in dealing with it; those with other advantages find that those advantages can be translated into advantages in the legal arena. There arise new differences in access and competence—thus law itself can amplify the imbalances that it set out to correct. The scope and location of these differences in party capability, one expects, would vary with other features of the society.

I do not want to claim too much for any specific version of the party capability theory. It is a cluster that invites disaggregation in several ways. First, we have to isolate the nature (and composition) of the superior capability enjoyed by some parties. Is it a superior capacity to obtain, store, retrieve and utilize information? Is it superior ability to employ experts? To coordinate related undertakings? To employ strategies unavailable to other

natural actor distinction points to the heart of party capability. It does not alert us to the disparities among corporate actors (cf. patent litigation) or among natural persons (cf. the Indian material presented by Kidder and Morrison). And it ignores major differences in interests among natural persons, who may stand in very different relations to corporate actors.

actors? One assumes that these will vary from one class of cases to another, for different parties and at different times and in different social and cultural settings.

Then what are the specific characteristics of the parties which give rise to these superior capabilities? Is it size? Absolute size (measured by personnel or dollars)? Size relative to the other party? Size relative to the claim at stake? Or is it the element of repetition: experience in handling claims? Experience in litigation? In litigation in this forum? In this kind of claim in this forum? Again, one would expect variation by case type and setting.

Although I am broadening the repeat player notion by using it as a shorthand indicator for more capable parties, I emphasize that there is reason to think that such capability may be closely related to being a repeat player in the narrow literal sense. Kidder's and Morrison's portrayal of Indian litigants and Sanders' (1975) account of American drug cases suggest that experience in the forum and adaptation to its exigencies is central to explaining the pattern of results. Other advantages like wealth are mediated through the differential capacities of actors in the immediate setting and these in turn are dependent on familiarity and experience and on tactical options which derive from recurrent play in this forum.

(6) I do not mean to suggest that the RP-OS distinction, or any party capability factors, can explain everything about the distribution of litigation in a society. It seems to me that it is necessary to go beyond the characteristics of individual parties to another set of factors which seem to be clearly related to the profile of official litigation—that is to the relation between the parties. Are the parties strangers or intimates? Is their relationship episodic or enduring? Is it single-stranded or multiplex? For example, we may surmise that most litigation in the United States is between parties who are strangers to each other. Either they never had any mutually beneficial continuing relationship, or they had one and are now at the point of divorce—familial, commercial or organizational.

Black (1971:1097) suggests that invocation of official remedies increases with the relational distance between the parties. This connection between litigation and strangers clearly does not hold for all societies. Morrison and Kidder describe to us a pattern of litigation with intimates in India. Consider Morrison's (1974:57) report of the North Indian villagers who "commented scornfully that Netaji [a chronic litigant] would even take

a complete stranger to law—proof that his energies were misdirected."

Relationship between the parties seems to me to add another explanatory factor which says something that is genuinely distinct from the notion of party capability and holds great promise for relating the profile of official litigation directly to the whole complex of dispute processing. Party capabilities and party relationships, in turn, point us to broader features of social structure, to the whole web of relationships within which parties form theirs and through which differential capabilities are distributed. There is much to suggest that the profile of dispute processing varies with possibilities of specialization and mobility afforded by a society, as posited in Felstiner's (1974) attempt to trace the connection between social structure and the presence of adjudicatory mechanisms.

(7) Finally, we come to ideology or belief systems. Lowy (n.d.:27) argues for "the primacy of ideology over social relationships" in explaining court use in a Ghanaian city. The work of Hahm (1969) and Henderson (1968) on East Asia posits a direct relationship between belief systems and patterns of litigation.[12] From working with the American material, however, one would not necessarily conclude that belief systems could explain much about dispute processing. Who "believes in " plea bargaining, our overwhelmingly prevalent way of handling criminal cases? A variety of practices of negotiation, compromise, avoidance and resignation seem to flourish in a population said to be very rights-minded. The converse appears to be the case in India where litigation flourishes alongside an avowed preference for compromise and reconciliation. Comparative exploration of dispute processing certainly cannot ignore the ideology factor; we want to know when and how ideology does have an effect.

We must recognize the limitations of any attempt to explain the profile and outcome of litigation in a single institution. Grossman and Sarat (1975) display some of the difficulties that beset an attempt to analyze the flow of business in a single forum that is part of a larger complex. All societies contain not only a multiplicity of dispute processing institutions but institutions of diverse types. The official courts that are the subject of most of the articles in this collection co-exist with a variety of other dispute institutions: some are governmental, some are not; some

12. A second kind of 'ideology' hypothesis is that of Cohn (1959) who suggests that the prevalence of litigation among North Indians is attributable to conflict between their normative perspectives and those embodied in official law. For an interesting critique, see Kidder (1973).

are adjudicative, some are not. The dispute processing terrain, in the United States and elsewhere, remains largely unmapped. Ross (1975) provides an example of the vast amount of dispute processing that takes place in non-official settings and hints at the cultural and structural links to the official dispute system. Felstiner (1974), too, suggests that these various dispute processes are not isolated, but interact dynamically: the use of courts, he suggests, will be associated with the availability, cost and attractiveness of alternative remedies and these in turn will be connected with changing structures in the society. The possibilities of comparison of these relations across space is suggested by Blankenburg (1975) and by Grossman and Sarat (1975) as are the formidable challenges of combining these with explanations of litigation patterns over time.

To conclude, I hope that this note suggests that explanation of patterns of litigation is a promising way to explore the range of dispute processing in a society; that explorations along these lines would be worthwhile undertaking on a comparative basis; and that we have a number of suggestive starting points to create the conceptual framework for such explorations.

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