

University of Missouri School of Law Scholarship Repository

Faculty Publications

Spring 2008

An Appreciation of Marc Galanter's Scholarship

John M. Lande

University of Missouri School of Law, landej@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

John Lande, *An Appreciation of Marc Galanter's Scholarship*, 71 *Law & Contemp. Probs.* 147 (2008)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

AN APPRECIATION OF MARC GALANTER'S SCHOLARSHIP

JOHN LANDE*

I

INTRODUCTION

I had the good fortune to be one of Marc Galanter's students. From 1989 to 1995, I was a doctoral student in sociology at the University of Wisconsin-Madison. I had gotten my law degree in 1980, practiced law and mediation, and then decided to get a doctoral degree as a foundation for an academic career focusing on dispute resolution. In my second semester at Wisconsin, I took Galanter's "Sociology and Law" course, which was cross-listed in the Law School and Sociology Departments. I had previously read his *Why the "Haves" Come Out Ahead* article¹ and knew that he was a leading figure in the law-and-society world. He had been interested in dispute resolution and decided to focus the entire course on various aspects of dispute resolution. He assigned a lot of reading, which provided me with a wonderful introduction to the socio-legal literature on dispute resolution.

I made a wise decision in this course, which had a major impact on my career. The course required students to write a paper and, early in the semester, I made an appointment to meet with Professor Galanter to discuss possible paper topics. Since I was interested in dispute resolution generally, I was open to writing about many different things. I asked if he was working on anything in which my research could be helpful. I was offering, in effect, to be an unpaid research assistant. I figured that he would be more interested in my work if I wrote about something he was already interested in. In addition, he would presumably pick a more significant topic than I would have on my own.

My plan worked. Galanter described several different pieces he was working on and I quickly decided to focus on what he called "private courts." He suggested that I research court-annexed arbitration, private judging, organizational tribunals "embedded" within private organizations, private tribunals organized to handle complaints by outsiders, and independent professional service providers. I wrote a decent paper (which got an "A") but,

Copyright © 2008 by John Lande.

This Article is also available at <http://www.law.duke.edu/journals/lcp>.

* Associate Professor and Director, LL.M. Program in Dispute Resolution, University of Missouri-Columbia School of Law. J.D., Hastings College of Law; Ph.D., University of Wisconsin-Madison.

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

more importantly, I started developing a relationship with Marc. He was incredibly generous to me. I was not even expecting an acknowledgment in a footnote in his article but he made me a coauthor.² Our article was translated into Japanese and he got a \$500 honorarium, which he split with me. Again, I was not expecting this and did not feel it was necessary (though I certainly appreciated it, as I was living on a graduate-student budget).

During my time at Wisconsin, Marc was the director of the Institute of Legal Studies and he arranged for a Hewlett Fellowship for me, employed me as a research assistant, and served on my dissertation committee. He was a member of the Civil Justice Reform Act Advisory Group for the U.S. District Court for the Western District of Wisconsin and arranged for the court to hire me to develop a dispute resolution pamphlet and directory. He also helped me get a fellowship at the Harvard Program on Negotiation, which enabled me to finish my dissertation. His scholarship profoundly influenced my work and I am proud to write this appreciation as one of his students.³

This brief essay highlights three of his works to illustrate qualities that seem especially worth emulating.⁴ It includes extended excerpts of his writing because

2. See Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 *STUD. IN LAW, POL. & SOC'Y* 393 (1992). In fact, about forty percent of the text in the article came from my paper. I was involved in editing the entire article, but he generated the main ideas and did most of the work, so I did not expect any credit. In another example of his scholarly generosity, he delayed publishing my phrase "process pluralism," which he encountered reading my dissertation, until I had a publication he could cite.

3. I dedicated my first law-review article to Marc Galanter. See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 *FLA. ST. U. L. REV.* 839, 839 n.* (1997) [hereinafter Lande, *Lawyering and Mediation Practices*]. More recently, I published a critical appreciation of Galanter's work focusing especially on his "vanishing trial" thesis. See John Lande, *Shifting the Focus From the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter*, 6 *CARDOZO J. CONFLICT RESOL.* 191 (2005) [hereinafter Lande, *I Learned Almost Everything From Marc Galanter*]. In my biography accompanying the article, I wrote,

Though this essay quibbles with a few aspects of [Marc Galanter's] Vanishing Trial Report, I write this with great affection and admiration for his tremendous contribution to our understanding of conflict resolution. I include extensive cites to and quotes of his scholarship to introduce readers to it (or remind them of it).

Id. at 191 n.*. My own scholarship certainly has been influenced by his writing. I remember him advising me, as a graduate student, to avoid being either a Cassandra of doom or an uncritical cheerleader about alternative dispute resolution, which is advice I still try to follow. Although there are some differences between our perspectives, I share his views, values, and tastes highlighted in this essay. Of course, there were many influences on my career and I also especially appreciate Craig McEwen, Joe Sanders, and Mark Suchman as role models.

4. Galanter is a prolific writer and a renowned expert in many areas, including Indian Law, Jewish Law, civil justice, lawyers, legal culture, and dispute resolution, among others, as one can see from his website. See Marc Galanter, <http://marcgalanter.net/index.htm> (last visited Feb. 19, 2007). Thus these three writings reflect only a fraction of his scholarship. Because of space limitations, this essay focuses on only these publications. If I were to add one more, it would be his *Justice in Many Rooms* article, which provides an excellent framework of legal pluralism (describing how many legal regimes coexist simultaneously in the same society) and challenges the "legal centralist" perspective, a problematic worldview that dominates the legal academy. See Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 *J. OF LEGAL PLURALISM* 1 (1981).

his concepts and language are so evocative that paraphrasing often does not do them justice.

II

WHY THE "HAVES" COME OUT AHEAD

Galanter's classic article, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*,⁵ was my first introduction to his writing. I went to law school in the late 1970s to learn how to use law to promote social justice. The title of the article made it a must-read for me. Although some might have expected a polemic criticizing injustice caused by inequality, the article provides a cool analysis of mechanisms causing and reinforcing inequality in the legal system. Rather than follow conventional wisdom by focusing on differences in resources, Galanter identifies a key distinction between "one-shotters" and "repeat-players."⁶ He follows—and helped develop—the law-and-society perspective that focuses particularly on how the legal system actually operates in daily life without assuming that actual operations perfectly mirror statements of the law by courts and legislatures.⁷ Thus, rather than relying primarily on formal legal authorities such as appellate opinions or statutes, his insights are based on empirical and journalistic accounts of a wide range of legal behaviors, including creditors' use of small claims courts,⁸ automobile-insurance adjusters' practices in handling insurance claims,⁹ prosecutors' decisions about whether and how to charge defendants,¹⁰ relationships between automobile manufacturers and dealers,¹¹ the propensity of Yugoslavian and Philippine citizens to use litigation,¹² and on and on. His article provides an important analysis challenging a conventional wisdom that simply providing have-nots

5. Galanter, *supra* note 1.

6. *See id.* at 97–104. To illustrate the difference between one-shotters and repeat-players, he writes, "The sailor overboard and the shark are both swimmers, but only one is in the swimming business." Marc Galanter, *Afterword: Explaining Litigation*, 9 *LAW & SOC'Y REV.* 347, 363 (1975). He argues that there is overlap between repeat-player status and power, wealth, and social status, but that these are not identical. *See* Galanter, *supra* note 1, at 103. He shows how repeat players have advance intelligence (often from structuring the situation), expertise, economies of scale, ongoing relationships with key players, incentives to establish tough bargaining reputations, tolerance for risks in playing the odds in particular cases, and opportunities to litigate strategically to develop favorable precedents. *See id.* at 98–101, 125.

7. Galanter focuses on "effectiveness at the field level," which he calls "penetration" of law, as distinguished from rules propounded by "peak agencies." Galanter, *supra* note 1, at 97. The law-and-society literature often refers to this as the distinction between "law on the books" and "law in action." *See* Marc Galanter, *The Portable Soc 2; or, What to Do until the Doctrine Comes*, in *GENERAL EDUCATION IN THE SOCIAL SCIENCES: CENTENNIAL REFLECTIONS ON THE COLLEGE OF THE UNIVERSITY OF CHICAGO*, 246, 256–59 (J.J. MacAloon ed., 1992) (describing derivation of these concepts and analyzing strategies for dealing with the "gap" between the law on the books and law in action).

8. Galanter, *supra* note 1, at 99 n.9.

9. *Id.* at 99–100 n.13.

10. *Id.* at 101 n.16.

11. *Id.* at 102 n.19.

12. *Id.* at 104–05 n.22.

with more lawyers engaging in impact litigation to change legal rules would make a substantial difference in reducing inequality.¹³ Although such increased access to justice might help somewhat, he suggests that there would be substantially greater impact by organizing one-shotters into repeat-players and expanding lawyers' roles beyond courtroom advocacy.¹⁴

This article is also quite relevant to the dispute-resolution field, which has become the focus of my career. Even before the 1976 Pound Conference, which is often identified as the initiation of the modern alternative-dispute-resolution (ADR) movement,¹⁵ Galanter provided a more insightful analysis of alternatives to dispute resolution through court adjudication than that in much of our current scholarship.¹⁶ In *Why the "Haves" Come Out Ahead*, he focuses on the vast majority of legally oriented behavior, which occurs outside of court.¹⁷ He distinguishes truly private dispute resolution (such as inaction, self-help, withdrawing from relationships, and intra-group processes) from settlement systems that are oriented or "appended" to official legal institutions.¹⁸ Moreover, he argues that disputing processes are not objects with fixed characteristics, but are malleable sets of interactions that people selectively shape and use.¹⁹

III

CASE CONGREGATIONS AND THEIR CAREERS

Whereas *Why the "Haves" Come Out Ahead* has rightly received great acclaim, *Case Congregations and Their Careers*²⁰ has had a regrettably obscure scholarly career.²¹ This article is a gem that deserves more attention. It illustrates Galanter's penchant for conceptualizing the legal system broadly and for reflecting complex interactions with the rest of social life. Rather than focus on individual cases as the unit of analysis in which cases are largely independent of each other, *Case Congregations* focuses on "congregations" of cases as the cases interact and the congregations evolve over time. Like a naturalist,

13. *Id.* at 114–19, 123–24, 149–51.

14. *Id.* at 149–51.

15. See, e.g., Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309–10 (1996) (suggesting that the modern ADR movement dates back to the 1976 Pound Conference).

16. Galanter, *supra* note 1, at 124–35.

17. *Id.* In a later article, he coined the term "litigotiation," which he defines as "the strategic pursuit of a settlement through mobilizing the court process." Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDU. 268 (1984).

18. Galanter, *supra* note 1, at 124–35.

19. *Id.* at 144–48.

20. Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371 (1990).

21. A Westlaw search of the "journals and law review" database found more than 800 citations of *Why the "Haves" Come Out Ahead*. This understates the number of citations as the Westlaw library did not include many journals for much of the period following the article's publication in 1974. There were 467 cites for the ten years from 1997 through 2006, with a range of thirty-three to fifty-eight cites per year. By contrast, there have been only twenty-seven cites to *Case Congregations* in the same Westlaw database in more than sixteen years since its publication.

Galanter creates a taxonomy of cases with populations, families, and congregations of cases. He defines populations as sets of cases "that are very large and long-lasting, such as automobile-injury cases, divorce cases, and collection cases."²² Families of cases are sets of "very closely related cases (for example, involving a single party or incident)."²³ Finally, he defines a congregation as a "group of cases that are seen as a defined set that share common features, that are shaped by a common history, that are subject to shared contingencies, and that lean into a common future."²⁴ He contrasts congregations with populations. Populations are relatively enduring, stable, and sluggish, and cases in populations are not strongly affected by similar recent cases. Congregations, on the other hand, are smaller groups in which cases are subject to greater influence by preceding cases.²⁵ He writes that "congregations are cultural categories, part of the culture of the regulars, created by an act of labeling, that in turn intensifies interaction and mutual influence."²⁶

Having identified these classes of case aggregations, this modern Darwin of legal life proceeds to classify the evolutionary²⁷ dynamics of the "congregation" class. He begins by rejecting the plausible assumption that the amount of litigation is closely related to the level of underlying social activity. For example, one might assume that the amount of personal injury litigation arising from automobile collisions would be correlated to the number of miles driven. Although this idea is intuitively appealing, Galanter marshals compelling evidence to show that it is conceptually problematic and empirically inaccurate.²⁸ He identifies several classes of dynamics that do affect the careers of case congregations. "Endogenous" changes originate within case congregations,²⁹ "holistic effects" result from actors treating cases as part of a set of cases rather than as independent units,³⁰ and "career effects" reflect

22. Galanter, *supra* note 20, at 372 n.1.

23. *Id.*

24. *Id.* at 372. He gives the following examples of congregations:

The shared features that define the set may differ: a set may be connected by its origin in a specific event (e.g., a disaster like the Babylift crash, the Buffalo Creek flood, or the Hyatt Skywalk collapse; a particular form contract; or a financial incident). Or a set may be related to use of a particular product (e.g., the Dalkon Shield) or a particular type of product (e.g., all-terrain vehicles [ATVs]). Or a set may represent a conjunction of a particular kind of party and doctrine (e.g., insurance bad faith) or of a particular right and a particular procedure (e.g., Title VII class actions).

Id.

25. *Id.*

26. *Id.* at 373.

27. It is not quite accurate to use the analogy of biological evolution because changes in litigation phenomena result, in part, from humans' strategic decisions. Galanter writes, "Case types are like soap operas. They change over time, as claimants are mobilized, lawyers specialize, knowledge accumulates, and so forth. Actors reflect on the sequence, estimating what is to come and investing according to their notions of advantage." Galanter, *supra* note 20, at 386.

28. *Id.* at 373-78.

29. *Id.* at 379.

30. *Id.* at 384-85.

“changes in litigation behavior that result from the temporal sequence of similar litigation.”³¹

The catalog of endogenous effects includes prevention of future harm and liability exposure,³² changes in legal “regimes” for handling problems,³³ changes in recordkeeping practices affecting the production and retention of potential evidence,³⁴ and “promotional effects” of changes in the legal system that encourage or discourage future litigation.³⁵ Galanter identifies two holistic effects: “relativization,” whereby people evaluate individual cases “relative to the expected profile of the whole congregation, experienced and anticipated,”³⁶ and “rationing,” whereby “[s]carce resources are allocated to cases with an eye to the demands of the whole caseload.”³⁷

Galanter classifies various types of career effects. “Anticipation” effects occur when actors expect that early cases in a congregation will have substantial effects on later cases and act accordingly.³⁸ “Information-sharing and coordination effects” result when “[l]awyers who have similar cases, especially ones that require elaborate preparation, . . . form networks for information sharing and strategic coordination.”³⁹ The “depletion effect” occurs when the pool of readily actionable cases dries up due to a “complex mix of changes in rights, in procedures, in incentives, in actors, and in defendant responses.”⁴⁰ A congregation’s odyssey is affected as lawyers gain expertise over time and there is turnover in lawyers working on cases in the congregation.⁴¹ “Outcome stabilization” occurs as congregations mature over time and the “outcomes become more predictable.”⁴² Using the metaphor of an evolving stream, Galanter summarizes the dynamics of case congregations this way:

31. *Id.* at 385–86.

32. Galanter, *supra* note 20, at 379–81. For example, “[p]roducts may be redesigned or withdrawn . . . ; hazards repaired or guarded, disclaimers made, or permissions sought.” *Id.* at 379.

33. *Id.* at 381–82. For example, processes for handling workplace injuries may be shifted from courts to workers’ compensation agencies, and legal causes of action can be created or eliminated. *Id.*

34. *Id.* at 382. For example, businesses may discourage employees from writing about matters that could be used as evidence in later litigation. *Id.*

35. *Id.* at 383–84. For example, if a court establishes a new cause of action or a plaintiff achieves a sensational victory, others may feel encouraged to follow suit. This dynamic can work both ways and thus depress litigation if would-be plaintiffs and their attorneys interpret legal changes as decreasing their chances for success. *Id.*

36. *Id.* at 385. To illustrate this dynamic, Galanter cites research indicating that “participants in larger riots received less severe sentences than participants in smaller riots.” *Id.*

37. Galanter, *supra* note 20, at 385. For example, when dealing with a substantial congregation of cases, lawyers and judges need to ration the amount of attention they can devote to individual cases. *Id.*

38. *Id.* at 386–87. For example, after a statute is enacted, parties may “over-invest” in litigation to establish favorable precedents for later cases. *Id.*

39. *Id.* at 387.

40. *Id.* at 388. The most obvious depletion effects occur when there are a limited number of claimants, such as the victims of a disaster, but this is also related to preventive effects resulting from defensive actions by potential defendants. *Id.*

41. *Id.* at 389. For example, “[a]ltruistic pioneers, strongly identified with their clients’ ‘cause’ may be displaced by profit-seekers who can afford to finance the cases.” *Id.*

42. Galanter, *supra* note 20, at 389–93.

As these examples remind us, a case congregation is not just a succession of cases in which each is measured against a fixed (or slowly changing) framework of law. Instead, it is a changing stream whose course shifts and turns, widens and deepens, diverts and quickens. Law, lawyers, parties, audiences, practices, institutions, outcomes, stakes, expectations, discourse, meanings—all of these may undergo change as one of these congregations runs its course.⁴³

One can fully appreciate Galanter's conclusion in *Case Congregations* only by reading his words:

We can, I think, identify many regularities in this process, many paths by which a variety of influences work. Whether these can be subsumed in a comprehensive master pattern seems doubtful. No one is in charge: a case congregation is "the product of the action of many men but . . . not the result of human design[.]" It is an interactive system that "utilize[s] the separate knowledge of all its several members, without this knowledge ever being concentrated in a single mind, or being subject to those processes of deliberate coordination and adaptation which a mind performs[.]" External events and the litigation system are simultaneously connected and separated by the strategies of the actors. External changes affect the litigation system as they are filtered through the strategic considerations of the parties. That is, we are dealing with a kind of behavior in which people are acting strategically; they are thinking about stakes, probable returns, and tactical options. This is not to say that their motives are solely economic. They may want vindication or revenge. They may be poorly informed or may miscalculate. But generally their behavior is not impulsive and irreversible: they recruit advisers and allies, ponder options, assess what the other side is doing, and act after some deliberation. So when we see changes in litigation over time, we see reflections of changes in the resources, alternatives, and strategies available to the players.

To imagine the connection between the litigation system and the wider society, consider the following extended analogy. Imagine a strange variation of billiards in which when one player is shooting, the other can change slightly the position of the balls on the table. Imagine such a match being played on an immense table on which innumerable such games are taking place simultaneously. Games are playing through one another, so the balls in one match may ricochet unexpectedly from the strokes in another match. The surface of the table, rutted and torn by constant wear, changes imperceptibly between plays. Only part of the throng in the vast hall is intermittently diverted from other amusements to attend to the billiards table. Those who play and observe apply several overlapping and changing systems of keeping score. Tokens for play are distributed partly on the basis of recent scores but partly according to chance contact and intensity of interest. Would-be players press forward or depart on the basis of rumors about the course of play and the pull of rival entertainments. The changing band of players brings different combinations of agility, coordination, calculation, boldness, experience, and so forth.

What would an observer perched above the table see? Balls colliding, deflected; energies dissipated and transmitted. The course of the balls is not random. Much of what happens can be traced to the moves of the players, and these moves can be understood as pursuit of their goals. Yet the overall pattern is not traceable to or deducible from the goals or strategies of any of the players. For each is surrounded by unknowable contingencies, including in part the cumulative effects of the actions of the others. Although the course of play is influenced by many things that happen in the hall—the composition of the crowd, the volume and appeal of the other amusements—it is not a direct reflection of any of these.⁴⁴

43. *Id.* at 393.

44. *Id.* at 394–95 (citations omitted).

IV LOWERING THE BAR

Galanter's recent book, *Lowering the Bar: Lawyer Jokes and Legal Culture*,⁴⁵ is the culmination of much of his work on American law. Although he virtually never collects his own empirical data, he is an avid analyst of others' data. *Lowering the Bar* is something of an exception as he provides what is almost certainly the most comprehensive analysis of the "corpus" of lawyer jokes, which he collected from all around the world and by going back through historical sources. At first thought, one might assume that there would be little value in analyzing lawyer jokes. Galanter easily demolishes that assumption, showing that "[j]okes provide a rough gauge of common attributions of traits to various social groups and perceptions of the stature of various sorts of behavior."⁴⁶ He has been working on this project since the early 1990s and has published at least a dozen articles using lawyer jokes as data.⁴⁷ Although Galanter uses jokes and cartoons as his primary sources in *Lowering the Bar*, they are "juxtaposed with other outcroppings of legal culture—public opinion as expressed in surveys; the discourse about law among political, media, and business elites; and the portrayal of law and lawyers in the media."⁴⁸ He sorts the jokes into nine major categories, which "can be organized into two waves[:] an enduring core of topics and themes that have been well established for several centuries and a set of new thematic areas that have flourished since 1980."⁴⁹ The enduring themes are that (1) lawyers are corrupters of discourse, who "lie incorrigibly," (2) lawyers are greedy economic predators who do not produce anything of value but rather live off of productive members of society, (3) lawyers are allies of the devil, (4) lawyers are "aggressive, competitive hired guns, incurably contentious, unprincipled mercenaries who foment strife and conflict by encouraging individual self-serving and self-assertion rather than cooperative problem solving," and (5) lawyers are "enemies of justice [who] are

45. MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005).

46. *Id.* at 28. Galanter specifically addresses the question why lawyer jokes provide valuable information about legal culture. *See id.* at 26–28. Reading any chapter of the book demonstrates the value of the enterprise.

47. *See, e.g.*, Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and its Discontents*, 47 DEPAUL L. REV. 457 (1998); Marc Galanter, *Changing Legal Consciousness in America: The View from the Joke Corpus*, 23 CARDOZO L. REV. 2223 (2002); Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647 (2000); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998); Marc Galanter, *Lawyers in the Laboratory Or, Can They Run Through Those Little Mazes?*, 4 GREEN BAG 2D 251 (2001); Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994) [hereinafter, Galanter, *Predators and Parasites*]; Marc Galanter, *Tournament of Jokes: Generational Tension in Large Law Firms*, 84 N.C. L. REV. 1437 (2006); Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002) [hereinafter Galanter, *Turn Against Law*].

48. GALANTER, *supra* note 45, at 5. He argues that the skeptical representation of lawyers in jokes is similar to views expressed in public-opinion polls. *Id.* at 250.

49. *Id.* at 17.

indifferent to justice and willingly lend their talents to frustrate it.”⁵⁰ The jokes of recent vintage portray (1) lawyers as opportunistic betrayers of the trust—not only of opponents, but also clients, partners, friends, and family, (2) lawyers as morally deficient, lacking normal human feelings and decency, (3) lawyers as objects of scorn, despised because of shared social contempt for them rather than for their deeds or character, and (4) celebration of the death or absence of lawyers, who constitute a social affliction.⁵¹ Galanter uses the jokes and other data to illustrate his thesis that in recent decades, social and business elites have cultivated a “jaundiced view” of the legal system:

Our civil justice system was widely condemned as pathological and destructive, producing untold harm. A series of factoids or macro-anecdotes about litigation became the received wisdom: America is the most litigious society in the course of all human history; Americans sue at the drop of a hat; the courts are brimming over with frivolous lawsuits; resort to courts is a first rather than a last resort; runaway juries make capricious awards to undeserving claimants; immense punitive damage awards are routine; litigation is undermining our ability to compete economically. Although a litigious populace and activist judges were also blamed, lawyers, as the promoter, beneficiaries, and protectors of this pathological system, held pride of place among the culprits responsible.⁵²

In the concluding chapter of *Lowering the Bar*, Galanter considers whether his findings were unique to the United States and, after reviewing lawyer jokes and consulting with scholars and practitioners in Great Britain, Australia, India, the Netherlands, Germany, and Denmark, he finds that the legal culture and attitudes about lawyers are quite different in those countries.⁵³ In the United States,

[p]atterns of joking appear to track changes in the ubiquity and invasiveness of lawyers and law rather than a worsening of lawyer behavior In conjunction with growing resistance to regulation, taxes, and “big government” starting in the late 1970s, many recoiled against what they viewed as the excessive reach and cost of law.⁵⁴

Collectively, the lawyer jokes capture a deep American ambivalence about the law and lawyers. Galanter concludes,

Through this decentralized, endlessly receptive, and very expensive system, we attempt to pursue our multiple and colliding individual and social visions of substantive justice. We want our legal institutions to yield both comprehensive policy embodying shared public values and facilities for the relentless pursuit of individual interests. But we are suspicious of the concentrated authority required to provide the

50. *Id.*

51. *Id.* at 17–18.

52. *Id.* at 9 (footnote omitted). Galanter has written numerous articles analyzing this jaundiced view or malaise. *E.g.*, Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 *BUFF. L. REV.* 1369 (2006); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255 (2005); Galanter, *The Turn Against Law*, *supra* note 47; Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 *ARIZ. L. REV.* 717 (1998); Galanter, *Predators and Parasites*, *supra* note 47; Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 *DENV. U. L. REV.* 77 (1993); Marc Galanter, *Beyond the Litigation Panic*, in *NEW DIRECTIONS IN LIABILITY LAW* (Walter Olson ed. 1988); Marc Galanter, *The Legal Malaise; or, Justice Observed*, 19 *LAW & SOC'Y REV.* 537 (1985).

53. GALANTER, *supra* note 45, at 253–56.

54. *Id.* at 249.

latter routinely to ordinary citizens. We prefer fragmented government and reactive legal institutions with limited resources, so that in large measure both the making of public policy and the vindication of individual claims are delegated to the parties themselves, who are left to fend according to their own resources. But lawyers, each attached to her own client, cannot fulfill the fatally divided promise of substantive justice.

The lawyer joke corpus is a form in which strands of popular and elite resistance to the law come together. Both are anxious whether the society and world we live in are just. We each know that in this or that familiar corner of things, wrongdoers prosper and there is lots of undeserved and avoidable suffering. We would like to think that nevertheless somehow it all adds up, that each gets his deserts, that there is a cosmic balance in which virtue is rewarded and evil punished. But there is a nagging feeling that the wicked flourish.⁵⁵

V

AN APPRECIATION OF MARC GALANTER'S SCHOLARSHIP

Why the "Haves" Come Out Ahead, Case Congregations and Their Careers, and Lowering the Bar illustrate many of the superlative qualities of Galanter's scholarship. He is deeply committed to developing as accurate an understanding of legal phenomena as possible. He is like a data vacuum cleaner, collecting every source of relevant information he can put his hands on and generously giving credit to others' work. His writing reflects insights from an incredibly broad range of sources, including government statistics, scholarly research, media accounts, public-opinion polls, popular culture, conversations with judges, legal practitioners and scholars, and even lawyer jokes. His work regularly challenges comfortable assumptions of conventional wisdom to produce realistic portraits of the legal world. He develops creative concepts and theories that help people see the world more clearly and frame future analyses. While resisting temptations to engage in polemics or ideological crusades, his work reflects a deep commitment to promoting his eclectic vision of the public good, with particular concern for the have-nots in our world. Although his writing is dense and complex at times, his language is full of wry, understated humor and colorful images that provide a multi-dimensional portrait of legal life. What does a better job of capturing the reality of the legal world than his metaphor of a grand and bizarre billiard-game spectacle?⁵⁶

No scholar provides a universal model of excellence, not even Marc Galanter. Readers may disagree with some of his analyses. (Perhaps worse, readers may agree with all of a writer's views, suggesting that the scholarship may not be sufficiently original.) Scholars must develop their own voices and views to achieve their highest scholarly potential. Socio-legal scholars can benefit greatly by considering Galanter's work as a model and by adapting some of his approaches.

55. *Id.* at 259 (footnotes omitted).

56. *See supra* text accompanying note 44.

I have chosen this path and I am proud to be one of Marc Galanter's students. I am quite happy to toot Marc's horn and much less comfortable focusing on my own work. In the context of this symposium, however, my scholarship is part of his legacy and so it is worth at least a brief mention of how he influenced it. Most obviously, my writing is laced with cites to his writing.

I tip my hat several times to Marc in my article, *How Will Lawyering and Mediation Practices Transform Each Other?*⁵⁷ Adapting his term, "litigotiation,"⁵⁸ I coined the term "liti-mediation" culture, referring to situations in which it is "taken for granted that mediation is the normal way to end litigation."⁵⁹ The discussion of liti-mediation phenomena is inspired by a socio-legal analysis of how the relationships between lawyers, mediators, and parties affect the dynamics in mediation and the mediation market.⁶⁰ It also reflects a skepticism of orthodox doctrine (in this case, doctrine of mediation practice) and a descriptive and normative preference for a pluralist perspective.⁶¹

In an article derived from my dissertation, I documented business lawyers' and (especially) executives' "failing faith" in litigation, reflecting the "jaundiced view" that Galanter writes about.⁶² Galanter's writing style clearly influenced how I painted the portraits of my subjects.⁶³ My hopes for improving litigation and cautions about institutionalization of alternative dispute resolution are in the voice of a pragmatic idealist, like Galanter, rather than that of a Cassandra or a cheerleader.⁶⁴

More recently, I playfully turned the tables on the master by using Galanter's own words and methods to contest parts of his thesis in his "Vanishing Trial" report, which documents an ongoing decrease in trial rates.⁶⁵ I note that the "vanishing trial" has become so much a part of conventional wisdom that "even as sharp a skeptic as [law-and-society pioneer] Lawrence Friedman can be seduced by the mythical language, referring, in passing, to 'the mass extinction of trials' as if it is an indisputable fact."⁶⁶ To challenge this contemporary "myth," I created a Galanter-esque phrase and acronym, "the phenomenon known as the vanishing trial ('TPKATVT')," and amassed a variety of sources of data to bolster my argument.⁶⁷ My article takes Galanter's report to task for falling prey to a legal centralist perspective and advocates

57. See Lande, *Lawyering and Mediation Practices*, supra note 3.

58. See supra note 17.

59. Lande, *Lawyering and Mediation Practices*, supra note 3, at 841.

60. See id. at 879-95.

61. See id. at 854-57.

62. See John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1 (1998).

63. See id. at 48-54.

64. See id. at 54-68.

65. See Lande, *I Learned Almost Everything From Marc Galanter*, supra note 3.

66. See id. at 195-96 (footnotes omitted).

67. See id. at 191, 193-99.

using, instead, Galanter's concept of the "ecology" of conflict resolution.⁶⁸ These are but a few of many possible illustrations of how Marc's work helps animate my scholarship.⁶⁹

68. *See id.* at 199–212.

69. One of my articles was recently named as the article that best advanced understanding in the field of ADR in 2007. *See* Int'l Inst. of Conflict Prev. and Resol., CPR 2007 Award Winners, http://www.cpradr.org/CMS_disp.asp?page=awards-guidelines2005&M=1.7 (last visited Feb. 11, 2008) (citing John Lande, *Principles for Policymaking About Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619 (2007)). Marc Galanter deserves some credit for this achievement, as he is one of my major role models and mentors.