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Galanter v. Weber

DAVID A. WESTBROOK†

I too would like to thank the Mitchell Committee for inviting me to participate in this year's program.

I really like the ambivalences in Marc's paper.¹ Consider how ambivalently Marc treats the corporation. On the one hand, he acknowledges that corporations make any number of collective actions possible, and so life as he enjoys it—as we all enjoy it—presumes corporate activity.² On the other hand, the entire paper is structured around a familiar antipathy to corporations, especially large corporations, an anxiety that is hardly the monopoly of left/liberal types.

Marc also presents courts in ambivalent, indeed competing, ways. First, the court is an arena in which two relatively equal parties struggle in front of a neutral arbiter. Let's call this the adversarial model of the court.³ Today, the adversarial model is under stress, however, because corporations regularly turn up with bigger knights, taller basketball players in Marc's example.⁴ Therefore, corporations on balance win more often than natural persons. The adversarial contest seems, in some deep way, to be unfair.

This structural imbalance gives rise to a second image of courts, which we might call the administrative model. In this model, the real purpose of the court system is to keep

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

2. *Id.* at 1370.

3. *Id.* at 1396.

4. *Id.* at 1396-97.

things running smoothly, and at least roughly in accordance with social policy, however that might be understood.⁵

There is of course a third possibility, which seems very real in the current political climate: courts might be made unavailable for claims by natural persons against artificial persons (APs), classic liberal litigation. There is a considerable—and probably still growing—prejudice against such litigation and the plaintiff's bar that conducts it. Marc, however, has spent a great deal of energy over the years arguing that “too much litigation” is not a problem confronting America.⁶ So in this third model, courts are rarely used by ordinary people. Let's call this the oligarchic court model—you have to be rich, an oligarch, and usually an artificial person, to afford judicial dispute resolution.

Marc uses the deep normative appeal of the adversarial model of courts—our ideals of fair trial, equal access to justice, and the idea that courts are places where society's moral commitments are vindicated—as a basis from which to mount a counterattack on the oligarchic court model. I do not think—and I do not think Marc believes—that the adversarial model can or even should prevail outright. Why not?

Marc wants corporations in court. But as he has long argued, there are structural reasons that corporations, large bureaucratic organizations, are likely to be better at litigation than individuals represented by law firms.⁷ Thus, the desire to get corporations in court compromises the desire for the adversarial model. Moreover, if litigation concerns the practices of large organizations, then such litigation affects many people. This fact is only made explicit by certifying a class of plaintiffs. But once litigation is understood to be about a class of cases, and how policy will work going forward, then litigation has come to

5. *Id.* at 1400-01.

6. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986); Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 652 (1994); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1154 (1996).

7. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1979); see also IN LITIGATION: DO THE 'HAVES' STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

resemble legislation.⁸ And legislation doesn't really fit the adversarial model.

Thus, there is a bit of jujitsu in Marc's paper. We care about the adversarial model of courts, natural persons getting access to justice, but what we're really hoping to get, as a practical matter, is more regulation of APs by courts. And there has been some good news lately. After Enron and the Sarbanes-Oxley Act, courts are taking a much more active role in the regulation of corporations.

But one might want to be cautious here, too. We've heard a version of this story before. In fact, it is the story of modern corporation law. During the last decades of the nineteenth century and the first decades of the twentieth, corporations played an increasing role in American life. More businesses were organized as corporations, but more importantly, some individual corporations grew into giants. Corporations seemed to be taking over everything, not just the legal system.

In 1932, two liberal intellectuals, Adolf Berle and Gardiner Means, would brilliantly re-present this problem in terms of the structure of the corporation.⁹ This story is historically problematic, as Gerald Berk has shown.¹⁰ But the story has a certain plausibility, internal logic, and even truth. At any rate, it runs like this: the corporation is a way of raising and organizing large amounts of capital, the investments of vast numbers of shareholders who enjoy limited liability. The business, however, cannot be run by the owners, the investors, because there are so many of them, and they are so spread out. Instead, the business is run by a core of professional managers. In the famous phrase, ownership of the modern corporation is separate from control.¹¹ The problem of corporation law as such, then, is to bring corporations under control. And the institution to do this would be the courts. Shareholders should be given various rights against management so that the performance of such duties would be judicially enforced.

8. Galanter, *supra* note 1, at 1396.

9. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

10. See *generally* GERALD BERK, *ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER, 1865-1917* (1994).

11. See BERLE & MEANS, *supra* note 9, at 118.

The line of scholarship following Berle and Means wanted corporations in court, like Marc does.¹²

Experience has shown that there are at least three problems with the solution of enhanced judicial supervision of corporations. First, it turned out that courts are not very good at resolving many business conflicts. Shareholder protection is rarely best achieved through litigation, which is expensive.

Second, Berle and Means took little notice of a host of marketplace—or strategic—modes of controlling managers. Competition among managers, the risk of takeovers, executive compensation schemes, and the ability of investors to sell into broad markets all serve to protect shareholders, or at least adequately diversified shareholders.¹³

Third, the separation of ownership and control is a characterization of the relations between shareholders and management, but that relation does not explain all of corporate behavior. Most of the juicy law and policy stuff is addressed through other areas of the law, broadly speaking, regulation. Consider consumer protection or environmental law, laws which regulate corporate activity, but from an essentially external perspective.

Today, of course, after Enron and the collapse of the Internet bubble, judicial oversight of business activity seems more sensible than it has in a long time. Courts again seem relatively good at disciplining companies. Conversely, market mechanisms now seem to provide little protection against abusive management. And while various regulatory regimes will continue to regulate the external activities of corporations, there is a lot more interest in using corporation law to foster integrity in business practice. At the same time, however, as memories of the last few years fade and new opportunities, that is to say, risks, present themselves, the newly rediscovered enthusiasm for judicial oversight of business activity may weaken, indeed, may be weakening already.

12. See, e.g., William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737 (2001).

13. The locus classicus is Henry Manne's *Market for Corporate Control*. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

So have we learned anything, or are we merely traveling around in a circle? In order to address that question, let's return to the basic ambivalence in Marc's paper, whether corporations are good or bad. Corporations and other APs are designed to accomplish some task, and much of the time they do. This would seem to make corporations, in general, good. But there is something unsettling about artificiality—it is created by us, yet somehow foreign to us. Marc compares the corporation to Dr. Frankenstein's monster;¹⁴ one might also mention the golem of Jewish legend, a servant without a soul, who in the end proves difficult to manage.

The common ambivalence over the corporation is a species of the ambivalence with which I think most thoughtful people confront modernization. So the question that Marc's paper poses for me is whether his preferred solution, the court, really addresses this ambivalence. And here I am not so sure. I think courts tend to make things more bureaucratic, not less, and therefore they are unsettling and artificial in ways we associate with corporations.

First, courts are not very good at substantive business judgments. Courts, therefore, have adopted the business judgment rule, that is, courts tend to defer to even very wrong headed business judgments.¹⁵ While the rule may be sensible, it is difficult to see how a court that defers to business decisions can relieve us of any ambivalence we might feel about the process of corporate bureaucratization.

Second, as Marc points out, corporations as litigants deploy their bureaucratic powers, which is what makes them such good litigants. In order to oppose such powers, one must adopt similar tactics—that is what class actions and plaintiff side law firms do, they allow the plaintiff's side to become as bureaucratic and formal as the defense's side.

Third, and more generally, law denaturalizes. The adversarial notion of courts, in which lawyers are thought to be "safeguarding just relationships and democratic

14. Galanter, *supra* note 1, at 1370.

15. See, e.g., *In re Walt Disney Co. Derivative Litig.*, No. 15452, 2005 Del. Ch. LEXIS 113, at *150 (Del. Ch. 2005) (discussing the rationale for business judgment rule).

institutions,"¹⁶ is a heroic idealization. One of the things that is lost in the idealization is that law is formal. Sandra Jones becomes the plaintiff, who has certain rights, which were violated by the actions of the defendant, etc. What we teach in the first year of law school is this process of denaturalization, of restating a particular human situation in the formal language of the law. It is therefore a little strange to speak, in the context of courts, of corporations in contradistinction to natural persons. In an important way, there are no natural persons in courts: there are plaintiffs, defendants, lawyers, clients, judges, clerks, and witnesses. Entering a court requires that one adopt such a predefined role, and that thereby one becomes a part of the court as a bureaucracy.

Fourth, and most problematically, courts impose bureaucracy, and so exacerbate the problem. Lawyers, it has been said, provide formal or procedural answers to substantive questions. This is certainly true in the corporate arena. In case after case, courts (and legislatures) have addressed a failure of corporate governance by requiring a procedure intended to prevent such failings in the future. So, for example, faulty oversight leads to the appointment of compliance officers, independent directors on the audit committee, and a host of required paperwork.¹⁷ Whether or not such efforts produce better accounting, they definitely produce more bureaucracy.

Thus, while I am sympathetic to the notion that APs are taking over the legal system, I do not think courts can provide *much* of a solution. That said, and here I will conclude, perhaps it is not too much to hope that courts can *ameliorate* the situation. There is quite a lot to be said for making even large organizations justify themselves in public. The recent accounting trials are not just great theater, they are instructive, and perhaps a bit humbling.

16. Galanter, *supra* note 1, at 1386 (quoting Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 998 (2000)).

17. See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. 1996). See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified in scattered sections of 15, 18 U.S.C.).

And maybe in that way, courts can make APs if not more human, at least a bit more laughable.

