

# IMPLEMENTING THE RIGHTS REVOLUTION: REPEAT PLAYERS AND THE INTERPRETATION OF DIFFUSE LEGAL MESSAGES

CHARLES R. EPP\*

## I

### INTRODUCTION

Rights policies are everywhere, in name or in form. Nearly every organization has both general equal-employment-opportunity policies and specific policies in particular areas, among them sex-harassment policies. Nearly every police department has highly specific policies on the use of force against citizens. Nearly every organization that maintains a children's playground has some sort of safety policy. Over the last several years, I have studied the development and spread of these sorts of rights policies, with an eye to understanding why they have developed and why their administrative depth varies considerably from place to place.

In answering these questions, I have found my thinking heavily influenced by three of Marc Galanter's many contributions to legal scholarship. The first is his famous argument that "the 'haves' come out ahead"<sup>1</sup> because they are organized to gain advantage in iterated legal contestation.<sup>2</sup> The second is his equally famous argument that the so-called "litigation explosion" is all hot air: litigation rates have not increased appreciably and most injured people do not sue over their injuries.<sup>3</sup> The third is a less famous, but equally perceptive and powerful observation: the diffuse and ambiguous signals sent by courts gain meaning in light of the knowledge, resources, and skills of parties to disputes.<sup>4</sup>

Although at first glance these insights may seem unconnected, together they help to explain both the development and the continuing variation in rights policies in the United States. Before suggesting why, this article first discusses the nature of U.S. rights policies.

## II

### ADMINISTRATIVE-RIGHTS POLICIES IN THE UNITED STATES

---

Copyright © 2008 by Charles R. Epp.

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

\* Associate Professor, Department of Public Administration, University of Kansas.

1. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 124 (1994).

2. *Id.* at 98-104.

3. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

4. Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 126-28, 135-38 (Keith O. Boyum & Lynn M. Mather eds., 1983).

In the modern state, rights are empty promises in many contexts unless they are given life in administrative policies and practices. My research focuses specifically on administrative-rights policies within government, so the discussion here is limited to that context. Government policy is made and remade at the lowest levels of the administrative state where officials—police officers, social workers, development planners—give meaning to the often-ambiguous goals set by legislatures, courts, and executives, and develop goals of their own. It is widely believed that in this process, bureaucracies generally dislike the limits imposed by legal rights and seek, in their administrative policies and practices, to undermine these rights. That overriding pessimism, while often justified, should be tempered: U.S. bureaucracies in some contexts have internalized a wide range of administrative policies and practices favoring protection for civil liberties and rights.

Consider the example of policing. In 1960, the standard U.S. police-department policy governing police officers' use of force employed highly general restrictions on shooting at civilians, and shooting training consisted largely of target practice.<sup>5</sup> The decision to shoot, in other words, was left to individual officers' best judgment, despite considerable evidence that the decision to shoot varied widely among officers and often was influenced by the race of the target.<sup>6</sup> With the benefit of hindsight, one can hardly imagine a more ambiguous policy and a training protocol less aimed at minimizing inappropriate uses of force. By 2000, the standard U.S. police policy on use of force specified a "graduated use of force" with specific itemizations of different levels of force—ranging from voice restraint to discharge of weapons—and the conditions under which each was legal and appropriate.<sup>7</sup> Additionally, police training in the use of force has come to focus on correct application of the use of force continuum, and the best training programs also now teach officers how to defuse tense situations before resorting to the use of force.<sup>8</sup>

The shift in policing from a general, vague policy on the use of force in 1960 to a highly specific, training-focused policy in 2000 is nothing less than fundamental. And it is a shift that is characteristic of changes in U.S. administrative policies toward rights more generally. That is, in the decades after 1960 and in a host of policy areas, U.S. administrative governance became significantly, even dramatically, more rights-focused; the rights policies at the

---

5. See, e.g., SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990* 26 (1993).

6. See generally James J. Fyfe, *Blind Justice: Police Shootings in Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707 (1982).

7. Joel H. Garner & Christopher D. Maxwell, *Measuring the Amount of Force Used By and Against the Police in Six Jurisdictions*, in *USE OF FORCE BY POLICE* 37–38 (NAT'L INST. OF JUSTICE, Oct. 1999), available at <http://www.ncjrs.gov/pdffiles1/nij/176330-2.pdf>.

8. See, e.g., JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 38–42, 183–84 (1993); James J. Fyfe, *Training to Reduce Police-Civilian Violence*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 165 (William A. Geller & Hans Toch eds., 1996).

heart of the change became institutionalized and integrated into government agencies in substantial administrative depth.<sup>9</sup>

In some places, nonetheless, local bureaucracies have adopted few of these rights-based innovations, or they decline to enforce them—particularly with regard to vulnerable populations. The Chicago police department, for instance, is currently embroiled in a scandal involving allegations of systematic mistreatment of the residents of some public housing projects, and allegations that the department failed to enforce its elaborate rules on police misconduct.<sup>10</sup>

The dominant theoretical explanation of administrative-rights policies views the policies as the expression of institutionalized models developed in the face of ambiguous threats from the legal environment, particularly threats of legal liability.<sup>11</sup> In this view, the organizational field that adopts administrative-rights policies is itself the source of those policies. Thus, in the area of policing, it might be argued that police-use-of-force policies grow out of a dynamic within professional policing itself. Although my research on administrative-rights policies is informed by such an institutional theory, I have come to think that the standard focus on institutional norms *within* organizational fields should be supplemented by a focus on the generative role of organizational repeat players *external* to those organizational fields. My understanding of these issues reflects the influence of Marc Galanter's contributions in three areas.

### III

#### GALANTER'S FOUNDATIONAL INSIGHTS

Marc Galanter pioneered a legal-realist interpretation of the dynamics of legal contestation and legal change over time. His classic article *Why the "Haves" Come Out Ahead* (hereinafter *Haves*) hypothesized that the powerful prevail not only in politics, but in law as well.<sup>12</sup> In contrast to some observers in the late 1960s and early 1970s who placed great hope in the transformational agenda of left-liberal public-interest litigation, Galanter warned that, over time, interests that are organized so as to maximize legal advantage, that have the organizational and financial capacities to "play for rules" (rather than for victories in particular cases), and that have ongoing familiarity with local jurisdictional rules, officials, and customs are likely to prevail over "one-shot"

---

9. Charles R. Epp, *Implementing the Rights Revolution* (Jan. 15, 2008) (unpublished manuscript, on file with author).

10. See Jamie Kalven, *Kicking the Pigeon* (2005–2006), [http://www.viewfromtheground.com/wp-content/media/ktp/kicking\\_the\\_pigeon.pdf](http://www.viewfromtheground.com/wp-content/media/ktp/kicking_the_pigeon.pdf); Craig B. Futterman, H. Melissa Mather & Melanie Miles, *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, in 23 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK (Thompson West eds.) (forthcoming 2008), available at <http://www.law.uchicago.edu/files/brokensystem-111407.pdf>.

11. See, e.g., Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

12. Galanter, *Why the "Haves" Come out Ahead*, *supra* note 1.

litigants whose capacities in these areas are weak and whose time horizon is limited to the case at hand.<sup>13</sup>

Regarding the impact of liability on administrative policies, one might naturally infer from Galanter's argument that these policies, too, are likely to reflect the interests of the "haves." One-shot tort litigants are likely to gain, at best, small-value buy-offs from private organizations and governments, in the form of run-of-the mill settlements. These small-value buy-offs are likely to generate, at best, only symbolic changes in organizational policies or, at worst, organizational changes that lead to more effective legal domination of one-shot litigants.<sup>14</sup> Thus, in response to threats of liability, organizations may adopt symbolic policies (such as written employee policies that forbid sexual harassment), but they are unlikely to implement or enforce those policies.<sup>15</sup> Or organizations may adopt policies and procedures that bring legal challenges against the organization *into* the organization, where they are processed (and rendered harmless to the organization) by internal grievance procedures.<sup>16</sup>

On the other hand, Galanter's classic *Haves* article has a second motif.<sup>17</sup> It suggests that "have-not" parties *might* gain some of the advantages of the "haves" by developing repeat-player organizational capacities and longer-term legal strategies aimed at "playing for the rules," rather than aiming only for short-term success in the case at hand.<sup>18</sup> In particular, if the "have-nots" can develop organized litigation-support groups, long-term funding for litigation campaigns, and long-term strategies for legal change, then they may gain influence over the development of legal policy.<sup>19</sup> If so, one might infer, as well, that the more organized and sustained the degree of legal challenge to an organization, the more greatly will the organization be forced to respond with more substantive changes to its policies and procedures. Thus, in the face of ongoing, sophisticated threats of legal liability, organizations may adopt changes that go far deeper than symbolic evasion or internal suffocation of legal complaints.<sup>20</sup>

Overall, though, Galanter's realist *Haves* argument suggests the hypothesis that the threat of tort liability may be less potent than assumed by the popular view. Legally experienced organizations, in this view, are likely to recognize that few people injured by their activities are likely to sue<sup>21</sup> and that most of

---

13. *Id.* at 98–104.

14. *See id.* at 101–04.

15. *See, e.g.,* Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1436–37 (1990); *see also* Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 11, at 1542–47.

16. *See, e.g.,* Lauren B. Edelman et al., *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 L. & SOC'Y REV. 941, 952–53, 982 (1999).

17. *See* Charles R. Epp, Comment, *The Two Motifs of "Why the 'Haves' Come Out Ahead" and Its Heirs*, 33 L. & SOC'Y REV. 1089 (1999).

18. Galanter, *Why the "Haves" Come out Ahead*, *supra* note 1, at 141–44.

19. *Id.*

20. *See supra* notes 14–16 and accompanying text.

21. *See* Galanter, *Reading the Landscape of Disputes*, *supra* note 3, at 13–15.

---

---

these claims can be bought off relatively cheaply with settlements that leave the organization's legal position no worse off.<sup>22</sup>

Galanter's famous intervention into the "litigation explosion" genre in *Reading the Landscape of Disputes*<sup>23</sup> (hereinafter *Landscape*) is equally realistic, with equally significant implications for rights-policy development. To the complaint by many in the mid-1980s that the United States had experienced an explosion of lawsuits, particularly tort lawsuits, Galanter simply asked, "show me the numbers." Thus, he compared rates of tort litigation in the United States with rates in the past; he compared injury rates with litigation rates (which were and are dramatically lower than rates of injury, meaning that most of the injured do not sue); and he compared litigation rates in the United States with rates in other countries.<sup>24</sup> The results, though not a great surprise to social scientists working in the area, brought together the evidence in a remarkably clear, coherent, and forceful observation that there simply had been no litigation explosion.<sup>25</sup> Galanter's analysis in *Landscape* has been, by any standard measure of scholarly influence, remarkably influential. I recall teaching undergraduate courses a few years after its publication and, before it had percolated even in academia, finding my students uniformly committed to the "litigation explosion" idea. Upon introducing Galanter's thesis, my students would reply, "It can't be." But surprisingly often they came around after carefully reading the article. Now, more than twenty years later, when I teach the topic, invariably some students anticipate my basic point, echoing Galanter's analysis even before reading it. Might we all be so influential!

More to the point, the implications of *Landscape* for understanding the development of rights policies are equally significant and profound and point in the same direction as *Haves*. If litigation rates have not increased appreciably in the United States, and if the overwhelming majority of complaints of injuries—against abusive police officers, for instance—are "lumped,"<sup>26</sup> then there is a remarkably weak incentive (at least in relation to the costs of injury), from the tort liability perspective, to reform injurious practices. The *injured*, by and large, not the *injurer*, lump their legal claims; it is the injured, then, who bear the costs of injuries. Litigation's "bite" is muzzled. Organizations, in response to such impotent threats of being sued, are likely to adopt administrative policies on rights that are far less vigorous, reaching, and enforceable than if litigation's bite were sharper and deeper.

If we left the matter there, the implications of Galanter's work for understanding administrative-rights policies, although important, would fit

---

22. See Galanter, *Why the "Haves" Come out Ahead*, *supra* note 1, at 101–02.

23. Galanter, *Reading the Landscape of Disputes*, *supra* note 3.

24. *Id.*

25. *Id.*

26. See Galanter, *Why the "Haves" Come out Ahead*, *supra* note 1, at 124–25 (describing "lumping" as inaction, where potential claimants do not make a claim because they lack information or access to information, or decide that litigation costs outweigh their benefits).

comfortably into a standard realist genre. But Galanter contributed another insight, with implications for the topic that are nothing short of profound. It is that incentives provided by law are best understood as “messages”—not constraints or inducements—and that these messages are likely to be interpreted in varying ways depending on the standpoint of the listener.<sup>27</sup> Specifically, “the messages disseminated by courts do not carry endowments or produce effects except as they are received, interpreted, and used by (potential) actors. Therefore, the meaning of judicial signals is dependant on the information, experience, skill, and resources that disputants bring to them.”<sup>28</sup> Although this observation is not nearly as famous as the two previously mentioned, some prominent scholars, notably Michael McCann, have relied on it in developing a constitutive theory of law.<sup>29</sup> To put the matter bluntly, the meaning of judicial decisions as understood by academic experts is not what matters for how organizations interpret and use those decisions; what matters is how judicial decisions are understood by organizational officials. Therein lies an insight that threatens—potentially—to upend the implications drawn above from Galanter’s *Haves and Landscape*.

If organizational officials believe that the United States has experienced a litigation explosion; if they believe that their constituents are highly litigious; if they believe that the liability terrain has shifted against their interests—in sum, if they believe that litigation’s bite is sharp and deep—then they are likely to act on the basis of that belief, and not on the contrary information known by realist academics.

#### IV

##### RESEARCH ON THE MEANING OF TORT LIABILITY FOR DEFENDANT ORGANIZATIONS

The question immediately arising from the foregoing discussion is this: How do officials in defendant organizations interpret their liability environment, both with regard to the level of liability threat and the nature of the appropriate response? Remarkably little is known. In some areas of industry, product-design engineers believe the messages from products-liability cases are so ambiguous and contradictory that they largely ignore the law and make design decisions on the basis of other factors.<sup>30</sup> By contrast, human-resources specialists working for organizational employers have relatively specific understandings of the law on improper discharge of employees, believing the threat of litigation to

---

27. Galanter, *The Radiating Effects of Courts*, *supra* note 4, at 126–28, 135–38.

28. *Id.* at 136.

29. MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 10 (1994); Michael McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 732 (1992) (reviewing GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991)); Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being so Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 467–68 (1996).

30. GEORGE EADS ET AL., DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION 108–09, 123–24 (1983).

be relatively high—but their understanding is contradicted by reports from academic, legal interpretations of the law.<sup>31</sup> At least one line of research suggests the importance of examining in detail the perceptions held by organizational officials.<sup>32</sup>

As part of a current project on the construction of administrative-rights policies by local governments, I have interviewed numerous local government administrators in Kansas, Missouri, Arkansas, and California. The localities vary in size, race and class diversity, rate of economic growth, and age of the public works and roads infrastructure. To get a long-term perspective on the legal environment of local government, I selected respondents who had served in local administration for a long time, typically several decades. These included mainly city managers and assistant city managers, but included as well several city attorneys, several attorneys in private practice who have represented cities, several risk managers, and several senior departmental managers. The interviews were semi-structured and open-ended. Standard question protocols were pursued in each interview, as well as in other questions that became appropriate in response to answers to the planned questions. The interviews were illuminating.

#### A. Perceptions of the Threat of Litigation

The senior managers interviewed for this study generally shared the popular belief that the frequency and costs of litigation in the United States are excessive, and they applied that belief to the local-government context. Typical observations by respondents included the following:

“Our city is constantly being sued.”<sup>33</sup>

“We’re constantly facing new lawsuits.”<sup>34</sup>

“One thing or another is always under litigation.”<sup>35</sup>

“The threat of litigation is always in the back of your mind.”<sup>36</sup>

“What are we supposed to do with all of these lawsuits? If the courts are trying to send a message, hey, we’ve got it.”<sup>37</sup>

These observations (and many others like them) suggest that local government administrators perceive that they face significant and substantial (and heightened) threats of liability. Thus, in comparison to empirical studies on trends in litigation rates, an element of exaggeration apparently affects managers’ perceptions of the extent of litigation.

---

31. Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & SOC’Y REV. 47, 64–68 (1993).

32. See, e.g., Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 11, at 1548–51.

33. Interview with respondent #M3 (Apr. 8, 1998).

34. Interview with respondent #M7 (Apr. 13, 1998).

35. Interview with respondent #M8 (Apr. 14, 1998).

36. Interview with respondent #M11 (Apr. 20, 1998).

37. Interview with respondent #M12 (Apr. 21, 1998).

## B. Who Sues (and Who Matters)

Each interview included a number of questions regarding which types of litigants are perceived as posing the most significant threats and as having the most significant effects on the policy or administrative process. Many of the respondents' observations reflected an apparent recognition by administrators of the relative power of "repeat players" versus "one-shotters." Respondents universally recognized the significance of the relative organizational "staying power" (as one put it) of a litigant or potential litigant. Organizational litigants, according to the respondents, nearly always must be taken seriously. In contrast to at least some one-shotters, their claims are likely to have some merit or basis and are likely to be advanced with sophistication; and such litigants are less likely simply to drop their claims. In the perceptions of senior local administrators, the organizations that must be taken seriously include not only business organizations, but also cause-advocacy organizations. Thus, one respondent made a typical observation:

It's tougher to deal with advocacy organizations than with individual lawyers. Their constituency base gives them strength, and also means that they have to deal with their constituents if they compromise too much. They also have more funding typically than individual lawyers, and thus they can give you a tougher fight, can carry it on longer. Also, more publicity is generated when an organization is involved—they like to go to the media, whereas individual lawyers don't—and then it's tougher to come to an agreement. So I'd much rather deal with an individual lawyer than with an organization.<sup>38</sup>

On the other hand, virtually all of the managers observed that individual lawyers representing run-of-the-mill plaintiffs posed the potential for serious disruption of city policy. Being a one-shotter, and even a relatively ordinary one, does not appear necessarily, or even commonly, to place a claimant in a "not-to-be-taken-seriously" category—but *only if the one-shotter is legally represented*.<sup>39</sup> As one respondent observed, "All litigants have staying power if they have an attorney, because most of the time the attorney will be working on a contingency basis, and so the expenses aren't out of the plaintiff's pocket."<sup>40</sup>

Additionally, the senior administrators interviewed for this study universally emphasized significant changes over the last thirty-five years in the capacity of litigants. The biggest change, in their perception, has been a broadening of the universe of those who sue or threaten to do so. Thirty-five years ago, the managers observed, the universe was limited mainly to businesses or real-estate developers either doing business with localities or developing property within localities. By the 1970s, businesses were joined by an increasingly diverse range of individuals and groups, particularly antidevelopment forces, including neighborhood associations, historical preservationists, environmentalists, civil-rights and civil-liberties claimants, and a wide diversity of individuals claiming

---

38. Interview with respondent #M6 (Apr. 10, 1998).

39. See Galanter, *Why the "Haves" Come out Ahead*, *supra* note 1, at 114.

40. Interview with respondent #M4 (Apr. 9, 1998).

personal injuries. The change, in the view of several respondents, has been dramatic: “Now almost anybody can get a lawyer to take a case; it didn’t used to be that way.”<sup>41</sup>

Nonetheless, several of the managers, particularly those in rural or more-isolated cities, made observations suggesting that the expansion and diversification of the threat of liability may vary significantly by geographical area. For instance, a lawyer who has both represented cities and sued them observed, “You know those cops that get fired in the cities because of brutality? You know where they end up? You think they become garbage collectors? No. They just get hired as cops in these small towns out here where the rules are more relaxed and nobody’s going to sue them.”<sup>42</sup>

Similarly, a manager in an isolated town said, “There aren’t a lot of personal injury lawyers here. We don’t get sued very much. The last time it happened, the lawyer was somebody from out of town. I can’t remember where he was from—I think one of the bigger cities down the road.”<sup>43</sup>

In sum, senior public managers’ perceptions about who represents a potential litigation threat are revealing: the universe of perceived sources of liability threat has become surprisingly broad and diverse. Some administrators emphasized repeatedly that “anybody” can get a lawyer. That perception reveals a sort of democratization of the perceived threat of litigation. Nonetheless, that perceived democratization of threat is not all-pervasive. Even in urban areas, several managers emphasized that organizational litigants typically have more staying power than individual litigants and thus pose greater threats. Moreover, the handful of rural or geographically isolated respondents interviewed for this study seemed to hold much lower perceptions of the significance of liability litigation than did their urban counterparts.

### C. Administrative Policy Responses

The respondents identified a number of forward-looking, defensive policies and actions taken by their organizations in order to minimize legal threats. First, as may be expected, they universally observed that the role of lawyers in the policy and administrative process has expanded. As one respondent noted,

When I first started this game, you’d bring lawyers in only occasionally, if some outside party raised a legal concern. Now the city’s lawyers are in on every single policy discussion, at every stage of the discussion. And if there are high-level discussions, say between a department head and the city manager, a third person—a lawyer—is always present. And it is the lawyer who makes the presentation. Not the policy expert.<sup>44</sup>

A second significant, forward-looking effect observed by virtually all the respondents is what may be called a “systematization of procedures.” In the

---

41. Interview with respondent #M4 (Apr. 9, 1998).

42. Interview with respondent #L2 (Apr. 16, 1998).

43. Interview with respondent #M19 (Aug. 21, 1998).

44. Interview with respondent #M5 (Apr. 9, 1998).

area of risk management, this is especially evident. The respondents in each jurisdiction reported that their government had begun systematically checking infrastructure thought to pose safety or accident risks—checks, for instance, of road signs, road conditions, sewer lines, and park and playground equipment. In each instance, the senior managers emphasized that the key to such systematization is precise recordkeeping of the nature and timing of both the checks and the actions taken in response to observed problems. Such systematization, particularly in recordkeeping, they observed, helps to insulate the organization from liability. A closely related development is the systematization of procedures governing relations between the citizen and the local government. For instance, systematic procedures have been instituted for approval of (and objections to) development permits, for complaints about police activity, for injury- or property-damage claims, for discrimination claims, and for investigations of these claims. Thus, a typical observation is as follows:

The threat of litigation leads to more systematic planning and documentation. Now we have employees do regular trips down all county roads to check for problems in the road or missing signs. And we document those trips. So if a sign comes up missing and causes an accident, we can show that we'd taken steps to avert that problem and that the problem hadn't been present in the previous regular check. Years ago, of course we'd be concerned about road conditions and missing signs. But mainly we'd correct problems when a call came in, or when an employee happened to notice it. Now the program is more regular, more systematic, and more documented.<sup>45</sup>

A third forward-looking effect of heightened legalization has been the institution of regularized training for new employees, and, for some types of employees—particularly the police—periodic continuing training. The types of training run the gamut. In most of the jurisdictions included in this study, employees receive training regarding prohibited forms of discrimination, particularly sex and race discrimination, and harassment. Relatedly, several respondents emphasized that their governments had adopted “zero tolerance” policies toward harassment. Police receive training in constitutional law covering search, seizure, pursuit, arrest, and use of force. Public-works employees receive training in identifying and reporting problems with streets, sidewalks, road signs, and other parts of the infrastructure. The extent and rigor of such training obviously varies. Nonetheless, the senior managers interviewed for this study universally stressed that an increased emphasis on training has been among the most important effects of legalization. Even without prodding, several identified it as the most significant effect.<sup>46</sup> One respondent, in sum, tied all of the defensive policies and actions together: “Responding to the whole litigation area is like a comprehensive program: you need a comprehensive policy that covers everything, from getting good legal advice, to planning for

---

45. Interview with respondent #M9 (Apr. 14, 1998).

46. Interview with respondent #M4 (Apr. 9, 1998); Interview with respondent #M5 (Apr. 9, 1998); Interview with respondent #M9 (Apr. 14, 1998).

known risks, to training employees, to insurance coverage, to being responsive to citizens' complaints."<sup>47</sup>

## V

### CONCLUSION

The observations from interviews presented here are only suggestive, but are potentially significant for understanding administrative-rights policies. As institutional theories of organizational policies might suggest, organizational managers perceive appropriate rights policies in light of their understanding of their legal environment. But this understanding, at least in the public sphere, is shaped not only by dominant institutional models, but also by very specific perceptions of the liability threat in their locality. And these perceptions are best understood in light of Marc Galanter's theoretical contributions regarding repeat-player litigants, the so-called litigation explosion, and the role of litigant capacity in shaping understandings of the meaning of law.<sup>48</sup>

As Galanter suggested, the diffuse messages sent by courts gain meaning in light of the perceptions, knowledge, skills, and resources of potential disputants.<sup>49</sup> In the governmental context, senior administrators share some aspects of Galanter's legal realism: administrators see liability as a greater threat to the extent that a potential claimant is supported by organizational resources and has "staying power."<sup>50</sup> Moreover, they seem to recognize that many potential claimants lack these capacities and are unlikely to sue or, if they sue, are unlikely to represent a significant legal threat.<sup>51</sup>

On the other hand, senior local-government administrators share some aspects of the naïve, popular view of litigation that *Landscape* sought to debunk. They claim to fear widespread litigation and claim that litigation rates against their governments have virtually exploded. In response, they say that their governments have adopted "comprehensive systems" of administrative policies aimed at minimizing governmental harms to protected rights, via clarified policies, improved training, and improved internal oversight.<sup>52</sup> Nonetheless, some administrators, typically those in geographic areas distant from urban centers, say that the threat of liability is rare and, quite literally, distant.<sup>53</sup> In these contexts, administrative-rights policies appear to be significantly less developed than in contexts where the perception of liability is greater.

---

47. Interview with respondent #M4 (Apr. 9, 1998).

48. See discussion *supra* Part III.

49. Galanter, *The Radiating Effects of Courts*, *supra* note 4, at 126–28, 135–38.

50. Interview with respondent #M4 (Apr. 9, 1998); Interview with respondent #M6 (Apr. 10, 1998).

51. Interview with respondent #M4 (Apr. 9, 1998); Interview with respondent #M5 (Apr. 9, 1998); Interview with respondent #M9 (Apr. 14, 1998).

52. See discussion *supra* Part IV.

53. *Id.*

If these hypotheses are supported by more systematic research, then organizational-rights policies are possibly influenced not only by dominant institutional norms, but also by highly specific liability threats related to the efforts of repeat-player litigants.