

# A Pioneer of the Law & Society Movement: One Eyewitness's Reflections

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## INTRODUCTION

There is arguably no more seminal a figure in the field of law and society than Professor Marc Galanter. That a Special Issue featuring dedications to several leading academic lights would be hosted by the *University of Chicago Law Review* is especially significant in terms of Marc's inclusion because Chicago is where Marc came of age as a student.

Professor Richard Abel, some years back, chronicled Marc's educational journey in Hyde Park.<sup>1</sup> As Abel tells it—and as Marc has told me over the years—after finishing his B.A. and while continuing to work on his master's degree from Chicago, Marc enrolled at the University of Pennsylvania for law school in 1953.<sup>2</sup> Yet after a frustrating first year at Penn, because of what he saw as the narrow confines of legal education, Marc returned to Chicago—his intellectual oasis. There, he finished his M.A. and began at the law school as a second-year transfer student, and he ultimately earned his J.D. in 1956.<sup>3</sup>

This Essay will offer my perspective on the influence that Marc has had on different areas of the law, as well as on me. In

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<sup>1</sup> See generally Richard Abel, *How Marc Galanter Became Marc Galanter*, 62 DEPAUL L. REV. 555 (2013).

<sup>2</sup> *Id.* at 556. The information from which this Essay is gathered is based on twenty-five years of conversations with Marc—more specifically, in-depth discussions that occurred on November 17, 2020; November 26, 2020; January 8, 2021; and February 13, 2021.

<sup>3</sup> *Id.* at 556–57. Adding even more to the fortuitous nature of this Special Issue, Marc was the Book Review and Essays Editor of the *University of Chicago Law Review*. *Id.* at 556.

what some of my friends in India might refer to as “destinical,” forty years after Marc contemplated leaving legal education and the law altogether, he encountered a terribly naïve student who was experiencing similar sentiments after his 1L year. In 1994, after completing two semesters at Ohio State, I felt lost. I knew that I had a keen interest in how law intersected with politics, particularly within the country from where my parents immigrated—India. I also knew that I might one day want to write and teach in the areas of law and social science. But beyond these generalities, I was not sure about much else.

During that summer of 1994, I set up three meetings with academics at Ohio State: the judicial politics scholar Lawrence Baum; Nancy Rogers, who was highly regarded in the field of alternative dispute resolution (ADR); and then-provost Richard Sisson, a political scientist who studied India. After hearing about my interests, each independently suggested that I reach out to Marc to introduce myself.

I subsequently wrote to Marc. As an undergrad (also at Ohio State), I had read his famous book *Competing Equalities*, which dealt with the legal struggles lower castes faced in India.<sup>4</sup> I mentioned how I had done a senior honors thesis on the Indian caste system and that I was inspired by the decades that he had spent becoming an expert on Indian law and society. I also explained that I was unfulfilled in law school and that I would love to hear his thoughts on how best I should proceed.

To my surprise, Marc called me one evening and said that he was delighted to receive my letter. While several law students over the years at Wisconsin had taken an interest in Africa, China, Europe, and Latin America, he said that few had focused on India, and it was exciting to hear from me. He then had an idea.

He suggested that I should complete my second year of law school at Ohio State but that, during my 2L fall semester, I should apply to the Ph.D. program in political science at Wisconsin, which had a group of acclaimed scholars who researched issues related to law and comparative politics. If I was accepted, I could join the following year and then finish my third year of law school in Madison in due time as a visiting student. Additionally, I could possibly work with Marc as his research assis-

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<sup>4</sup> See generally MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984).

tant and take an intensive independent study with him. And he said that I could become involved in Wisconsin's renowned Center for South Asia, where he held a faculty appointment.

I was spellbound—and persuaded. I spent the fall of 1994 studying for the GRE and coordinating the necessary logistics. In the spring of 1995, I was admitted to Wisconsin, and, later that summer, I was off to Madison.

### I. LEARNING FROM MARC—THE EARLY YEARS

My experience at Wisconsin was life changing, and Marc was one reason for it. In the fall of 1995, Marc helped to introduce me to major figures within the law and society community, including Professors Howie Erlanger, Stewart Macaulay, Louise and David Trubek, and many more.<sup>5</sup> Marc also put me in contact with other graduate students, one of whom referred me to Professor Herbert Kritzer, who would eventually become my wonderful dissertation chair.<sup>6</sup> Yet, in addition to these contacts, it was being tutored (both formally and informally) under Marc that was distinctly meaningful. Of course, I had to attend to my doctoral studies and finish my law classes. But being a student under Marc, particularly during those early years, was a special experience.

For example, we would regularly meet at his home because it was there where he kept most of his seemingly endless numbers of articles, books, journals, and manuscripts in his third-floor library. One space that caught my attention from the start was a section of the room that Marc had devoted to the Bhopal/Union Carbide gas leak tragedy, where thousands of people had been injured and killed and which had occurred eleven years prior.<sup>7</sup> The trauma for the survivors and for those who were connected to India, including Marc, was still palpable.

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<sup>5</sup> For historical background on the law and society movement, see generally Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 *LAW & SOC'Y REV.* 409 (1998).

<sup>6</sup> I cannot emphasize enough the impact Bert Kritzer has had on my professional development. I have been his research assistant, student, political science doctoral advisee, coauthor, colleague, and friend. Although I was part of a team that nominated Bert for the Lifetime Achievement Award within the Law & Society Association—in 2019, he (with others) won what later became called the Association's Legacy Award—a full tribute, like the one I am doing here for Marc, is something I plan to do in the very near future.

<sup>7</sup> For a history of this case, and Marc's involvement, see generally Jayanth K. Krishnan, *Bhopal in the Federal Courts: How Indian Victims Failed to Get Justice in the United States*, 72 *RUTGERS U. L. REV.* 705 (2020).

Marc had become directly involved in the Bhopal litigation as an expert witness. The Indian government, on behalf of the victims, had sued Union Carbide in the Southern District of New York, and its main lawyers, who were based in Minneapolis, called on Marc for assistance.<sup>8</sup> In short, Marc was asked to assess whether the Indian judiciary could adequately adjudicate the case on behalf of the victims.<sup>9</sup> The argument Marc put forth, based on his years of research, was that—because Indian tort law was underdeveloped and the Indian courts faced structural infirmities—the better place to try the matter would be in the United States.<sup>10</sup> This way, the perpetrator of the disaster, Union Carbide, which had its headquarters in the United States, could be held monetarily accountable.

Although presiding Judge John Keenan found Marc's scholarship on India and his credentials to be "impressive,"<sup>11</sup> he ultimately ruled against the plaintiffs and returned the case to India on forum non conveniens grounds.<sup>12</sup> Even though I arrived in Madison nine years after Judge Keenan's ruling, the case was still fresh for Marc. Our subsequent conversations about it left a lasting imprint on me.

For instance, learning about Bhopal from Marc affected how I viewed my dissertation fieldwork, which was focused largely on the Indian courts and Indian legal profession. Additionally, after I became a law teacher, my ethnographic research in India built upon lessons from Marc—whether it was writing on legal education, ADR, Indian lawyers, or the Indian judiciary.<sup>13</sup> In fact, this was especially true in 2019—thirty-five years after the Bhopal tragedy—when, upon Marc's encouragement, I conducted a retrospective analysis of that case.<sup>14</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 714–17.

<sup>10</sup> *Id.* at 715–16.

<sup>11</sup> See *In re Union Carbide Corp.*, 634 F. Supp. 842, 847 (S.D.N.Y. 1986).

<sup>12</sup> *Id.* at 866–67.

<sup>13</sup> See generally Jayanth K. Krishnan, *Lawyering for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575 (2006); Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447 (2004) [hereinafter *Professor Kingsfield*]; Jayanth K. Krishnan, *From the ALI to the ILLI: The Efforts to Export an American Legal Institution*, 38 VAND. J. TRANSNAT'L L. 1255 (2005); Jayanth K. Krishnan et al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 HARV. HUM. RTS. J. 151 (2014) [hereinafter *Grappling at the Grassroots*].

<sup>14</sup> See generally Krishnan, *supra* note 7.

As Marc helped me discover, there was not just the one Bhopal case in the United States from that period but rather a string of subsequent matters that lasted through 2014—with Judge Keenan presiding in each of them. (Marc was directly involved only in the initial litigation.) In every one of these cases, Judge Keenan did not budge from his first decision, issuing dismissal after dismissal.<sup>15</sup>

The irony was that, throughout this period, Marc had continued to conduct rigorous empirical research on the Indian courts. Even his early views on the judiciary's functioning had somewhat changed. He documented the great efforts taken by various judges to assist those in need. He described how judges embraced the Indian public interest litigation movement and, later, how they launched brave *suo moto* initiatives.<sup>16</sup> Overall, however, his conclusions remained: Most Indians still were not receiving proper access to justice. And these findings were supported by evidence.<sup>17</sup> Unfortunately, the same could not be said for Judge Keenan, whose recalcitrant views did not move in nearly three decades.<sup>18</sup>

## II. INDIA AND THE “HAVES” ARTICLE

Marc's concern for everyday litigants in India began in 1957, when he received a Fulbright scholarship to travel to Delhi. Although there were initial struggles, he soon came to see India as his “second home.”<sup>19</sup> To be sure, Marc had advocated for the disadvantaged while in the United States. But in India, he saw socioeconomic cleavages accentuated like never before.

Attuned observers know that this Indian experience indelibly shaped Marc's legendary 1974 article, *Why the “Haves” Come Out Ahead*. Abel tells the glorious story of how, after reading

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<sup>15</sup> *Id.* at 723–24.

<sup>16</sup> See generally MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA (Rajeev Dhavan ed., 1989); Marc Galanter, *Snakes and Ladders: Suo Moto Intervention and the Indian Judiciary*, 10 FIU L. REV. 69, 74–77 (2014).

<sup>17</sup> See Krishnan, *supra* note 7, at 735–40.

<sup>18</sup> *Id.* at 742–44.

<sup>19</sup> See Abel, *supra* note 1, at 557. One day that was a particular highlight occurred when Marc, together with the other Fulbright Fellows in Delhi, was invited to Prime Minister Jawaharlal Nehru's residence. He recalled that they sat on the floor with the prime minister, happily chatting and sharing a plate of cashew nuts! Interview with Marc Galanter, Professor Emeritus, Univ. Wis.—Madison L. Sch. (Jan. 8, 2021).

Marc's first draft, Abel concluded that "we, as Americans, now had our own Max Weber."<sup>20</sup>

The moral of the "Haves" study is well known: one-shot litigants (the "have nots") lose in litigation more often than "repeat players" (the "haves"), because of the latter's resources, expertise, and familiarity with the legal process.<sup>21</sup> But the article is chock-full of additional details that later papers have been devoted to confirming, adapting, and even, at times, critiquing.<sup>22</sup> In 2008, Macaulay and I organized a mini-*Festschrift* for Marc on his other scholarship.<sup>23</sup> Interestingly, several of the contributors noted that the influence of the "*Haves*" article was inescapably present in Marc's later work.<sup>24</sup>

As someone who has worked closely with Marc, I fully understand this last point. For me, the significance of the "*Haves*" article is its analysis of the concept of power: who is seeking it, who is wielding it, and who is clutching to retain it. These dynamics can play out in many of life's various ways, beyond litigation. Consider the following story.

In 1999, Marc and I wrote a paper focused on how family, or "personal," law operated in India—and also in Israel.<sup>25</sup> Marc's Jewish identity had long been a springboard for his interest in Israel, and, as he taught me, there were intriguing overlaps between it and India. In fact, I was so taken by Marc's instruction that I added Israel as a case study to my dissertation, which then led me to study Hebrew and spend time in both Tel Aviv and Jerusalem doing fieldwork.

At the heart of our personal law paper was how the power of religious and state officials could affect, in the Israeli case, "who is a Jew"<sup>26</sup> and, in the Indian case, what type of deference the Muslim minority received from the Hindu majority in matters of marriage and divorce. The following year, we presented the

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<sup>20</sup> Abel, *supra* note 1, at 560.

<sup>21</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103 (1974).

<sup>22</sup> See generally, e.g., Symposium, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 799 (1999); IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

<sup>23</sup> See generally Jayanth K. Krishnan & Stewart Macaulay, *Toward the Next Generation of Galanter-Influenced Scholars: The Influential Reach of a Law-and-Society Founder*, 71 LAW & CONTEMP. PROBS., no. 2, 2008, at i.

<sup>24</sup> See *id.* at iv.

<sup>25</sup> See generally Marc Galanter & Jayanth K. Krishnan, *Personal Law and Human Rights in India and Israel*, 34 ISR. L. REV. 101 (2000).

<sup>26</sup> *Id.* at 129.

draft at a conference at Hebrew University. I recall several highly regarded professors appreciating our research, and we were subsequently invited by the *Israel Law Review* to publish the paper.<sup>27</sup>

There was, however, one exception in the audience that day—a prominent academician who loudly and derisively complained that our comparison of Israel to a country like India was “stupid” and a complete waste of time. Israel was so different and much more advanced than India, he shouted. Maybe a comparison to the United States or a country in Europe would be acceptable, but to India—never!

I was still a graduate student, and I confess that I was shaken, especially given the crassness in how the critique was delivered. Conversely, Marc’s reaction was instructive. He was unfazed. As he explained to me later, we had touched on the sensitive subjects of law and religion through rigor, candor, and care, and others in the audience clearly had valued our approach. That one colleague felt defensive and challenged by our work was unsurprising because it had forced this powerful member of the establishment to confront a thesis in a way that he likely had not encountered before.

### III. USING THE “HAVES” FRAME IN OTHER WAYS

In the early 2000s, Marc and I began researching India’s ADR system. With the Indian courts infamously hampered by delay, we sought to understand whether the emergence of different ADR forums was alleviating the litigation backlog preventing “have not” claimants from attaining timely justice.<sup>28</sup>

Over the next decade, we would present our research to audiences from the World Bank and the United Kingdom’s Department for International Development, as well as at academic, judicial, and bar conferences in the United States and India. Unfortunately, many of the findings from our fieldwork were not encouraging. Like their regular court counterparts, these alternative tribunals were also exceedingly delay-ridden, costly, understaffed, and unable to provide the remedies that everyday litigants desired.<sup>29</sup> These forums also saw, in particular, lower

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<sup>27</sup> See generally *id.*

<sup>28</sup> See generally Marc Galanter & Jayanth K. Krishnan, “Bread for the Poor”: Access to Justice and the Rights of the Needy in India, 55 HASTINGS L.J. 789 (2004).

<sup>29</sup> *Id.* at 829–30.

castes, women, and religious minorities frequently treated iniquitously by the process.

What I witnessed working with Marc was that, even though the research uncovered harsh realities, he remained a cautious optimist. One interest group that had been opposed to the growth of these ADR forums was the Indian bar. The reason was that these venues sought to resolve disputes *without* lawyers. Indeed, as Marc had written in the past, the bar had a history of resisting change. Furthermore, many lawyers were not trained or willing to creatively address the needs of everyday claimants. That the public's image of lawyers was low was also a discouraging aspect of legal life in India.<sup>30</sup>

Yet Marc's thinking on Indian lawyers was not, and has never been, one-dimensional. Although certainly problematic on the ADR front, the profession has changed in other ways, particularly after the Indian economy liberalized in the early 1990s. From Marc, I learned firsthand about how Indian legal education was transformed during this period.<sup>31</sup> In addition, the 1990s and 2000s saw a growth in the corporate legal sector, which Marc rightly advised me to study closely.<sup>32</sup> Marc also emphasized that important developments in "bottom-up" lawyering occurred postliberalization, when there were valiant efforts to enhance protections for those who suffered from various forms of discrimination.<sup>33</sup> (As he hastened to remind me, much of this lawyering had historical analogues—through, for example, the heroic work done by those who fought Prime Minister Indira Gandhi's imposition of Emergency rule and, before that, by many lawyers who championed independence from the British.)

#### IV. CLOSING THOUGHTS

In this Essay, I have sought to identify the places where Marc's and my teachings, writings, and personal journeys have intersected since we first met in Madison in 1995. To that end, let me recount two final vignettes.

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<sup>30</sup> *Id.* at 822–23.

<sup>31</sup> Marc was a key consultant in the formation of the National Law School of India University in Bangalore, and he mentored me on one of my articles: *Professor Kingsfield*, *supra* note 13.

<sup>32</sup> Marc's influence on me was enormous, especially on Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 *GEO. J. LEGAL ETHICS* 57 (2010).

<sup>33</sup> See generally Galanter & Krishnan, *supra* note 28; see also generally *Grappling at the Grassroots*, *supra* note 13.

First, in 2005, Marc published *Lowering the Bar*, commonly known today as the “Galanter joke book” on U.S. lawyers.<sup>34</sup> I was then at William Mitchell College of Law in Minnesota, and we invited Marc to give a public lecture on the book.<sup>35</sup> The auditorium was packed, and Marc provided a humorous but nuanced argument that as Americans have become increasingly reliant on—and have demanded more from—the law, lawyer jokes have correspondingly become more biting and intense.

The rationale, he contended, was based on a discomfort among Americans who were seeing their society further “legalized,” thus necessitating (those dreaded) lawyers to be able to operate within it.<sup>36</sup> Fueled as well by antilawyer interests that depicted the profession in a brutally negative light, jokes about lawyers, as Marc’s research showed, were an inevitable consequence and served as a release valve to both stoke and vent this frustration.<sup>37</sup>

Of course, there is more to this book than space here allows. But the point is that the carefulness of Marc’s work in taking a subject that has long been part of popular culture—here, jokes about lawyers—and delving beyond the conventional wisdom is emblematic of Marc as a scholar. The same can be said regarding his groundbreaking findings on how, contrary to public perception, there actually has been a *decline* in civil trials in the United States.<sup>38</sup> Or, returning to India, this can be seen in how—despite the popular myth that Indians are excessively litigious and thus are themselves responsible for the judicial backlogs—the empirical reality is that a set of structural factors largely accounts for the delay in the courts.<sup>39</sup>

The second vignette relates to this last point. Just a month before the global COVID-19 pandemic took hold, our Stewart Center on the Global Legal Profession here at Indiana invited Marc to be the keynote speaker for a comparative law

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<sup>34</sup> MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005).

<sup>35</sup> Marc Galanter, Professor Emeritus, Univ. Wis.–Madison L. Sch., Address at the William Mitchell College of Law (Oct. 11, 2005).

<sup>36</sup> See GALANTER, *supra* note 34, at 9–13.

<sup>37</sup> *Id.* at 14–20.

<sup>38</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 518 (2004).

<sup>39</sup> See Galanter & Krishnan, *supra* note 28, at 789 n.1.

symposium.<sup>40</sup> Fittingly, and coming full circle, Marc's lecture focused on Bhopal—three decades later. Listening to Marc's talk reminded me of what he said while I was a student: Things are not always what they seem. Simple and easy can make for nice soundbites, but they are not necessarily accurate reflections.

Marc's Stewart Center lecture outlined the history of the Bhopal case, but then he took questions about why there remains such difficulty for everyday Indians to access justice still to this day. Marc's responses were characteristically nuanced. Although some positive changes had been occurring, he said, historically disadvantaged groups had depended upon episodic advocacy by lawyers acting in an atomistic fashion, rather than in a specialized and strategic manner. And for too long, real reformation of the court system had not been a state priority.

Implicit in Marc's answer was an even broader point. While quick-fix analyses and slipshod diagnoses of problems ("Indians love to litigate") are easy to parrot, such misinformation only creates false narratives, with the harmful ramification being that those who struggle will continue to do so. There was another takeaway as well, which is reflected throughout Marc's entire scholarship. Namely, that for those of us who are concerned about power differentials within both law and society, it is important to go beyond the surface and dig deeper so that we can ensure that the disparities between the "haves" and "have nots" are not perpetuated but are instead reduced.

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<sup>40</sup> Marc Galanter, Professor Emeritus, Univ. Wis.—Madison L. Sch., Keynote Address at the Stewart Center on the Global Legal Profession (Jan. 30, 2020).