



## Do the “Haves” Come Out Ahead in Shanghai Courts?

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Drawing on 2,724 documents of adjudication decisions from Shanghai courts, this article tests the Galanter thesis that the stronger party tends to prevail over the weaker party in litigation. We find that the stronger parties not only win more often, but also do so by a large margin. Overall, institutional litigants fare better than individual litigants. When the litigants are classified by their organizational and social status, government agencies or government-related companies are the biggest winners, enjoying an enormous advantage, and farmers are the most disadvantaged underdogs, with other individuals and companies in between. When controlling for legal representation, these winning gaps remain significant and sizable. The edge of the stronger parties recurs across categories of cases in different issue areas of the law. Echoing previous comparative studies, we cast doubt on the party capability theory. We speculate that the causes of judicial inequality in China lie not only in resource gaps but also in the roots of the law and the nature of the court.

The ideal court adjudicates impartially, while a real court often favors the rich and powerful. Rousseau deemed this to be “the universal spirit of the Law” (Rousseau 1763:200; cf. Haynie 1994). A Chinese saying puts it this way: “The court gate opens as wide as *ba* [the Chinese character 八], but enter not if one possesses only a righteous claim but no money.”<sup>1</sup>

This truism thus known, the task for students of legal studies is to quantify its degree. Then, we can compare it across legal systems so as to gain insights into the nature of a legal system and its potential to bring about social change. Indeed, starting with Galanter’s path-breaking analysis (1974), this line of research has achieved canonical status and gained paradigmatic influence. Galanter proposed, and many have tested, the hypothesis that despite the institutional arrangements in place to guard against particularism, private power, and inequality, the haves still come out ahead in the U.S. court system. Underneath vernacular terms such as “haves” and “have-nots” is a powerful research program that pierces the inner workings and contradictions of a court system by exploring the

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<sup>1</sup>The wording in Chinese is 衙门八字开，有理无钱莫进来.

sociological predictors of winning and losing in litigation. Statistical analyses have been conducted to compare differences in the probability of winning for two opposing parties. A count suggests that by 2003 as many as 184 articles had been published in major journals such as *Law & Society Review* (Glenn 2003).

This research program has been extended to study court systems outside the United States, including work on the English Court of Appeal (Atkins 1991) and the Supreme Court of Canada (McCormick 1993), as well as systems markedly different from common-law systems (Dotan 1999; Haynie 1994; Hendley et al. 1999). In these comparative studies, while Galanter’s hypothesis is supported by the findings from some countries, equally valuable insights have been gained when the hypothesis has been rejected in others. The fact that the litigation outcomes in the courts of some countries differ from their counterparts in the United States provides a unique vantage point for understanding these court systems. Party capability in litigation means very different things in different societies (Hendley et al. 1999). Also, insufficient insulation from politics may tilt a court toward certain special categories of litigants, for example, the poor and disadvantaged in the cases of Israel and the Philippines (Dotan 1999; Haynie 1994; Haynie et al. 2001).

Until very recently, efforts had rarely been made to empirically assess the role of the Chinese judicial system in achieving social justice (Clarke 2003). This situation has now been changed by a few scholars with training in the social sciences (Michelson 2007, 2008; Pei et al. 2010; Landry 2008; Balme 2010) and by lawyers assessing the system from a social science perspective (Zhu 2000; Peerenboom 2001, 2006; Woo & Wang 2005; He 2007, 2009a, 2009b; Fu 2009). They have approached the question either by conducting surveys of average citizens or litigants (Michelson 2007, 2008; Landry 2008; Peerenboom 2001, 2006) or by interviewing judges or litigants (Liebman & Wu 2007; Balme 2010; He 2007, 2009a, 2009b; Gallagher 2006; Gechlik 2005). These studies in turn have begun to shed valuable light on the institutional logic and operational patterns of Chinese courts, as well as on the relationship between court decisions and extra-legal social forces. However, despite this recent progress, it is fair to say that the scholarship of empirical research on Chinese courts is still in its infancy. Although the two common approaches—public surveys and fieldwork interviews—are capable of providing insights, they work through the interpretative lens of public or legal professionals. The objectiveness of these studies would have been greatly augmented if they had been able to access court documents and archives, as researchers in the West often do.

To that end, a great opportunity has recently opened up. For roughly the last two years, many courts across China have begun to make their documents of adjudication decisions (裁判文书 or DADs) available to the public. The earliest DADs available are those from the courts in Shanghai. The basis of this article is research coding and analyzing 2,689 DADs of cases from Shanghai courts.

## I. GALANTER’S THESIS IN THE COMPARATIVE PERSPECTIVE

Commonly labeled as the party capability theory (Atkins 1991; Songer & Sheehan 1992) or the resource inequality theory (Haynie 1994), Galanter’s (1974) seminal paper articulated

the pivotal role played by litigation experience, financial might, and the strategic position of being a repeat player; the haves win more often by possessing more of these things. To the extent that he considered factors beyond the differing strength of the parties, Galanter pointed to defects in the court system that allow resources, as opposed to the merits of the case, to determine the winner. Chief among these flaws is case overload, which increases delays and trial costs; this is a common situation that the stronger party can exploit. Galanter also cited the fact that “rules,” even purported to be evenhanded, nonetheless give an edge to the stronger party either because of their tendency to protect the possessor or holder in guarding against precipitate action, or due to their complexity, which calls for the assistance of legal services. By and large, Galanter’s focus is unmistakably on party capability. Two of his insights have since inspired an influx of empirical research. One is his trademark distinction between the “one shotter” and the “repeat player,” an easily observable pair of parties. Using these proxies as the haves and the have-nots makes many quantitative studies possible. In his other insight, he convincingly argued that even if ideal legal arrangements—such as judicial independence, due process, ethical and competent judges, and so on—are in place, the haves will still inevitably come out ahead because the advantages for the stronger party will not just go away.

Galanter clearly had the contemporary U.S. legal system in mind. How far away the U.S. system is from the legal ideals he did not say. Nor is it clear whether his theory is applicable to other systems in the world. A broader theory was proposed by Wheeler et al. (1987) in their empirical study on the U.S. state supreme courts. They proposed three sets of reasons—relating to the law, the court (judges), and the characteristics of parties and their lawyers—to explain Galanter’s proposition that stronger parties win more often. For the purposes of a later discussion in this article, we call these three propositions the Law Hypothesis, the Court (Judge) Hypothesis, and the Party Capability Hypothesis. The first of these hypotheses suggests that there may be a normative tilt of the law toward, or against, the stronger’s interests; the second proposes that the court itself, specifically the judges, may be biased toward, or against, the stronger’s interests; the third stipulates that the stronger party typically commands greater resources, has more experience, or has a better strategic position. Wheeler et al.’s evidence from their particular empirical data on litigations in the state supreme courts in the United States favors the party capability explanation over the other two. A few other studies on U.S. and British courts have drawn similar conclusions (Atkins 1991; Songer & Sheehan 1992; Songer et al. 2000).

If one approaches the question from a comparative perspective, a country’s judicial inequality has to be understood not only in terms of party resources. In countries where the rule of law is only an inspiration instead of a practice and the formal court system has a young history, the law, starting with the ideology behind it, may be tilted toward one group over the others. It may even be the norm rather than the exception that the court is vulnerable to penetration by outside influences and corruption. For this reason and many others, the rich and powerful may come out ahead by a clear margin in these systems. On the other hand, for political reasons such as social stability, there must also be reasons to believe that the weak may have the upper hand in certain areas of the law; for example, researchers have found that at least in the supreme courts of the Philippines and Israel, the weaker parties seem to be winning more cases than the stronger parties (Haynie 1994;

Dotan 1999). A few other studies that have examined the litigation gap in developing countries have also raised questions about the party capability theory. Haynie (1994) and Dotan (1999) both reasoned that a political ideology favoring the have-nots and a concern about the legitimacy of the state have been injected into the judicial decision-making process. In these systems, the have-nots tend to win more as the law represents at least a symbolic attempt to narrow the gulf between the rich and poor (Haynie 1994:753–54).

## II. CHINESE COURTS IN TRANSITION

More than three decades after China's economic and legal reforms, China has developed a "thin" version of rule of law (Peerenboom 2002). The court system has been strengthened in many ways in order to deal with the dramatic increase in the number of disputes as a result of economic development and social changes. The number of judges is approaching 200,000; there are perhaps 140,000 lawyers and roughly 400 law schools. The courts now handle approximately 8 million cases a year (Peerenboom & He 2009; Cohen 2006). However, the judicial system is far from well-established. Corruption and favoritism are rampant and judicial independence remains largely on paper. Therefore, in the context of China's judiciary and society, what are the various reasons why the haves might, or might not, enjoy greater success? In light of the three propositions (Wheeler et al. 1987) discussed above, we organize our discussion into the following three areas: the law, the courts, and party capability.

### *A. Why the Stronger Party Should Come Out Ahead in China*

Is there a normative tilt in the law that favors the stronger party? This question can first be considered in terms of ideology. A tradition emerged during the early reform years as the country gave development precedence over all other priorities. Since economic development became the most important measurement of performance for government officials, foreign and domestic investments have been eagerly pursued. This tradition has the potential to favor the haves over the have-nots in order to facilitate economic development.

Is the law itself tilted toward the haves? This question can be considered in terms of law making. In a nondemocratic society, the law is made to reflect the values and interests of the leaders and state officials more than those of ordinary citizens; for example, laws and rules in relation to insurance, medical practice, and transportation are not only legislated by the relevant ministries, but are also subject to their interpretations. State-owned enterprises or state-related companies in these areas are naturally protected by these laws and rules because, according to the ideology of socialism, they represent the interests of the state. These enterprises and companies, especially the gigantic monopolies, are also far more influential than the public in affecting the law-making and law-amending processes. Similar situations exist in the field of administrative law, where government agencies are invariably placed in an advantageous position.

When the detailed rules governing the relationship between patients and state-owned hospitals are issued by the Ministry of Health, what would one expect the outcome of a

lawsuit between a patient and a state-owned hospital to be? In the nongovernmental sectors, since businesses exert a much bigger influence on the government than individual citizens, individual litigants are conceivably disadvantaged, in terms of the nature of the law, even before their cases appear before the courts.

With regard to the courts (judges), the inequities of Chinese courts may differ from the U.S. systems not in degree, but in nature. In the United States, careful institutional constraints have been put in place to prevent obvious extra-legal intervention or corruption from affecting court decisions (Epstein 1990:827, 838; Sisk et al. 1998:1498; Cohen 1991:187, 192, 193). In contrast, the legal system in China is inadequate, inconsistent, and constantly undergoing change. The courts in China are not independent for three reasons. First, officials of the courts are appointed by local government and the judges' career development is significantly controlled by these court officials. As a result, judges are accountable less to the law and ethics than to the bureaucratic and political hierarchies. Second, like other branches of the government, the courts are far from being immune to corruption (Li 2010). Not only is government power easily translated into influence in a court, but businesses and the wealthy can work through government officials to affect the outcome of a case. Third, professionalism among Chinese judges, including professional ethics, has barely been developed, and they thus are more susceptible to extra-legal influences. Since the passage of the Judges' Law, which requires entry-level judges to have a bar qualification, China has effectively replaced many army veterans with college graduates. While an increasing number of judges are receiving formal legal training, a high proportion of them are fresh out of law school and inexperienced in both the law and life (Cohen 2006).

The decision-making structure of the courts also paves the way for such influences. The "adjudication committee," which is usually composed of the court's administrative leaders rather than the three judges who hear the cases, remains the highest decision-making body in the court system. It continues to decide significant or complex cases behind closed doors. Through this channel, the government, the party and upper-level courts, and other extra-legal forces frequently influence rulings behind the scenes (Wu 2006; He 2012). With only a fragile system to supervise the behavior of judges, judicial decisions may be influenced by the resources of litigation parties with certain Chinese characteristics, namely, state connections, wealth, and moral recklessness (willingness to corrupt the courts).

With regard to party capability, the gap between the haves and the have-nots in terms of legal representation is large. Although the number of lawyers has increased rapidly, the overall supply remains inadequate. The legal service is therefore still expensive. Largely due to a lack of professional ethics, many lawyers screen cases brought by the have-nots beforehand, taking on only those that are profitable and leaving the others unrepresented (Michelson 2008). Moreover, local lawyers avoid cases filed by poor individuals to challenge illegitimate taxation, police bullying, uncompensated land confiscation, and wrongfully withheld wages (Cohen 2006). Moreover, the legal aid system remains underdeveloped (Fu 2009).

### *B. Why the Weaker Party Should Come Out Ahead in China*

It is, however, possible to frame alternative hypotheses that argue that the weaker party should enjoy greater success. In recent years, given that the country's economy has taken

off, the ruling party has placed more emphasis on social stability than on economic development. The normative tilt of the law could be affected by this recent development. Beginning in the late 1990s, the regime has tried to bring “harmony” or “stability” to a society whose recent prosperity has exacerbated tensions between the haves and the have-nots. Protecting the weak groups in society has become the new slogan of the Chinese state-controlled media. Many developments in the legal system reflect this change. The 2007 litigation fees regulation (State Council 2006), for example, significantly lowered the threshold for accessing the courts and has thus allowed more have-nots to seek justice there. The 2008 Labor Contract Law, emulating the equivalent legislation in many industrial countries, is weighted toward the interests of labor rights. A lot of effort has been made to strengthen the administrative laws, and hence the parties affected by government actions may have more opportunities to use litigation to protect their interests (State Council 1999, 2004).

From the perspective of the courts, there are also reasons why, in certain areas of the law, court decisions may favor the weaker party. First, the performance of Chinese judges is subject to quantifiable criteria such as the number of cases handled, completion rates, appeal rates, and complaint rates (Ai 2008; He 2009b). These considerations may affect judges’ decisions not just on the merits of cases, but also on their bureaucratic implications; their decisions may even, at times, be affected by the fear of disgruntled litigants “making trouble” following an unfavorable verdict. Empirically, we expect that in cases related to “trouble-prone” issues such as medical malpractice, judges will make a ruling in the hope of an expedient closure at the expense of a case’s merits. Typically, judges may give partial awards to alleged malpractice victims, an obvious weaker party in such litigation. Also, as documented in an earlier study based on fieldwork data, judges themselves may benefit from such practice: not only do they resolve the dispute, but they also protect themselves against high appeal rates or other potential liabilities (He 2009b; He and Ng forthcoming). Second, the courts as an institution must take the concerns of the party/state into account, especially in cases of significant consequence such as those related to public order (He 2007; Fu & Peerenboom 2010) and, as result, this may benefit the weaker party; for example, when social stability becomes local government’s foremost concern, the courts must toe the government’s line in handling collective labor conflicts (Su & He 2010). In other words, Chinese courts are prone to being politicized. The result of this tendency may affect the decision to give more weight to the interests of potential protesters for the sake of diffusing grievances and pacifying conflicts. That is, the have-nots may even come out ahead of the haves in areas of litigation with rich political implications, such as cases involving collective labor disputes.

### III. STUDYING CHINESE COURTS USING DOCUMENTS OF ADJUDICATION DECISIONS

#### *A. Data Source*

As noted above, for the last few years, many courts across China have begun to make their documents of adjudication decisions (裁判文书 or DADs) available to the public. In an

effort to improve the transparency of the judicial process, resonating with the newly revitalized slogan “judiciary for the people,” the Supreme People’s Court made clear in its Three Five-Year Reform Outlines that it would attempt to put DADs on the web.

Many high courts at the provincial level, such as those in Beijing, Shanghai, Yunnan, and Anhui, have pioneered this effort, while others are following suit. The Henan High Court, for example, claimed that all the DADs for all three levels of court in the province would be on the web by the end of 2009; as of September 2009, 25,167 pieces of DADs had been put on (China Youth Online 2009). According to the high court, “all” documents means everything other than those documents involving state secrets, business secrets, privacy issues, and adolescent criminals. If one of the litigation parties involved opposes publication, then publication must be approved by the court director. As early as 2004, the Shanghai High Court had already started to put its DADs on the web (Xinhua Net 2009; Shanghai Court Net 2011); as of 2009, more than 100,000 documents had been made available on the Internet. The Shanghai courts have been more cautious than the Henan High Court. A relevant regulation issued by the Shanghai High Court states that the judge or the collegial tribunal (合议庭) in charge will determine whether a document should be made public.

Adjudication and mediation decisions are directly relevant to this project since only these two types of documents contain meaningful information on the issues, information on the parties, and case outcomes. A typical adjudication decision will list the litigation parties, any representatives (legal or not) of the parties, the institutions with which the individual litigants are affiliated, the disputes at issue, the parties’ arguments, the court’s position on the disputes, and the case outcome. Depending on the complexity of the case, the adjudication may be rendered by a collegial tribunal under the normal procedure (普通程序) or a single judge under the summary procedure (简易程序). All this information allows us to collect data on the relationship between the nature of the litigants, the nature of the disputes, and the case outcomes.

These judgments not only record how the case is decided, but also provide information on the form and amount of the remedy, whether the litigating parties are organizations or individuals, the legal representation of the parties, the occupational background of individuals, the types of organization, and so forth. All this additional information provides a basis for developing independent variables to predict the win rates of the parties.

The basis of this article is our data-collection project, which involved coding and analyzing DADs from Shanghai courts. As the industrial, financial, and commercial hub of China, Shanghai hosts a concentration of manufacturing activity in the key industries of automotive, electronics, telecommunications, machinery, textiles, iron and steel, and petrochemicals. With 1 percent of China’s population (16 million, excluding 4 million internal migrants), the Shanghai region’s GDP was nearly US\$ 375 billion in 2003, accounting for roughly 25 percent of China’s total GDP. The GDP of the city of Shanghai alone grew 11.6 percent to nearly US\$ 73 billion in 2003, reaching a GDP per capita of US\$ 4,500 and accounting for over 5 percent of China’s total output.<sup>2</sup>

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<sup>2</sup>See <<http://www.export.gov/china/shanghaicontacts.asp>>, last visited September 20, 2009.



All these external socioeconomic factors have had a huge impact on the effectiveness of judicial reforms inside the court system (He 2009a, 2009b). With the abundant financial resources extracted from a strong and diversified local economy, the courts can afford to offer a higher salary (double the average GDP per capita) to attract law graduates. Compared to other regions of the country, the level of professionalism in the courts is relatively high. The institution building of the courts has, with the support of adequate resources, had more positive consequences than in less resourced areas. According to one hypothesis, the corruption in Shanghai courts seems to be less visible (Gechlik 2005). As a showcase of China's reforms and development, the Shanghai courts have been pioneers of judicial transparency. This explains why Shanghai was one of the first regions to put its DADs on the web. Also, an empirical survey has suggested that the effectiveness of Shanghai courts in terms of enforcing contracts and the litigants' impressions of the courts and the judges is quite positive (Pei et al. 2010). All these findings suggest that Shanghai courts are atypical of China's overall situation in that they are in a better position than courts elsewhere. Therefore, there is no attempt in this study to use the Shanghai courts to represent the courts in the entire country. On the contrary, we consider the Shanghai courts to be at the forefront of legal developments in transitional China. It is our hope that this study will foreshadow an era in which it will be possible to access nationally representative samples of Chinese court decisions.

### *B. The Sample*

The Shanghai High Court has posted its first wave of DADs from all three levels of its courts. The 100,000 DADs that had been posted by the end of our data-collection period cover the time period from 2004 to 2009 and include issue areas such as labor, insurance, housing management, housing demolition, sale of apartments, traffic accidents, medical malpractice, and administrative cases.<sup>3</sup> We selected a sample of 3,000 cases from the basic court level for our study. We first identified 12 issue areas that we were interested in and used keywords to search all the available DADs. We then randomly sampled from the identified DADs. To obtain a sufficient number of subsample cases in each issue area, we used different ratios in our sampling; for example, we undersampled cases of contractual debt disputes, but oversampled, to differing degrees, cases of medical malpractice, labor disputes, housing, administrative disputes, and so on. We developed a codebook, based on our reading of DADs, which contains a list of variables for which information is available. A group of research assistants printed out each selected DAD and coded its information into a computer.

The resulting data set contained 2,908 cases, from which we dropped four because they lacked the information to enable us to determine whether a party in the case was an individual or an organization litigant. We dropped a further 180 cases whose DADs did not

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<sup>3</sup>The majority of cases are from 2008 and 2009 at the time of our research, with only a small number of cases from the other years. The data are posted at the website Shanghai Legal Documents Searchable Center (上海法律文书检索中心) of the Shanghai Courts <<http://www.hshfy.sh.cn:8081/flws/index.jsp>>, accessed in February 2010.



provide information on who won the case (i.e., plaintiff, defendant, or a partial win for both sides).<sup>4</sup> The final number of cases for our analysis was 2,724 (see Table 1).

It is clear that our sample is not representative of cases from Shanghai courts. The courts will not make some cases public (e.g., politically sensitive cases), despite their rhetoric on judicial transparency. In other words, there is no way of obtaining a genuinely representative sample using open sources. Moreover, early research has indicated that the percentage of politically or otherwise sensitive cases is very small among the large amount of mundane cases processed by the basic level courts (He 2011). Given the large size of our sample, the selection bias of the DADs seems rather trivial in relation to our purpose of measuring the possibility of winning between stronger and weaker parties.

### *C. Deciding on Winning and Losing*

There are two pieces of information in a typical DAD from which we can judge who wins a case: the percentage of the legal fees that the judge decides the plaintiff should be responsible for (litigation fee share, or LFS), and the percentage of the monetary amount awarded to the plaintiff, compared to the amount of the plaintiff's petition (awarded amount, or AA). According to the Measures on Litigation Fees (State Council 2007) in China, the losing party shall bear the entire litigation fee, and the court has the discretion on allocating the fees in situations of partial winning or losing (Art. 29). In most situations, they tend to allocate the litigation fee according to the ratio between the AA and the claimed amount. The real situations, however, are often fraught with a number of complications.<sup>5</sup>

First, it is known that in the tort cases of personal injury, traffic accident, and medical malpractice, the victim party tends to ask much more than may be realistically awarded, *inter alia*, a high amount of spiritual compensation. In this situation, according to our interviews with Chinese judges, the judge first exercises his or her discretion to disconnect the litigation fee and the claimed amount, and assign LFS to each party that reflect the judge's sense of who won the case by how much. Second, for some categories of cases, the litigation fee is a fixed and small amount, for example, only 10 *yuan* for a labor case, and 50 *yuan* for most administrative cases; the judge may just ask the stronger party of the two to pay it, regardless of who wins the case. With these considerations in mind, the following are the rules we use in deciding on winning or losing a case.<sup>6</sup>

1. We use litigation fee to decide on winning, losing, or partial winning for the cases in three issue areas—personal injury, traffic accident, and medical malpractice.

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<sup>4</sup>As described below, we based our decision on how much was awarded to the plaintiff and how the litigation fees were shared by the two parties.

<sup>5</sup>We interviewed three judges from mainland China who were taking classes at the City University of Hong Kong for a mid-career legal degree in 2009.

<sup>6</sup>While the scheme presented here is attuned to the real-life complexity and the most nuanced, using litigation fee only yields very similar patterns from the data analysis in an earlier version of this article. Similarly, we also ran models that use awarded amount to decide; the results show a compatible data pattern.

- a. “Plaintiff wins” if the defendant was asked to pay 100 percent of the litigation fees;
  - b. “Defendant wins” if the plaintiff was asked to pay 100 percent of the litigation fees; and
  - c. “Partial win for both sides” if both sides shared the payment of the fees.
2. We use awarded amount to decide on winning, partial winning, and losing for the cases in the other nine issue areas—contractual debt, labor dispute, administrative, insurance, housing demolition, residential community, real estate, property and other.
- a. “Plaintiff wins” if the plaintiff is awarded the full claimed amount;
  - b. “Defendant wins” if the defendant is awarded the full amount; and
  - c. “Partial wins for both sides” if the plaintiff is awarded a partial amount.
3. To reduce the number of missing cases, if a case lacks information on litigation fee, we use awarded amount to decide. LF will be used if a case lacks information on AA.

#### *D. Measuring the Strength of the Litigation Parties*

It would have been ideal if we had had information on the social and economic status of individual litigants and the financial might or political power of organization litigants. However, the DADs do not furnish such information. Fortunately, we had some proxies that helped us differentiate the strong from the relatively weak. Guided by insights from earlier studies (Galanter 1974; Wheeler et al. 1987), we gleaned three sets of information that were useful. First, we were able to decide whether a party was an individual (the so-called one shotter or OS) or an organization (the so-called repeat player or RP). Second, based on information of the individual litigants’ occupations, we were further able to distinguish the stronger from the weaker among the OSs. In the tables, we present four classes of OSs: unknown individuals whose occupations we cannot determine (UKI), farmers, city workers, and white-collar workers. In a setting such as Shanghai, farmers are, in fact, most likely to be migrant workers from the countryside, although some may be suburban peasants. In the logistic models, we classified OSs into only two groups: farmers and other individuals. Third, we also classified RPs, distinguishing between nongovernment companies, state-owned enterprises (SOEs), and government agencies.

#### *E. Other Measures*

The DADs provide information on whether a contending party has hired a lawyer from a professional law firm. In the case of organizational players, we also counted their in-house counsels. We hence distinguished litigants with counsels from those without.

As mentioned above, the current sample in fact consisted of the subsamples from 12 issue areas of the law, including contractual debt, personal injury, and labor disputes. We first conducted an analysis on the aggregate sample. Since the legal processes and dynamics

differ greatly across issue areas, we also examined the win rates among the cases within each individual issue area.

#### IV. DO THE “HAVES” COME OUT AHEAD?

Before we report our findings on whether, and, if so, to what extent, stronger parties prevail, we first need to know whether the win rate differed between the plaintiffs and the defendants. The first row of Table 1 reports the relevant results. Among the 2,724 valid cases in our sample, the plaintiffs had a 38.07 percent chance of winning outright, while the defendants’ chance was 28.38 percent. In other words, party position matters, with the plaintiffs being more likely to win by a margin of 10 percent. Given that these were initial filing cases, the advantage of the plaintiff shown here is not surprising. The plaintiff chooses to file a lawsuit, usually as a last resort after trying all other alternatives (Felstiner et al. 1980–1981), and hence he or she is in a position to deliberate the merits of filing a suit beforehand; by contrast, the defendant is passively dragged into the foray and cannot evade the lawsuit even if the chances of winning look bleak. For example, as presented in the latter sections of this article, one becomes a plaintiff in a contractual debt case only when the other party owes money. In other words, the merit of such cases is usually beyond reproach. It is no wonder that, as existing empirical studies have shown, in most debt collection cases, the plaintiff usually wins (He 2009a, 2011). However, there are exceptions to this rule of plaintiff advantage, such as administrative cases in which the government is the defendant (cf. Zhu 2007). These findings suggest that when we talk about win rates, we must consider whether the party involved is a plaintiff or a defendant.

A second preliminary point to note is that in a significant portion of the cases in our sample, neither party fully won the case. Instead, both sides partially won (or partially lost, to put it another way) in 33.55 percent of cases. However, in other countries, most cases are straightforwardly classified as either lose or win. Many of these partial win cases in our data are settled in court, largely because judges, thinking about how their own performance will be assessed, want to avoid enforcement, appeals, or complaints. This group of cases also includes those cases in which judges grant a partial victory to both sides due to the complexity of the case, or to extend a token of condolence for certain groups of litigants who have endured a severe loss, or to pacify potentially disgruntled losers.

Table 1: Winning Disparity Between Repeated Players and One-Shotters

	<i>Plaintiff wins</i>	<i>Both sides win partially</i>	<i>Defendant wins</i>	<i>Number of cases</i>
All cases	38.07%	33.55%	28.38%	2724 (100%)
OS vs. OS	55.00%	32.14%	12.86%	420 (100%)
OS vs. RP	19.49%	32.03%	48.48%	1021 (100%)
RP vs. OS	43.06%	39.89%	18.06%	504 (100%)
RP vs. RP	50.06%	32.86%	17.07%	779 (100%)

SOURCE: Documents of Adjudication Decisions of Shanghai Courts, 2008–2009.

## A. “Haves” Do Come Out Ahead by Large Margins

In the rest of Table 1, we offer a first glance at the success disparity between individual litigants (OSs) and organization litigants (RPs). Comparisons across the four types of cases—OS versus OS, OS versus RP, RP versus OS, and RP versus RP—show a clear and consistent pattern: repeat players edged out one-shotters. The position advantage of an OS as a plaintiff was not enough to compensate for his or her disadvantages in a case against a RP. Seen from the plaintiff’s point of view, when his or her opponent was also an OS, an OS would achieve a complete victory 55.00 times out of 100, but such a win rate went down to 19.49 times out of 100 when his or her opponent was an RP. Seen from the defendant’s perspective, the win rate for an RP over another OS was as high as 48.48 percent, but this rate reduced to 17.07 percent when the defendant’s opponent was an RP. As an exception in this table, the RP advantage does not appear when comparing the OS versus OS cases and the RP versus OS cases, with the defendant (OS) win rate lower among the former cases than among the latter cases. If such comparisons fall short of being ideal to compute “net advantage” (Wheeler et al. 1987; Songer & Sheehan 1992), let us look closely at the numbers that enable us to compare the OS versus RP cases with the RP versus OS cases. As a plaintiff, an OS’s win rate was 19.49 percent against an RP, whereas when an OS was the defendant, an RP plaintiff’s win rate was 43.06 percent; thus, RPs had a 23.57 point net advantage over OSs. As a defendant, an OS’s win rate was 18.06 percent against an RP, while when an OS was a plaintiff, an RP defendant’s win rate was 48.48 percent; therefore, RPs had a 20.42 point net advantage over OSs. These are very large margins in comparison with the RP advantage reported elsewhere. For example, in a study on state supreme courts in the United States, Wheeler et al. (1987:422) reported the average net advantage to be 5.2 percent. In another study, Songer and Sheehan (1992:243) reported a net advantage of 28.6 percent.

If the above-documented disparities in win rates were unmistakably substantial, the gaps became extraordinary when we further specified the social economic status of individual litigants and the types of organization litigants. For about one-third of the OSs, we were able to glean information to make decisions on occupational status; these individuals were classified either as a farmer, a worker with city origins, or a white-collar worker. We labeled the remaining individuals as “unknown individuals.” We classified most of the RPs either as a private company (firm), a state-owned enterprise (SOE), or a government agency. Table 2 reports more pair comparisons between the detailed categories of OSs and RPs. We report on the pairs that afforded enough cases to compute a meaningful percentage. To summarize, four messages clearly stand out from the numbers in the table.

First, the biggest losers are the farmers. Although we were not able to compute the net advantage the other parties had over the farmers, the available numbers clearly point to farmers (including migrant workers) being in the weakest underdog position. In our sample, their chance of winning against a firm was 12.96 percent; their fighting chance against a government agency was as low as 0.00 percent. In comparison, the chances of a city worker, a white-collar worker, or an unknown individual winning against a firm defendant were 10.19 percent, 14.93 percent, and 28.04 percent,

Table 2: Winning Rate by Nature of Parties in Shanghai Courts

	<i>Plaintiff wins</i>	<i>Both sides win partially</i>	<i>Defendant wins</i>	N
Farmer vs. Farmer	45.71%	48.58%	5.71%	35 (100%)
Farmer vs. Company	12.96%	44.45%	42.59%	54 (100%)
Farmer vs. Government agency	0.00%	0.00%	100.00%	41 (100%)
Worker vs. Company	10.19%	62.96%	26.85%	108 (100%)
White collar vs. Company	14.93%	64.17%	20.90%	67 (100%)
UKI vs. White collar	69.23%	26.92%	3.85%	27 (100%)
UKI vs. UKI	58.68%	27.78%	13.54%	288 (100%)
UKI vs. Company	28.04%	32.63%	39.33%	567 (100%)
UKI vs. Government agency	7.50%	0.83%	91.67%	70 (100%)
Company vs. Worker	4.88%	56.10%	39.02%	41 (100%)
Company vs. White collar	38.10%	28.57%	33.33%	21 (100%)
Company vs. UKI	38.72%	42.62%	18.66%	359 (100%)
Company vs. Company	47.18%	40.00%	12.82%	585 (100%)
Company vs. Government agency	5.88%	0.00%	94.12%	51 (100%)
Govnt-owned company vs. UKI	89.66%	8.62%	1.72%	58 (100%)
Govnt-owned company vs. Company	85.84%	13.28%	0.88%	113 (100%)

SOURCE: Documents of Adjudication Decisions of Shanghai Courts, 2008–2009.

respectively; for an unknown individual against a government agency, the figure was 7.50 percent.<sup>7</sup>

Second, the biggest winners are government agencies or government-owned firms. In our sample of cases, the chance of a government agency or a government-owned firm winning a case was 85.84 percent or above. For example, the win rates of government agencies over farmers, unknown individuals, and companies were 100.00 percent, 91.67 percent, and 94.12 percent, respectively. Similarly, the win rates of government-owned companies over unknown individuals and companies were 89.66 percent and 85.84 percent, respectively. This left their opponents, whether a private company or an individual, with a next-to-zero chance of winning any case.

Third, we found that firms have the upper hand over individuals, but when they face government-backed opponents, their winning chances are miniscule. Comparing the cases of “firm versus unknown individual” and the cases of “unknown individual versus firm,” the net advantage of companies as plaintiffs was 10.68 percent and as defendants was 20.67 percent. Once again, this shows that firms, or the haves by our definition, enjoy more success than individuals, or the have-nots. However, when a company faces a government

<sup>7</sup>Until very recently, the residential registration system (*hukou*) created a class divide between peasants and urban dwellers, a system akin to a caste system in which the peasants enjoyed far less economic opportunities (Solinger 1999). The historical legacy has persisted in the reform era; many peasants have swarmed into the cities to take up the lowest jobs and many others have been left behind in the countryside, becoming the new downtrodden in the prosperous economy. Clearly, because they have become migrant workers in the city, peasants are now involved in litigation in Shanghai’s courts; they formed about 8 percent of the OSs in our sample. As scholars have demonstrated, farmers and migrant workers lie at the very bottom of Chinese society, remote from wealth, power, or social connections (Solinger 1999; He 2003, 2005; Halegua 2008).

Table 3: Comparing Legal Representation Across Categories of Parties

	<i>As Plaintiff</i>		<i>As Defendant</i>	
	<i>Percent with counsel</i>	n	<i>Percent with counsel</i>	n
Farmer	40.79%	152	11.11%	54
Worker	24.62%	130	18.18%	33
White collar	32.73%	110	17.65%	68
Unknown individual	35.08%	975	9.09%	737
Company	73.33%	1065	67.19%	1454
Govt-owned company	93.85%	179	72.50%	40
Government agency	85.71%	7	57.21%	229
Unknown organization	66.67%	6	66.67%	9

SOURCE: Documents of Adjudication Decisions of Shanghai Courts, 2008–2009.

agency or a government-owned company, its chance of winning can be as low as 10 percent or less, as discussed in the second point above.

*B. Legal Representation Gap and its Effect*

It is suggested that one of the main reasons for the disparities in winning is the fact that the stronger party can deploy more resources and experience in the litigation process. The availability of legal representation may be the most significant aspect of such an imbalance. Our data show that the majority of individual litigants do not have professional attorneys. In our study, the percentage of cases where the plaintiff had an attorney ranged between 24.62 percent and 40.79 percent; the corresponding figure for defendants was below 20 percent and could have been as low as around 9.09 percent (Table 3). By contrast, the rate of legal representation was much higher for organization litigants who used in-house lawyers or attorneys from outside law firms. In our sample, as shown in the lower half of Table 3, the likelihood of a typical company having a professional attorney was 73.33 percent when it was the plaintiff and 67.19 percent when it was the defendant. Government-related RPs are even more likely to be professionally represented: for a government agency, the rates were 85.71 percent (as a plaintiff) and 57.21 percent (as a defendant); the rates for a government-owned company were 93.85 percent (as a plaintiff) and 72.50 percent (as a defendant). The numbers shown in Table 3 classify litigants into three groups in terms of legal representation from the lowest level to the highest level: individuals, companies, and government-related enterprises or agencies.<sup>8</sup>

As shown by the clear contrasts in Table 4, legal representation consistently contributed to a party’s chances of winning. The numbers in this table represent the win rate on the plaintiff’s side, and the four columns provide information to compare the effect of legal

<sup>8</sup>Overall, there is a pattern that the plaintiffs, across all categories, are more represented than the defendants. This difference may stem from the fact that the plaintiffs have a chance to evaluate the possibility of winning before filing a lawsuit. In other words, they may choose not to initiate legal action if they are unable to hire an attorney. The defendants, who are dragged into lawsuits, simply do not have this option. They have to participate in litigation even if they do not have access to legal services. This situation is more obvious in a country with a poor system of legal aid.

Table 4: Comparing Legal Representation and Plaintiff Winning Chances

	<i>Without vs. Without</i>	<i>Without vs. With</i>	<i>With vs. Without</i>	<i>With vs. With</i>
All cases	42.69%	21.57%	48.83%	37.79%
	759	408	602	807
OS vs. OS	60.22%	33.33%	53.93%	34.21%
	269	18	89	38
OS vs. RP	23.75%	16.47%	32.76%	20.00%
	261	334	58	275
RP vs. OS	40.87%		47.15%	32.26%
	115	3	316	31
RP vs. RP	46.49%	47.17%	60.43%	49.03%
	114	53	139	463

NOTE: numbers in cell represent the percent winning (full win) rate and number of cases.

SOURCE: Documents of Adjudication Decisions of Shanghai Courts, 2008–2009.

representation. A plaintiff's counsel has increased the chances of winning, while an opponent's counsel has decreased the chances of winning, and this was mostly the case when we examined all the numbers in the table. For example, with all the cases included (Row 1), the "with versus without" combination won the case 48.83 times out of 100, whereas the "without versus with" combination only won the case 21.57 times out of 100. This pattern, however, does not seem to hold up when the cases were divided into the four categories.

This suggests that the gaps in legal representation did not seem to be the main cause of the disparities in winning between OSs and RPs. In statistical terms, when legal representation was controlled for, the winning gaps between OSs and RPs shrank but still remained. For example, as previously stated, Table 1 shows that the net advantage of RPs (as plaintiffs) in our overall sample was 23.57 percent before controlling for legal representation. In comparison, contrasting the numbers in the two middle rows of Table 4, the net advantage of RPs (as plaintiffs) was 17.12 percent for cases in which neither side had an attorney, 14.39 percent for those cases in which the plaintiff was represented but the defendant was not, and 12.26 percent for the cases in which both sides were represented (The net advantage for cases "without vs. with" cannot be obtained due to there being insufficient cases to include in one of the cells in the table.) In short, controlling for legal representation significantly reduced the winning gaps, thus attesting to the resource inequality thesis. In the meantime, the remaining gaps were by no means small after the control, which suggests that there had to be reasons other than legal representation for the winning gap between the haves and the have-nots.

### *C. Parties in Specific Issue Areas*

The results from the different categories of legal relationship varied greatly. There is thus a need to look at the specific structure of the legal relationship and the law itself separately in each area. Within a typical issue area, we were able to discern a prototypical role relation; for example, the two contending parties of a divorce are obviously two individuals, labor cases involve the employee versus the employer, and administrative law cases involve the



Table 5: Winning Rates by Issue Area

	<i>Plaintiff wins</i>	<i>Both sides win partially</i>	<i>Defendant wins</i>	<i>Number of cases</i>
Contractual debt	60.38%	30.46%	9.16%	742 (100%)
Personal injury	43.98%	42.74%	13.28%	241 (100%)
Traffic accident	28.70%	57.89%	14.04%	171 (100%)
Labor	10.56%	58.10%	31.34%	284 (100%)
Administrative	4.74%	0.00%	95.26%	232 (100%)
Insurance	25.66%	30.09%	44.25%	113 (100%)
Medical	19.33%	47.90%	32.77%	119 (100%)
Housing demolition	31.91%	4.26%	63.83%	188 (100%)
Residential community	34.04%	44.68%	21.28%	329 (100%)
Real estate	42.98%	28.07%	28.95%	114 (100%)
Property	56.19%	30.48%	13.33%	105 (100%)
Other	71.43%	13.10%	15.48%	84 (100%)

SOURCE: Documents of Adjudication Decisions of Shanghai Courts, 2008–2009.

government as the defendant. Generally, we felt fairly safe in designating the employers, the insurers, the clinics, the developers, and the managements of residential communities as the haves. With this information in mind, the winning rates reported in Table 5 are useful as a further basis for discussing which kind of player (individual, company, or government) wins more often.

Do the haves come out ahead in separate issue areas? Information relevant to this question can be obtained by examining the plaintiffs' and defendants' win rates because the legal relationship is clear in each area. In the contractual debt cases, the plaintiffs had a very high rate of success, as shown in Table 5. This finding is consistent with some existing empirical studies that attribute high success rates to the merits of the case and the functioning operation of the courts (He 2009b, 2011). Usually, in order to avoid disturbing an ongoing legal relationship, plaintiffs will not file a lawsuit in cases of debt collection, which usually occur between business organizations, unless they have no other choice (Macaulay 1963). Also, as shown in Table 5, an extraordinary high rate of winning by defendants was found among the administrative cases, which adds texture to previous findings that government agencies maintain a huge advantage over the parties affected by government behavior. In the labor cases in our sample, the chances of the plaintiff winning were not very high, compared to some statistics found elsewhere (Li & Zhang 2009).<sup>9</sup> However, it is interesting that medical cases had a relatively high partial win rate, while the win rate for the plaintiffs was quite low.

The size of the gap between the haves and haves-nots varied greatly. For example, among the cases of administrative law, the chance of the plaintiff winning was next to zero,

<sup>9</sup>This disparity may stem from the nature of the labor disputes handled by the Shanghai courts. Many cases in the Shanghai courts are disputes between permanent employees and their employers with regard to severance pay, housing, retirement, and workers' compensation. The employers in the Shanghai region may still enjoy a huge advantage, compared to their counterparts, in straightforward wage demand cases, which are common in the Pearl River Delta.

indicating that the government, or the defendant, is overwhelmingly dominant in such cases. Also showing the advantage of the stronger party, the defendants in the insurance cases in our sample, which are most likely to be companies, registered a much higher win rate (44.25 percent) than the plaintiffs, who were most likely to be individuals. We expected to find a very high win rate for the traffic accident cases, but as it turned out, the number was moderate. It is worth noting that in the personal injury, traffic accident, and medical malpractice cases, the partial win rates were very high (all more than 40 percent). In contrast, in the administrative, labor, and housing demolition cases, we found that the partial win rates were very low (all less than 10 percent). It is interesting to note that in the group with the lowest partial win rates, the haves seemed to be much stronger than the have-nots. The government agencies in the administrative cases, for example, were far more powerful and resourceful than the parties affected by the government's behavior. Accordingly, the win rates of the haves were also much higher in these categories (all more than 60 percent). Correspondingly, in the group with the highest partial win rates, the difference between the plaintiffs and defendants in terms of power and resource was more modest.<sup>10</sup>

#### *D. Multivariate Analysis*

To test if the above empirical patterns held up in the multivariate context, we ran a series of multiple regression models. We treated the dependent variable as having three possible outcomes—a full win, a partial win (a partial loss), or a full loss, and then fitted ordered logit models (OLM) accordingly.

We classified the independent variables into three groups: party background measures, legal representation measures, and issue area measures. We classified litigants into four categories—farmer, other individual, government-related organization, and non-government company. Taking account of both the plaintiff and the defendant, we classified eight types of cases in terms of party background, from which we create six dummy variables (“plaintiff other individual” and “defendant other individual” being the reference group). For the legal representation measures, we had a dummy variable to indicate whether the plaintiff was represented and another to indicate whether the defendant was represented. In the meantime, we also introduced the interaction of these two measures, so as to specify all four types of cases in terms of legal representation. Finally, using personal injury as a reference group, we have 11 dummy measures to specify 12 issue areas.

Similar to logit models (LM), ordered logit models (OLM) predict the probability of outcomes, which is recorded as *odds* or, in the linear form of a model (as is the case in our models reported here), *logarithm of odds*. While in an ordinary LM model there is only one outcome, hence one probability, to be predicted (with the other being the reference), there is more than one outcome in OLM, hence there are two or more probabilities to be predicted. In our case, our models in Table 6 predict the probabilities of two outcomes—full win and partial win, in the form of logarithm of odds. Only one set of coefficients is

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<sup>10</sup>It is hard to know, for example, whether there is such a difference between the two parties in personal injury and traffic accident cases. As many partial win situations are settlements inside the courts, an explanation for this pattern seems to be that the more resourceful one party is compared to its opponent, the less likely it is to be willing to settle.

Table 6: Coefficients of Ordered Logit Models Predicting Plaintiff Winning Rate

	<i>Model 1</i>	<i>Model 2</i>	<i>Model 3</i>
Party background			
Plaintiff other individual (reference)			
Plaintiff farmer	-0.723**	-0.723**	-0.890**
Plaintiff company	0.438**	0.438**	0.242
Plaintiff govt firm or agency	2.608**	2.656**	1.954**
Defendant other individual (reference)			
Defendant farmer	1.274**	1.265*	1.024**
Defendant company	-0.434**	-0.267	-0.389**
Defendant govt firm or agency	-3.486**	-3.366**	-1.600**
Legal representation			
Plaintiff with counsel (PwC)		-0.044	0.044
Defendant with counsel (DwC)		-0.362**	-0.180
PwC × DwC		0.076	-0.307
Issue area			
Personal injury (reference)			
Contract debt			0.231
Traffic accident			-0.260
Labor dispute			-1.315**
Administrative			-3.326**
Insurance			-1.111**
Medical malpractice			-0.899**
Housing demolition			-1.453**
Residence community			-1.076**
Real estate			-0.442**
Property			-0.021
Cut point 1	-1.304	-1.362	-2.128
Cut point 2	0.420	0.370	-0.247
<i>N</i>	2724	2724	2724
Negative 2 log likelihood	5154.38	5140.67	4871.02

\* $p < .05$ ; \*\* $p < .01$ .

SOURCE: Documents of Adjudication Decisions of Shanghai Courts, 2008–2009.

estimated for both outcomes, on an assumption that a unit change in an independent variable causes an equal change in both outcomes. Despite this, the predicted probabilities for the two outcomes are different, and OLM provides two differing estimations of the baseline (similar to intercept in OLS models, although here there are two instead of one). In Table 6, these baselines are recorded as “Cut Point 1” and “Cut Point 2.”<sup>11</sup> For sake of simplicity, in the following when we use “winning rate,” we mean the probability of *two* possible events—a full win over a partial win and a partial win over a full loss.

<sup>11</sup>For discussion on mathematical principles and reasoning behind OLM, see Long (1997:114–47). For a lucid discussion on applying OLM to social science research, see Greeley and Hout (1999:828–31, Appendix B). For excellent computer software to estimate model parameters, use the command OLOGIT in STATA (StataCorp 2003:95–104).

The findings reported in Table 6 demonstrate the unequal chances of winning in stark terms. Among the four categories of litigation players, the biggest loser was the farmer and the government-related player was the biggest winner. The coefficient for “plaintiff farmer” is negative (e.g.,  $-0.723$  in Model 1), while that for “defendant farmer” is positive ( $1.274$  in Model 1), both significant, indicating that being a farmer will diminish his or her own winning chance and will enhance the opponent’s winning hand. Obtaining the exponents, these two coefficients can be translated in terms of odds ratios  $\exp(-0.723)$ , or  $0.482$ ;  $\exp(1.274)$ ,  $3.57$ . In other words, being a farmer will undercut his or her own chance as a plaintiff by about half, while when serving as the defendant, being a farmer will enhance the opponent’s chance by  $3.57$  times. By contrast, also evident in Model 1, a government agency or government-related firm increases its own winning rate and undercuts its opponent’s. It increases its own chance as the plaintiff by a factor of  $\exp(2.608)$ , or  $13.57$ , while decreasing its opponent’s winning rate by a factor of  $\exp(-3.486)$ , or  $0.031$ , that is, a staggering 32 times difference.

These patterns remained almost intact when legal representation was controlled for (Model 2). The model also shows that legal representation itself does not have a large effect on the plaintiffs’ win rate. Among the three measures, only the defendant’s counsel made a significant but moderate impact: it diminished the plaintiff’s chances of winning by a factor of  $\exp(-0.362)$ , or  $0.696$ , that is, a less than 1.5 times difference.

In the last model in the table, we introduced issue areas as a control factor. The differences in terms of winning across the issue areas echo our findings reported earlier in Table 5. When issue areas were controlled for, the effect of being a farmer and of being a government-related player were still significant and sizable. For example, the plaintiff being a farmer reduced the chances of winning by about 2.44 times (odds ratio =  $\exp(-0.890) = 0.411$  in Model 3), and the plaintiff being a government-related player increased its odds by more than 7.06 times (odds ratio =  $\exp(1.954) = 7.06$  in Model 3).

There are five messages to take away from the multivariate analysis, all of which are consistent with the findings we reported in the earlier tables: (1) in terms of winning, there are large gaps between the haves and the have-nots; (2) an enormous advantage is enjoyed by government-related RPs (government agencies or government-related companies); (3) farmers have a huge disadvantage; (4) nongovernment companies edge out individual one-shotters, although their advantage is far smaller than that of government-related RPs; and (5) when controlling for legal representation, these winning gaps remain significant and sizable.

## V. BEYOND THE PARTY CAPABILITY THEORY

In an early study, Wheeler et al. (1987) (see also Songer & Sheehan 1992) initially hypothesized that the stronger party’s advantage in winning a case may be explained by three possible sets of factors: the law, the courts, and the party’s resources. They rejected the first two hypotheses following an analysis that compared bigger businesses with small businesses and large government organizations with small government organizations. They reasoned that if there had been a normative tilt inherent in the law or a biased attitude

among the judges, then they would not have found the differences that they did in these comparisons.

Our data from Chinese courts do not allow us to reject any of the three hypotheses; rather, the circumstantial evidence documented in this study suggests that we should entertain all three of them. Given our data, one could continue to argue that resources still make a difference. That is to say, the party capability thesis remains intact, if not sufficient, to explain away the winning gap between the haves and the have-nots. There are big gaps between the haves and have-nots in terms of the availability of legal counsel. The numbers in Table 3 show that only 11.1 percent of farmer defendants in our sample had counsel, while the corresponding figure for organization defendants was more than 60 percent and the counsel availability rate for government plaintiffs was as high as 93.85 percent. One can also argue that legal representation makes a difference. Generally speaking, across all the litigation categories, the difference in winning rate between those who had legal representation and those who did not was not insignificant. But in Chinese litigations, the impact of party resources deployable in the courtroom may only be the tip of the iceberg. Indeed, after controlling for legal representation, the difference in winning rates across the classes of the parties remained significant and large. There must be much more to this than meets the eye.

In the party capability theory, particularly in Galanter's original formulation, there is a healthy amount of optimism that the courts are more or less insulated from outside influences. One party wins over the other mostly on the basis of the strength of experiences or resources that are useful to ensuring fair play within the boundaries of existing rules. However, when empirical studies have been expanded to jurisdictions outside the United States and especially to the developing countries, this assumption becomes extremely problematic (Haynie 1994; Haynie et al. 2001; Kritzer 2003). Our study of Shanghai courts, echoing previous studies, confirms that there is a need to go beyond the party capability theory.

One of our most striking findings is that when a party in a case is a government or is government related, it leaves little chance for the opponent to win. In our study, the lowest win rate for government agencies or government-related firms, regardless of whether their opponent was an OS or a RP, was as high as 86.21 percent (government-owned firm vs. unknown individual). This exceedingly high win rate is difficult to explain without appreciating the fact that Chinese courts operate under the shadow of the government. Scholarship has pointed out the obvious absence of judicial independence (Peerenboom 2010), and journalists and folk in the streets all know about the *penetrable courts*. This penetration of the courts comes through two main channels, one institutional, the other social. Institutionally, the courts are beholden to the government as a whole. As noted, the judges still depend on local governments for appointments, promotions, and, until very recently, funding and material security (Sichuan Online 2008). Hence, it seems difficult, if not completely impossible, for the courts not to favor the interests of the government in any type of litigation. One telling piece of evidence is that in the administrative litigation in our sample, the defendants won 95.26 percent of the cases completely and 0.00 percent partially, and the percentage of wins for the plaintiffs was 4.74 (Table 5), which is consistent with most existing findings in this area (Zhu 2007). The government-owned firms also seem

to be in a similar position since a close connection exists between these firms and the government and they can exert a similar influence on the courts. This suggests that the government is not just a specific type of RP. More fundamentally, it indicates that the courts are penetrable from the outside. The differences in the chances of winning between governmental litigants and nongovernment litigants are on the order of 90 percent. Such differences cannot be comprehended in terms of resource disparity; rather, they should be understood in terms of institutional arrangements. Echoing our findings of the large advantage enjoyed by the government, a few previous studies on various countries have documented a dominant pattern that is not advantageous to the haves but is advantageous to the government (cf. Kritzer 2003). Kritzer argues that this pattern is not merely a matter of resources; rather, it is due to the fact that the courts are part of the government. He writes: "Despite norms of judicial independence, courts and judges are not independent of government, but part of government. Courts are agencies of the state. One possible impact of this is that judges feel some loyalty toward the government or regime of which they are a part" (2003:343).

Institutional penetration in order to influence the courts may also take the form of constraints on the behavior of the judges. In the above, we posit that the judges' consideration of their own career and the larger political implications may have an impact on the litigation outcomes. The data, however, did not allow us to single out politically sensitive cases and measure their outcomes. However, there was evidence to suggest that in the medical cases, the judges may have favored the have-nots, even though such favoritism in no way turned around the overall underdog position of the have-nots. In the medical cases, the partial win rates were the highest, even though the win rate for the plaintiffs was quite low. Medical malpractice victims try to obtain some compensation through the courts, but usually they are unable to pass the burden of proof test in proving the negligence of the clinics. As the clinics control all the medical records and the appraisal institutions are well-connected with the clinics, malpractice victims have tremendous difficulty in proving the negligence of doctors or clinics. However, it is in this category that plaintiffs are prone to complain. The victims, who have usually lost loved ones or part of their bodies, tend to be very disgruntled as they have suffered so much in the process. They tend to be suicidal or homicidal at worst, or, at best, are likely to appeal or complain against the verdict. To avoid such appeals or complaints, which could adversely affect their performance appraisal, judges simply find some minor problems with the clinics and offer partial or spiritual compensation to the victims. As clinics often have more resources, they are less likely to complain even if they are asked to give partial compensation (He 2009b).

Socially speaking, the penetration of the courts can take the form of personal deals behind the scenes. A party's resources are not deployed in the open before the court, but through powerful connections. In a society where the ethical codes of conduct for judges are not rigorously enforced or even nonexistent, a party's capability plays a large role in a penetrable court. In this sense, to the extent that we still use party capability to account for winning gaps, we cannot do so without also bringing in the hypothesis of the penetrable court. In a way, this finding distinguishes this study from the findings in the existing literature. The existing empirical studies suggest that resource difference is one of the

foremost reasons why the haves come out ahead (Wheeler et al. 1987; Songer & Sheehan 1992; Songer et al. 1999), but when the courts are susceptible to external influences, this could overshadow any other reasons, including litigation capacity. Even when a correlation exists between more resources and higher possibility of winning, it is difficult to disentangle two reasons: whether the haves come out ahead because they have more experience, specialized expertise, and better counsel to play the formal legal battle or simply because they have more effective or direct ways of affecting the court's decisions using their resources and connections. A lack of judicial independence and outright corruption seem to enlarge the success gap between the haves and the have-nots.

In light of the Law Hypothesis, the large gap between the haves and have-nots may also stem from a strain in laws governing some specific arenas. Our data indicate that in insurance, medical malpractice, housing demolitions, and labor cases, the defendants, which are usually the stronger parties, fare much better than the weaker parties. This may stem from different sources of laws and regulations. The laws governing the business of insurance, medical services, housing demolition, and the labor market are usually drafted by the respective ministries of the central government in China. These ministries are also entrusted to legislate on the implementation rules of the laws, and they are also the authorities that interpret the laws and regulations when they become controversial. Since the ministries are closely related to the business sectors, among which are many state-owned or government-related organizations, the laws thus legislated will clearly be tilted toward the interests of business. As a result, with the weaker parties usually placed in the position of being the plaintiffs, the defendants have consistently higher win rates in these cases, and this occurs despite the general advantage enjoyed by the plaintiffs.

A similar interpretation applies to the much higher win rate in administrative cases. Most administrative laws, which are designed to regulate the behavior of the government, are legislated by the government itself. Other than a few laws issued by the National People's Congress, there are few institutional constraints on the legislation process. Needless to say, it is unrealistic to rely solely on the self-conscientiousness of the government to provide an equal footing for both parties in administrative litigation. Hence, the plaintiffs may be significantly disadvantaged.

By contrast, in contractual, personal injury, and traffic accident cases, plaintiffs consistently enjoy a better chance of winning. While one may explain these win rates by the fact that the plaintiff and defendant in such cases are more or less equal (RP vs. RP or OS vs. OS), the contrast may also be related to the fact that the major laws governing these areas are legislated by the National People's Congress and its standing committees. The legislators here have little interest in favoring either party in these disputes. The general advantage enjoyed by the plaintiffs is thus not offset in these categories. These patterns point to the usefulness of a possible tilt in the law in contributing to the winning gaps, which Kritzer summed up as follows: "First, the government makes the rules, which the courts in turn enforce" (2003:343).

In this section, we have speculated about the validity of all three hypotheses proposed by Wheeler et al. (1987) and have suggested that we go beyond party resources and capability to explain the striking gaps in litigation success in countries like China. Our case thus appears to lend support to Haynie et al., who wrote in a study testing the Galanter



thesis across six countries, that “[I]tigrant resources may not be the best explanation for the variation among the parties but rather the relationship between the governments and the courts could be the determining factor” (2001:16).

## VI. IMPLICATIONS AND CONCLUSION

Based on published adjudication documents, this study has assessed the performance of the courts in Shanghai. We find enormous gaps in terms of litigation outcome between the haves and the have-nots. Given that Shanghai is the richest city in China, if economic development improves court performance, it is conceivable that China’s other regions would not fare much better (Balme 2010; He 2009c; Peerenboom & He 2009; Zhu 2007; Chong & Calderon 2000; Clague et al. 1997). Also worth noting is the fact that these gaps exist at a time when the Communist Party has been promoting a “harmonious society,” a catchphrase that seems to be in favor of the underdogs of society. In short, if Shanghai courts at the time of our study are somehow less than typical, the problems we have documented in this article would be even more pronounced in other places or at other times in China.

Our analysis has provided some Chinese numbers, which have long been awaited by comparative scholars. Since Galanter’s seminal paper, quantitative analyses of litigation have commonly been used to study the legal systems in the United States, Great Britain, Canada, and many developing countries. China has not been in this league and has thus fallen outside the purview of comparative studies on redistributive justice. The differentiation in win rates recorded from within the Chinese legal system, along with our tentative conclusions on the sources of judicial inequality, will have direct implications for legal developments in transitional China. One of the major debates can be characterized as a debate between “form” and “substance”: legal reform leads to an increasingly formalistic system, but does judicial equality increase in tandem with this process? Some scholars have questioned the merit of applying the international best practices of judicial independence to China. They argue that such practices fail to capture the complexities of local contexts and that China’s current structure may be doing no worse than any other system in delivering the substance, if not the form, of judicial justice (Zhu 2010; see generally Peerenboom 2010). Showing the gaps in stark terms and pointing to the law and the courts as the culprits of the inequality, our discussion strongly suggests the need for further legal reform. In particular, judicial independence should be taken more seriously.

Looking at the political environment of the courts, the legislative processes are in need of reform. Despite the lip service given to supporting the weak in the socialist legacy or the current calls for a harmonious society, the making and the interpretation of rules, in fact, favor the strong. It is therefore necessary to transfer the legislative power from the administrative regulators to the relatively more neutral congresses and to empower the courts to interpret the rules.

The present study has also revealed the gap in legal representation between the haves and have-nots. The dismal chances of migrant workers from the countryside are sobering. Although they formed a small portion of our sample, they are the largest group in China’s

population. One remedy of reform would be to transform OSs into RPs; that is, to set up more legal aid programs so to make legal services more accessible and to facilitate the functioning of NGOs, such as labor unions, consumers associations, and property owners associations, in representing the interests of various types of have-nots.

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