Repeat Player vs. One-Shotter: Is Victory all that Obvious

Bahaar Hamzehzadeh
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I. INTRODUCTION

As a former employee at Wal-Mart in Texas, Mike Michell was responsible for catching shoplifters, and he was good at it, catching 180 shoplifters in a two-year period. However, not all of Michell’s attempts were successful. During one of his shifts, Michell chased a thief, a woman who used stolen checks to pay for her goods, into the parking lot where her accomplice was waiting in the car. As the thief and her accomplice sped off, they slammed into Michell leaving him with a broken kneecap, a badly torn shoulder, and two herniated disks. Shortly after reporting his need for surgery to Wal-Mart, Michell was fired allegedly as a strategy to lower the company’s expenditure on workers’ compensation bills.

Unfortunately, Michell is not the only employee who has reported complaints about the company, and in fact, the complaints have not been limited to employees. When Wal-Mart enters a neighborhood, its impact is felt almost immediately, and it begins with the residents living in the surrounding area. Carrying a wide variety of items ranging from diapers to tires at exceptionally low prices, the store attracts many customers, which directly results in more local traffic, noise, and pollution for the nearby residents. In addition to the residents, local, small businesses are also affected by the presence of a Wal-Mart. Unable to compete with Wal-Mart’s selection and low prices, small retailers are forced to go out of

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3. Id.

4. Id.

5. Id.


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business, leaving business owners and their employees unemployed. To supplement the local damage, Wal-Mart also harms manufacturers worldwide. Built on an empire of bargains, the company consistently pressures manufactures to lower their prices. In order to stay in business, manufactures are forced to move production overseas where labor is cheaper and working conditions are less stringent. Yet even when production is outsourced, manufactures are compelled to further reduce expenses by lowering payrolls and requiring employees to work efficiently in factories that are often hazardous.

Despite these complaints, consumers continue to shop at Wal-Mart and more importantly, remain unaware of the company’s underlying consequences. Given the amount and seriousness of the damage, it seems likely that over time the company’s policies and practices would change, especially in the United States, where those who are wronged can seek legal recourse in courts; however, since the birth of the company in 1962, the number of lawsuits filed against Wal-Mart have only increased, which possibly suggests that the company’s policies and practices have not changed. Former company employees and managers, local businesses, environmentalists, and even customers have filed numerous complaints in court against Wal-Mart, but as the complaints allege, the company continues to cut overtime pay from its employees’ paychecks, expand to neighborhoods that resent its presence, rob small business of their customers, and demand low prices from manufacturers. In light of this,
one question seems long over-due: Why hasn’t Wal-Mart changed?

Marc Galanter, author of Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change, suggests an answer to this question. According to Galanter, classes of litigants with the greatest resources and the lowest relative risk in litigation have the highest rates of success in courts. To supplement his theory, Galanter argues that litigants can be classified as either repeat players or one-shotters. The classification of a litigant will determine that litigant’s likelihood of success in court because repeat players and one-shotters have distinct characteristics. According to Galanter, repeat players attain greater success in courts than one-shotters because they have greater familiarity with the court system and the laws, a relatively low risk of loss, superior resources, and “advance intelligence.” Conversely, one-shotters typically have very limited exposure to the court system and the laws, a relatively high risk of loss, inferior resources, and no “advance intelligence.” Furthermore, repeat players generally have greater financial success than one-shotters, and thus are better able to sustain the costs of litigation. Given their ability to hire the best available legal representation and incur significant legal expenses, such as discovery expenses, court and expert witness costs, attorney’s fees, and appellate review expenses, repeat players are capable of increasing the probability of their success in court. Additionally, unlike one-shotters, repeat players naturally have greater litigation experience, which allows them to evaluate the facts and merits of each case and to create and employ comprehensive litigation strategies such as forum shopping and jury selection.

Using Galanter’s theory to answer the question probed earlier—why hasn’t Wal-Mart changed—the answer becomes relatively simple. Under Galanter’s definition, Wal-Mart has attained the status of a repeat player. As the world’s largest retailer, the company is easily able to afford the

16. Wal-Mart Stores, Inc. v. American Drugs, Inc., 319 Ark. 214 (1995) (holding that Wal-Mart did not violate the Arkansas Unfair Practices Act prohibiting below-costs sales because the plaintiff did not prove that below-cost sales were made with the intent to destroy the retailer’s competition).
18. Id.
19. Id. at 14.
20. Id. at 14-22.
21. Id. at 15-17, 22-26.
22. Id.
23. Id. at 17.
25. Id.
26. Wal-Mart attained the status of a repeat player in the 1990s. The company was created in 1962, and up until the 1990s, Wal-Mart litigated relatively few cases, thus qualifying as a one-shooter.
costs of litigation, and as a magnet for lawsuits, the company prides itself in knowing the ins-and-outs of the court system and law. Consequently, Wal-Mart will litigate when its probability of winning in court is high, and it will settle when its probability of winning in court is low, thus ultimately achieving a high rate of success in court. The presumption here is that as a repeat player Wal-Mart is equipped with the knowledge and skills necessary to evaluate the facts and merits of each case prior to taking any action. If the facts and law are unfavorable to Wal-Mart, the company will settle the lawsuit; however, if the facts and law are favorable to it, Wal-Mart will pursue litigation. Moreover, given that settlements are typically private and not subject to court orders, Wal-Mart can settle unfavorable cases without having to amend its practices and policies.27 Conversely, in cases where the law is in Wal-Mart’s favor or open to interpretation, Wal-Mart will litigate for an easy win or in hopes of shifting the rules in its favor.

The following study is aimed at evaluating the validity of Galanter’s theory using a sample of state and federal court opinions in which Wal-Mart Stores, Inc. is a party. If Galanter’s theory is valid, the results should indicate that during the 1960s, 1970s, and 1980s, when Wal-Mart was a one-shotter, the company had a low rate of success in court. Conversely, the results should indicate that during the 1990s and 2000s, when Wal-Mart transformed into a repeat player, it had a high rate of success in court. Furthermore, the results should reveal that Wal-Mart wins cases primarily because of precedent that is favorable to it.28

Part II of this article explains Galanter’s theory in detail. Part III discusses Wal-Mart as a business and demonstrates why the company is a suitable candidate for testing Galanter’s theory. Part IV describes the methodology employed in this study. Part V presents the results, and Part VI consists of a discussion of the results. Part VII addresses the policy implications of this study and possible future research directions. Part VIII summarizes this study.

27. Whether made in or out of the court, the court will likely sustain a settlement if it is made fairly. Wheeler v. McNett, 281 Ore. 485, 488-489 (1978). The settlement of claims is preferred in the law because it controls the overcrowding of court dockets, avoids a trial of sharply disputed issues, and dispenses with wasteful litigation. Chappell v. Roth, 353 N.C. 690, 692 (2001); Dawson v. U.S., 68 F.3d 886, 897-898 (5th Cir. 1995).

28. The deduction here is that Wal-Mart will litigate a case primarily on the basis of favorable precedent; if the company finds that the law is not on its side, it will settle the case or if the facts are favorable to Wal-Mart, it will litigate the case in hopes of shifting the rules.
II. GALANTER’S THEORY

In studying the dynamics of a legal system similar to the one employed in the United States, Galanter suggests that classes of litigants with the greatest resources and the lowest relative risk in litigation have the highest rates of success in courts.29 To support his theory, Galanter describes in detail the different elements in the legal system—parties, lawyers, institutional faculties, and rules—and how they interact to benefit primarily one side, specifically the repeat player.30

Galanter begins his paper by placing the parties in a lawsuit into one of two categories: one-shotters or repeat players.31 One-shotters are parties who seek recourse in the courts only occasionally (i.e., the spouse in a divorce case, the homeowner in an eminent domain case, or the victim in an assault case), and repeat players are parties who are constantly involved in litigation over similar issues (i.e., a health insurance company in a medical malpractice case, a prosecutor in a criminal case, or a landlord in an unlawful detainer case).32

The distinction between one-shotters and repeat players is important because there are several key characteristics that are associated with each. One such difference is that repeat players have “advance intelligence” because they have previously litigated the same issues and thus, have a general sense of what the law is prior to pursing litigation;33 however, one-shotters have very little, if any, litigation experience, and thus lack such intelligence. Due to their extensive litigation experience, repeat players are able to evaluate the rigidity of the rules that pertain to them and are more likely to concentrate their resources on changing those rules that are receptive to change and that produce the greatest number of tangible benefits.34 Repeat players also have expertise and easy access to specialist because of their frequent exposure to the courts and the presence of in-house or private counsel.35 In comparison to one-shotters, repeat players enjoy the economies of scale of these services because of their low start-up costs.36

According to Galanter, the court system itself provides advantages and disadvantages that are distinct to repeat players and one-shotters. For example, repeat players have opportunities to develop informal relations with institutional actors such as court clerks or judges because they are

29. GALANTER, supra note 16.
30. Id. at 14-27.
31. Id. at 14.
32. Id.
33. Id. at 15.
34. Id. at 16-17.
35. Id.
frequently in court. This heightened level of familiarity with institutional actors allows repeat players to occasionally disobey court rules or obtain information that is not readily accessible to the public (e.g., receive extensions on court filings or learn the unwritten rules of certain judges' court decorum). Consequently, repeat players must establish and maintain a credible reputation in order to facilitate future lawsuits and settlements.

On the other hand, one-shotters are not required to establish a credible reputation because they are unlikely to encounter similar incidents. Furthermore, repeat players seek both long-term benefits (i.e., rule changes and new precedent) and short-term benefits (i.e., damages, declaratory relief, injunctions, etc.) in the courts, whereas one-shotters seek only short-term benefits. Repeat players have an interest in making the law more favorable to them because it will increase their probability of success in the courts in the future. On the contrary, one-shotters are only interested in seeking short-term benefits because they do not have a future interest vested in the courts.

Repeat players and one-shotters also differ in the way they perceive risks and the outcome of a case. Repeat players can afford to take risks because the loss of any one particular lawsuit is insignificant compared to their financial strength. They can also substitute current losses with future gains in subsequent cases, which over time may maximize their gains. It is for this reason that repeat players are more likely than one-shotters to invest their resources (i.e., time, money, knowledge, experts, etc.) into favorable rule-changes. Conversely, one-shotters are likely to adopt minimal-risk strategies in order to reduce the probability of maximum loss. It is unlikely that one-shotters will use their resources to change the law because the probability of them returning to court on the same or similar issue is very low. Furthermore, repeat players consider an immediate loss to be a success if the ruling will produce favorable results in the future, whereas one-shotters consider an immediate loss to be a pure loss because they have no interest in future cases.

Given these characteristics, Galanter suggests that on average repeat players in the United States are larger, wealthier, and more powerful than one-shotters, and consequently are better able to withstand the costs,
delays, and uncertainties of the courts. Furthermore, due to their continuous presence in the court system, repeat players have objectives distinct from one-shotters. The objective of repeat players is to gain both short-term and long-term success, whereas, the objective of one-shotters is to gain only short-term success. As time elapses one-shotters are generally more willing to receive some compensation through settlement than to risk losing all compensation through litigation.

The decision to settle a lawsuit is also affected by each party’s lawyers. According to Galanter, “parties who have lawyers do better,” and typically repeat players, who are generally larger, wealthier, and more powerful, can afford better lawyers. Conversely, Galanter reasons that the lawyers who represent one-shotters usually consist of the “lower echelons” of the legal profession. These lawyers are often employed on a contingency fee basis, which means that they have a greater incentive to settle and to settle early, irrespective of the merits of the case.

Aside from having more money, strategic advantages, and better lawyers, repeat players are also benefited by courts’ passivity, overload, and rules. By being passive, courts “must be mobilized by the claimant—giving advantage to the claimant with information, ability to surmount cost barriers, and skill to navigate restrictive procedural requirements.” If a party does not make a convincing case because it lacks adequate resources, the court will not come to its aid. Additionally, the court’s case overload further disadvantages one-shotters because it creates an inadvertent pressure on the parties to settle rather than litigate. Galanter demonstrates this point by noting that courts discount the value of damages through direct and indirect action. For example, the court’s case overload causes delays in litigation, which subsequently, raises costs for the parties since

43. Id. at 14-15. “Typically, the [repeat player] is a larger unit and the stakes in any given case are smaller (relative to total worth). [One-shotters] are usually smaller units and the stakes represented by the tangible outcome of the case may be high relative to total worth.” Id. It is important to note that these descriptions of repeat players and one-shotters are generalizations. Galanter acknowledges that some of these characteristics may overlap between the two classes of litigants. For example, repeat players such as the government may advocate the rights of one-shotters, and one-shotters such as corporate executives may face criminal charges (i.e., white collar crimes) that are typically associated with criminal repeat players (e.g., embezzlement and grand theft). Id.
44. Id. at 15.
45. Id.
46. Id. at 22-25.
47. Id. at 22.
48. Id. at 23.
49. Id.
50. Id. at 25-27.
51. Id. at 25.
52. Id.
53. GALANTER, supra note 16, at 25.
cases must be litigated over an extended period of time. To remedy this problem, courts induce court employees to clear dockets and suggest the adoption of restrictive rules to discourage litigation. Moreover, the rules adopted by courts favor repeat players because repeat players are able to successfully amend their operations to match pre-existing rules.

In sum, the combination of these elements—the parties, lawyers, courts, and rules—creates an environment that is most beneficial to those litigants who have the greatest resources and the lowest relative risk in litigation (i.e., repeat players).

III. WAL-MART STORES, INC.

According to Galanter’s theory, Wal-Mart Stores, Inc. has become the epitome of a repeat player. Sam Walton, the founder of Wal-Mart Stores, Inc., created an international phenomenon as the world’s largest retailer. With more than 7,390 stores and club locations in 14 markets including Argentina, Brazil, Canada, China, Costa Rica, El Salvador, Honduras, Japan, Mexico, Nicaragua, Puerto Rico, and the United Kingdom, Wal-Mart has diversified its range of shoppers and opportunities for growth. The company is currently divided into six divisions: Wal-Mart Discount Stores, Wal-Mart Supercenters, Marketside, Wal-Mart Neighborhood Markets, Sam’s Club, and Walmart.com.

To keep its stores open and in business, Wal-Mart hires more than 2 million employees worldwide, including more than 1.4 million in the United States, making it the largest private employer in the United States, Mexico, and Canada. Since its first store, Wal-Mart’s sales have risen substantially. In the fiscal year ending January 31, 2008, Wal-Mart made $374.526 billion in sales. This number is not surprising considering that Wal-Mart serves more than 137 million customers weekly in the United States and more than 175 million customers worldwide. For the last three years, these numbers translated into an average annual total revenue growth of slightly more than 10% per year. Recognizing Wal-Mart’s financial success, Fortune has consistently named Wal-Mart as a top Fortune 500

54. Id. at 25-56.
55. Id.
56. Id. at 26.
57. SAM WALTON, MADE IN AMERICA: MY STORY 1 (Batnam Books 1992).
59. Id.
60. Id. at Facts & News.
61. Id.
62. Id. at Investors.
63. Walmart, supra note 62.
company, ranking it number one for a total of six years.\textsuperscript{64}

The company’s success is further displayed by the value of its stock over the years. In 1970, Wal-Mart made its initial public offering of 300,000 shares at a price of $16.50, and in 1972, the company began trading on the New York Stock Exchange under the symbol WMT.\textsuperscript{65} Since then, the company has seen a gradual increase in the price of its stock, reaching a high of roughly $90 a share.\textsuperscript{66}

However, being the world’s largest retailer comes with a price, and it is often in the form of a lawsuit. As the company grew in size, so did the number of lawsuits filed against it. It is estimated that “Wal-Mart is sued two to five times every business day somewhere in the United States in federal court alone.”\textsuperscript{67} This estimate is startling given that federal courts are courts of limited jurisdiction, and thus restrict the types of cases that may be brought before them.\textsuperscript{68} In 2002 alone, the company was a defendant in more than 6,000 lawsuits, of which roughly 70 were alleged class actions.\textsuperscript{69} In the span of two years, Wal-Mart dramatically increased the size of its in-house counsel from 50 lawyers in 2002 to 250 (116 national and 138 international) in 2004.\textsuperscript{70} In addition to its in-house counsel, Wal-Mart uses more than 400 law firms in the United States to help with its litigation.\textsuperscript{71} To ensure the quality of its lawyers, the company provides its lawyers training in the company’s business strategies and cultures.\textsuperscript{72} Throughout their employment, all of Wal-Mart’s lawyers are connected to an electronic newsletter published by the legal staff in

\textsuperscript{65} Walmart, \textit{supra} note 59.
\textsuperscript{67} How Often is Wal-Mart Sued?, http://www.walmartlitigation.com/howmany.htm (last visited Nov. 11, 2009).
\textsuperscript{68} In federal court, subject-matter jurisdiction is limited to federal question and diversity jurisdiction. In federal question jurisdiction cases, a federal court may hear cases involving the United States Constitution, laws passed by Congress, or cases arising under a federal treaty. In diversity jurisdiction cases, a federal court may hear cases pertaining to state law if each plaintiff is from a different state than each defendant and the amount in controversy exceeds $75,000, exclusive of costs and interest. 28 U.S.C. §§ 1331-1332 (2009).
\textsuperscript{70} Id. Wal-Mart does not provide details as to the number of lawyers it employs or the number of cases filed against it because it is not public information. Steve Painter, Lawsuits sizes S-XXL: Wal-Mart is Fighting Suits Minor to Monumental Brought by Customers and Employees, http://wakeupwalmart.com/news/article.html?article=559 (last visited Feb. 12, 2009).
\textsuperscript{71} Mars, \textit{supra} note 69.
\textsuperscript{72} Id.
Bentonville, Arkansas. This newsletter provides the lawyers current information about important court decisions, strategies, and expert witnesses that the company may have to challenge.

Furthermore, Wal-Mart’s practices and policies are structured to foster a sense of loyalty within the company’s litigation department. As an incentive to defend the company, Wal-Mart pays its lawyers on primarily a per-case basis. This strategy keeps the costs of litigation down in terms of attorney’s fees and increases the probability that a case will result in a trial rather than a settlement; hence, the company rarely settles cases outside of court.

Furthermore, Sam Walton... established the company policy of fighting lawsuits and it remains the policy today. Wal-Mart settles cases only after prolonged court proceedings (called discovery) make it clear that the company was at fault and the plaintiff sustained serious injuries and will appear to the jury as a likeable person. Settlements are usually small compared to similar injuries in other cases where the corporation is a defendant.

As a means of quality control, each case is individually evaluated by lawyers at the company headquarters before proceeding with litigation and thereafter, distributed to hundreds of lawyers across the country. The distribution of cases ensures that the company is adequately represented in court.

Wal-Mart’s litigation strategy is a by-product of its size and culture. As the world’s largest retailer, the company is susceptible to an extraordinary number of lawsuits, and to protect its reputation and viability, Wal-Mart must prove to the public that the allegations filed against it are false and that the company can successfully defeat what it believes to be meritless lawsuits. Though the company settles a fair number of cases, it only does so after a thorough investigation of the facts and law because it does not want a reputation for settling cases and rewarding plaintiffs for


"The project’s goal is to ‘level the playing field’ so plaintiffs have a better chance of winning suits where Wal-Mart has done wrong by educating plaintiffs’ lawyers about cases similar to their own against Wal-Mart, and by facilitating communication between plaintiffs’ lawyers on issues of law, discovery and litigation tactics."

Id.

74. Id.

75. What You Should Know About Suing Wal-Mart, supra note 73.

76. Id.

77. Id.

78. Painter, supra note 67.
filing unsubstantiated complaints. Wal-Mart’s store-wide culture is also one that is easily offended by false allegations. While building his empire, Sam Walton took great pride in his employees, and in an effort to share his passion for the company with his employees, he exclusively referred to them as “Associates.” This soon became a part of the company’s culture, and to this day, Wal-Mart continues to hire “Associates” as opposed to employees. The company also cherishes its customers by continually striving to obtain the lowest price possible. Wal-Mart’s strict settlement policy aims to maintain the company’s culture.

Given Wal-Mart’s great financial success, extensive legal counsel, and ability to purchase other resources, the company is usually the litigant with the lowest relative risk. With $374.526 billion in sales, Wal-Mart can lose a few cases in court and still function as a Fortune 500 company. On the other hand, Wal-Mart’s opponent—typically a one-shotter—does not have the same advantage. For example, suppose an employee of Wal-Mart files a complaint for workers’ compensation benefits because he was injured on the job. This employee, who was probably earning minimum wage at Wal-Mart, cannot afford to lose at trial because he is now out of work, injured, and unable to pay his medical bills. Due to his financial situation, this employee has a much higher relative risk of losing in court than Wal-Mart. In fact, even if this employee has a solid case against the company, he may be inclined to settle the case for less than what he would be entitled to in court for the sake of having a guaranteed and immediate recovery.

However, Wal-Mart was not always a repeat player. In fact, for the first three decades the company took on the characteristics of a one-shotter. In 1962, Sam Walton opened the first Wal-Mart discount store, and as Figure 1 illustrates, by the end of that decade the company expanded to 26 stores, producing $12.6 million in sales and only one lawsuit. As the years progressed, Wal-Mart expanded, but its number of lawsuits did not. By the end of the 1970s, Wal-Mart consisted of 276 stores in 11 states and produced $1.248 billion in sales, but it litigated only two cases. During the 1980s, the number of cases Wal-Mart litigated continued to rise, but not substantially. By the end of the 1980s, the company operated in 29 states with approximately 1,200 stores, which generated $15.9 billion in sales and

79. What You Should Know About Suing Wal-Mart, supra note 73.
80. WALTON, supra note 57, at 199-201.
121 litigated lawsuits. Though the company was transitioning from a one-shotter to a repeat player during the 1980s, it did not complete the transition until the 1990s. In the 1990s, Wal-Mart completely transitioned into a repeat player when it had close to 3,000 stores and litigated more than 1,700 cases. This trend continued into the 2000s with Wal-Mart operating approximately 6,200 stores and litigating nearly 3,000 cases.

Figure 1. This chart illustrates the relationship between Wal-Mart's growth as a business and a litigant. During the first three decades of the company, Wal-Mart was a one-shotter, and as the company matured in the 1990s and 2000s, Wal-Mart became a repeat player.

Given the details of the company’s trends, financial strength, and number of lawsuits filed against it over the years, Wal-Mart is an excellent candidate for this study. The company’s trend during the past five decades produces a great advantage for this study because Wal-Mart’s rate of success as a repeat player can be compared to its rate of success as a one-shotter, thus providing the full spectrum of Galanter’s theory.

IV. METHODOLOGY

To test Galanter’s theory, this study used Wal-Mart Stores, Inc. as an example of how a litigant’s status, either as a repeat player or as a one-shotter, affects court rulings. The study measured Wal-Mart’s successes and failures in state and federal court by examining both published and unpublished decisions at all court levels, including decisions at trial and district courts that have not been overruled. Trial and district court decisions were included in this study because Galanter’s conclusions—classes of litigants with the greatest resources and the lowest relative risk in litigation have the highest rates of success in courts—focuses primarily on rates of success rather than a decision’s ability to serve as binding authority. Similarly, unpublished decisions were also included in this study because they contribute to a party’s rate of success in court.

Due to the vast number of lawsuits in which Wal-Mart is a party, the scope of this study was limited to labor and employment law. The labor and employment law cases included, but were not limited to, those cases relating to discrimination, wage and hour, and workers’ compensation. Causes of actions outside the scope of labor and employment law within a decision were disregarded. The cases were divided by decade, starting with the 1960s and ending with the 2000s. Due to the fact that Wal-Mart was a one-shotter during the 1960s, 1970s, and 1980s, it litigated relatively few cases during these decades, and therefore, all the cases that pertain to labor and employment law within these decades were used in this study. For the 1990s and 2000s, a simple random sample of 100 decisions related to labor and employment law were selected.

The cases were located electronically through the use of Westlaw. A list of all Wal-Mart cases was obtained through Westlaw’s “Find a Case by Party Name” feature. The word “Wal-Mart” was entered into the “Find a Case by Party Name” search box. The jurisdiction selected for this search was “All U.S. Federal and State Cases.” This list was narrowed to include only cases from a certain decade and within a certain area of the law by using Westlaw’s “Locate in Result” feature. The results were
narrowed by decade by entering the dates of the decade into the “Dates” search box. For example, to retrieve cases from only the 1990s, the dates “1/1/1990” and “12/31/1999” were entered into the “Dates” search box. The results were narrowed to include only labor and employment law cases by entering the word “employee” into the “Locate” search box. Due to the fact that Wal-Mart litigated relatively few cases during the 1960s, 1970s, and 1980s, the “Locate in Result” feature was used only to narrow the list by decade. Hence, all cases from the 1960s, 1970s, and 1980s were read, and if the case pertained to labor and employment law, it was included in the study. As for the 1990s and 2000s, once the results were narrowed by decade and labor and employment law, the cases were selected randomly using a random number generator.

Each decision was read to determine which party prevailed. A strict standard of success was applied unilaterally to Wal-Mart. For the purposes of this study, Wal-Mart’s success was based on whether the issues relating to labor and employment law were rendered completely in favor of Wal-Mart. Therefore, a decision that was rendered partially in favor of Wal-Mart and partially in favor of the other party was not counted as a success for Wal-Mart. For example, an appellate decision affirming an employee’s claim against Wal-Mart for sex discrimination, but decreasing the amount of damages would not constitute a success for the company. This strict standard was implemented because presumably, Wal-Mart, a litigant that evaluates and strategizes each case individually, should be able to accurately predict the best outcome for the company in any one particular case. Furthermore, it was assumed that in cases like the one mentioned above Wal-Mart could have obtained a more favorable outcome through a settlement because the company would not have had to spend nearly as much money on damages, court costs, attorneys’ fees, resources, and research had it settled the case before trial. On a separate note, if a decision is rendered on numerous causes of action (e.g., a complaint alleging breach of contract, failure to pay workers’ compensation benefits, and intentional infliction of emotional distress) only those issues pertaining to labor and employment law were examined to determine Wal-Mart’s success in the case.

Each decision was also read to determine whether it was based on procedural or substantive law. In order for a decision to be categorized as procedural, the court must have made its decision without considering the merits of the case (e.g., granting a motion to dismiss for lack of personal

93. The term “employee” was used because nearly all labor and employment law cases focus on employee-employer conflicts. The results also did produce some cases that were not related to labor and employment law cases, and those cases were disregarded.

94. The random number generator used in this study was provided by Random.org. Random.org, http://www.random.org (last visited April 1, 2009).
jurisdiction or for improper venue). Conversely, in order for a decision to be categorized as substantive, the court must have based its decision on the specific facts and merit of the case (e.g., finding the defendant liable for medical bills because the plaintiff was injured while on the job). If a decision was rendered based on substantive law, the case was read to determine whether favorable precedent, a shift in the rules, or new precedent allowed either Wal-Mart or the other party to prevail. This specification was provided to demonstrate each litigants ability, or lack thereof, to predict the outcome of a case, and therefore, either settle early or litigate. Furthermore, this specification assessed whether repeat players and one-shotters were more likely to litigate a case when there is precedent that is favorable to them.

For example, in Brooks v. Wal-Mart Stores, Inc. the plaintiff, an employee of Wal-Mart, filed a complaint against the company in state court for injuries she sustained when she slipped and fell on an accumulation of ice and snow in the store’s parking lot.95 The plaintiff sustained these injuries during her non-working hours when she visited the store to purchase some items and pick up her paycheck.96 The trial court dismissed her complaint for lack of subject-matter jurisdiction because the employee’s cause of action was within the exclusive jurisdiction of the workers’ compensation commission, and the appeals court affirmed the trial court’s decision.97 For the purposes of this study, this decision was categorized as a procedural success for Wal-Mart because the complaint was dismissed without discussing the merits of the case.

Conversely, in Garner v. Wal-Mart Stores, Inc. the plaintiff, a female employee of Wal-Mart, filed a complaint against the company alleging that it had discriminated against her because of her sex.98 During her employment, the plaintiff took a maternity leave, but when she returned to work, she was denied her former position as department manager.99 Instead, the position was filled by a male employee who was less experienced than the plaintiff.100 The court of appeals affirmed the trial court’s decision, stating that the relevant case law and facts of the case supported a finding of sex discrimination.101 This decision was categorized as a substantive loss for Wal-Mart because the court ruled in favor of the plaintiff on the basis of precedent.

To determine whether Wal-Mart’s rate of success is high or low, this

96. Id.
97. Id.
98. 658 F.2d 1536, 1537 (11th Cir. 1987).
99. Id.
100. Id.
101. Id. at 1538-1540.
study calculated the percentage of labor and employment law cases that the company won in each decade. Although Galanter does not explicitly define what percentage of cases constitutes a high or low success rate, the title of his article—Why the Haves Come Out Ahead—offers some insight. From the title, it appears that in order for a repeat player to attain a high rate of success it must merely win more cases than it loses in court, which translates to a 51% success rate. Thus for the purposes of this study, prevailing in court 51% or more of the time constitutes a high rate of success, and prevailing in court 49% or less of the time constitutes a low rate of success. On the other hand, prevailing in court exactly 50% of the time constitutes neither a low or high rate of success, but rather a neutral rate of success.

The results of this study should help confirm or disconfirm Galanter’s theory that classes of litigants with the greatest resources and the lowest relative risk in litigation have the highest rates of success in courts. If Galanter’s theory is correct, the results should indicate that during the 1960s, 1970s, and 1980s when Wal-Mart was a one-shooter it had a low rate of success in court. The results should also indicate that during the 1990s and 2000s when Wal-Mart completely transitioned into a repeat player, it attained a high rate of success in court. Furthermore, the results should reveal that when Wal-Mart litigates and prevails, it is most likely because of favorable precedent.102

V. RESULTS

The results from this study generally support Galanter’s theory. As Figure 2 below shows, during the 1960s and 1970s when Wal-Mart was a one-shooter, the company lost both the cases that it litigated in those decades. During the 1980s when Wal-Mart was still a one-shooter—but transitioning to a repeat player—it prevailed in only 50% (12 of the 24) of the cases it litigated. A significant improvement is seen in the 1990s and 2000s when Wal-Mart entered the realm of a repeat player. During the 1990s, the company prevailed in 67% (67 of the 100 randomly selected cases) of the cases that it litigated, and in the 2000s, it prevailed in 66% (66 of the 100 randomly selected cases) of the cases that it litigated. In terms of rates of success, Wal-Mart had a low rate of success in the 1960s and 1970s, a neutral rate of success in the 1980s, and a high rate of success in the 1990s and 2000s.

102. This result would support Galanter’s theory that repeat players are better equipped to evaluate and strategize cases than one-shotters. Hence, repeat players litigate cases when the law is in their favor and settle cases when the law is not in their favor.
Further in accordance with Galanter’s theory, the results indicate that Wal-Mart’s successes are primarily due to favorable precedent. Of the three options—favorable precedent, rule-shift, or new precedent—Wal-Mart primarily utilized precedent that was favorable to it to argue its case. As Figure 3 displays, in the 1980s, each of Wal-Mart’s victories were due to favorable precedent; the company was successful in 12 cases and the success of each case was due to favorable precedent (100% of its successes were due to favorable precedent). In the 1990s, Wal-Mart was successful in 67 cases, and the company prevailed in 66 of those cases in part because of favorable precedent (98.5% of its successes were in part due to favorable precedent). Similarly, in the 2000s, Wal-Mart was successful in 66 cases, and it prevailed in 66 of those cases because of favorable precedent (100% of its successes were due to favorable precedent).
VI. DISCUSSION

The results of this study supports Galanter’s theory that classes of litigants with the greatest resources and the lowest relative risk in litigation have the highest rates of success in courts. As the results indicate, Wal-Mart had a low rate of success in courts as a one-shotter during the 1960s and 1970s, losing both the cases it litigated in those decades. As the company began to expand in the 1980s, the number of lawsuits that it litigated and its rate of success grew as well. During the 1980s (Wal-Mart’s transition period), the company litigated a total of 121 cases, and the study reveals it had a 50% success rate in cases pertaining to labor and employment law. When Wal-Mart became a repeat player in the 1990s the company’s appearance in court and rate of success increased by a significant margin. During this decade, the company litigated over 1,700 cases, and as this study reveals, it obtained a 67% success rate in the area of labor and employment law. This same trend is seen in the 2000s as Wal-Mart maintained its repeat player status. Though the number of cases the company chose to litigate in the 2000s increased significantly—over 2,830 and still counting—the results reveal that Wal-Mart’s litigation success in the area of labor and employment law remained high with a 66% success rate.

The study’s results also support Galanter’s theory that when repeat
players choose to litigate and subsequently prevail it is often on the basis of favorable precedent. Galanter suggests that repeat players are equipped with the resources to evaluate the strengths and weaknesses of each case. If the facts of a case and the relevant law are in its favor, the repeat player will litigate; however, if the facts and the law are not in its favor, the repeat player will likely settle. From the results of the preliminary study, it is clear that when Wal-Mart chooses to litigate a case and subsequently prevails it is often because of favorable precedent. During the 1980s, Wal-Mart prevailed in 12 cases, and each case was decided on the basis of favorable precedent. During the next two decades, the company continued to prevail primarily on the basis of favorable precedent. In the 1990s, Wal-Mart prevailed on the basis of favorable precedent 98.5% of the time, and in the 2000s, the company prevailed on the basis of favorable precedent 100% of the time.

VII. POLICY IMPLICATIONS AND FUTURE RESEARCH

Given Wal-Mart’s successes and failures in the realm of labor and employment law litigation, this study presents several policy implications. In the United States, the judicial branch of government was created to address wrongdoings in a neutral setting in which all litigants are treated equally in the eyes of the law. This philosophy is what drives litigants to court with the hope of rectifying their problems; however, as this study indicates, this philosophy is not necessarily valid. Repeat players, like Wal-Mart, consist of those classes of litigants with the greatest resources, the lowest relative risk in litigation, and ultimately, the highest rates of success in court. Though the law may be applied equally to all parties, there exist disparities between the parties that present themselves in court. Equipped with the ability to assess the merits of each case individually, repeat players are naturally at a strategic advantage by settling cases they are likely to lose and litigating those they are likely to win. With this strategy in place, courts become merely a judicial puppet for repeat players.

To avoid this destiny, Galanter suggests a number of possible solutions and amongst them is an increase in institutional facilities.\textsuperscript{103} By increasing the number of institutional facilities (i.e., the courts), the current delays and costs of litigation would decrease.\textsuperscript{104} Given that most one-shotters discount expected future values, “claimants would be inclined to litigate more and settle less” knowing that their claim may be adjudicated in a timely fashion.\textsuperscript{105} On the same token, an increase in litigation and

\textsuperscript{103} Galanter, supra note 16, at 36.

\textsuperscript{104} Id.

\textsuperscript{105} Id.
increase in settlement would force repeat players to conform their methods of conducting business to the law.\textsuperscript{106} By weakening the incentive to settle, courts would regain their ability to rectify wrongdoings. To further even the odds, "greater institutional ‘activism’ might be expected to reduce advantages of party expertise and of differences in the quality and quantity of legal services."\textsuperscript{107} Though this solution would help reduce some of the current inequities of the judicial system, it is a costly and lofty goal. Increasing the number of institutional facilities requires a significant amount of taxpayer dollars to fund the construction of courthouses, employ judges and administrative personnel, and support the day-to-day operations. Furthermore, an increase in institutional facilities does not per se change the law; to reap the full benefits of this solution requires an extensive amount of time and judicial activism, both which have been historically unavailable to one-shotters.\textsuperscript{108}

In addition to an increase in the number of institutional facilities, Galanter also suggests increasing the quantity and quality of legal services available to one-shotters.\textsuperscript{109} By increasing the quantity and quality of legal services, the presumption is that one-shotters would have some of the same advantages of repeat players, such that both parties would be equipped with the same degree of knowledge in a specific area of law.\textsuperscript{110} The judicial process would be equalized by lowering costs, eliminating expertise advantages, and filing more appeals on behalf of one-shotters.\textsuperscript{111} Though this suggestion would theoretically equal the playing fields, it is not very practical because it is difficult to quantify the quality of attorneys and price-fix attorney's fees. Nonetheless, if this suggestion were implemented, it could change the stakes for one-shotters.

To further equalize the judicial process, Galanter suggests reforming one-shotters into repeat players.\textsuperscript{112} The reform envisioned entails organizing one-shotters "into coherent groups that have the ability to act in a coordinated fashion, plan long-run strategies, benefit from high-grade legal services, and so forth."\textsuperscript{113} Such groups already exist, and they include trade unions, interest groups, performing rights associations, and environmental action groups. By forming such groups, one-shotters are able to better obtain and utilize information, gain expertise, enhance their

\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} By their very nature, one-shotters prefer immediate and guaranteed results (i.e., settlements) over prolonged and uncertain results (i.e., litigation) because of their shortage of time and money. Furthermore, one-shotters are generally unable to afford experienced attorneys who can persuade judges to deviate from precedent.
\textsuperscript{109} \textit{GALANTER, supra} note 16, at 37.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.} at 37-38.
\textsuperscript{113} \textit{Id.} at 37.
bargaining power, and withstand the delays in the adjudication process.\textsuperscript{114} Moreover, one-shotters can improve their strategic position by combining claims that are too small to litigate individually (i.e., class actions).\textsuperscript{115} The combination of these actions is likely to redistribute the advantages that once belonged only to repeat players.

However, before launching into these suggestions, more research must be conducted to test Galanter’s theory. Though the results of this study indicate that Wal-Mart enjoys a high rate of success in court as a repeat player, this may not be true of all repeat players. Other repeat players such as Exxon Mobil, Bank of America, General Motors, or Kaiser Permanente may produce different results. Furthermore, this study examines only one area of the law—labor and employment—when in fact there are several other areas of the law that are just as frequently litigated (e.g., tort, intellectual property, real property, health, construction, insurance, etc.). To truly test the validity and applicability of Galanter’s theory, additional areas of the law must be examined. This study is also limited in that it does not distinguish between decisions rendered in state and federal courts; however, there may be differences between these two court systems. On the same token, there may also be regional differences in the decisions rendered, which this study does not address. In order to establish confidence in Galanter’s theory, more research must be conducted.

VIII. CONCLUSION

The main objective of this study is to assess Galanter’s theory, which asserts that classes of litigants with the greatest resources and the lowest relative risk in litigation have the highest rates of success in court. By using Wal-Mart Stores, Inc., a company characterized as both a one-shotter and a repeat player at different points in its existence, this study unveils the consequences, if any, of being a one-shotter or a repeat player in the court system. The results of this study provide an answer as to why and how Wal-Mart, the world’s largest retailer, continues and is able to enforce practices and policies that are at times unethical, and more importantly, unlawful in a nation that prides itself in providing justice through its judicial branch of government.

\textsuperscript{114} GALANTER, supra note 16, at 37-38.
\textsuperscript{115} Id.