LITIGATION IN THE FEDERAL COURTS: A COMPARATIVE PERSPECTIVE*

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INTRODUCTION

Courts, unlike most other political institutions, depend almost exclusively on the actions of others to initiate proceedings which comprise their agendas of decision-making. Formal rules and custom proscribe the independent searching out of cases by American courts. These courts may, in a sense, invite litigation by the way they handle certain kinds of issues, but they must await the development of real "cases and controversies;" and, more importantly, they must await private choices which may or may not bring these cases and controversies to court. Recent years have brought some recognition of the importance of such private choice-making activity in setting the boundaries of the policy-making roles which the courts can play. As Donald Black (1973:126) argues, "[t]he day to day entry of cases into any legal system cannot be taken for granted. Cases of alleged illegality and disputes do not move automatically to legal agencies for disposition and settlement."

The uneven movement of cases into the legal system is, according to Black (1973:128), a function of the general but uneven reluctance of citizens to "mobilize the law." This reluctance implies that the notion of courts as the "ultimate" resolvers of most societal conflicts is a myth. The risks and costs of using the courts for dispute settlement suggest that in many societies litigation will be a statistical abnormality, a rare intrusion into the realm of private problem solving. Yet within this generalized reluctance to litigate there are important differences to be

* An earlier version of this paper was delivered at the 1974 Annual Meeting of the American Political Science Association. The authors wish to acknowledge with gratitude the efforts of Gary Bunch, Daniel Dunn, Max Ellis and James Robert Kirk in collecting, coding, and processing the data used in this paper. Lawrence Baum, Bliss Cartwright, Mary Grossman, Robert Kidder, Marc Galanter, Jack Schlegel and Richard P.Y. Li read the manuscript and made many excellent suggestions. Indispensable financial support was provided by the Graduate Research Committee and the Center for Law and Behavioral Science at the University of Wisconsin.

understood—differences among people, groups, and issues, at different times and under varying social, political and economic conditions.

Litigation is a special case of the more general and pervasive category of legal activity. By legal activity we refer generally to the invocation of substantive and procedural rules and formal processes established in the legal system to regulate, order, guide and legitimate private social, economic and political relationships. Legal activity, as we have defined it, is not always visible, or recognizable as such. It is not always conflictual, nor does it always involve lawyers. The acquisition and sale of property and the transfer of goods and services in the marketplace are all dependent, to some extent, on current or former legal activity.[1] The extent of legal activity might be measured by the use of common forms of licensing, contracting, and entitling.

While resort to the courts remains a costly, often traumatic, and rare experience, most other types of legal activity of the kind just described are routine and less openly conflictual. But the importance of litigation to the workings of the legal system, and to the resolution of disputes throughout the society, may be far out of proportion to its relative infrequency.

In this paper we examine some of the social, economic and political conditions which facilitate or inhibit the growth of legal activity generally, and litigation in particular. Our analysis relies on aggregate data. We are interested in the determinants of legal activity and litigation over time, and in explaining cross-sectional differences in different areas of the United States.[2] At our macro-social level of analysis it is possible to identify two sets of aggregate, environmental factors likely to encompass many of the major determinants. We refer to these simply as the Social Factor and the Political Factor. We also recognize the importance of what might be called "internal" factors, such as changes in substantive and procedural law; but our focus in this paper is on variables formally external to the legal system.

The Social Factor

Much writing on law and society proceeds from the assumption that the use of law in a society reflects the level of social

1. Legal activity should be distinguished from the use of previously developed legal forms which generally require neither the services of a lawyer nor any additional "legal" acts other than signing a document (e.g., getting married).
2. The determinants of legal activity and litigation are unquestionably more complex than appear from this paper. Our intention is not to provide a comprehensive explanation, but to test several important hypotheses discussed in previous research.

and economic development in that society.[3] The literature suggests, generally, that in societies in which the level of economic development is relatively low and in which social relationships are close and interdependent, customary devices of social control and mechanisms of conflict resolution seem to predominate and make unnecessary the development of formal legal institutions (Gulliver, 1969: 15, Abel, 1973). Increased reliance on formal law and its processes appears to parallel changes in the complexity of a society which are produced by economic growth and development.[4] Close, interdependent relations which facilitate informality are replaced by relationships in which interests diverge; new kinds of social organizations emerge which are more dependent on competition than cooperation. Friedman (1973: 17) depicts a corresponding explosion of legal activity:

> The number of contracts, notes and deeds executed rises fantastically; the number of corporations that are formed increases explosively; so does the percentage of population that leaves a will and a probated estate; every rising indicator of economic activity has its corresponding reflection in the legal system. This follows from a simple basic thesis: legal change follows and is dependent on social change. As a society modernizes, as its population leaves farm and village for factory and city, as commerce quickens, the market touches on the lives of more and more people and the number of things that require legal form goes up correspondingly.

Toharia's data on legal activity in Spain seem to substantiate Friedman's thesis. Using the number of notarized documents as his indicator of legal activity, Toharia (1973) reports that as Spain has developed, legal activity has increased both absolutely and in proportion to the population. However, his data indicate that legal activity has not increased in a uniform and consistent manner. In the more industrialized provinces of Spain, the level of legal activity has increased far more rapidly than in those provinces lagging behind in economic development. Toharia (1973:13) observes that ". . . while the number of notarial instruments has increased in post-Industrial Spain by +104.4 between 1910 and 1967 . . . , the increase between those two dates has been of just +30 in pre-industrial Spain."[5]

Does the economic and social development of a society, manifest in increased legal activity, mean that there will also be a greater utilization of courts to solve disputes and make public

3. See, for example, Schwartz and Miller (1964) and Trubek (1972).
4. Increased social differentiation may have other consequences for the legal order. Durkheim, (1960:111) for example, predicted that increased differentiation would lead to a shift from criminal to civil sanctions (from "repressive to restitutive laws"), but not necessarily to increased legal activity.
5. The figures refer to the number of notarial instruments per 1,000 inhabitants.

policy? Available evidence, again from the work of Friedman and Toharia, suggests a disjunction between legal activity and litigation: social and economic development does not necessarily lead to higher rates of litigation. Friedman (1973: 19) suggests that the effect of social development on litigation may be curvilinear. In the early stages of development there may be a marked increase in the litigation rate; but with industrial maturity the litigation rate levels off. As he puts it,

> Traits develop that discourage use of the courts. Costs rise. Delays increase. The number of judges remains static. The system is rationalized and "improved"; nonetheless, it remains remote and foreign to the average citizen—and to the average *potential* litigant. The volume of legal transactions increases rapidly. But the rate of litigation is static or declining.

Friedman presents data from England which seem to support his argument. These data show that litigation has, for most of this century, remained static even as the population has grown rapidly.

Toharia presents a detailed and convincing picture of the way in which economic development has different effects on legal activity and litigation. In Spain, in spite of the dramatic increase in legal activity, the litigation rate "has remained remarkably constant and at a relatively low rate . . . the process of economic change does not seem to have affected the rate of litigation . . ." (Toharia, 1973: 14). When he disaggregates and considers the relationship in individual provinces he concludes (1973: 15) that,

> . . . the process of economic growth does not seem to find any significant reflection in the flow of judicial activity in those provinces which constitute the most advanced contexts of the country . . . , which show a practically constant ratio of cases brought to Courts. On the other hand, in those provinces which seem to have entered a phase of economic take-off . . . the process of growth seems to have a sizeable reflection in the flux of cases going to the Courts.

This suggests that early phases of industrial development will be accompanied by higher rates of litigation, but that increases will cease as a point is reached where there is simply more to be gained by continuing the economic relationships which litigation might disrupt. Economically advanced societies may develop alternatives to litigation which impose fewer social and economic costs (Sarat and Grossman, 1975: 14-18).

Studies of the social context of litigation suggest the following hypotheses. First, the litigation rate will be higher in more developed societies than in less developed societies. Second, development leads to an increase in legal activity, without a corresponding increase in the litigation rate. Finally, within any society the effect of social change and social development on liti-

gation will not be uniform, but will reflect internal variations in the pattern of development. Although the limitations of our data do not permit us to test these hypotheses fully, we hope to contribute to an understanding of the way in which social, economic and political variables influence the patterning of litigation in at least one court system.

The Political Factor

Litigation is political in the sense that the very act of involving the formal, public authority of the courts in dispute resolution inescapably is part of the political process and likely to have important political consequences. Litigation is a form of political participation even if the individual who enters the judicial arena is not fully cognizant of the political ramifications of his act. Although individual motivation in such matters may be more situation specific than broadly political, the decision to litigate may be influenced by key political variables. For example, whether participation in public affairs is encouraged in a society and whether the organization of political institutions facilitates such participation may be important determinants of the rate at which citizens "consume" the services which courts provide (Grossman and Sarat, 1971).

Political cultures which encourage participation in politics are often characterized as "modern;" those which discourage public participation are often labeled "traditional" (Elazar, 1966). In "modern cultures" we expect that there will be a higher litigation rate; "traditional cultures," on the other hand, characterized by a reluctance to acknowledge publicly the existence of conflict and by a parallel emphasis on private dispute resolution, should display a lower litigation rate. Herbert Jacob (1969: 92) has observed that in more traditional political cultures,

> . . . there is greater reliance on private dispute settling processes . . . . people will make greater efforts to negotiate settlements between themselves . . . because they feel they know one another on a personal footing, they have greater opportunity to settle conflicts within the confines of established personal relationships.

Yet there are two reasons to consider seriously the converse hypothesis that higher litigation rates will be found closer to the traditional than to the modern end of the political culture continuum. First, if litigation is a form of political participation it is generally privatized and indivdualized in form. At least in theory, litigation does not require the building of coalitions, alliances and the attraction of public support which is character-

istic of other forms of participation and competition.[6] As a result, it may not be as incompatible with the norms of a "traditional culture" as we once suggested (Grossman and Sarat, 1971). Second, litigation may be an alternative to "orthodox" political participation and hence an inverse relationship would be expected.[7]

A critical problem with this "political" explanation is its overlap with the social development theory which we discussed above. One would expect a relationship between social and economic development, and political modernity. Therefore, in studying these influences, it is necessary to determine if the relationship of political factors to litigation rates persists when we control for the impact of social and economic development.

THE DATA

We have utilized three major types of data in this study. First, to serve as a rough indicator of levels of legal activity we have constructed a simple ratio of lawyers to the general population. (This choice is explained below.) On both a state and national basis the number of lawyers was recorded at ten year intervals, from 1900 to 1970. Data on the incidence of lawyers is drawn from the Census Bureau Reports, as is Population data.[8]

We have used two indices of litigation—total civil cases and total private civil cases filed in the United States District Courts at ten year intervals, from 1902 to 1972. (This data comes from the Annual Reports of the Administrative Office of the Federal Courts, and from the Attorney General's Reports for the years before 1942.[9]) To facilitate analysis of the social, economic and political influences on litigation we have aggregated district court data to the state level. For any category and reporting year,

6. A considerable body of literature suggests that litigation may be dependent precisely on the same strategies of coalition and alliance building as are other types of political participation (e.g., Vose, 1959, 1972 and Handler, 1974).
7. Jacob's study of bankruptcy and garnishment litigation in four Wisconsin cities supports the hypothesis that low rates of litigation are associated with traditional political cultures (Jacob, 1969: Ch. 6). But bankruptcy and garnishment cases may not be as good a measure of the litigiousness of a community as they are a surrogate measure of traditionalism. One would expect bankruptcy rates to rise in a culture overtaken by mass merchandising and impersonal buyer-seller relationships.
8. We have relied on Census Bureau figures on the incidence of lawyers because they provided the most consistent data over the period of our study. Martindale-Hubbell uniformly reports higher totals, but these are available only since 1940.
9. We recognize, as have others, that federal court statistics may be inaccurate, particularly for the early years of our study (American Law Institute, 1934: 29).

the litigation reported for a state is the total number of cases filed in all of the federal district courts in that state. Alaska, Hawaii, the District of Columbia, and all territorial courts are excluded from our cross-sectional comparisons. In this paper we refer both to litigation and to litigation rate. The former consists of raw totals. Litigation *rate*, on which we rely primarily, is a ratio of litigation to population, expressed as the number of cases per 100,000 population. Thus, a litigation rate of 19.9 indicates that many cases for every 100,000 persons.[10]

In carrying out our analysis of social, economic and political influences on litigation, we rely on federal court case filings because comparable data from state courts simply are not available. Not every state compiles such data, even today. And only a few states compiled such data prior to 1950. One of our main goals was to observe the longitudinal development of litigation, and this could be done only with federal data.

The use of *either* federal or state court data presents problems of interpretation. It is likely, for example, that litigation in the federal courts involves greater stakes, which may imply something about the organization and resources of the parties. Almost certainly the issues are likely to be more complex, and the involvement of "repeat players" is greater.[11] Federal courts are generally less proximate to individuals and to community norms. The studies from which we draw our major hypotheses, by Friedman, Toharia and Jacob, relate mostly to "primary" courts with strong local ties. Federal courts, on the other hand, while not without such ties, may reflect less a local than a national legal culture.[12] Furthermore, the relationship between litigation in local and national court systems is difficult to determine and is complicated by the prevalence of "forum shopping," the attempt by litigants to locate and structure their cases to conform to rules governing access to courts of different types with different jurisdictions and different procedural rules. Thus, our research may be less useful in corroborating these hypotheses

10. Except for descriptive purposes we do not rely on raw litigation figures in this paper, primarily because the correlation between litigation in the federal courts and population is so high as to indicate almost total dependence. We are seeking to test the effect of other variables.

11. The term "repeat players," as opposed to "one-shotters," is used by Marc Galanter (1974) to refer to frequent litigants. He suggests that advantages which come with repeated litigation may increase the propensity for further recourse to the courts.

12. Although, if Richardson and Vines (1970:45) are correct in observing that federal judicial constituencies "reflect the distinctive characteristics of state political and social systems," then our basis for generalization is enhanced.

than in demonstrating their limitations when applied to the more complex processes of the federal courts. Our study also does not permit us to consider the interaction between federal and state courts in a particular locality. We have no doubt that some of the distinct variations in federal court data are traceable to this interaction. For example, substantial differences in the diversity of citizenship caseload in different federal districts might be attributable more to the vagaries of state law than to the economic and political variables which we are testing.

We do not claim that parallel results would be obtained from state court data. But the hypotheses generated in this study might well be tested with state court data in those states where it is available. We recognize the limits imposed by our reliance on federal data, but there are some positive advantages to relying exclusively on federal cases. They are simply *more* comparable, on a jurisdiction by jurisdiction basis, than would be the case with state or any other kind of data. Even this uniformity is only relative, for within the federal system there may be important local or regional differences in the application of both substantive law and the rules governing access to the federal courts.

The third major source of data for this paper is provided by the work of Richard Hofferbert (1968). Hofferbert has gathered data on the social, economic, cultural and political characteristics of the American states, for the years 1890-1960. (We have added comparable data for 1970.) Included among Hofferbert's measures are percent employed in manufacturing, urbanization, income per capita and two multivariate factors labeled industrialization and cultural enrichment or affluence. We have used such indices in our cross-sectional analyses, and in describing changes in litigation and legal activity. We are interested both in the development of broad, historical trends, and also in a more precise delineation of differences among the states.

THE FINDINGS

Indicators of Legal Activity

We begin our analysis with the simple hypothesis that in the 20th century there would be an increase in the level of legal activity greater than what might be expected from population growth alone. It is not just population growth, but increased economic and social complexity which affects the pace of legal activity. Although the hypothesis is relatively straightforward, justifying our operationalized measure of legal activity is considerably more complex—indeed, controversial. We recognized

that it would be impossible to construct or find a measure as direct as Toharia's (1973:11) index based on notarized documents. It might be possible to construct other indices; some that have been suggested are the number of judges, the volume of statutes and/or court decisions, the number of business licenses, or public expenditures in certain categories. None of these seemed practicable for this study. Nor did any appear to have any greater claim to validly represent the incredible diversity and range of legal activity in the United States.

A lawyer/population ratio therefore was the best available and least inadequate index.[13] Lawyers are not involved in all legal activity, but they play at least an indirect role in almost all significant legal affairs. And data on lawyers was available for the entire period of our study. One weakness of a lawyer based index of legal activity is that the work focus of many lawyers, paralleling the organization of business enterprises, cuts across geographic boundaries: the lawyers practicing in a particular state do not encapsulate the legal business of that state. Also one cannot assume that the prevalence of lawyers is due exclusively to the demand for legal services.[14] But acknowledging these distortions in our index (and others such as the unequal workload of lawyers) it still appears to be the best available indicator of legal business.

Insofar as lawyers are a useful indicator of the level of legal activity in the United States, we expect the ratio of lawyers per 100,000 population to show the following three traits. First, this ratio should increase over time: second, it should show the greatest increase in the most industrialized states. If Toharia (1973: 13) is correct, it is in this most economically developed sector of a society that the volume of legal activity advances most rapidly.[15] As the level of economic development in the United States has risen the amount of legal activity should have increased, and it should have increased most rapidly in the most economically developed states. Third, we expect that states which display the highest levels of economic development (i.e.,

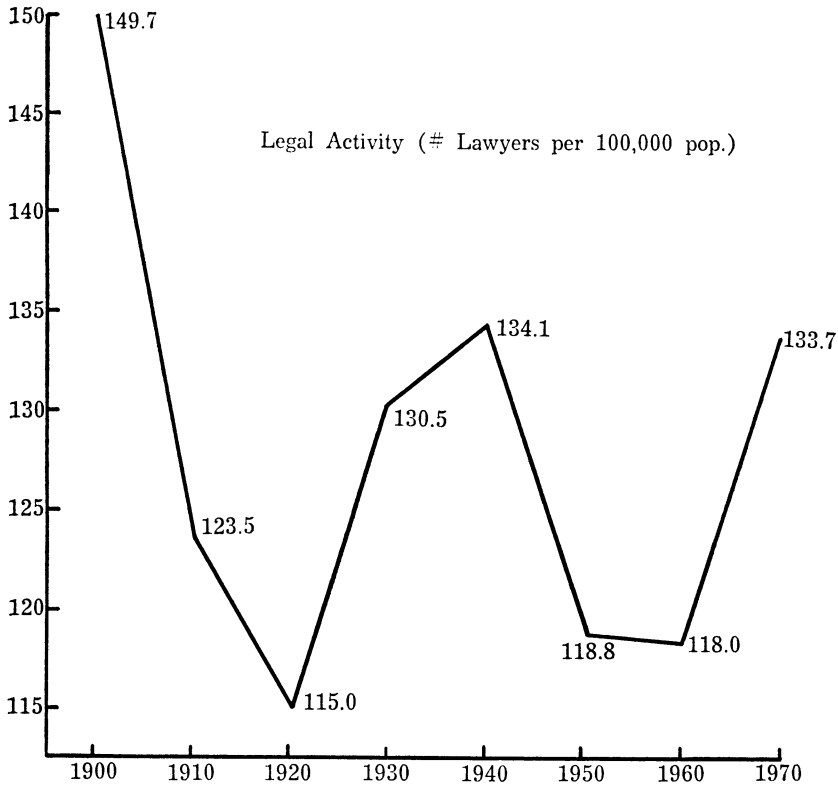
13. In computing both legal activity and litigation rate we have utilized total population figures. In future research it might make sense to exclude nonadults.

14. Our legal activity indicator implicitly assumes a supply and demand model. This assumption has been made by Mayhew and Reiss (1969), but we concede its imperfections. It does not take account of the efforts of the organized bar to control entry into the profession, or to create a favorable balance between lawyers available and law work. Nor does it account for a variety of other social forces which have affected entry into law school and the legal profession.

15. The comparison between Spain and the United States ignores the fact that most or all of the American states would correspond to Toharia's "post-industrial Spain" category.

which are most industrialized and affluent) will have the highest levels of legal activity. Friedman (1973) argues that in these areas the market relations which give rise to increased legal activity should be most advanced; in these areas the functioning of the economy and the pattern of social relationships should be

Figure 1: **Legal Activity in the United States, 1900-1970**



MAGNITUDE OF CHANGES IN LEGAL ACTIVITY		*PERCENT INCREASES IN POPULATION*	
1900-1910	—17.5%	1900-1910	+21.4%
1910-1920	— 6.9%	1910-1920	+15.2%
1920-1930	+13.5%	1920-1930	+15.6%
1930-1940	+ 2.8%	1930-1940	+ 7.6%
1940-1950	—11.4%	1940-1950	+14.6%
1950-1960	— .7%	1950-1960	+18.5%
1960-1970	+13.3%	1960-1970	+13.2%

TOTAL NUMBER OF LAWYERS

1900	113,934
1910	114,118
1920	122,519
1930	160,605
1940	177,643
1950	180,461
1960	212,348
1970	272,446

most conducive to the development and employment of legal forms and procedures to govern the routine transactional activity characteristic of an industrialized economy. We recognize, of course, that state boundaries do not necessarily coincide with natural economic or geographic areas. And, as we have already noted, the work of lawyers is not always confined within their home states.

Figure 1 shows a slight decrease (of 10.7 percent) in the level of legal activity in the United States from 1900 to 1970. During the first two decades of the century, if our measure is accurate, the rate of legal activity declines sharply, by 23.2 percent. This does not indicate an absolute decline in legal activity but a growth in population disproportionate to the growth of the lawyer population. From 1900 to 1920 the population increased by nearly 40 percent; the total number of lawyers also increased, but only by 7.5 percent.[16] After World War I, there is a reversal of this trend and a relatively steady increase in the rate of legal activity. The decade 1940-1950 again shows a decline in our indicator of legal activity, followed by a leveling off in the 1950s and a sharp increase from 1960 to 1970.

The slight overall decrease in legal activity from 1900-1970 is somewhat surprising given the continuing urbanization and industrialization of the United States during that same period. The decline which we have noted may reflect the peculiarities of our measure. The highly irregular character of the development of legal activity from 1900-1970 makes interpretation difficult. For example, while legal activity appears to grow substantially during the post-war period of the 1920s, a roughly comparable period of war and recovery during the 1940s is associated with a downturn in our measure of legal activity. Only the decade of the 1960s, which has, by most accounts, witnessed a striking legalization of many previously private areas of life (Scheingold, 1974), produces an interpretable pattern of growth in nationwide legal activity.

When we look at the development of legal activity in the states over the course of this century, as reflected in Table 1, we find that it has grown only in the most industrialized states.[17] In the others it declined between 25 and 35 percent. We expected

16. This finding of a decline in legal activity may be spurious, caused by the cumulative effects of licensing and law school accreditation requirements. Cf. Hurst (1950: 276-285).

17. By 1900 the United States had passed through its industrial revolution. Subsequent differences among the states in industrialization must be viewed as differences within an advanced industrial economy.

TABLE 1

CHANGES IN LEGAL ACTIVITY (1900-1970) BY STATES, GROUPED BY LEVEL OF INDUSTRIALIZATION IN 1960*

		Legal Activity (Lawyers per 100,000 population)		
		1900	1970	% Increase 1900-1970
I	Most Industrialized	133.8	152.8	+14.2%
II	Industrialized	140.2	106.4	—24.1%
III	Semi-Industrialized	160.1	109.9	—31.4%
IV	Least Industrialized	170.0	109.4	—35.6%

* The quartile groupings were derived from Hofferbert's industrialization factor scores for 1960. They express only relative levels of industrialization. We have relied only on the 1960 scores because changes in rankings of the states from 1900 to 1960 were not significant. Hofferbert himself suggests that over this period ". . . there is a low amount of variation in the infrastructure . . ." of the industrialization factor (1968: 409). The most important instances of instability are found in groups II and III, in the states of Maine, Texas, Vermont, New Hampshire and Florida. Even with these instances of instability, the rank order correlation (Spearman's r) of the industrialization groupings in 1900 and 1960 is .893. The groupings on the industrialization factor are as follows: *Group I*: New Jersey, Connecticut, New York, Massachusetts, Illinois, Pennsylvania, Rhode Island, Delaware, Ohio, California, Michigan, Maryland. *Group II*: Indiana, Wisconsin, Missouri, New Hampshire, Washington, North Carolina, Virginia, Tennessee, Minnesota, Georgia, South Carolina, Louisiana. *Group III*: Iowa, Maine, West Virginia, Oregon, Texas, Vermont, Alabama, Florida, Kentucky, Kansas, Colorado, Utah. *Group IV*: Nebraska, Oklahoma, Mississippi, Arkansas, Arizona, Nevada, Idaho, Montana, New Mexico, South Dakota, Wyoming, North Dakota.

such a growth in legal activity among the most industrialized states, but the decline recorded among the other states is surprising.

When we observe the development of legal activity at ten year intervals, we find several patterns. One of our measures of industrialization, percent employed in manufacturing, shows no significant relationships to legal activity. The pattern for our other industrialization measures—population density, urbanization, farm value and Hofferbert's industrialization factor score—seems clearly to change over time. In the earliest years of our study, no significant relationships appear. Beginning in the 1930s and 1940s we obtain significant and strong positive correlations between these variables and legal activity. Two other variables, property value per capita and income, show, at most time points, statistically significant correlations with legal activity. However, these may be regarded more as measures of affluence than industrialization. The association of affluence and legal activity which is indicated in our data parallels the findings

TABLE 2

CORRELATIONS* BETWEEN SOCIO-ECONOMIC FACTORS AND LEGAL ACTIVITY
1900-1970

	Legal Activity (Lawyers per 100,000 population)							
	1900	1910	1920	1930	1940	1950	1960	1970
% empolyed manufacturing	-.180	-.234	-.130	-.024	.159	.207	.167	.046
Population density (pop. per sq. mile)	-.249	-.151	-.098	.145	.351	.404	.402	.459
Urbanization	.117	.102	.161	.461	.630	.655	.589	.619
Farm value (mean value per acre)	.063	.147	.049	.310	.365	.334	.310	.177
Industrialization factor score	-.220	-.249	-.128	.260	.330	.374	.436	—
Income (per capita personal income)	.708	—	—	.608	.724	.624	.652	.685
Property value per capita	.621	.747	.718	.382	.504	—	.463	.208

* Pearson's R

.000—Those correlations which are underlined are statistically significant. Significant ($\Sigma \leq .05$)

NOTE: For Tables 2, 5 and 6 there are no data available for Income (1910, 1920), Industrialization Factor Score (1970), and Property value (1950).

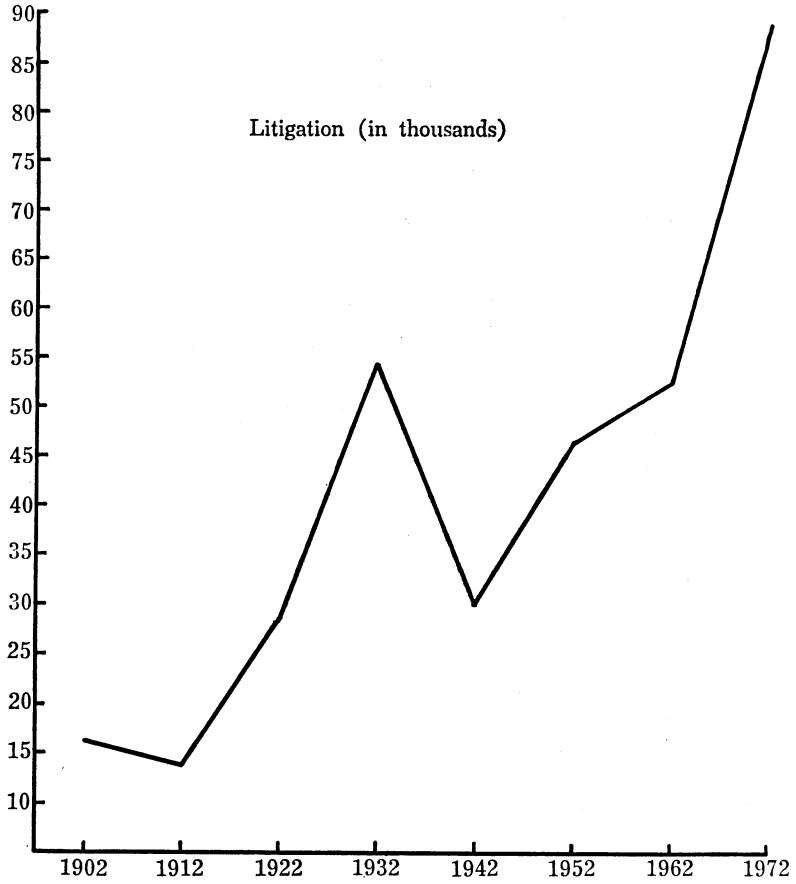
of Mayhew and Reiss (1969). Their survey data, like our income and property measures obtained through aggregate data, reinforce the common wisdom that the legal system is oriented strongly toward the service of wealth and property. As a whole, our findings tend to confirm the hypothesized cross-sectional relationships between legal activity, on the one hand, and affluence and industrialization on the other.

Indicators of Litigation

From 1902 to 1972 there has been a dramatic overall increase in the absolute number of cases filed in the federal district courts, and a relatively smaller increase in the litigation rate.[18] In 1902 there were 19.9 cases filed per 100,000 persons; in 1972 43.9 cases per 100,000, an increase over the period of 120 percent. On the other hand, the absolute number of cases filed rose nearly 500 percent.

18. The volume of civil litigation pending in the federal courts remained quite constant from 1873, when statistics were first recorded, until 1904, when the additional calculation of a category of "cases commenced" was begun (American Law Institute, 1934: 32ff).

Figure 2: **Changes in Litigation in the Federal Courts, 1902-1972**

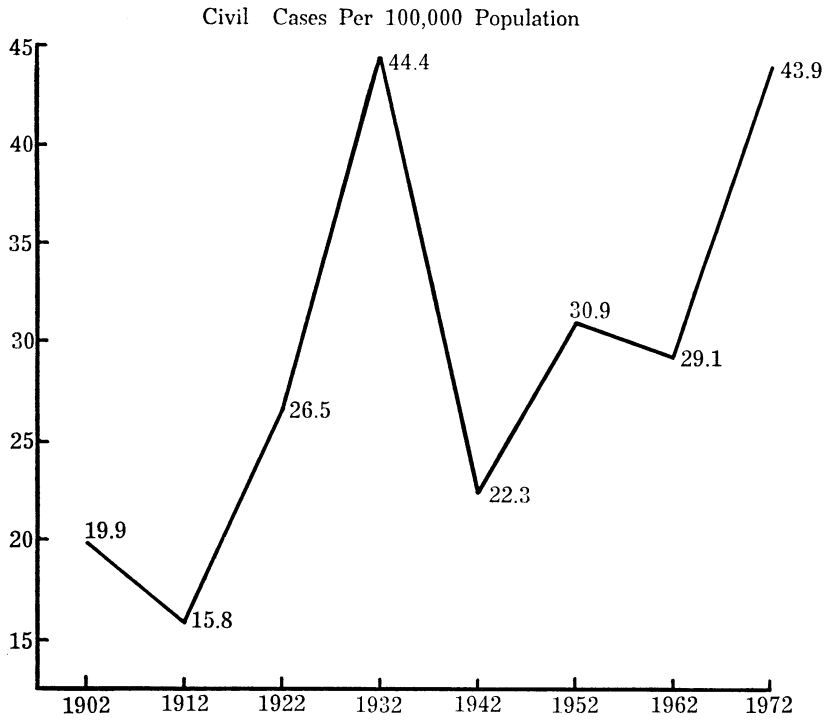


MAGNITUDE OF CHANGES IN LITIGATION RATE

1902-1912	—20.6%
1912-1922	+67.7%
1922-1932	+67.5%
1932-1942	—49.8%
1942-1952	+38.6%
1952-1962	— 5.8%
1962-1972	+50.9%

The observed increases have not been uniform, as shown in Figures 2 and 3, and in Table 3. The largest component of the dramatic increase following World War I was in the category of government cases and reflected the era of Prohibition. In 1920 there were 92 civil liquor cases; by 1932 there were nearly 16,000 (as compared to nearly 14,000 other government cases) (American Law Institute, 1934:37). During this decade the number of government cases rose from 9,455 in 1922 to 33,311 in 1932 while the number of private cases increased by less than 3,000. The end of Prohibition and the Depression brought a reversion to

Figure 3: **Changes in Litigation Rates in the Federal Courts, 1902-1972**



more "normal" litigation rates, followed by another rapid increase following World War II.[19] With the exception of the decade beginning in 1952, both litigation and litigation rates increased, the former at a consistently higher rate. This was true for all cases, and for private and government cases considered separately. Beginning in 1952 private cases began to exceed government cases, reverting to the pattern at the beginning of the century.

19. Frankfurter and Landis (1928:56) assert that the business of the federal courts has come "from the interests that at different periods have been predominant in our national life. The range and intensity of governing political, social and economic forces are accurately reflected in the volume and variety of federal litigation." They also note (1928:230) the similarity between the post Civil War and post World War I increases in litigation in the federal courts. See also the studies by Willard Hurst (1964) and Francis Laurent (1959). Laurent describes the fluctuations in state litigation in one northern Wisconsin county, detailing its relationship to major population, economic and political changes. On the other hand, the Freund Commission Report recently observed, with respect to Supreme Court cases only, that "the lesson of history teaches that, independent of other factors, the number of cases will continue to increase as population grows and the economy expands" (Freund, 1973: 3). Casper and Posner (1974) take issue with this conclusion; they suggest—persuasively—other factors such as expansion of substantive rights and the Court's own policies to account for much of the recent increase in the workload of the Court. We do not suggest that the causes of increased appellate litigation are identical to the causes of litigation at the trial court level, but that there are interesting parallels.

TABLE 3. LITIGATION AND LITIGATION RATES IN THE FEDERAL COURTS, 1902-1972*

	Total Civil Cases				Total Private Cases				Total Government Cases			
YEAR	No. of Cases	Percent Increase Tot. Civil Cases	Litigation Rate	Percent Increase Lit. Rate	No. of Cases	Percent Increase Private Cases	Litigation Rate	Percent Increase Lit. Rate	No. of Cases	Percent Increase Gov't Cases	Litigation Rate	Percent Increase Lit. Rate
1902	15,137**		19.9		10,958**		14.4		4,173**		5.5	
1912	14,611	-3.5%	15.8	-20.6%	10,670	-2.6%	11.5	-20.1%	3,941	-5.6%	4.3	-21.8%
1922	28,239	93.3%	26.5	67.7%	18,784	76.0%	17.6	53.0%	9,455	139.9%	8.9	106.9%
1932	54,665	93.6%	44.4	67.5%	21,354	13.7%	17.3	-1.7%	33,311	252.3%	27.1	204.5%
1942	29,592	-45.9%	22.3	-49.8%	13,630	-36.2%	10.3	-40.5%	15,962	-52.1%	12.0	-55.7%
1952	46,994	58.8%	30.9	38.6%	24,978	83.3%	16.4	59.2%	22,016	37.9%	14.5	20.8%
1962	52,461	11.6%	29.1	-5.8%	33,514	34.2%	18.6	13.4%	18,947	-13.9%	10.5	-27.6%
1972	89,365	70.3%	43.9	50.9%	64,316	91.9%	31.6	69.9%	25,049	32.2%	12.3	17.1%
	Increase in Litigation, 1902-1972: 490 percent.				Increase in Litigation, 1902-1972: 487 percent.				Increase in Litigation, 1902-1972: 500 percent.			
	Increase in Litigation Rate, 1902-1972: 120 percent.				Increase in Litigation Rate, 1902-1972: 119 percent.				Increase in Litigation Rate, 1902-1972: 123 percent			

* Excluding Alaska, Hawaii, the District of Columbia and Territorial Courts, and Bankruptcy cases.
** The litigation figures for 1902 are close approximations, since for that year the reports show only government cases *pending* instead of government cases filed.

Table 3 shows that private cases have increased over the whole period of this study by approximately the same percentage as cases involving the government. There have been, of course, fluctuations in the make-up of these broad categories. Recent decades have witnessed increases in personal rights cases, reflecting the rapid and continuing expansion of rights defined and protected by federal law and the federal courts (Freund, 1973). Substantive and procedural changes in the law, such as the provision of lawyers to indigents and the rise of class actions suits, as well as the increase of groups committed to achieving social change through the courts[20] have invited and promoted this increase in both litigation and litigation rates.

This brief glimpse of the development of federal litigation in the United States contrasts with what we know about the development of litigation in at least two other nations, England and Spain. There, the litigation rate has remained relatively stable over approximately the same period of time. Exact comparisons are difficult in the absence of strictly comparable data. We can be reasonably certain at least that the growth in litigation in the federal courts is *not* substantially due to the increase in tasks of "routine administration" which, according to Lawrence Friedman, (1973:19) have increasingly clogged the dockets and defined the function of state trial courts. Perhaps the rise of government activity and the development of a litigious personal rights consciousness account for some of this growth.

We expected a positive correlation between litigation rates in the federal courts and industrialization. Using the division of the states, by level of industrialization, employed in Table 1, we found that the most highly industrialized states did not have the highest litigation rates.[21] Nor did they demonstrate the highest rates of litigation rate growth. In 1972, for example, the most industrialized states had the lowest litigation rates in all categories, although they showed moderately high rates of increase in litigation rates from 1912 to 1972. The greatest increase in total civil litigation is in the Category II states. The impact of industrialization on litigation displays a curvilinear form. Growth in litigation rates moves from lowest to highest in a steady progression as one moves from Category IV to Category II states, and declines somewhat in the most industrialized states.

20. A good recent account of the importance of such strategies can be found in Handler (1974).

21. In fact, litigation rates among the most industrialized states in 1972 range from a high of 71.7 cases per 100,000 persons in Massachusetts to a low of 25.0 cases per 100,000 persons in Connecticut.

TABLE 4

CHANGES IN MEAN LITIGATION RATE, 1912-1972, BY STATES GROUPED BY LEVEL OF INDUSTRIALIZATION*

States by Level of Industrialization	Mean Litigation Rate: Total Civil Cases (# of Cases per 100,000 Pop.)			Mean Litigation Rate: Private Cases (# of Cases per 100,000 Pop.)			Mean Litigation Rate: Government Cases (# of Cases per 100,000 Pop.)		
	1912	1972	% Increase	1912	1972	% Increase	1912	1972	% Increase
I Most Industrialized	14.5	37.9	161.4%	11.1	28.4	155.9%	3.4	10.4	206.0%
II Industrialized	15.0	51.1	241.0%	10.2	35.8	250.0%	4.9	14.6	198.0%
III Semi-Industrialized	17.3	46.4	168.0%	15.3	31.2	104.0%	3.6	13.7	281.0%
IV Least Industrialized	20.9	47.6	128.0%	12.4	31.2	152.0%	8.1	16.5	104.0%

* As defined in Table 1.

NOTE: For this table we are using 1912 instead of 1902 as a base year, owing to the imprecision of reported data for the earlier year. The mean litigation rate for government cases for 1912 in category II excludes Indiana; in that state there were only 2 reported "government" cases and thus an aberrantly low litigation rate.

The pattern of litigation growth seen here thus seems similar to what Friedman (1973) suggests is to be expected.

Because of the large component of government cases, some bias may be introduced by relying exclusively on total civil cases in relating litigation rate to socio-economic factors. To be sure, the government's use of the courts may also be responsive to economic factors, but perhaps it is not as reflective of cross-sectional differences. Table 4, however, demonstrates that the impact of industrialization is no more in line with our original hypothesis when private cases alone are examined.

The cross-sectional relationships reveal additional complexities, as seen in Tables 5 and 6. Here we report correlations between litigation rate and seven of Hofferbert's socio-economic indicators. Although there is considerable variation in the relationships between these indicators and total civil litigation, most are not statistically significant. The correlations depicted in Table 5 do not reveal a definitive role for industrialization in explaining litigation rates among the states. At some points liti-

TABLE 5

CORRELATIONS* BETWEEN SOCIO-ECONOMIC FACTORS AND LITIGATION RATE (Total Civil Cases) 1902-1972

	Litigation Rate (Cases per 100,000 population)							
	1902	1912	1922	1932	1942	1952	1962	1972
% employed manufacturing	-.201	-.383	-.257	-.305	-.244	-.332	-.293	-.314
Population density (pop. per sq. mile)	-.245	-.258	.008	-.157	-.129	-.112	-.178	-.131
Urbanization	-.045	-.076	.036	-.068	.046	.116	.025	.015
Farm value (mean value per acre of farm)	-.248	-.096	-.123	-.157	-.279	-.270	-.262	.086
Industrialization factor score	-.308	-.348	-.149	-.178	.520	-.218	-.163	—
Income (per capita personal income)	.591	—	—	.065	.213	.149	-.049	-.189
Property value per capita	.665	.419	.282	-.037	-.102	—	-.098	-.179

* Pearson's R

.000—Those correlations which are underlined are statistically significant. Significant ($\Sigma \leq .05$)

https://doi.org/10.2307/3052980 Published online by Cambridge University Press

gation seems significantly higher in less industrialized states, at other points no significant relationships appear. Furthermore, unlike our measure of legal activity, litigation rates generally do not seem to be affected by levels of affluence.

Examining the relationship of industrialization and litigation in private civil cases, we again find correlations that are weak and, for the most part, not statistically significant. Litigation rates in private cases are no higher in the more industrialized states than in less industrialized states.[22] Over time, with a few exceptions, even in cases between two private parties, cases in which the impact of the social and economic factors discussed earlier presumably will be most apparent, industrialization and affluence show little ability to explain differences between the states. Like Herbert Jacob (1969: Chap. 6), we are forced to conclude that, while socio-economic factors may be useful in explaining variations in voting turnout or state budget expenditures, they may play only a secondary role in explaining litigation rates in the federal courts.

Jacob then suggested, as we have already noted, that political culture variables might provide an explanation. Specifically he

TABLE 6

CORRELATIONS* BETWEEN SOCIO-ECONOMIC FACTORS AND LITGATION RATE (Private Cases) 1902-1972

	Litigation Rate (Cases per 100,000 population)							
	1902	1912	1922	1932	1942	1952	1962	1972
% employed manufacturing	-.143	-.078	-.167	-.226	-.102	-.144	-.128	-.174
Population density (pop. per sq. mile)	-.239	-.052	.028	-.160	.010	-.037	-.082	-.060
Urbanization	-.062	-.166	.082	-.012	.211	.211	-.003	.003
Farm value (mean value per acre of farm)	-.304	-.085	-.108	.062	-.107	-.170	-.152	-.040
Industrialization factor score	-.296	-.035	-.081	-.097	.338	-.034	-.018	—
Income (per capita personal income)	.570	—	—	.121	.233	.081	-.031	-.147
Property value per capita	.631	-.158	.289	-.151	.028	—	-.115	-.150

* Pearson's R

.000—Those correlations which are underlined are statistically significant. Significant ($\Sigma \leq .05$)

22. Atkins and Glick (1974) note a similar relationship in their analysis of private cases in state supreme courts. In fact, they suggest (1974:20) that more private cases are decided in state supreme courts serving *less* industrialized states.

hypothesized that in traditional cultures, litigation rates would be low.[23] Using two common "indicators" of political culture—level of interparty competition and turnout in gubernatorial elections—we find no support for Jacob's hypothesis. As shown in Table 7, in most of the years encompassed by our study, neither

TABLE 7

CORRELATIONS* BETWEEN (SURROGATE) POLITICAL CULTURE MEASURES AND LITIGATION RATE (Total Civil Cases) 1902-1972

	Litigation Rate (Cases per 100,000 population)							
	1902	1912	1922	1932	1942	1952	1962	1972
Index of competitiveness gov. elect.**	.197	.228	-.021	.079	-.190	-.076	-.596	.060
Turnout gov. elect.**	-.041	.044	-.214	.150	-.279	-.017	-.522	-.275

* Pearson's R

** We are using Hofferbert's measure of gubernatorial elections which is based on the most recent previous election.

.000—Those correlations which are underlined are statistically significant. Significant ($\Sigma \leq .05$)

of these indicators displayed significant correlations with our measure of litigation rate. More than half of the correlations are negative, but most are weak and only two are statistically significant. Only in 1962 do political variables appear important. In that year, litigation rates were higher in states characterized by lower levels of political participation and competition, states which we would label "traditional" in their political cultures. For the most part, however, litigation in the federal courts shows only the most tenuous relationships with our political culture variables. These results must be regarded as inconclusive. Our earlier stated alternative hypothesis that litigiousness might well be found in more traditional cultures is neither proved nor disproved. Further testing will be required to determine if, in more traditional cultures, litigation functions as an alternative and more privatized form of political participation.

For both 1962 and 1972, the years in which the negative correlations between political culture and litigation were strongest, we computed regression equations in which one culture variable, turnout, and one dimension of industrialization (the dimension with the consistently highest factor loading, percent employed in manufacturing, were entered as independent variables and

23. Political culture is a difficult concept to operationalize. It is common to utilize surrogate variables, such as turnout and party competition, a practice we have followed in this study.

litigation rate as a dependent variable. For 1962 only the industrialization variable remains significantly associated with litigation, and they are again inversely related. In 1972, on the other hand, both variables are significantly related to litigation rate, both again in a negative direction. Litigation rates in the

TABLE 8

REGRESSION EQUATIONS
INDUSTRIALIZATION,
TURNOUT AND LITIGATION RATE
(Total Civil Cases) 1962 & 1972

	Zero Order	Partial	Standardized Regression Coefficient	T-value 33 D.F.	Significance
			1962		
*Turnout	-.522	.037	.035	.2144	n.s.
*% employed manufacturing	-.293	-.364	-.367	-2.2464	.031
			1972		
*Turnout	-.275	-.326	-.310	5.3369	.025
*% employed manufacturing	-.314	-.358	-.346	6.6118	.013

* The zero order correlations between the two independent variables for 1962 is .084; for 1972 it is -.105. Neither is statistically significant.

federal courts in that year are highest in states both low in their level of industrialization and traditional in their political culture.

SUMMARY AND CONCLUSIONS

We began this inquiry with what we believed were a set of well established hypotheses. (See above, pp. 000) However, few of our expectations were confirmed. For example, only in the Category I (high industrialization) states did *both* legal activity and litigation increase over time; furthermore, while Category I states experienced such increases, their rate of increase on both our legal activity and litigation measures was not, as we had expected, higher than the rate of increase among other groups of states. In the remaining categories of states we found a decline in legal activity *and* an increase in litigation. Neither of these patterns is consistent with what Toharia found in Spain and what Friedman argues is the case in Great Britain.

It is difficut to explain why we found that legal activity has declined in most parts of the United States. What we know of current trends toward legalization points toward a contrary conclusion. During the 70 years covered by our study, the growth in the number of lawyers has not kept pace with the

growth in population; the result is a decline in the level of legal activity as we have measured it. At the same time, there appears to have been a narrowing of the gap between legal activity and litigation. More legal business ends up in federal court at present than was the case at the beginning of this century, and this increase cannot be accounted for exclusively by population growth (Rathjen, 1974). We have no way to estimate what proportion of the legal business in a society is litigated. The causes of an increased federal litigation rate are thus not entirely clear. Certainly one possible explanation is an increase in litigiousness. Another may be a rise in the complexity and range of potentially conflictual problems which are perceived to require some form of legal action.

Industrialization is a useful predictor of levels of legal activity but not of litigation rates; legal activity but not litigation rates appears to be greater in more industrialized areas. The most industrialized and economically developed states have experienced more rapid growth in legal activity but not in litigation. States lower in their level of industrialization appear to be somewhat more litigious. In all of our data we find considerable temporal variance which should serve as a caution against exclusive reliance on cross-sectional analysis of legal activity and litigation.

The counter intuitive nature of our findings suggests the need to identify the conditions under which the original hypotheses might be expected to hold. Precise measures of industrial growth, rather than levels of industrialization, ought to be obtained for all states. And certainly a more precise specification of political culture—or perhaps "legal culture"—variables is required. Data on individual dispositions to litigate are also needed. The degree to which decisions to litigate are situation specific, or related to a wider range of attitudes toward, and contacts with, the legal system, remains largely unexplored.[24]

Differences in the litigiousness of ethnic or economic subcultures which cut across jurisdictional lines also deserves attention. We have no data on subcultural patterns as such, but there are some data which point to the potential importance of such factors. For example the correlations between litigation rate and Hofferbert's index of percent Negro move from a moderate in-

24. Zeisel, Kalven and Buchholz have suggested differences in "claims consciousness" to explain the substantial variations between Detroit and Chicago in tort litigation claims (1959: chapter 20). We are aware of no subsequent attempt to operationalize this concept, or to explain it except by reference to the political culture variables that we have already described.

verse relationship in 1902 (-.235), in an almost perfect progression to a strong positive correlation of .419 in 1972. We also found a set of correlations, between litigation rate and percent foreign born, which moved in precisely the opposite direction, from a moderate positive correlation in 1902 (.312) to a moderate negative relationship in 1972 (-.277). This parallels the decline in foreign born citizens in our population, and development of more accepting attitudes toward those not born on American soil. This progression suggests an association between ethnic heterogeneity and litigation.[25] Perhaps such an association depends on the assimilative aspirations and/or cohesiveness of an ethnic group, as well as on the degree of acceptance of minorities by dominant groups.[26]

A number of other factors should also be considered in future efforts to understand the phenomenon of litigation. One is the influence which the very presence of a court may have in stimulating litigation. If this factor is important, then any study which relies wholly on federal court data would be biased in an important way. State courts are much more numerous, geographically proximate, and more accessible to a larger part of our population. Perhaps they are also somewhat less forbidding and more inviting. We do not know, but we might speculate that sheer accessibility of courts in a physical and psychological sense is an important determinant of litigation.

At the beginning of the paper we mentioned the importance of substantive and procedural law, and particularly changes in the law, in either promoting or impeding litigation. A recent study by the Federal Judicial Center suggests, for instance, that specific changes in federal law, by the courts or by the Congress, are strongly connected with ensuing changes in the pattern of cases litigated (FJC, 1972). That such changes in the law are, at least in theory, uniformly applied in all federal courts, may help to account for the relative unimportance of external, environmental factors which we have reported in this paper.

We regard the findings reported in this paper as tentative but not wholly speculative. Even though they are an inadequate

25. Trans-ethnic hostility may affect perceptions of legitimacy and diminish frequency of resort to official adjudicative institutions. Cf. Doo (1973); Sarat and Grossman (1975).

26. Since our focus in this study is on characteristics of states as independent variables to explain litigation rates, we can only infer that concentration of Negroes may in some way contribute to, or reflect, conditions conducive to litigation. The absolute number of Negroes involved would be too small by itself to account for major changes in litigation frequency. Distinctive legal attitudes and differential reliance on the legal system is to be expected among the poor, Negroes, and other stigmatized minority groups (Sykes, 1969).

base for firm generalizations, we hope they advance our understanding of the phenomenon of litigation. The problems we have encountered in defining such variables as political culture, legal activity, and even litigation itself, should be instructive to others. Important breakthroughs will probably come only when we can define these concepts more precisely and when we can examine the ways in which decisions to go to court are made and put into practice by individual actors.

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