CONNECTING LITIGATION LEVELS AND LEGAL MOBILIZATION: EXPLAINING INTERSTATE VARIATION IN EMPLOYMENT CIVIL RIGHTS LITIGATION

CHARLES R. EPP

Social science research on civil litigation has concentrated either on explaining variations in aggregate litigation levels or on explaining individual-level mobilization of the law. This article attempts to connect the two approaches by analyzing variations in state-level employment civil rights litigation within a framework based on individual-legal decisionmaking. Because the structure of our court system forces individuals to consider the costs and benefits of pursuing litigation, the model developed here incorporates factors that would affect individuals' cost/benefit decisionmaking with regard to civil rights litigation. The multivariate regression model based on this framework explains, with increasing strength, much of the state-level variation in civil rights litigation levels for the years 1970, 1975, and 1980. Although the framework has certain limitations, it may serve to enhance our understanding of aggregate litigation levels.

I. INTRODUCTION

Two separate and unconnected bodies of research sum up social-scientific understanding of civil litigation. One approach—largely unsuccessful—attempts to explain variations in aggregate litigation levels. The other approach explores factors related to individual-level mobilization of the law. The separation of the two approaches has hindered the development of research, particularly research on aggregate litigation levels. This article attempts to connect the two research agendas by framing an empirical study of interstate variations in employment civil rights litigation within an explicit analytic framework of individual-level mobilization of the law.

The framework assumes that individuals make legal decisions based on the costs and benefits, broadly defined, of those decisions

This article is based on a presentation at the Southwestern Political Science Association annual meeting, March 29–April 1, 1989, Little Rock, Arkansas. I would like to thank C. K. Rowland and Paul Edward Johnson for helpful comments on the development of this research, and Herbert Kritzer and Joel Grossman for helpful comments on an earlier draft.

LAW & SOCIETY REVIEW, Volume 24, Number 1 (1990)

(see Zemans, 1982, 1983; Priest and Klein, 1984). For many legal actors, limited resources demand a heavy emphasis on economic considerations in decisions to invoke the legal process. For others, "costs" and "benefits" need not be so narrowly defined: favorable caselaw that broadens the definition of a right may be sufficiently important to justify much effort and expense. In any case, an analytic framework focusing on rational individual decisions usefully directs research on aggregate litigation levels.

The world, however, is more complex than oversimplified economic models of legal decisionmaking would suggest (Johnson 1980–81: 567–68). The approach developed here attempts to recognize the complexity of the world while at the same time benefiting from the clarity of analysis provided by the analytic tool of rational decisionmaking. Max Weber, himself no friend of sterile formal models, developed an ideal type of rational choice for use as an analytic tool. As Weber emphasized, the benefits of such a tool result not only when the model fits the matter studied but also when it does not fit; the most interesting observations often arise from lack of fit between a conceptual tool and experience (Weber, 1975: 186–91).

The multivariate model based on the conceptual framework developed here explains, with increasing power, much of the interstate variation in Title VII employment civil rights suits for the years 1970, 1975, and 1980. In addition, where the model generates unexpected results, they are interpretable within the framework developed here. Thus the framework is useful not only for explaining variation in litigation levels but also for directing future research aimed at explaining unexpected results found here.

II. LITIGATION LEVELS AND LEGAL DECISIONMAKING

A. Aggregate Litigation Levels

Variations in litigation levels across space and time remain to some extent a puzzle to social scientists. While theoretical scholarship has suggested a variety of hypotheses to explain variations in litigation rates, empirical research has caused most of the hypotheses to be rejected (Munger, 1988; Daniels, 1984, 1982; Grossman and Sarat, 1975; Grossman *et al.*, 1982). Empirical research has been guided variously by structural-functionalist assumptions, political culture assumptions, institutionalist assumptions, and a combination of functionalist and political assumptions. The usual measure of litigation levels is the ratio of the total number of suits filed to the total population. This measure aggregates many different kinds of litigation into one variable, which may unnecessarily muddy the water by mixing distinct phenomena. A variety of such problems have hindered the full development of research on litigation levels.

Some studies have attempted to relate variations in litigation

levels to the broader social and political environment, often loosely employing structural-functionalist assumptions that have their root in Durkheim's social theory (Durkheim, 1984 [1893]; see also Munger, 1988, and Daniels, 1984). This approach relates variations in individual action to variation in broader social structures. The most significant change in such structures, according to the structural-functionalist approach, occurred with the transition from traditional to modern society. The interdependent economy, division of labor, and communication system of modernity posed new problems for law and encouraged different kinds of legal action from these of the more unified, "mechanical," traditional societies (Durkheim, 1984 [1893]). While Durkheim maintained that Western society already had largely undergone this transition from traditional to modern structures, contemporary researchers have used his traditional/modern dichotomy in an attempt to analyze a range of much more minor variations in law and social structures, including rural/urban differences and temporal changes across a few decades. While much might be said for relating legal differences to such differences in social structure, such an analysis remains relatively foreign to the grand theoretical questions of modernization and disenchantment posed by such thinkers as Durkheim and Weber. The structural-functionalist approach is even more foreign to Weber, who continually related analysis of individual action to analysis of social structures, and who steadfastly refused to posit any deterministic relation between the two. Empirical research on litigation levels often raises the broad structural questions that concerned Durkheim and Weber but avoids in varying degrees relating aggregate litigation levels to plausible assumptions about individual-level decisionmaking. Like Durkheim, too many researchers have dropped the individual from their frameworks.

Much of the empirical research on litigation levels has attempted to test the structural-functionalist model. Grossman and Sarat's early effort (1975), which used the states as units of analysis, found no consistent correlations from 1900 to 1970 between socioeconomic and political variables and two measures of "legal activity," aggregate litigation rates and number of lawyers. Daniels (1982), in a related but geographically more limited effort, compared rural and urban litigation in Illinois courts and found some support for the theory that litigation increases with urbanization and population destiny. Heydebrand and Seron (1986) studied the relationship between population density, number of corporations, and extent of government presence with litigation levels at the federal judicial district level, and found consistently positive effects for population density and number of government employees, but mixed effects for number of corporations across the time period (1986: 314–18). These studies suggest that urbanization, population density, and government presence are positively but rela-

tively weakly related to litigation levels. The models, however, explain relatively little variance and some researchers have failed to test alternative explanations (see, e.g., Heydebrand and Seron, 1986).

A study examining the influence of political culture on litigation was no more successful. Grossman *et al.* (1982) used Elazer's typology of political culture to analyze litigation rates in several categories of suits across five regions of the United States, but found no support for their hypotheses regarding the influence of political culture.

Several longitudinal studies also demonstrate no consistent relationship between litigation and the economy and other structural variables. McIntosh's study (1983) of litigation rates in the St. Louis district court over a hundred-year period concluded that "residual court capacity" and political variables influence litigation rates. (Residual court capacity refers to the capacity of the courts to process suits; crowded courts act to lower the rate of litigation (McIntosh, 1983: 999).) Although court capacity seemed important in McIntosh's model, availability of lawyers did not: the relationship between number of attorneys per 1,000 population and the litigation rate was not significant (*ibid.*). Political variables were significant, however. Voter turnout in state legislative elections and litigation rates were negatively related over the period as a whole, while degree of single-party control of the legislature and litigation rates were positively related (*ibid.*). The relationships in the model, however, changed in unexpected ways when the time period was broken down into three shorter periods (1983: 1001).

Some of the longitudinal research has produced apparently contradictory results. Litigation seems to increase in periods of decreasing voter turnout and increasing single-party domination of the legislature (McIntosh, 1983) but litigation also seems to increase as a country democratizes (Giles and Lancaster, 1989). Giles and Lancaster (1989) examined the relationship in Spain between litigation rates, socioeconomic development, and degree of political democratization over the transition period to Spanish democracy, and found a positive relationship across time between measures of socioeconomic development and democracy and litigation rates.

In sum, the research on aggregate litigation rates remains inconclusive. Important theoretical questions have been raised regarding the relationship between the law and social structures, but questions relating to individual decisionmaking generally have not received explicit formulation. The research on U.S. litigation has led either to rejections of hypotheses or to confirmation of contradictory hypotheses. Based on such a record, Daniels (1984) suggests abandoning the grand theoretical research driven by structural-functionalism in favor of research aimed at understanding the relationship between courts and their environment in particular, local court systems. Krislov (1983) has gone further, sug-

gesting that research on variations in litigation levels should be abandoned entirely. Social science research on litigation might benefit from Zemans's advice (1983: 700) to recognize differences between types of litigation. The results of Stookey (1986), Munger (1986), and Daniels (1985) suggest the value of recognizing these differences: disaggregating litigation levels into meaningful types enhances our ability to interpret and understand variations in litigation levels. In this article I show how research on a particular type of litigation can prove more fruitful than research on litigation in the aggregate, and that we need not yet abandon cross-sectional, nationwide studies on litigation.

B. Individual-Level Mobilization of the Law

While researchers on aggregate litigation levels often approvingly quote Donald Black's (1973) reminder that courts depend on citizen initiation to function, very few go on to incorporate assumptions about individual action in their theoretical frameworks (McIntosh, 1983, is a notable exception). Some research and theory on individual-level decisions may prove useful for developing such connections.

The literature on individuals' decisions to litigate generally recognizes that costs in time and money constrain such decisions. The emphasis on costs appears most markedly in the "legal needs" literature, which argues that the structure of the U.S. legal system limits access by the poor and minorities (see, e.g., Carlin and Howard, 1965). As Zemans notes, this literature tends to assume a certain "objectivity" of needs rather than defining legal needs in relation to the state of the law and the interests of the individual (1982: 990–92; see also Mayhew, 1975: 404–9).

A second approach, the dispute-processing approach, has accumulated valuable descriptive statistics on the factors related to variations in levels of "disputes" (disagreements that are potentially litigable), based on surveys of households (see, e.g., Miller and Sarat, 1980–81). The results of such studies usefully describe the correlates of variations in dispute levels. The descriptive statistics in themselves, however, do not increase our understanding of plausible individual-level reasons for taking "disputes" to court.

That the notion of "legal needs" is thoroughly problematic is clarified by a third approach to mobilization of the law, which focuses on individual legal decisionmaking within a broader social and legal context (see Mayhew, 1975; Zemans, 1982). Legal needs, or "demand," should be defined interactively in relation to expected legal outcomes, or "supply" (Zemans, 1982: 992–95), and both can be understood in the context of shared definitions of rights (Mayhew, 1975: 409; see also Felstiner *et al.*, 1980–81). "Demand" and "supply" need not be defined in narrow economic terms, however. People and organizations may have a variety of

reasons for mobilizing the law, from securing favorable economic outcomes to developing favorable precedents for future litigation. The demand-supply approach to mobilization of the law is an analytic framework that focuses attention on the individual and his or her reasons for filing a suit (Zemans, 1982: 992–95). The framework is capable of incorporating the very constraints that are central to the analysis put forward by the legal needs approach.

Zemans outlines the influences of six variables on legal decisionmaking. First, laws declare what rights the state guarantees and under what conditions state power can be invoked (1982: 1006). Individuals develop their decisions about litigation, and their conceptions of the rights to which they are entitled, through interaction between their own interests and the official definitions of such rights formalized in the law. Second, like laws, community and reference group norms influence individuals' perceptions of offenses and decisions about what responses are appropriate (*ibid.*, pp. 1007–9). Third, rights consciousness influences individuals' degree of concern with and willingness to assert their rights. In addition, "rights consciousness may help explain why many cases are pursued even when the cost of doing so exceeds the potential economic gain" (*ibid.*, p. 1009). Fourth, while socioeconomic status generally is taken to be positively related to access to legal services, rights consciousness, and legal competence, research shows that its influence is more complex. the influence of socioeconomic status seems to be issue-specific in legal matters (*ibid.*, pp. 1014–16). Fifth, expectations of success influence the decisionmaking process: "the greater the expectation of success, the more likely the pursuance of a case" (*ibid.*, p. 1020). Finally, the costs of both taking action and not taking action influence legal decisions. Not taking legal action involves costs just as taking legal action involves costs. Costs include time and social considerations (loss of friends or harassment) as well as monetary costs (*ibid.*, pp. 1022–28).

Supply factors and demand factors interact to shape the substance of each influence in this framework. Rights consciousness develops in conjunction with the development and clarity of legally enforceable rights. Expected outcomes are defined in terms of the clarity and calculability of the law. The clarity and reliability of the law, in turn, evolves through the pressures placed on it by citizens litigating their demands. Costs of litigation are understood in relation to clarity of the law, degree of expected opposition, and availability of legal assistance.

Several structural characteristics of the legal system play particularly important roles in structuring perceptions, costs and benefits, and the decision to litigate. First, lawyers act as gatekeepers to the court system; their number in proportion to the general population, the costs of using their services, and their willingness to take different kinds of cases influence what issues are litigated

(*ibid.*, p. 1051). Second, several general legal rules structure litigation. Rules defining the limitations of class action suits, for example, structure the pace and type of litigation (*ibid.*, pp. 1062ff). As Zemans notes, "that these rules themselves may be, and indeed often have been, the subject of litigation reflects broad cognizance of their substantial impact on the flow of cases into the courts and by implication on the claims for which the law can be effectively mobilized" (*ibid.*, pp. 1062–63).

While the cost/benefit approach usefully directs attention to individual legal decisionmaking, any research based on this approach must recognize that it is only one among several possible analytic frameworks and that it has its own biases and limitations. Its particular strengths—conceptual clarity and simplicity—prove to be its weaknesses as well. First, the framework is an ideal type—not normatively but conceptually ideal. Actual human action varies considerably from ideal-typical rational action, and this variation is at times systematic. In particular, people do not deploy equal social power or resources, characteristics that vary systematically in American society (the variation occurs most noticeably by race and sex). Particular care, therefore, should be taken to avoid translating a conceptual model like the one employed here into either a presumed description of actual experience or a normative claim. Evidence that action systematically deviates from such a model, however, may inform both description and normative concerns. Second, this approach has limited usefulness for explaining long-term variations in social action as social structures change. Such changes can only be understood within a broad historical context and with the use of broader theoretical perspectives. The approach used here, therefore supplements, but does not supplant, broader historical and theoretical work. Finally, this approach should not be understood to provide normative approval of given levels of litigation. Miller and Sarat found that discrimination grievances are the least likely of a variety of common grievances to be translated into claims for redress (1980–81: 544–45). Whether overall civil rights litigation levels should be lower or higher remains an issue for political and ethical debate.

III. EMPIRICAL RESEARCH WITHIN THE COST/BENEFIT FRAMEWORK: EMPLOYMENT CIVIL RIGHTS LITIGATION

Research on litigation within this framework requires, as a first step, disaggregating litigation into subcategories defined narrowly enough that individual-level assumptions can be framed. Unfortunately, government reports on litigation levels generally aggregate suits into fairly broad categories of law. One exception to this aggregation of data is employment civil rights litigation, on which statistics exist for every year since 1970.

Employment civil rights litigation under Title VII of the Civil Rights Act of 1964 is a useful category of cases on which to begin research. Employment civil rights cases are numerous enough to develop patterns, yet nonetheless constitute a discrete category that is sufficiently narrow to allow construction of plausible individual-level hypotheses. For the year ending June 30, 1980, 5,017 such cases were filed in U.S. district courts (Administrative Office of the United States Courts, 1981). The possible reasons for filing suit under Title VII nonetheless remain very clearly limited and defined in comparison to the possible reasons for filing suit in many broader categories of litigation (contract, for example) or, for that matter, in the broadest "category," aggregate litigation. This study uses multivariate regression to analyze cross-sectional variations in state-level employment civil rights litigation for the years 1970, 1975, and 1980.

The unit of analysis used here is the state. While some have argued that the state is not a meaningful unit for analyzing variation in litigation, several significant problems relate to the other possible unit, the federal judicial district. Most data for independent variables are not available at the federal district level, and many of the arguments against using states (that they are too large, that they wash out variations at more local levels) also apply to judicial districts (some of which, of course, are as large as states). States are used here as the best of a poor lot of choices. The number of employment civil rights cases varies significantly by state; when litigation is expressed as a ratio of cases filed to the relevant employee population per state, much of the variation is eliminated although significant variation remains.

A. Variables and Hypotheses

The dependent variable, litigation level by state, is operationalized in the standard way, as a ratio of the number of lawsuits filed in the relevant population (Lempert, 1978; Grossman and Sarat, 1975; Grossman *et al.*, 1982; McIntosh, 1983).[1] The dependent variable is the number of lawsuits filed per 1,000 minority and female employees subject to Equal Employment Opportunity Commission jurisdiction in each state (employee data obtained

[1] A healthy debate exists regarding the correct use of ratio variables in multiple regression. Firebaugh and Biggs (1985) argue that ratio and nonratio variables should not be used in the same equation; if one variable theoretically should be expressed as a ratio, for example, to population, then all variables in the equation should also be standardized to population and a 1/population term should be included. Kritzer (1990) concludes that ratio variables should be used when they are theoretically meaningful and should not be used when that is not the case. This means that both ratio and nonratio variables should be used in the same equation when doing so is theoretically meaningful. The regression equation used in the research presented here follows Kritzer's position, which is persuasive.

from Equal Employment Opportunity Commission, 1970, 1975, 1980).[2]

The purpose of Title VII is to remedy discrimination in employment on the basis of race, sex, national origin, or religion. Such discrimination may appear in measurable form in several ways. Illegal employment discrimination may take the form of lower pay for minorities and women than for whites and men in the same jobs, or of fewer promotions for minorities and women on companies' job scales. If litigation rates respond to levels and frequency of discrimination, we would predict that higher pay ratios of minorities to whites and women to men would be associated with lower litigation levels (data derived from U.S. Census for 1970 and 1980).[3] A related but distinct hypothesis is that higher ratios of minority to white, and female to male, representation in managerial positions will be associated with lower litigation levels (data from the EEOC for 1970, 1975, 1980).[4] These hypotheses in part reflect narrow economic calculations by potential litigants, but do not necessarily rule out broader factors. These broader factors might include enhancement of self-respect and respect from others, and a rights-consciousness-based desire to advance the position of one's racial or gender group.

While pay and promotional discrimination are plausible explanations for filing employment civil rights suits, other factors may qualify the explanation. Zemans's framework suggested the influ-

---

[2] Total employee population is operationalized as the total number of minority and female employees reported for each state in the Equal Employment Opportunity Commission's *Annual Report.* This figure includes only employees in firms subject to EEOC and Title VII regulations, and thus constitutes the total population of those who can litigate employment discrimination claims under Title VII.

[3] Data for female and male pay and minority and white pay were obtained from the 1970 and 1980 Census reports for each state; 1975 data are an average of that for 1970 and 1980. The variable is operationalized by computing female full-time income as a percentage of male full-time income for each state; the minority/white pay disparity is operationalized in the same way. Data on income of those working full time was used, rather than median income, in order to minimize the influence of factors that are not clearly discriminatory in nature (such as the effects of part-time workers and young workers). Minority pay was operationalized as male black pay, which avoids the double counting of minority and female pay.

[4] Data on the percentage of women, minorities, males, and whites in management positions were taken from the EEOC annual reports for 1970, 1975, and 1980. Promotional discrimination is operationalized as a disparity in representation of females and minorities in managerial positions, as defined by the EEOC. For females, for example, the variable is calculated as the percentage of total employed females who are employed in managerial positions, compared with the percentage of total employed males who are employed in managerial positions. The comparison has been computed as a ratio of female representation to male representation. The minority managerial disparity has been calculated in the same way. (An alternative method of computing the comparison is to calculate it as the difference between male and female representation; this method, however, would calculate a two-point difference equally, whenever it occurs on a percentage scale, from 10 percent to 50 percent.)

ence of several structural constraints on litigation. First, lawyers act as gatekeepers to the courts. For many kinds of litigation, the gatekeeping role may not systematically alter the distribution of cases in the courts, but the situation with civil rights litigation may be unusual. Steel argues that "victims of discrimination frequently must spend a good deal of time hunting for attorneys" since many attorneys will not take civil rights cases (Steel, 1983: 362). In addition, victims of discrimination may be less able than many in the general population to pay average attorneys' fees. Minority and female attorneys are plausibly more sympathetic to complaints of discrimination, and they also are plausibly more willing to devote resources for reasons other than economic return (the "rights-consciousness" factor). We hypothesize, therefore, that higher numbers of minority and female attorneys will be associated with higher levels of employment civil rights litigation (data from the Bureau of the Census, *Census of the Population*, 1970 and 1980).[5]

Court availability, although not mentioned by Zemans, is a second structural variable considered relevant by many researchers. Individuals are less likely to pursue redress through the courts when resolution of the problem is delayed by a clogged docket. McIntosh's (1983) longitudinal study of St. Louis courts found that litigation rates fell as court dockets became more crowded. Thus, we predict here that litigation will be lower where the median time to resolve civil cases is higher (court delay) (data from Administrative Office of the United States Courts, 1970, 1975, and 1980).[6]

Apart from pay and promotion disparity, educational disparity may also affect the appearance of discrimination. American society relates merit to educational attainment (Parsons, 1977: 190–93). Perceptions of discrimination may therefore increase as minority and female individuals' educational attainment more closely approximates or even exceeds that of whites and males. Whereas it may be possible to justify lesser treatment of people with low relative education on the basis of low merit, such treatment is likely to

[5] The female and minority lawyer variable was computed by adding the total number of female lawyers and the total number of male minority lawyers for each state. The variable is expressed as a ratio of total female and minority lawyers to the state population of females and minority males, in thousands.

[6] The data on court delay were obtained from the Annual Reports of the Administrative Office of the U.S. Courts for 1970, 1975, and 1980. Court delay is operationalized as the median number of months to resolve civil suits in a state's federal district courts. This measure is not completely satisfactory because employment civil rights cases constitute only 3 to 4 percent of federal courts' total caseload (Burstein and Monaghan, 1986: 362). Furthermore, there may be substantial variation in the time required to resolve different types of cases: at least one commentator has charged that delaying tactics are an important weapon used by defense attorneys in civil rights cases (Steel, 1983: 363). Nonetheless, some measure of court availability must be included, and the one used here does exhibit substantial variation in median court delays across states.

be understood as discrimination when applied to people with high educational attainment. Our next hypothesis therefore states that as the disparity between the educational attainment of whites and minorities and men and women narrows, litigation will increase (data from the U.S. Census of the Population, 1970 and 1980).[7]

The civil rights movement aimed its reform proposals at the discrimination historically found in the South. The South originally had been home to slavery, which was replaced by Jim Crow laws and other forms of racial discrimination after Reconstruction. While discrimination undoubtedly also existed in the North, the civil rights movement aimed its earliest efforts at the traditionally discriminatory South. Indeed, civil rights litigation may have occurred in the South at rates disproportionate to the level of discrimination found there, relative to the rest of the country. Therefore, we predict that litigation will be higher in the South. The South variable is a dummy variable, with 1 coded for states in the Confederacy, and 0 coded for all others.

These hypotheses exhaust the available data but do not address all the factors deemed most relevant in the analytic framework. In particular, mobilization of the law may depend in addition on the likelihood of at least partial success. Data on plaintiffs' success rates in employment civil rights suits in federal district courts unfortunately are not available. Burstein and Monaghan (1986), in a study of appellate and Supreme Court decisions on equal employment litigation, provide information on the overall success rate of such litigation. First, equal employment litigation increased steadily from 1970 to 1983, which is consistent with an interpretation both that employment discrimination continues to exist and that "past mobilization has been successful enough to encourage further mobilization" (Burstein and Monaghan, 1986: 362–63). Second, for all higher-court suits since 1970, plaintiffs won "somewhat more than half the time" when "winning" includes either monetary return or favorable caselaw development (*ibid.*, pp. 372–74). While these data cannot be used for cross-sectional hypothesis testing, they do suggest that the likelihood of a favorable outcome is considered by employment civil rights litigants.

B. Results

1. Separate Tests for 1970, 1975, and 1980. The strength of the model developed where improves between 1970 and 1980 (Table 1). For 1970, only the female/male managerial ratio is statistically sig-

[7] Data on educational attainment were obtained from the 1970 and 1980 U.S. Census reports for each state; figures for 1975 were computed as a mean of those for 1970 and 1980. Relative educational attainment for females and minorities is operationalized as a ratio of the percentage of each with a college degree or higher to the percentage of males and whites (respectively) with such a degree.

nificant, but it is not in the expected negative direction. Other variables do not approach significance and many are not in expected directions. Obviously the 1970 data do not in any way support the hypotheses advanced here. Plausible reasons for this are discussed in the next section.

Table 1. Explaining Variations in Employment Civil Rights Litigation Levels for 1970, 1975, 1980 ($N=50$)

Variable	Expected Relationship to Litigation	Parameter Estimate (Standard Error) 1970	1975	1980
Intercept		−.456	.161	3.210***
		(.397)	(.685)	(1.170)
Female/male pay ratio	—	.361	−.381	−4.944***
		(.622)	(.933)	(1.479)
Black/white pay ratio	—	.198	.165	−.775*
		(.174)	(.228)	(.447)
Female/male managerial ratio	—	1.594***	.881	−1.182
		(.456)	(.573)	(.949)
Black/white managerial ratio	—	−.255	−.688**	−.010
		(.223)	(.309)	(.008)
Female/male college ratio	+	.079	.149	1.998**
		(.166)	(.276)	(.956)
Black/white college ratio	+	.012	.130	−.217
		(.067)	(.103)	(.183)
Female & minority lawyer availability	+	.255	.196**	(.336)****
		(.249)	(.090)	(.069)
Court delay	—	−.007	−.008	−.010
		(.006)	(.009)	(.011)
South	+	.058	.089	.161
		(.077)	(.080)	(.111)
R^2		.317**	.501****	.572****

* Approaches significance ($p < .10$)
** Significant at .05 level
*** Significant at .01 level
**** Significant at .001 level

The results for 1975 change somewhat from those for 1970. The model fits the data better, explaining about 50 percent of the variation in litigation rates across the states. Only two variables are statistically significant, however. The availability of female and minority lawyers is significant and positively related to litigation, as expected. The black/white managerial ratio is significant and negatively related to litigation, as expected. No other variables are significant, however, although all but the black/white

pay ratio and the female/male managerial ratio are in the expected directions.

The results for 1980 are sharply different from the 1970 and 1975 results. Most of the expected relationships emerge, and the model is modestly powerful, explaining 57 percent of the variation in litigation rates. Four of the nine variables are significant or approach significance at the .05 level, and all have the expected relationship to litigation. Of the remaining variables, only the black/white college ratio is not in the expected direction. Both the female/male pay ratio and the black/white pay ratio are negatively related to litigation, as expected, and the first is significant at the .01 level, while the second approaches significance. The results indicate, on average, that for every percentage point the female to male pay ratio increases, there are almost 5 fewer employment civil rights cases per 1,000 employees—a rather strong relationship. The relationship is not nearly as strong for the black/white pay ratio.[8] The ratio of females with college degrees to males with college degrees also has the expected relationship to litigation and also is significant. On average, for every percentage point the female to male college degree ratio increases, there are almost 2 more employment civil rights cases per 1,000 employees—again a strong relationship. As in the 1975 data, the availability of minority and female lawyers is significant and in the expected (positive) direction; for 1980 the relationship becomes stronger. In 1980, for every additional female or minority lawyer per 1,000 females and minorities in the population there is an increase of .34 employment civil rights suits per 1,000 employees. The relationship is not as strong as the income and education ratios, but the standard error for the lawyer availability variable is very small, so that the effect is statistically significant. Somewhat surprisingly, neither the court delay variable nor the South dummy variable is significant for any of the years, although both variables always exhibit the expected relationships to litigation.[9]

2. Combining the Data for 1970, 1975, and 1980. The relationships between the variables change markedly between 1970 and 1980. Female and minority lawyer availability, the female/male pay ratio, and the female/male college degree ratio variables all

[8] The weakness of the black/white income disparity variables raises troubling questions (see the next section). Although the dependent variable controls for black employee population, it might be argued that the percentage of a state's population that is black would be a more valid control. Therefore, I included that indicator as an independent variable in one analysis; the results were not significantly different.

[9] Although the South dummy variable was never statistically significant, readers might still suspect that the results presented arise primarily from the influence of the South as a distinct region. Therefore, I ran on equation with the southern states removed from the data; the results were not significantly different.

grow in importance across the time period. In the 1980 data, a number of expected relationships suddenly emerge.[10] To determine whether the change across the years is statistically significant, the data were pooled. Two models were constructed, one with dummy variables for 1975 and 1980 and interaction terms for each of the variables in those years, and one without the dummy variables and corresponding interaction terms. The model with the year dummy variables and interaction terms has an R^2 of .74, while the model without those variables has an R^2 of .55. The Chow test for degree of significance of the difference in fit of the two models produced an F value of 5.107, significant at .0001. This means, in short, that the relationships examined change significantly from 1970 to 1980. The change seems to occur between 1975 and 1980: the 1975 dummy variable is not significantly different from the 1970 baseline, while the 1980 dummy variable is significant.

C. Discussion

These findings suggest several important questions. First, why did the relationships between the variables change significantly across the years? Why are expected relationships absent in 1970 but mostly present in 1980? There are several possible explanations. First, the enforcement and case-processing capabilities of the Equal Employment Opportunity Commission were significantly upgraded in several stages between 1970 and 1980 (Burstein, 1985; Bullock and Lamb, 1984), apparently resulting in an increased systematic response to complaints of discrimination by the EEOC. Employment civil rights lawsuits develop in part from EEOC enforcement efforts. This improvement in systematic response may account for some of the increase in importance of the substantive variables over the years studied here.

In addition, between 1970 and 1980 there were substantial changes in the law surrounding Title VII. As cases were resolved over the first years of the law's existence, court rulings began to fall in favor of plaintiffs, and interpretations of the law broadened plaintiffs' rights to collect damages. Some of the most important substantive and procedural issues surrounding the application of the law remained unresolved, however, until the early and even mid-1970s (Belton, 1978: 931–36). Two cases regarded as among the most important for clarifying provisions of Title VII were decided in 1975 and 1976 (*Albermarle Paper Co. v. Moody* (1975) and *Franks v. Bowman Transportation Co.* (1976), respectively; see Belton, 1978: 936). These cases were decided in the plaintiffs' favor, and they were part of civil rights interest groups' strategies

[10] The expected relationships continue through 1985, the last year for which employment civil rights litigation statistics are available, thus strengthening confidence in the model.

to favorably develop the Title VII caselaw. As Zemans argued, the development and clarity of guarantees embodied in law significantly affect individual decisionmaking regarding the costs and benefits of litigation, and therefore often are the focal point of organized reform activity (Zemans, 1982: 1006–7, 1063).

Individuals unsupported by interest group resources may be more willing to file suit as "success" becomes more likely through the development of caselaw. Indeed, such unsupported individuals are filing a higher proportion of employment civil rights suits as time passes (Burstein, 1988: 8). Unsupported individuals could be expected to base their legal decisions on more narrowly defined economic costs and benefits than would public interest groups. Interest groups may have a number of reasons beyond economic returns for litigating, such as development of favorable caselaw (this is consistent with Zemans, 1982: 1003, 1009). While unsupported individuals also may have a number of such noneconomic reasons for litigating, they may well be forced by their own economic situation to give precedence to economic concerns (poor individuals cannot invest scarce resources in such economically risky ventures as litigating to develop favorable caselaw) (see Zemans, 1982: 1009). Thus, the increasing importance of economic variables may be explained partly by the increasing proportion of unsupported individuals litigating discrimination claims for narrowly economic reasons.

The changes between 1970 and 1980 in both the employment civil rights caselaw and the empirical results presented here are consistent with the theory that individual action and law are mutually constitutive (Zemans, 1982; Mayhew, 1975). Law places constraints on individual action: the substance of legal guarantees and the certainty of legal outcomes either encourage or discourage individuals to mobilize the law. But individual action in part constitutes the law. In employment civil rights law, citizen invocation of the law is a primary enforcement mechanism. In a very real sense, citizen action determines the implementation of employment civil rights law. Citizen action also changes the law. The changes in employment civil rights caselaw in the 1970s resulted from civil rights groups' concerted efforts to change the constraints the law placed on action. In turn, litigation patterns changed significantly. The results suggest that by the 1980s, under the new legal constraints, individuals were mobilizing the law generally for reasons related to income disparities. As expected, by 1980 litigation levels were highest where the female/male income disparity was widest.[11]

There are constraints on individual action beyond those im-

[11] These interpretations of the change over time cannot be tested here. They are not, however, inconsistent with the empirical results observed in this study, and they fit within the analytic framework of individual decisionmaking outlined here.

posed by law, however. The availability of minority and female lawyers clearly seems to affect litigation levels. This means either (or both) that nonavailability of such lawyers limits the filing of cases that otherwise would have been filed, or that the availability of such lawyers encourages the filing of cases that otherwise would not have been filed. Likely, as in law, here action and constraints are mutually constitutive.

The results also suggest the existence of a more troubling constraint. Why is the effect of the black/white pay ratio on litigation levels markedly less than the effect of the female/male pay ratio?[12] Past research suggests several starting points for interpretation. First, Miller and Sarat (1980–81: 559) found that blacks report significantly less "success" in discrimination disputes than do whites. Second, in an important book, Bumiller (1989: 99) argues that "the public claim of discrimination, even though one may be certain of the perpetrator's motives, is expressed uneasily because, paradoxically, the words force a person to become a victim in order to assert a right. The ambivalent invocation of the concept of discrimination stultifies legal action." In addition, victims of discrimination often feel that filing suit will bring harmful repercussions to themselves and their families. These observations reemphasize that within the U.S. cultural context, racial minorities may face rejection of their claims more often than women, and may be more affected than women by the stigma of the victim and fear of repercussions. If minorities feel particularly vulnerable in this way, litigation in response to pay disparities may proceed at much lower rates than among women.

Perhaps no analysis of litigation levels can address the kinds of factors that might limit civil rights litigation by minorities. Only a subtle ethnographic method may be able to increase our understanding. Limitations in quantitative data place restrictions on what can be accomplished statistically. The data on civil rights litigation do not include the subcategories of class-action suits and individual suits. Such a breakdown might permit analysis of the vulnerability hypothesis, since class actions could be expected to produce a lower sense of vulnerability than would individual suits.

Finally, if action and constraints are mutually constitutive, then individual action will never precisely match an abstract model of rational action. The model assumes that individual action is "free" when not constrained by structures. But action indirectly if not directly constitutes structures, which in turn constrain future action. People are not in some abstract sense "rational," surrounded by "structures" which constrain otherwise free action. The model of rational action must remain a research tool, limited

[12] For every percentage point increase in the female/male pay ratio, there are almost five fewer employment civil rights cases, compared to less than one fewer cases for the same change in the black/white pay ratio; in addition, the black/white variable is not statistically significant at the .05 level.

in its application by the recognition that action and structures constitute each other.

IV. CONCLUSION

This article has attempted to connect the study of litigation levels with the theory and research on individual-level mobilization of the law, two fields of inquiry which have remained largely divorced in much social science research on law. In addition, the article contributes to a small but growing body of literature on the mobilization of civil rights law. The connection between litigation levels and individual decisionmaking has been at least partly successful: the analytic framework of rational decisionmaking usefully highlights several variables that indeed are statistically significant and explain much of the state-level variation in employment civil rights litigation. The female/male full-time income and level of education ratios emerge as significant influences on civil rights litigation levels, and the availability of minority and female lawyers significantly affects litigation levels, as expected. Court delay, while always exhibiting a dampening effect on litigation levels, never approaches statistical significance.

This study has shown that nationwide research on litigation levels need not be abandoned, although theoretical frameworks for such research must be reconsidered. This research, based on a framework emphasizing individual decisionmaking and structural constraints, has helped clarify the influences on employment civil rights litigation levels. Analytic frameworks are useful not only when their expectations are supported, however. Several of the hypotheses developed here were rejected. Explaining why this is so might lead to useful research on additional constraints in the legal system affecting the flow of civil rights cases. In particular, future research might explore why the black/white pay disparity is only weakly related to variations in litigation levels.

REFERENCES

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1970, 1975, 1980, 1981) *Annual Report of the Director.* Washington, DC: Administrative Office of the United States Courts.

BELTON, Robert (1978) "A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964," 31 *Vanderbilt Law Review* 905.

BLACK, Donald J. (1973) "The Mobilization of Law," 2 *Journal of Legal Studies* 125.

BULLOCK, Charles S. III, and Charles M. LAMB, eds. (1984) *Implementation of Civil Rights Policy.* Monterey, CA: Brooks/Cole Publishing Co.

BUMILLER, Kristin (1988) *The Civil Rights Society: The Social Construction of Victims.* Baltimore: Johns Hopkins University Press.

BUREAU OF THE CENSUS (1970, 1980) *Census of the Population*, 1970 and 1980, Vol. 1: *Characteristics of the Population*, Ch. C, "General Social and

Economic Characteristics." Washington, DC: Government Printing Office.
BURSTEIN, Paul (1988) "Minorities, Women, and the Mobilization of Equal Employment Opportunity Laws." Delivered at the 1988 Annual Meeting of the American Political Science Association.
——— (1985) *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States Since the New Deal.* Chicago: University of Chicago Press.
BURSTEIN, Paul and Kathleen MONAGHAN, (1986) "Equal Employment Opportunity and the Mobilization of Law," 20 *Law & Society Review* 355.
CARLIN, Jerome E., and Jan HOWARD (1965) "Legal Representation and Class Justice," 12 *UCLA Law Review* 381.
DANIELS, Stephen (1985) "Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties," 19 *Law & Society Review* 381.
——— (1984) "Ladders and Bushes: The Problem of Caseloads and Studying Court Activities over Time," 1984 *American Bar Foundation Research Journal* 751.
——— (1982) "Civil Litigation in Illinois Trial Courts: An Exploration of Rural-Urban Differences," 4 *Law & Policy Quarterly* 190.
DURKHEIM, Emile (1984 [1893]) *The Division of Labor in Society.* New York: Free Press.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (1970, 1975, 1980) *Equal Employment Opportunity Report: Job Patterns for Minorities and Women in Industry*, Vol. 1. Washington, DC.
FELSTINER, William L. F., Richard L. ABEL, and Austin SARAT (1980–81) "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . .," 15 *Law & Society Review* 631.
FIREBAUGH, Glenn, and Jack P. GIBBS (1985) "User's Guide to Ratio Variables," 50 *American Sociological Review* 713.
GILES, Michael W., and Thomas D. LANCASTER (1989) "Political Transition, Social Development and Legal Mobilization in Spain," 83 *American Political Science Review* 817.
GROSSMAN, Joel B., and Austin SARAT (1975) "Litigation in the Federal Courts: A Comparative Perspective," 9 *Law & Society Review* 321.
GROSSMAN, Joel B., Austin SARAT, Herbert M. KRITZER, Stephen McDOUGAL, Kristin BUMILLER, and Richard MILLER (1982) "Dimensions of Institutional Participation: Who Uses the Courts, and How?" 44 *Journal of Politics* 86.
HEYDEBRAND, Wolf, and Carroll SERON (1986) "The Rising Demand for Court Services: A Structural Explanation of the Caseload of U.S. District Courts," 11 *Justice System Journal* 303.
JOHNSON, Earl, Jr. (1980–81) "Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions," 15 *Law & Society Review* 567.
KRISLOV, Samuel (1983) "Theoretical Perspectives on Caseload Studies: A Critique and Beginning," in Keith O. Boyum and Lynn Mather (eds.), *Empirical Theories about Courts.* New York: Longmans.
KRITZER, Herbert M. (1990) "Substance and Method in the Use of Ratio Variables, or the Spurious Nature of Spurious Correlation?" 52 *Journal of Politics* 243.
LEMPERT, Richard (1978) "More Tales of Two Courts: Exploring Changes in the Dispute Settlement Function of Trial Courts," 13 *Law & Society Review* 91.
——— (1976) "Mobilizing Private Law: An Introductory Essay," 11 *Law & Society Review* 173.
MARSHALL, Ray, Charles B. KNAPP, Malcolm H. LIGGETT, and Robert W. GLOVER (1978) *Employment Discrimination: The Impact of Legal and Administrative Remedies.* New York: Praeger.
MAYHEW, Leon (1975) "Institutions of Representation: Civil Justice and the Public," 9 *Law & Society Review* 401.
McINTOSH, Wayne (1983) "Private Use of a Public Forum: A Long Range View of the Dispute Processing Role of Courts," 77 *American Political Science Review* 991.
MILLER, Richard E., and Austin SARAT (1980–81) "Grievances, Claims, and

Disputes: Assessing the Adversary Culture," 15 *Law & Society Review* 525.
MUNGER, Frank W., Jr. (1988) "Law, Change, and Litigation: A Critical Examination of an Empirical Research Tradition," 22 *Law & Society Review* 57.
——— (1986) "Commercial Litigation in West Virginia State and Federal Courts, 1870–1940," 30 *American Journal of Legal History* 322.
PARSONS, Talcott (1977) *The Evolution of Societies*. Englewood Cliffs, NJ: Prentice-Hall.
PRIEST, George L., and Benjamin KLEIN (1984) "The Selection of Disputes for Litigation," 13 *Journal of Legal Studies* 1.
STEEL, Lewis M. (1983) "Why Attorneys Won't Take Civil Rights Cases," *Nation*, 326–64 (March 26).
STOOKEY, John A. (1986) "Economic Cycles and Civil Litigation," 11 *Justice System Journal* 282.
WEBER, Max (1975) *Roscher and Knies: The Logical Problems of Historical Economics*. New York: Free Press.
ZEMANS, Frances Kahn (1982) "Framework for Analysis of Legal Mobilization: A Decision-making Model," 1982 *American Bar Foundation Research Journal* 989.
——— (1983) "Legal Mobilization: The Neglected Role of the Law in the Political System," 77 *American Political Science Review* 690.

CASES CITED

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

STATUTE CITED

Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964).