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Social Change and Tort Litigation: Industrialization, Accidents, and Trial Courts in Southern West Virginia, 1872 to 1940

FRANK W. MUNGER*

I. INTRODUCTION

EVALUATIONS of the role which courts have played in nineteenth century American industrialization have often been preoccupied with the content and impact of the opinions of appellate judges. The decisions of appellate courts in the nineteenth and early twentieth centuries reflect interesting, much debated issues such as the relationship of legal evolution to economic expansion,¹ the interests of a capitalist class,² contemporary views of social justice,³ and the legal profession's own modes of reasoning.⁴ It is equally true that the majority of cases are never heard by appellate courts. Appellate courts can only address the issues in cases that are appealed. Therefore, a mere recounting of appellate opinions is neither reflective of the volume of trial court litigation, nor representative

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1. See S. SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 27-28, 41-42 (1982); Freyer, *The Federal Courts, Localism, and the National Economy*, 53 BUS. HIST. REV. 343 (1979); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304 (1979).

2. See G. KOLKO, RAILROADS AND REGULATION, 1877-1916, at 81-86 (1965); Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

3. See A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895 (1960); R. POUND, THE SPIRIT OF THE COMMON LAW 139-65 (1921); Paul, *Legal Progressivism, the Courts, and the Crisis of the 1890s*, 33 BUS. HIST. REV. 495 (1959).

4. See G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 163-91 (1978); Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70-110 (G. Geison ed. 1983); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1910*, 3 RES. L. & SOC. 3 (1980).

of the substance of the cases brought to court. Moreover, evaluations based on appellate decisions have produced little knowledge concerning the influence of appellate courts on either the intellectual life of trial courts or on the outcomes of cases decided by trial courts. Most importantly, neither appellate nor trial courts, by themselves, provide answers to questions about why litigation occurred, or what significance litigation held as a form of conflict or conflict resolution.

Courts undoubtedly play an important role in conflict and conflict resolution. An understanding of their role requires an understanding of how litigation arose from the activities and social relationships which make up the life of a community.⁵ Therefore, a better understanding of the role of courts in industrialization requires looking beyond appellate opinions to the actual litigation which provided the occasion for the legal opinions. The search cannot end there, however. It requires an examination of the circumstances and events that gave rise to the litigation, and a determination of how these factors affected the lives of the actors involved in the litigation.

This Article describes tort litigation in three southern West Virginia counties at the turn of the century.⁶ It represents an attempt to explore the functions⁷ of litigation in resolving conflicts arising from personal injury or property damage which occurred during America's nineteenth century industrialization. This Article is also an experiment in the methodology of examining trial court records. It attempts to bring to life the complex process by which courts become involved in change and conflict. The methodology employed examines both the narrow range of in-

5. Many of the questions which I have attempted to answer in this Article were inspired by the work of James Willard Hurst on law and social change. J. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN: 1836-1915* (1964). I have used Hurst's careful examination of social process and legal history as a starting point, and often as a source of hypotheses in need of testing and revision. For example, this Article reflects on Hurst's assumption that law is responsive to the social needs of a community. This hypothesis is subsumed by Hurst's premise that law is effective because it is legitimate. The relationship between the rational content of law and the actual uses made of legal institutions by community members is a link often overlooked both in Hurst's own work and in the research tradition it has inspired in the sociology of law. For related criticisms see Genovese, *Law and the Economy in Capitalist America: Questions for Mr. Hurst on the Occasion of his Curti Lectures*, 1985 AM. B. FOUND. RES. J. 113; Harring & Strutt, *Lumber, Law and Social Change: The Legal History of Willard Hurst*, 1985 AM. B. FOUND. RES. J. 123.

6. The three counties are Fayette, Raleigh, and Summers.

7. By function I mean the importance of litigation in maintaining, or helping to change, social relationships outside the legal system. For further discussion of the concept of function see Munger, *Law, Change and Litigation: A Critical Examination of An Empirical Research Tradition*, 22 LAW & SOC'Y REV. (1988) (in press).

formation available in trial court records, and also the broader information about litigants and their continuing relationships available in historical and archival sources.⁸

II. TORT LITIGATION IN THE LATE NINETEENTH CENTURY AND EARLY TWENTIETH CENTURY TRIAL COURTS

A. *The Case of Annie Jones*

In 1899 a fire broke out in a row house in Fayetteville, West Virginia, the county seat of Fayette County.⁹ In anticipation of the spreading fire, Annie Jones, a row house tenant living two doors from the fire, dragged her personal belongings to safety. In an effort to preserve the other houses in the row, Mr. Middleburg, Jones's landlord, detonated a charge of dynamite in the row house located between his row house and the burning structure. As a result of the explosion, burning debris fell among Annie Jones's personal possessions and destroyed them.

The range of typical responses of a victim of this misfortune may have included private appeals to Middleburg, friends, relatives, or other tenants, or merely accepting one's fate in silence. Perhaps Annie Jones actually attempted a private appeal for compensation or assistance. History has not left us with any indication of her extralegal attempts at a remedy. However, historical studies of litigation demonstrate that by 1899 America was already a litigious society.¹⁰ Perhaps motivated by a lack of a private remedy, or influenced by societal trends to litigate, or

8. The deficiency in utilizing only the limited information available in court records to describe complex procedures of conflict resolution was suggested by criticism of longitudinal research. Krislov, *Theoretical Perspectives on Case Load Studies: A Critique and a Beginning*, in *EMPIRICAL THEORIES ABOUT COURTS* (K. Boyum & L. Mather eds. 1983) [hereinafter *EMPIRICAL THEORIES*]. For details concerning the research design and the sampling technique see *infra* note 22.

9. The account of the fire and the litigation which followed is taken from the case file in the proceeding brought before the Fayette County Circuit Court in 1899. File reference number 2756. This case was selected from a sample of tort cases. Civil docket books no longer exist for the circuit courts studied in this research. Cases are listed in alphabetical order in a composite index compiled by the court clerks after the loss of the original docket books. The file reference number is the means by which the alphabetical listing and the case file are cross-referenced.

10. Studies of litigation include Blankenburg, *Legal Insurance, Litigant Decisions, and the Rising Caseloads of Courts: A West German Study*, 16 *LAW & SOC'Y REV.* 601 (1981-82); Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 *S. CAL. L. REV.* 65 (1981-82); Daniels, *Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties*, 19 *LAW & SOC'Y REV.* 381 (1985); Friedman, *Courts Over Time: A Survey of Theories and Research*, in *EMPIRICAL THEORIES*, *supra* note 8, at 9; Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 *LAW & SOC'Y REV.* 267 (1975-76); McIntosh, *Private Use of a Public Forum: A Long-Range View of the Dispute Processing Role of Courts*, 77 *AM. POL. SCI. REV.* 991 (1983).

both, Annie Jones elected to take her case to the Fayette County Circuit Court,¹¹ the state court of general jurisdiction for all matters involving more than \$25. She prayed for \$300 in damages resulting from the negligence¹² of Middleburg in placing and detonating the dynamite. Annie Jones was represented by the firm of Dillon and Nuckolls. The defendant Middleburg was represented by the firm of St. Clair, Walker and Summerfield. Both were respected Fayetteville law firms, and both firms handled a variety of issues and litigants. There was little apparent specialization among the members of the bar who handled tort suits for litigants such as Annie Jones.¹³ There were few outsiders in the circuit court practice of southern West Virginia, unless they came from Charleston.¹⁴ The case went to trial before a jury, which rejected Annie Jones's characterization of Middleburg's conduct as negligent, and returned a verdict for the defendant. There was no appeal. The circumstances of Annie Jones's case illustrate one way in which the growing density and complexity of community life might increase the likelihood of civil disputes.¹⁵

B. *Community Change and Tort Litigation, 1870-1925*

Fayetteville was a town in which the nineteenth century industrial

11. See *supra* note 9.

12. The law of negligence is particularly suited to redress for damages arising from any of the thousands of daily acts which occur between people living in close proximity. Indeed, one theory of the development of the law of negligence is that it represents a late nineteenth-century response to the increasing number of civil wrongs occurring between strangers. There are several well-known statements of this idea including W. FRIEDMANN, *LAW IN A CHANGING SOCIETY* 161-90 (2d ed. 1972); SCHUR, *LAW AND SOCIETY: A SOCIOLOGICAL VIEW* 121-22 (1968); see generally Selznick, *The Sociology of Law*, 9 *INT'L ENCYCLOPEDIA SOC. SCI.* 50, 57 (1968).

13. The trend toward specialization among lawyers handling tort litigation is discussed in Section III(F), *infra*.

14. In 1908, there were 14 attorneys whose practices were located in Hinton, the seat of Summers County. J. MILLER, *HISTORY OF SUMMERS COUNTY* 235 (1908). By 1920, 32 attorneys were listed as having a post office address in Beckley, the seat of Raleigh County. *WEST VIRGINIA HANDBOOK AND MANUAL AND OFFICIAL REGISTER* (J. Harris ed. 1920). While no comparable figures are available for Fayette County, attorney biographies in the leading county history suggest that a core of 12 to 15 attorneys had their practices in Fayetteville in 1900. J. PETERS & H. CARDEN, *HISTORY OF FAYETTE COUNTY* 361-62 (1926).

15. Other ways in which the increasing density and complexity of community life increased the likelihood of civil disputes included, for example, the increasing use of dangerous industrial technology. As machines became more powerful and workers increasingly interdependent (so that a mistake by one worker using a machine was more likely to hurt another nearby worker) the number and severity of injuries increased. Mechanization of transportation introduced similar risks for travelers as well as for transportation employees. Increasing population density, by itself, led to new risks which included both the risk of property damage (as in Annie Jones's case) and risks to life and health. See C. GLAAB & A. BROWN, *A HISTORY OF URBAN AMERICA* 206 (3d ed. 1983).

and technological transformation of American community life was occurring. This transformation was marked by a rapid increase in population. By 1900, Fayette County had 32,000 residents, an increase of 480% over 1870.¹⁶ Fayetteville was no longer the small town it had been a few decades before. Perhaps more significantly, the rise in population resulted from migration from other parts of the county, from other parts of West Virginia, from other southern states, and from an aggressive campaign by the State Department of Labor to encourage immigration of laborers from southern and southeastern Europe.¹⁷ Fayetteville's growth under the impact of West Virginia's industrialization was typical of southern West Virginia towns, and probably resembled the growth of many other industrializing communities throughout North America.¹⁸

The growth of Fayetteville typified the effect of the rapid industrialization on rural southern West Virginia.¹⁹ The building of the Chesapeake and Ohio Railroad between 1869 and 1873 opened the region to commercial coal production. Mining quickly became the region's principal industry and its link to the rest of the country. In addition, the changing scale and changing activities of community life in Fayetteville were driven by forces generated in the growing national economy. The rapidity of the national and local change, the immense technical and organizational problems of a new industry, and the conflict between new and old community ways increased both the number of transactions between relative strangers in the community, and also the subsequent likelihood of increased tortious injuries to property and persons.²⁰

As suggested above, the mere frequency of opportunity for tort liti-

16. BUREAU OF THE CENSUS, DEP'T OF COMMERCE AND LABOR, CENSUS REPORTS: TWELFTH CENSUS OF THE UNITED STATES, 1 CENSUS BULLETIN, No. 53, POPULATION OF WEST VIRGINIA BY COUNTIES AND MINOR CIVIL DIVISIONS 2 (1901).

17. D. CORBIN, LIFE, WORK AND REBELLION IN THE COAL FIELDS: THE SOUTHERN WEST VIRGINIA MINERS, 1880-1922, at 8 (1981).

18. For a description of demographic changes in the late nineteenth century and their impact on rural and urban life see C. GLAAB & A. BROWN, *supra* note 15, at 134-51. For an interpretation of the effect of the resulting social change on small town life, see R. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (1967).

19. R. ELLER, MINERS, MILLHANDS, AND MOUNTAINEERS: INDUSTRIALIZATION AND THE APPALACHIAN SOUTH, 1880-1930, at 49-52 (1982); J. WILLIAMS, WEST VIRGINIA AND THE CAPTAINS OF INDUSTRY 165 (1976).

20. Rapid growth in southern West Virginia expanded the lumber industry to a significant commercial enterprise, initiated railroad construction, and triggered the explosive growth of the mining industry. Each of these new activities involved the risk of bodily injury on a scale not before experienced in the region. Increased conflict of other kinds also accompanied industrialization, including numerous property title disputes, conflict between the labor force and owners, and the kind of commercial conflict which arises when deals are made and broken in an unpredictable economy. See D. CORBIN, *supra* note 17. See generally Williams, *The New Dominion and the Old: Ante-Bellum and*

gation does not in itself adequately explain the reasons for such litigation. In order to understand the function of tort litigation in late nineteenth and early twentieth century America, it is necessary to examine what actually happened in trial courts. While Annie Jones's case provides an example of what might be supposed to be a growing number of accidental injuries arising out of the greater density and complexity of social existence, it must be asked whether her case was in fact typical of actual litigated cases, and whether it fully reflected the function which tort law played in this growing American community. It must be asked whether tort litigation was used more frequently as communities grew, and if so, was the increase relative to the size of the community at each stage of its growth. It should also be investigated whether all types of tort cases increased in number as communities grew, or whether certain types of tort cases were more frequent than others.

In order to address these questions, the research presented in this Article employed longitudinal analysis of litigation trends. Longitudinal studies of trial-court caseloads can help answer questions about the changing role of litigation in the life of a community.²¹ The research was based on information taken from the order books and case files of three West Virginia state circuit courts between 1872 and 1940.²² Examining

Statehood Politics As the Background of West Virginia's "Bourbon Democracy," 33 W. VA. HIST. 317 (1972).

21. Longitudinal litigation research has typically involved an examination of the records of cases filed in a single jurisdiction over a significant period of time. The number of cases, the kinds of cases, who instituted and who defended the litigation, trends and the changing outcomes are recorded. See *supra* note 10. However, reliance on quantitative measures of these changes, without attempting to explore the intricacies of consequences and conflict, invites interpretation of trends as the outcome of a constant process in a changing external environment. In fact, however, the process of litigation is constituted by the actions of individuals who are *not* constants in the midst of change. Consequently, as I will demonstrate in this Article, it is not clear that quantities of litigation can be accurately compared from one time period to the next.

22. The analysis included information from state circuit and county court order books of Fayette, Raleigh, and Summers counties for the years 1872-1925, 1930, and 1940. The circuit courts were trial courts of general jurisdiction handling both civil and criminal matters. They also heard appeals from matters tried before justices of the peace. All matters before the court were included in the study provided they were not merely related to court administration, such as paying court officials, or nonadversarial administrative duties, such as granting various types of licenses. Information about more than 36,000 cases was read, coded, and analyzed by computer.

Concerns existed regarding drawing inferences from changes in the quantity of litigation alone. See *supra* note 21. However, these concerns were addressed by means of the research design, in which statistical data derived from the circuit court records were supplemented by other types of information. The study included a statistical analysis of the cases filed in the three state circuit courts. It also included examination of the case files in a random one third sample of tort cases filed in the circuit court in Fayette County. The sample yielded detailed information about litigation. See *infra* notes 65, 77, 79, & 96 and accompanying text. The examination of case files also provided

the changing numbers and types of cases in the state trial courts will begin to reveal how such changes affected the use of the courts to resolve conflicts arising from injuries to persons and property.

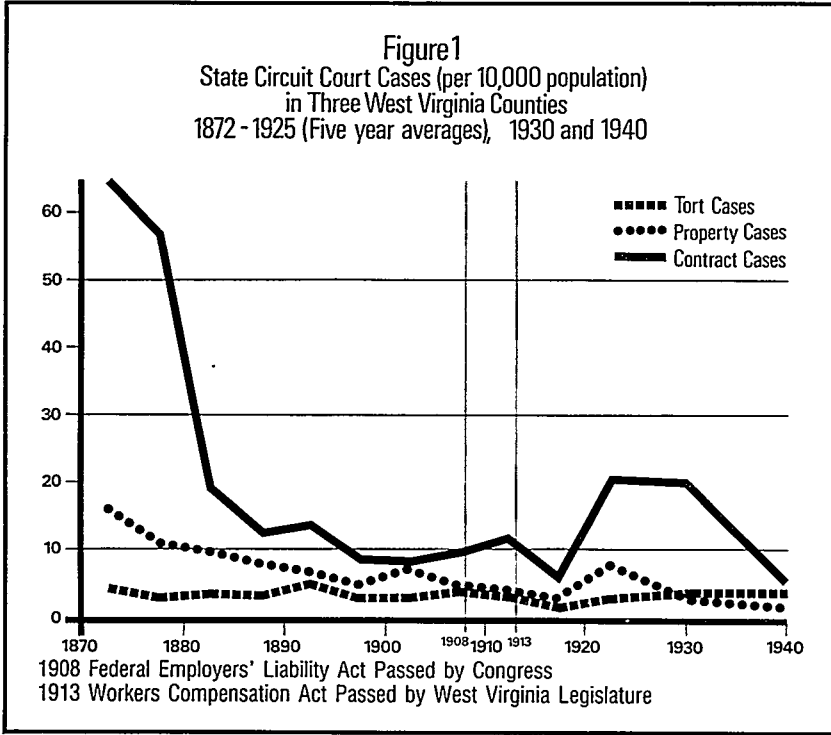
Tort litigation constituted only a small portion of the caseload of the circuit courts during the period of this study. While the percentage of tort cases rose from 3.1% between 1872 and 1875 to 6.2% between 1891 and 1895, it declined immediately to 3.9% and did not rise above the 1891-1895 peak until after 1930. Contract and property cases each consistently comprised a greater percentage of the total caseload than did tort cases. Though the percentage of tort cases remained small, the actual number of tort cases increased over time as the size of the communities increased. However, neither the percentage of tort cases, nor the increase in the number of tort cases, tells us whether tort cases were brought more frequently as communities grew in size and as industrialization changed the nature of the activities taking place in the communities. If it is true that larger, more industrialized communities rely more on litigation to resolve conflict than do smaller less industrialized ones, then litigation rates in these three West Virginia counties will have increased over the period of their growth.²³ Examining the number of cases per 10,000 inhabitants of the counties reveals whether litigation was more or less frequent at one period of the community's growth (size) than at another. The litigation rates per 10,000 persons which are displayed in Figure 1 show that tort, contract, and property litigation were affected differently by social change. Both contract and property litigation rates decreased during the periods of economic growth between 1870 and 1885 (during the takeoff in Fayette County), between 1905 and 1915 (during the growth in Raleigh County), and in the immediate post-war period. Tort

information about particular cases, the litigants, and their attorneys. See *supra* note 9; *infra* note 30. For a parallel study of cases appearing in federal district courts during the same time period, see Munger, *Commercial Litigation in West Virginia State and Federal Courts, 1870-1940*, 30 AM. J. LEGAL HIST. 322 (1986).

23. As a community grows, one would expect more tort cases because there are more people, and consequently more accidents. Depending on the nature of the activities in the community, the number of tort cases may increase faster than other kinds of cases. Consequently, the percentage of tort cases in the caseload of local courts may also increase. However, such increases do not necessarily mean that the courts are becoming more popular or useful. They only indicate that there are more accidents and that the number of accidents is probably increasing faster than other kinds of disputes. Even though the absolute number of cases fluctuates greatly, the rate of cases may be quite constant relative to the number of people in the community, or to the number of accidents. The number of cases relative to the population, or to the number of accidents, is called the litigation rate. For an excellent and influential discussion of the difference between the percentage of caseload and the rate of litigation see Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 LAW & SOC'Y REV. 91 (1978-79).

TABLE 1
TYPE OF CASES (PERCENT) IN THREE WEST VIRGINIA STATE CIRCUIT COURTS BY TIME PERIOD

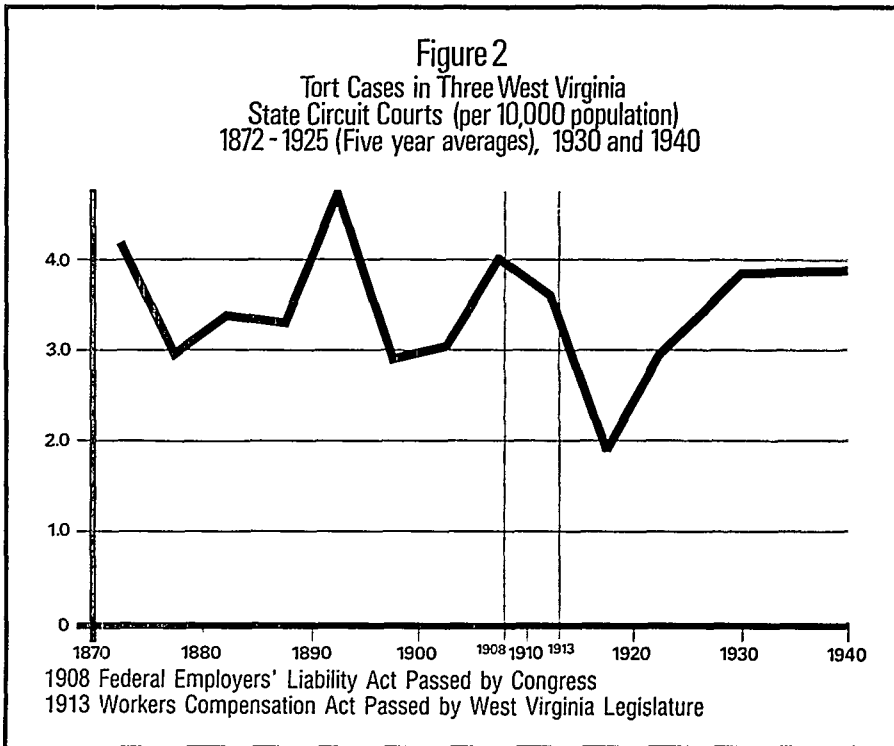
TIME PERIOD	1872-1875	1876-1880	1881-1885	1886-1890	1891-1895	1896-1900	1901-1905	1906-1910	1911-1915	1916-1920	1921-1925	1930	1940
CONTRACT	45.8	43.1	21.1	17.5	17.4	11.6	10.8	14.3	12.5	12.6	28.4	26.2	9.8
TORT	3.1	2.3	3.8	4.9	6.2	3.9	3.9	6.1	5.0	4.0	3.3	4.9	7.7
PROPERTY	8.4	5.4	9.5	7.4	5.7	3.4	6.6	4.3	3.7	6.0	7.6	2.1	.9
CONDEMNATION	2.4	.6	.7	.6	1.2	.8	2.3	3.2	.6	.8	.6	1.1	1.4
J.P. APPEAL	11.9	8.8	10.4	10.0	8.8	9.9	10.8	11.0	16.1	15.0	15.0	10.2	2.4
ADMIN. APPEAL	.7	2.0	.2	.4	.4	.8	1.0	1.2	.9	.9	.4	.2	.3
DIVORCE	1.6	2.0	5.1	8.5	10.6	13.9	18.0	21.5	21.9	28.5	19.6	21.1	45.7
CHANCERY-DEBT	7.1	6.7	10.0	8.3	8.6	6.9	3.7	3.4	3.4	3.1	2.2	5.3	2.4
CHANCERY-TAX	.8	6.1	12.2	13.0	14.3	16.9	11.0	7.3	6.3	3.6	8.0	8.3	0
OTHER	18.1	23.1	26.9	29.4	26.8	31.8	31.8	27.8	29.5	25.4	13.6	20.5	29.3
TOTAL PERCENT	100	100	100	100	100	100	100	100	100	100	100	100	100
(N)	(1018)	(1540)	(1437)	(1380)	(1855)	(2101)	(2774)	(3018)	(3716)	(2785)	(5758)	(1192)	(930)



litigation maintained a relatively constant rate with the exceptions of a sharp decline in both the late 1890s and during World War I, when all forms of litigation declined. It should be noted, however, that the appearance of relative stability in the tort litigation rate in Figure 1 is due in part to the effects of scale, since the number of tort cases was so much smaller than those of property and contract. This fact may be understood more clearly by examining Figure 2 in which tort litigation per 10,000 persons is plotted on a much finer scale.

Why did tort litigation rates display this particular trend? The answer lies in determining which changes taking place in these counties contributed to an increase or decrease in the use of courts as a means of resolving conflicts over compensation for injury to persons or property.²⁴

24. In addition to the changing relations between court and community, variables in the internal organization of the courts could also have affected patterns of litigation. These variables include the



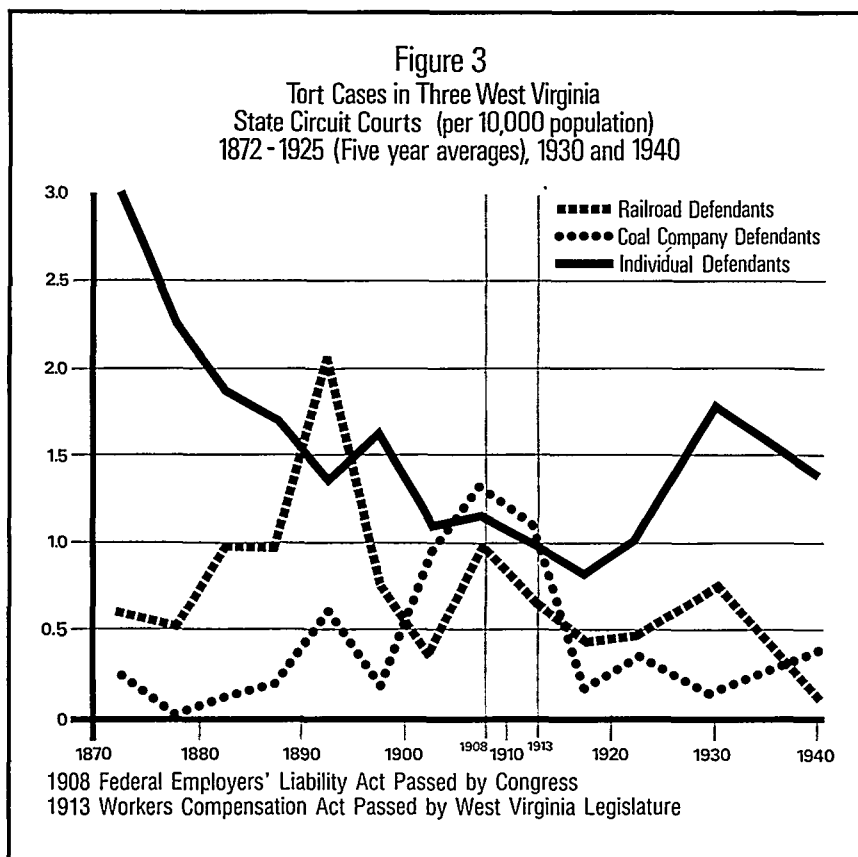
To begin with, social change affected particular kinds of relationships among actors in the communities in different ways. For example, relationships between employers and employees, between merchant retailers and consumers, and between neighbors were affected in different ways by such factors as industrialization, the growth of a national market, and increases in population.²⁵ The types of conflicts arising from each rela-

location of the court, the number of judges, court costs, jurisdictional amount or other jurisdictional boundaries, and factors affecting court delay. However, with the exception of court delays, which I do not examine in this Article, these factors did not change during the time periods examined in this study. Consequently, their progressive effect on tort litigation rates cannot be accurately determined from the data examined in this Article.

25. Industrialization and the growth of a national market are changes in social organization. The organization of work was affected most dramatically by these factors. More subtle changes included the development of techniques of marketing over large geographic regions, and the extension of increasing amounts of credit to both merchants and consumers. Growth of the native population increased the density of many communities, but migration and immigration, resulting from

tionship and what was done to resolve them were also likely to be different. Therefore, it is logical to examine the rate of litigation of conflict arising from each type of relationship separately.

Figure 3 presents the rates of tort litigation initiated by individual



plaintiffs against three types of defendants: individuals, railroads, and coal companies. The rate of litigation of tort cases (per 10,000 population) brought by individuals against other individuals shows a relatively steady decline until approximately 1920, coinciding with the advent of the automobile to West Virginia. The decline is unbroken until nearly 1920, with the exception of a brief fluctuation in the rate during the depression years of the 1890s. Annie Jones's case occurred during this fluctuation.

intense labor recruitment, had an even greater effect on population growth. These factors combined to change the meaning of city, community, and neighborhood. See S. HAYS, *THE RESPONSE TO INDUSTRIALISM: 1885-1914* (1957); R. WIEBE, *supra* note 18.

tuation.²⁶ Beginning about 1920, the tort litigation rate for suits brought by individuals against individuals increased steadily until another decline occurred near 1930.²⁷

The organizations sued by individuals in tort suits were mainly coal companies and railroads, and the rates of litigation against these two types of companies are plotted separately in Figure 3. Relative to the size of the population, tort litigation against both types of companies rose from the late 1870s until the depression of the 1890s, plausibly reflecting the effects of railroad construction and the expansion of mining into Fayette County. As Figure 1 illustrates, the depression of the 1890s reduced the rate of contract and property litigation, as well as tort litigation, perhaps because the costs of litigation remained fixed, while the resources of litigants were temporarily reduced. The decline was not unique to industrial accident litigation rates, which is demonstrated by a similar decline in all three litigation rates in the mid 1890s. The overall decline in litigation reveals the strong effects of a national depression on the process by which potential litigants in southern West Virginia selected alternative methods of resolving otherwise litigious conflicts. After the turn of the century, as Raleigh County developed with the construction of railroads and an increase in coal production, the rate of tort litigation against both types of companies rose again until about 1910. After 1910 both litigation rates declined relative to the size of the population.

A workmen's compensation statute was enacted by the West Virginia legislature in 1913,²⁸ but the decline in the rate in tort litigation against coal companies began well before this date. The Federal Employers' Liability Act, passed by Congress in 1908, eliminated some common-law defenses used by railroads in defending tort litigation brought by their employees.²⁹ Instead of rising, however, the rate of tort litigation

26. The precise reasons for the apparent rise in tort litigation at the beginning of the depression are not clear. However, one possible contributing factor was that hard times were the occasion for more frequent trespasses on neighbors' lands.

27. Since I have data only for the years 1872-1925, 1930, and 1940, I cannot tell when the decline between 1930 and 1940 began.

28. W. VA. CODE §§ 1-56 (1913).

29. Federal Employers' Liability Act (Railroads) of 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. §§ 51-60 (1982)). The Act made important modifications in the common law as applied to employers within the reach of the Act, among them railroads. Congress took care not to shift the burden of litigating cases under the Act to the federal district courts. The Act barred removal of covered cases to federal district court. The Supreme Court made clear in its construction of the Act that most litigation was expected to take place in state courts. The case load of the federal district court for the Southern District of West Virginia confirms that there was no surge of tort cases in the federal court when the Act was passed. Many tort cases were removed to federal court, of course, but on appropriate grounds, such as diversity of citizenship.

against railroads declined in the three counties following the passage of this Act. Employee accident litigation against both coal companies and railroads, therefore, must have been influenced by other factors which reduced the litigation rate. It is not known whether railroads and coal companies made special efforts to keep cases out of courts, or whether the number of accidents experienced by railroad employees, passengers, or miners actually declined. Any one, or any combination, of these factors could have produced a declining rate of tort litigation against both coal companies and railroads after 1910.

In sum, first, there was no overall rise in the rate of tort litigation as a result of the growth and industrialization in these three counties. As Figure 2 demonstrates, while the numbers of cases climbed, the number relative to the increase in population displayed no overall trend of increase. Second, the rate of tort litigation arising from different social relationships followed very different patterns. During the early decades of regional industrialization, tort cases between individuals declined relative to population until automobiles came into common use, while tort cases brought against industrial employers rose in rough proportion to the increasing activity in each industry. In the long run, however, while tort litigation between individuals rose, tort litigation against industries declined, the latter evidently at least partly the result of legislative changes. While some fluctuations in litigation rates can be plausibly explained as the result of a pattern of social change—such as the effects of the national depression of the 1890s, the effects of World War I, or the effects of the growing use of the automobile in West Virginia—others cannot be explained so easily. The greater hazards of industrial employment, the increasing density of population, and the risks of injury arising from the actions of others did not have a simple and direct effect on either the number of tort cases, or on their rate relative to the size of the population. For this reason, however, because they did not follow a pattern which may have appeared plausible, they raise interesting questions which may not have been otherwise asked.

III. INDUSTRIAL ACCIDENTS AND TORT LITIGATION

A. *The Case of Harrison Fox*

Annie Jones's suit against her landlord was not typical of the bulk of the tort cases filed in the state circuit court. This Article could have begun with another, more typical, type of case. A law suit brought in 1908 by the administrator of Harrison Fox's estate was more representative of

the largest class of cases.³⁰ Fox died while working in the Sunbeury Coal and Coke Company's "Sunnyside" mine. Fox was represented by Simms and Hamilton, a Charleston law firm, one of many which "rode the circuit" in the region east and south of the state capital.³¹ The case was one which evoked sympathy. Fox's job was to move coal cars from inside the mine to the foot of the main entrance, using only a mule to pull the cars. At the main entrance the cars were hauled to the tippie on the surface by an electrically powered motor. Electricity was a frequent source of coal dust ignition, and consequently a well-known hazard in the mines. However, that was not the problem on this occasion. Electrical wires had been allowed to dangle in a large puddle near the spot where Fox attached the cars to the machinery which hauled them to the surface. Stepping in the water on his way to the main entrance, Fox died instantly. The plaintiff prayed for \$10,000 in damages.

A jury trial was held, at which Sunbeury was represented by Dillon and Nuckolls, the firm which represented Annie Jones. Although Dillon had represented plaintiffs in accident litigation against coal companies in the past, he had done so in an earlier phase of his law practice, before forming the partnership with Nuckolls.³² The attorney with whom he practiced before 1899, C. W. Osenton, became the leading plaintiff's attorney in Fayette County after their partnership dissolved, while Dillon's later involvement in such cases was as a defense attorney.

Testimony for the plaintiff tended to show that the wires were placed negligently and fastened improperly. At the conclusion of the testimony, Dillon moved to have stricken from the record all of the testimony for the plaintiff. The basis for the defendant's motion was the common-law doctrine known as the fellow servant rule, which held an employer blameless for negligence attributable to another employee.³³

30. The facts which appear in this narrative are taken from the file in the case brought by Fox's administrator in the Fayette County Circuit Court in 1908. File reference number 2065. *See supra* notes 9 & 22.

31. W. McCORKLE, *RECOLLECTIONS OF FIFTY YEARS OF WEST VIRGINIA* at xi-xii (1928).

32. Dillon's practice with Nuckolls is described as "one of the ablest and best known law firms in Southern West Virginia." *BENCH AND BAR OF WEST VIRGINIA* 290 (G. Atkinson ed. 1919). Examination of the case files of the Fayette County Circuit Court between 1880 and 1910 revealed that Dillon had been in law practice with a number of other attorneys at different times.

33. The fellow servant doctrine stated that an employee injured through the negligence of another employee of the same employer could not hold the employer liable for the fellow servant's negligence. Although over time the doctrine accumulated many qualifications and exceptions (such as the qualification that an employer had a nondelegable duty to use ordinary care to provide a safe workplace), the rule created a difficult barrier to recovery by employees. Some jurisdictions recognized the fellow servant doctrine or the doctrine of assumption of risk, but not both. However, West Virginia accepted both doctrines. *See infra* note 34.

Finding the fellow servant rule applicable, the court granted the defendant's motion and directed the jury to find in favor of the defendant.

B. *Community Change and Industrial Accident Litigation*

In order to understand the significance of the Fox case, the frequency with which miners, or their next of kin, sought compensation through litigation must be examined. It should be determined if the outcome of the Fox case was typical of contemporaneous litigation. In addressing these issues, Figure 3 illustrates two relevant concerns suggested by the rising litigation rates against railroads and coal companies between 1900 and 1910. First, it is plausible to suggest that nineteenth century common-law barriers to recovery, such as the fellow servant rule, should have discouraged litigation.³⁴ If the West Virginia Supreme Court of Appeals maintained the fellow servant rule until 1913, when a workmen's compensation statute was enacted by the state legislature, then the rates of litigation against both coal companies and railroads, and the Fox case in particular, present a paradox. The apparent failure of appellate court hostility to lower the rate of industrial accident litigation in the state circuit courts until well into the twentieth century suggests that other factors offset the advantages that common-law rules gave employers. Those factors might have included the sympathy of judges or juries at the trial court level, increasing encouragement from lawyers, a change in the nature of accidents, and encouragement for litigation from family, peers, or the community at large.

Second, if the hypothesis of a rising litigation rate is confirmed, the result would add a significant dimension to the emerging picture of the factors which contributed to the adoption of workmen's compensation and mine safety legislation in the progressive era. Historians of progressive era regulatory reform have argued that industrial accident litigation had an effect on the adoption of both types of legislation. Mainstream and revisionist historians disagree about the motives for adoption. The

34. In addition to the common-law fellow servant rule, the doctrines of assumption of risk and contributory negligence also barred employer liability for employee injuries. Whenever an employee reasonably should have known the risks entailed by employment, and in theory bargained for a wage which would make the risks acceptable, assumption of risk barred that employee's recovery. Whenever the employee's own negligence contributed to any degree to the cause of the injury, contributory negligence barred employee recovery. Virtually every industrializing state accepted some, and usually all, of these rules, making recovery from employers for injury extremely difficult under the common law. For contrasting views of the general effects of these rules see Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); and Schwartz, *supra* note 2.

former claim that the changes reflected a growing consensus about social insurance as a fair and rational accommodation of the social welfare of both businesses and workers. The latter claim that businesses accepted and promoted progressive era regulation as a means of controlling both the destructive effects of competition and the threat of class conflict.³⁵ Mainstream theory assumes a continuing inability of injured workers to recover just compensation through litigation.³⁶ Revisionist theory assumes that litigation was at least sufficiently effective to motivate industrialists to seek self-interested reform.³⁷ While one historian of mine safety legislation has stated that the motives of coal operators who supported adoption of these laws are "obscure," the logic of the revisionist argument may make sense for the coal industry.³⁸ The existence of large

35. Mainstream arguments are made in Friedman & Ladinsky, *supra* note 34, at 65-69; and in Schwartz, *supra* note 2, at 1771. Both articles argue that the fellow servant rule and similar doctrines were changed by legislation to fit both a growing sense among business leaders that the system developed under the common law was impractical, and the view among workers' advocates that it was unfair. Workmen's compensation legislation represented a rational, problem solving response to the ineffectiveness of the common law. It reflected a growing belief that responsibility for industrial accidents should be shifted to employers. Revisionist views emphasize the self-interest of the business community in the adoption of social welfare legislation. See G. KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916* (1963); R. LUBOVE, *THE STRUGGLE FOR SOCIAL SECURITY, 1900-1935* (1968) (business concerns over financial losses); J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918* (1968) (business concerns over class conflict); Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NW. Q. 157 (1964) (business concerns over inefficiencies of the traditional system of regulation). Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 LAB. HIST. 156 (1967). These authors argue generally that social welfare legislation was adopted when, and because, business leaders saw it in their interest to do so. For a useful review of these revisionist positions, arguing against each one of them in turn, see W. GRAEBNER, *COAL MINING SAFETY IN THE PROGRESSIVE PERIOD 135-55* (1976).

36. Mainstream theorists make much of the accumulation of exceptions to the fellow servant rule. See Friedman & Ladinsky, *supra* note 34, at 59-65. Implicit in this theory is an assumption that the growing complexity of the law directly led to an uncertainty of outcomes at the trial court level. This, however, is an unexamined assumption. Mainstream interpretations of the adoption of workmen's compensation frequently cite evidence showing that trial courts were considerably more lenient than appellate courts in applying the fellow servant rule. However, lenience is quite different from inconsistency due to confusion about doctrine. Further, sufficient lenience, whether due to sympathy or due to doctrinal confusion, might allow great certainty in the outcome. Neither of these problems is dealt with by the mainstream scholarship. See also *infra* note 40.

37. R. LUBOVE, *supra* note 35, at 50-52; Weinstein, *supra* note 35, at 160-67. The specific focus of the self-interest varies with the account. Litigation plays a different role in motivating each facet of business self-interest in support of social legislation. The financial incentives for social insurance would be clearest if litigation of industrial accident liability was costly. Conversely, if litigation were cheap and routine, no such motivation could be inferred. If unions made lack of compensation an issue, pointing to litigation under the common law, then litigation might play an indirect role in maintaining yet another motive for social legislation, namely class conflict. Of course, litigation and the courts may have been only tangential to the process by which the statutory law was changed.

38. W. GRAEBNER, *supra* note 35, at 149.

numbers of small coal operators made it difficult to avoid the destructive effects of competition on safety standards, and thus increased the risk of accident liability.³⁹ A rising rate of litigation of industrial accident claims may have provided one motive for the adoption of workmen's compensation. However, these arguments are still quite speculative. We need to know much more about the rate and costs of industrial accident litigation in order to understand its impact on operators' motivations in supporting changes in the law.⁴⁰

IV. MEASUREMENT OF THE RATE OF INDUSTRIAL ACCIDENT LITIGATION

In examining the rates of tort cases, it may be observed that the number of cases fluctuates more rapidly than the size of the population, due to factors which sometimes may be plausibly inferred from the circumstances under which the changes occurred. However, the use of population as a basis for evaluation of industrial accident litigation does not help determine whether litigation fluctuates relative to the *risk* of acci-

39. *Id.* at 1-10.

40. General conclusions about the relationship between self-interest and litigation are often based on broad, nonspecific information. For example, seldom do theorists suggest that the docket in one or two state trial courts considered only over a brief span of years may not be representative of litigators' motives. For example, one article cited studies of trial court accident litigation in Wisconsin as if the results were likely to be representative of the patterns in other jurisdictions. Friedman & Ladinsky, *supra* note 34, at 58 n.29, 61. However, the general representativeness of the Wisconsin trial courts are questionable due to two factors discernible in the article. First, the studies themselves were not described in sufficient detail to allow the reader to judge their representativeness even to other Wisconsin trial courts. Second, throughout the article the authors acknowledged the exceptionally liberal decisions of the Wisconsin Supreme Court. However, this court's early position on the fellow servant rule was unique, and its caseload, which included more than seventy percent of industrial accident cases near the end of the nineteenth century, did not resemble that of the West Virginia Supreme Court of Appeals. Consequently, if the trends between the state courts of Wisconsin and West Virginia are not consonant, there is little reason to suspect that the trends in litigation of Wisconsin trial courts are reflective of West Virginia or any other state.

Similarly, another commentator examined trial court outcomes of cases appearing in a single Los Angeles county court for the years 1889 to 1895. Schwartz, *supra* note 34, at 1760. The commentator selected only accident cases brought against railroads. It is not clear whether accidents to passengers and accidents to employees were distinguished. Even if they were, the results do not appear to warrant a general conclusion about patterns of industrial accident compensation.

Another commentator's excellent history of the adoption of workmen's compensation laws in the United States relied exclusively on the contemporary studies of the inadequacy of the existing system of compensation under the common law. See R. LUBOVE, *supra* note 35. While these studies demonstrated a lack of adequate compensation under the common law, they did not address the specific questions raised by later historians, concerning the predictability of outcome, or the burden to particular classes of employers. Furthermore, Lubove's history introduced yet another variable not examined by other discussions of workmen's compensation, namely the insurability of the risk. *Id.* at 51-52.

dents, because population is not proportionate to risk.⁴¹ Consequently, by using a base for the tort litigation rate which more accurately reflects the risk of tort injury, the effects of intervening factors that contribute to the use of courts for dispute resolution may become more readily discernible. The plausible tie between the risk of injury in coal mining and the amount of coal produced suggests that the risk of accidents might be better represented by production than by population.⁴²

Figure 4 provides a comparison of two measures of the rate of tort litigation against coal companies. One is based on population and the other is based on coal production. The two measures yield quite different impressions of the trends in litigation rates. The wide variation in the population-based measure may be contrasted with the relatively steady production-based measure. Except for the astronomical (and misleading) litigation rate produced by the low coal production figures between 1870 and 1875, the rate of litigation per million tons of coal mined remained relatively steady until World War I. This steady rate strongly suggests that injuries and the resulting litigation were relatively predictable by-products for miners and coal companies, respectively.⁴³ Both measures of the litigation rate declined as a result of the depression in the late 1890s, and declined again after 1910. But in the period between the peak reached in the early 1890s and the year 1910, the trend in the population-based measure of the litigation rate is upward, while the trend in the production-based measure is steady or slightly downward.

While coal production is a plausible measure of the risk of injury, given the highly implausible assumptions of the constant man-hours and constant working conditions to produce a ton of coal, it may also be an inaccurate one. Another measure of the rate of litigation by employees against coal companies can be constructed using the accident statistics

41. Automobile accident cases provide a useful explanatory contrast. Due to the widespread use of the automobile, population is a plausible proxy for the risk of accidents because the number of cars is roughly in proportion to the size of the population. For a discussion of further problems with even this straightforward argument about the relationship between population and one kind of litigation, see Lempert, *supra* note 23, at 127-28.

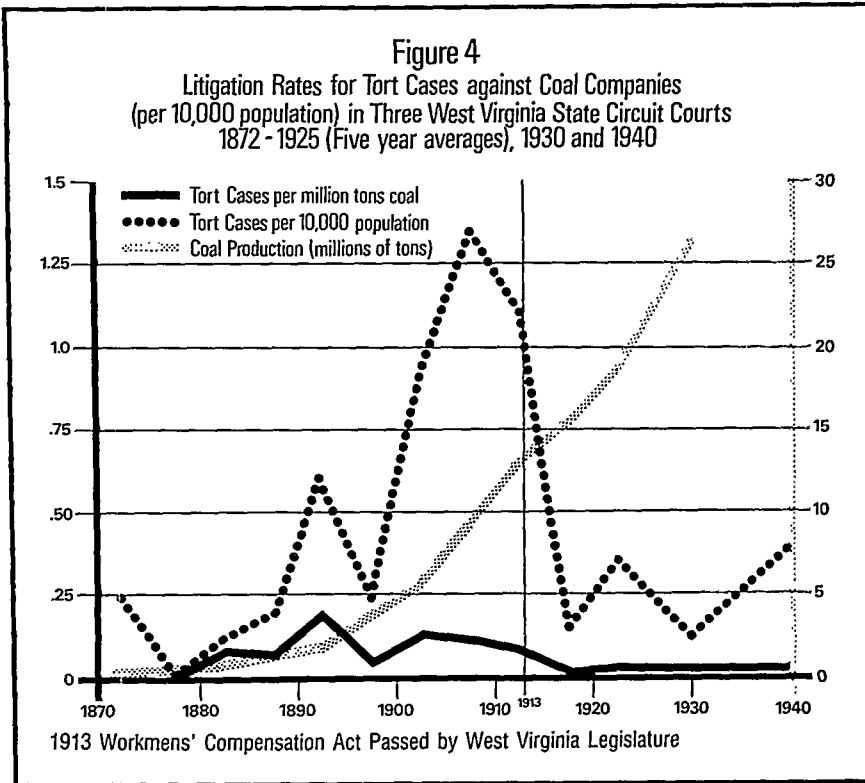
42. Criminology is familiar with the problem of selecting an appropriate base for a rate which accurately represents the proportion of opportunities for a particular kind of behavior, which actually results in that behavior. See Black, *Production of Crime Rates*, 35 AM. SOC. REV. 733 (1970). One commentator has argued that population has limited value as a surrogate for opportunities for some types of litigation. See Lempert, *supra* note 23.

43. I will argue that the statistical predictability of accidents fails to distinguish between two categories of accidents to individual miners. The first includes accidents caused by routine occupational hazards such as falling roof slate, mine cars, and electricity. The second consists of occasional disasters due to explosions. The coal operators' level of concern about each source of injury was likely to have been quite different. See *infra* Section V.

compiled by the West Virginia Department of Mines.⁴⁴ The number of accidents is a direct measure of the number of events which gave rise to litigation. Therefore, the ratio of accidents litigated to accidents occurring should be the best measure of the role played by litigation relative to other means of resolving conflict. The only apparent difficulty with using the accident statistics of the West Virginia Department of Mines is a serious one. The accident statistics of the West Virginia Department of Mines were based on self-reports. The Department was desperately understaffed, making verification of the reports impossible.⁴⁵ Accidents in the earliest statistics, beginning in 1888, are almost certainly underreported, and therefore likely to create the impression of higher initial litigation rates relative to later ones. Nevertheless, the ratio of cases litigated to accidents reported did not steadily decline. In Table 2, I have grouped the ratio of cases to accidents by five-year intervals similar to the five-year average used in plotting measures of the litigation rates in Figure 4. In the second period, 1891 to 1895, the ratio of cases to accidents is highest, almost certainly due to the underreporting of accidents by coal companies. During the following five years, 1896 to 1900, all types of litigation declined. Between 1901 and 1905, the proportion of accidents resulting in litigation rose again to almost two and one-half times its size in the preceding period. After 1906, the rate declined in two successive periods, reaching its lowest value in the interval in which workmen's compensation was adopted.

44. West Virginia, Department of Mines annual reports contain accident statistics by county. WEST VIRGINIA DEP'T OF MINES, 1883 ANNUAL REPORT (1884) [hereinafter WEST VIRGINIA DEP'T OF MINES]. Accident statistics were examined in the Annual Reports of the years 1883 through 1925. However, Annual Reports were not available for the years 1884 through 1887. The 1883 Annual Report was the first Annual Report presented by the State Inspector of mines to the governor of West Virginia. An 1887 statute required the superintendent of a mine to report "loss of life or serious personal injury" due to a coal mine accident to the mine inspector for the district. 1887 W. Va. Acts c.50, § 15 (codified at W. VA. CODE § 488 (1913)). Because this information was based in large part on self-reports, it is apparent that there were wide variations in the perceived threshold of reportable injuries. The cause and nature of the injury involved in each accident is described in the report. From this information, it may be inferred that some lasting bodily injury, such as a broken bone, a severe burn or laceration, or a concussion, was required before an accident made it into the reports. A mere bump or bruise, after which the worker continued to mine coal, was unlikely to be reported. This suggests that a loss of work time of at least a day was required for reporting an accident, and perhaps a loss of a good deal more than one day was the rule for many mine owners. "Accident" should be understood in light of this variable, but significant, minimum standard.

45. G. Massay, Coal Consolidation: Profile of the Fairmont Field of Northern West Virginia, 1852-1903 (1970) (unpublished Ph.D. dissertation) (West Virginia University). Massay describes the establishment of the Office of Mine Inspector and the effective undermining of the powers of the office in spite of repeated efforts in the legislature to increase the inspector's power. *Id.* at 135-41.



Each of the three measures of the industrial accident litigation rate in Figure 4 yields different trends at various points in time. Yet those trends converge in two important respects. First, the rate of litigation of accidents against coal companies rose well into the first decade of the twentieth century. While the steepness of the slope of the trend is highly dependent upon the base used to represent it, the trend consistently appears across all three measures. Second, the industrial accident litigation rate began declining sometime before 1910, well before the adoption of workmen's compensation in 1913.⁴⁶ While I have no similar data with which to create alternative measures of the industrial accident litigation rate against railroads, the population-based measure for railroads de-

46. W. VA. CODE §§ 1-56 (1913).

TABLE 2
ACCIDENTS TO MINERS, CASES AND LITIGATION RATES,
FAYETTE COUNTY, 1887-1915.

YEAR	ACCIDENTS	CASES	RATE
1887	20	0	
1888	23*	2	
1889	25	2	.04
1890	31	0	
1891	19	1	
1892	35	2	
1893	41	5	.10
1894	36*	7	
1895	36*	2	
1896	33	4	
1897	51	1	
1898	43	0	.028
1899	57	1	
1900	102	2	
1901	72	9	
1902	73	0	
1903	72	16	.073
1904	77	3	
1905	128	3	
1906	135	1	
1907	164	1	
1908	238	4	.049
1909	276	6	
1910	279	42	
1911	215	2	
1912	190	1	
1913	157	16	.02
1914	144	5	
1915	533	1	

*Estimated

scribed similar trends. This trend in accident litigation against railroads is counter to expectations concerning the effects of both the common law and the Federal Employers' Liability Act. Under the more restrictive common-law rules in force up to 1908, the litigation rate went up. Under the more liberal Federal Employers' Liability Act, the litigation rate went down.

A. *The Common Law*

The search for the causes of change in the rate of litigation must begin by examining the decisions of the West Virginia Supreme Court of Appeals. A change in common-law doctrine which favored plaintiffs, or a change in the sympathies of the court in applying the doctrine to industrial accident cases, might explain the rising litigation rate. The West Virginia Supreme Court of Appeals played a role in all tort litigation, specifically industrial accident litigation, by articulating rules of law which governed the availability of judicial remedies. It is certainly plausible that common-law rules influenced the behavior of judges and lawyers. In turn, the behavior of these intermediaries affected the use of the courts for dispute resolution. It is also likely that the rules directly influenced the behavior of those whom they were intended to govern, among them employers who bore a legal duty of care toward others. I will examine both the changes in the common law between 1870 and 1910, and the pattern of decisions of the West Virginia Supreme Court of Appeals with respect to the liability of coal companies and railroads.

The West Virginia Supreme Court of Appeals followed the legal authority of other jurisdictions, which severely restricted the liability of employers for work-related injuries suffered by employees.⁴⁷ The early West Virginia cases on employer liability are based on legal precedent which the court interpreted as established American views of the fellow servant rule and the doctrines of assumption of risk and contributory negligence.⁴⁸ In the West Virginia of the 1880s, the doctrine of assumption of risk was interpreted as permitting an employee to recover for an injury caused by hazards in the work area, if the employee had both no knowledge of, and no control over, the hazards.⁴⁹ An 1883 statute on mine safety required coal mine owners to take certain precautions against the accumulation of methane gas, and an early case opened the door to re-

47. The State of West Virginia was created in 1864, and its supreme court of appeals was created in 1872. In its early years the supreme court of appeals looked to other states for common-law principles. The law of negligence had already taken shape in other jurisdictions and was embodied in widely cited treatises. The court's most commonly cited source was T. SHEARMAN & A. REDFIELD, *A TREATISE ON THE LAW OF NEGLIGENCE* (1869). The court also cited cases from a wide variety of jurisdictions, including Texas, Illinois, Michigan, and various eastern jurisdictions. With regard to the laws of liability governing employees, the court frequently cited H. WOOD, *MASTER AND SERVANT* (1877), as well as D. RORER, *RAILROADS* (1884), and C. PATTERSON, *RAILWAY ACCIDENT LAW* (1886).

48. *Berns v. Gaston Coal Co.*, 27 W. Va. 285 (1885); *Riley v. Railway*, 27 W. Va. 145 (1885); *Cooper v. P.C. & St. L. Ry. Co.*, 24 W. Va. 37 (1884). See also *supra* notes 33-34 and accompanying text.

49. See *Cooper*, 24 W. Va. 37, 48.

covery through this statute by allowing the jury to decide the question of whether an employer used ordinary care to prevent an explosion.⁵⁰ A later West Virginia case took a harder line on this issue, holding that an employee assumes the risk of such hazards even if reasonable precautions against danger have not been taken.⁵¹ Under the common law, the duty of care owed by railroads to passengers and bystanders was greater than that owed to employees.⁵² Moreover, between 1895 and 1905 the supreme court of appeals enlarged the duty of care railroads owed the public.⁵³

The barrier created by the legal doctrines applied to employer liability is reflected in the outcomes of decisions by the West Virginia Supreme Court of Appeals. Between 1890 and 1899 the court decided 144 cases

TABLE 3
PERCENT OF WEST VIRGINIA SUPREME COURT OF
APPEALS DECISIONS FAVORING DEFENDANT
COMPANIES BY TYPE OF CASE BY TIME
PERIOD

TIME PERIOD	COAL CO. EMPLOYEE ACCIDENT	RAILROAD EMPLOYEE ACCIDENT	OTHER RAILROAD TORT	OTHER COAL/RAIL CASE	N OF CASES
1890-1899	80% (5)	80% (35)	59% (51)	54.7% (53)	144
1900-1909	67% (18)	44% (9)	39% (33)	51.6% (99)	159

involving a railroad or a coal company. Thirty-five of these were tort suits brought by employees against railroads, fifty-one were tort suits brought against railroads by nonemployees, and only five were tort suits brought by coal company employees against coal companies. The rest were nontort litigation. Appeals in both railroad and coal company employee injury cases were decided in favor of the company approximately 80% of the time (thirty-one of forty cases). The degree of favor shown

50. W. VA. CODE § 5, ch. 70 (1883); *Berns*, 27 W. Va. 285, 305.

51. *Seldomridge v. Chesapeake & O. Ry. Co.*, 46 W. Va. 569, 33 S.E. 293 (1899).

52. *See Bess v. Chesapeake & O. Ry. Co.*, 35 W. Va. 492, 14 S.E. 234 (1891); *Carrico v. West Virginia Cent. & Pa. Ry. Co.*, 35 W. Va. 389, 14 S.E. 234 (1891); *Cooper*, 24 W. Va. 37.

53. *Compare Bess v. Chesapeake & O. Ry. Co.*, 35 W. Va. 492, 14 S.E. 234 (1891) with *Bias v. Chesapeake & O. Ry. Co.*, 46 W. Va. 349, 33 S.E. 240 (1899). These cases involved a widely known rivalry between two justices of the West Virginia Supreme Court of Appeals, Marmaduke Dent and Henry Brannon. Justice Dent was an early proponent of the deep pocket theory of liability, while Justice Brannon endorsed the classic laissez-faire view of enterprise liability. *See J. REID, MARMADUKE DENT OF WEST VIRGINIA: AN AMERICAN JUDGE* 123-40 (1968).

companies in employee injury cases is in contrast to the outcomes of other cases against coal companies and railroads. Nonemployee tort cases were resolved in the railroads' favor only 59% of the time (thirty of fifty-one cases). Nontort litigation resulted in a decision for the company in only 54.7% of the cases (twenty-nine of fifty-three cases).

In the following decade, between 1900 and 1909, the number of employee and passenger injury cases, and the proportion of them won by defendants, represent a sharp drop in the degree of favor shown railroads. Only nine tort suits by railroad employees were heard by the court, a sharp drop from the previous decade. Eighteen cases were brought against coal companies by employees. The number of cases brought against railroads for injuries to persons who were not employees dropped to thirty-three, also down from the previous decade. The remaining cases involving railroads and coal companies heard in the 1900 to 1909 period were nontort litigation, and comprised nearly two-thirds of the total (ninety-three cases), a much larger proportion than in the previous decade. Outcomes increasingly favored employees and passengers over railroads. Only 44% of the railroad employee tort cases (four of nine cases) were decided in the railroads' favor, a dramatic drop from nearly 80% in the previous decade. Coal companies won 67% of the tort cases against them (twelve of eighteen cases), also down from the approximate 80% they won in the decade before. The railroad won only 39% (thirteen of thirty-three) of the nonemployee tort cases, down from 59% in the previous decade. The decisions in nontort cases favored the company 51.6% of the time (forty-eight of ninety-three cases) compared to 54.7% for the previous decade.⁵⁴

The strong stand taken by the West Virginia Supreme Court of Appeals, maintaining the common-law rules barring recovery by coal company employees, could not have gone unnoticed by attorneys handling cases at the circuit court level. The rising rate of accident litigation against coal companies after 1900 was unlikely to have been the result of the marginal improvement in the rate of decisions favoring plaintiffs in the decade between 1900 and 1909. Railroads, however, were in a differ-

54. From its creation, the West Virginia Supreme Court of Appeals had nearly complete discretion over its caseload, one of the very few state supreme courts to possess this power. One interpretation of a decline in appeals, therefore, is that the court of appeals refused to hear them. Statistics published by the state auditor indicate that the court declined about 25% of all requests for appeals. AUDITOR OF THE STATE OF WEST VIRGINIA, 1877-1878 BIENNIAL REPORT (1879). The Biennial Reports for the years 1879-80 to 1925-26 were also examined to reveal the 25% declination of requests for appeals. However, we do not know how the court used its discretion to suppress or encourage particular issues.

ent position. Even though the common law governing recovery by railroad employees did not change until passage of the Federal Employers' Liability Act in 1908,⁵⁵ injured railroad employees, as well as injured nonemployees, enjoyed significantly greater success before the court in the later decade.⁵⁶ The change in the duty of care owed to nonemployees, together with the increasing proportion of employee and nonemployee cases lost by railroads, might well explain the rapidly rising litigation rate against railroads in the circuit courts after 1900. However, it does not explain the decline in the rate of tort litigation in the circuit courts against railroads which began before 1910.

B. *Outcome in the Trial Courts*

If the rising rate of coal company accident cases cannot be explained by changes in appellate court decisions, it may alternatively be explained by outcomes in the state trial courts. Whatever the apparent sympathies of the appellate judges, most cases were resolved by the circuit courts.⁵⁷ If the state circuit courts increasingly favored miners in accident litigation it is logical to suggest that more cases would be brought to court. Table 4 presents data which allow an evaluation of this hypothesis. As the data demonstrate, plaintiffs won approximately 56% of the cases brought in the three circuit courts. This success rate dropped by approximately 11% if the defendant was a company. However, of those cases which went to trial against coal companies, plaintiffs won over 85% of the time. This success rate by plaintiffs suing coal companies is not greatly different from the success rate of all plaintiffs in all trials.⁵⁸ It appears that the only advantage enjoyed by coal companies was that they were able to settle 10% more of the cases brought against them than were individual defendants. Suits against individuals were settled in 36% of the cases. Suits against coal companies were settled in 43.6% of the cases, which was also the average settlement rate for all company defendants.

55. See *supra* note 29.

56. See cases cited *supra* note 53.

57. Between 1872 and 1925, 218 cases were brought against coal companies seeking compensation for mining accidents. Of these, only 13, representing less than 6% of the cases, ended in an appeal heard by the West Virginia Supreme Court of Appeals. Similarly, only about 4% of all circuit court accident litigation against railroads ended in an appeal. Table 4 presents a summary of these statistics.

58. Plaintiffs won nearly 90% of the trials. This success rate dropped only 5% if the defendant was a company, but there was great variation between types of companies. For example, banks lost a substantially greater proportion of the cases they defended, while railroads won a larger proportion. See Munger, *supra* note 22, at 337.

In accident cases brought by employees, however, coal companies fared much better. Judgment for the employee was entered in only 16% of the cases, while plaintiffs won a judgment in 45.6% of all cases brought against coal companies. Coal companies settled 63.8% of all accident cases, but only 43.6% of the total number of cases against coal companies were settled. The low rate of judgment for miners is only partly explained by their high settlement rate. Of the accident cases which actually went to trial, miners won less than 50%, while all plaintiffs enjoyed an 85.8% trial success rate against coal companies.

Over time, the proportion of miners winning at trial varied considerably. As the average success rates for five-year periods in Table 4 demonstrate, before 1905 miners won less than 50% of the cases which went to trial, with the exception of two periods in which only a very small number of cases was initiated. Between 1906 and 1910, however, miners won 58.8% of the trials, and in the next three five-year periods miners won 45%, 100%, and 61.5% of the trials respectively.

The pattern of outcomes in industrial accident cases brought by miners does not explain the rising tort litigation rate against coal companies between 1900 and 1910. Employees of coal companies fared better in the state trial courts as time passed, but their success followed, rather than preceded, the increase in the litigation rate. Unless employees, or their lawyers, or both, anticipated a change in the sympathies of judges and juries, the subtle changes in outcomes evidenced by these data do not explain the increase in tort litigation. This conclusion is reinforced by a further statistical analysis which revealed no statistically significant correlation between tort litigation brought against coal companies and the percent of trials won by employees in the previous year.⁵⁹ The absence of any correlation suggests that employees, lawyers, and others who may have participated in decisions to litigate against coal companies were not persuaded to favor litigation by the outcomes of tort cases. If a sea change in the attitudes of judges and juries was anticipated, it remains to

59. Regression analyses of industrial accident litigation rates confirm many of the conclusions reached in this essay on the basis of interpretation of the figures which appear in the text. Regression analysis is a statistical procedure that estimates the extent to which two numerical characteristics of the object or events being studied covary. A statistically significant covariance revealed by regression analysis may be interpreted as evidence of the presence of a causal relationship between the characteristics used in the regression analysis. Causal connections between economic fluctuations, the adoption of remedial legislation, changes in the pattern of trial court outcomes, and the rate of litigation were analyzed by means of statistical regressions. Specifically, regression of the rate of tort litigation against coal companies on the percentage of trials favoring the employers during the previous year revealed no statistically significant relationship.

be documented and its effects on potential litigants explained.⁶⁰

Railroads, as defendants in the state trial courts, faced a mix of tort cases which was different from those faced by coal companies. Railroads were sued not only by employees for injuries suffered in the course of employment, but also by passengers, trespassers, and persons whose property had been damaged by railroad operations.⁶¹ Plaintiffs in all types of litigation against railroads won judgments only 21.8% of the time, compared with a 46% average against both coal companies and all types of companies considered together. The lower success rate of plaintiffs suing railroads may be explained in part by the railroads' tendency to settle a much larger proportion of cases than other companies. Railroads settled 65.6% of the time, while coal companies settled 43.6% of the cases against them. However, the higher settlement rate by railroads does not explain the difference in outcomes after trial. In trials against railroads plaintiffs won only 69.9% of the cases, compared with an 85.8% success rate for plaintiffs in cases brought against coal companies. Railroad attorneys may, of course, have been more selective in the cases which they allowed to go to trial.

Notwithstanding the mix of employee and nonemployee tort litigation against railroads, there were strong similarities in the outcomes of tort cases brought against railroads and those brought against coal companies. A similar proportion of tort cases were settled by both types of companies, with coal companies settling 63.8%, and railroads settling 59.3%. The similarity extends to removal of cases to federal court as well. Even though most railroads were incorporated out of state, while most coal companies were West Virginia corporations, about the same percentage of tort cases against each type of company was removed by the defendant to federal district court.⁶²

60. The standard histories of the adoption of workmen's compensation document the concerns of commissions established to examine the problem, but not the level of concern by the public, or changes in working class attitudes toward compensation. One helpful study documented the debate among lawyers in a number of states. Steidle, "Reasonable" Reform: *The Attitude of Bench and Bar Toward Liability Law and Workmen's Compensation*, in *BUILDING THE ORGANIZATIONAL SOCIETY: ESSAYS ON ASSOCIATED ACTIVITIES IN MODERN AMERICA* 31 (J. Israel ed. 1972).

61. By far the largest number of cases brought against railroads in the circuit courts were appeals from decisions by the justices of the peace. These cases typically involved property damage. See F. Munger, *Capitalists in Court in the Progressive Era: Did the "Haves" Come Out Ahead?* (1987) (unpublished manuscript, available from the author).

62. Although the percentages of tort cases removed to federal court were virtually the same between both types of companies, when all types of cases are compared far fewer coal cases were transferred to federal courts. See Munger, *supra* note 22, at 337. This may have been a coal company trial strategy in tort cases, although state courts appear to have favored coal companies slightly over

The facts that similar proportions of all types of tort litigation were settled and that similar proportions of tort cases were removed to federal court suggest that attorneys may have played a significant role in selecting strategies. Decisions to settle or to remove a case to federal court reflect litigation strategies in which counsel for the defendant played a decisive role. The hypothesis that there was a pronounced tendency among the regional bar to settle any tort case is suggested by comparing the outcomes of tort suits brought against individuals with those brought against company defendants. In tort litigation by individuals against other individuals, settlement occurred about 58% of the time. Similarly coal companies reached settlement in 63.8% of their cases, and railroads settled in 59.3% of their litigation. These three figures are strikingly close, suggesting that there was in fact a strong predisposition among members of the bar to settle tort cases, regardless of the defendants involved.

While the rates of settlement and removal of tort cases by coal companies and railroads were similar, there was a significant difference between the proportion of cases the two types of companies won at trial. In suits against railroads in state courts, plaintiffs won 63.1% of the trials, while plaintiffs in suits against coal companies won 49%. Furthermore, the proportion won at trial by plaintiffs suing railroads increased from 40% between 1886 and 1890 to 85.7% between 1916 and 1920. However, the litigation rate against railroads does not appear to conform to the fluctuations in outcomes.⁶³ The peak litigation rate reached in the early 1890s accompanied a relatively low success rate, and followed a period of equally low success. The rising rate between 1906 and 1910 was accompanied by a relatively low success rate and followed a period of moderately high success for plaintiffs.⁶⁴

railroads. Alternatively, it may reflect choices by lawyers who preferred to litigate locally against nonresident coal companies.

63. In estimating the rate of tort litigation against railroads we are hampered by the lack of accident statistics for any unit approaching the size of the region under study. As a result, the conclusion that the litigation rate against railroads was rising rests on the assumption that occasions for accident litigation increased in rough proportion to the size of the population. This assumption is not unreasonable, since it is likely that the number of passenger accidents is proportional to the number of passenger miles traveled. It is less certain that employee injuries bore a strong relationship to the size of the counties' population.

64. The conclusion that the outcome of trials at the circuit court level did not predict a rising or falling litigation rate was confirmed by regression analysis. A statistically significant relationship between the rate of litigation and the proportion of trials won by similar plaintiffs in the preceding year was not found by means of a regression analysis of the effects of trial court outcomes on tort litigation against coal companies, or tort litigation against railroads. See *supra* note 59. It is possible, however, that a more complex lagged effect was present combining the effects of other factors or

The apparent absence of a relationship between the results of all tort cases against railroads and the overall trend in initiating tort litigation against railroads does not mean that there is no similar relationship within particular types of tort cases brought against railroads. As noted earlier, tort litigation against railroads consisted of a mixture of distinct types of cases, predicated on liability to employees, passengers, bystanders, or even trespassers. Since the rules governing liability for injury to employees were different from the rules governing liability for injury to nonemployees, the two should be considered separately. Between 1890 and 1899, personal injury litigation against railroads in the three state circuit courts consisted of approximately 50% each of employee injury litigation and nonemployee injury litigation.⁶⁵ Since the West Virginia Supreme Court of Appeals liberalized the rules of liability to nonemployees, one might expect the ratio of employee to nonemployee suits to change, reflecting a greater proportion of nonemployee cases. But the proportion did not change over time. However, there were differences in the outcomes of the two classes of cases in the circuit courts, and the pattern of outcomes of nonemployees' cases changed over time. The overwhelming majority of employee cases ended in settlement. While nearly all of the employee cases going to trial were won by the railroad employee, fewer than 15% actually went to trial. This pattern did not change after 1900, and it did not even change after the adoption of the Federal Employers' Liability Act. Nonemployee cases went to trial at a rate of approximately 57% between 1890 and 1899, and at a rate of about 85% between 1900 and 1909. In addition, the rate of success at trial for nonemployee personal injury plaintiffs suing railroads went up from 40% between 1890 and 1899 to 60% between 1900 and 1909.

These patterns of railroad litigation by employees and nonemployees are consistent with reasonable expectations of the effects of appellate decisions. The tort law applied by the West Virginia Supreme Court of Appeals increasingly favored nonemployees. The increasing success of nonemployees in trials in the circuit courts was consistent with the trend

litigation rates. If so, the regression model applied would not have captured it. It seems unlikely, however, that there is any very precise relationship between circuit court outcomes and the rate of litigation. The findings suggest that other factors have a substantially greater effect on litigation rates.

65. The statistics describing the proportions and outcomes of employee versus nonemployee personal injury litigation are based on an examination of a one-third sample of case files drawn at random from the tort cases heard by the Fayette County Circuit Court. Due to the absence of formal pleadings in most files, it was only possible to distinguish the various types of personal injury cases after an inspection of the depositions and testimony of witnesses. See *supra* note 22.

in appellate doctrine.⁶⁶ The West Virginia Supreme Court of Appeals did not relax the doctrinal barriers to recovery by railroad employees, yet its decisions increasingly favored employees. This may explain in part why circuit court filings by employees kept pace with filings by nonemployees over the two decades. Far fewer employee cases were ever tried. The threat of a decision on appeal favoring the employee may have been sufficient to force settlement without trial, even though the law favored employers until the passage of the Federal Employers' Liability Act in 1908. Furthermore, neither the rate nor the favorable employee outcomes in litigation against railroads increased after 1908, when the Federal Employers' Liability Act overrode the common-law rules restricting recovery by railroad employees. In fact, between 1910 and 1915, the litigation rates against railroads for both employees and nonemployees declined, and were generally lower after 1915 than in earlier periods. In light of the considerations above, it appears that neither rules of law nor trends in circuit court outcomes can explain the decline in tort litigation against railroads.

C. *Litigation and Mine Disasters*

One of the simplest explanations of the increasing number of tort cases by coal company employees against coal companies is that the number of accidents increased.⁶⁷ Not only were there more accidents, but the nature of the accidents underscored the problems of mine safety and the plight of miners. The hazards of mining became a national issue, due in part to a series of disasters which occurred in Fayette County in 1900 and 1907, and in Monongah, West Virginia, where more than 460 miners were killed.⁶⁸ In addition, Table 2 illustrates that even in the absence of major disasters, accidents kept pace with the steady increases in production. The impact of these events on the success rate of miners in court can be examined by statistical means. A regression analysis demonstrates that the number of deaths due to explosions was a statistically significant predictor of the success rate of miners in any given year.⁶⁹ If mine disas-

66. See *supra* Section IV(A).

67. For example, the statewide number of reported mining deaths rose from 20 in 1883, the year the report first appeared, to 521 in 1914. WEST VIRGINIA DEPARTMENT OF MINES, 1916 ANNUAL REPORT 231 (1917).

68. See W. GRAEBNER, *supra* note 35, at 3.

69. Using data from the years 1897-1918, a regression analysis was performed to determine if a statistically significant relationship existed between the percentage of trials won by miners and several potential causal factors. These factors included: (1) the number of fatalities in mining accidents that year; (2) the wage level of miners; (3) the percent increase in coal production that year; and (4)

ters influenced judges and juries, they may also have created a climate in which miners or surviving relatives were encouraged to bring suits for compensation, even before the trend in circuit court outcomes was apparent.

D. *Union Organizing*

Union organizing in Fayette County reached a climax between 1902 and 1903.⁷⁰ The United Mine Workers of America, following a series of unsuccessful strikes in states whose coal production competed with coal from West Virginia, found that it could not maintain successful concerted action as long as West Virginia mines remained unorganized. John Mitchell assumed the presidency of the Union in 1899 on a platform committing him to organizing West Virginia miners. The strikes in 1902 and 1903 were of a magnitude not approached by previous or subsequent efforts of the union in West Virginia. In an effort to achieve recognition of the union, more than eighty mines were struck in Fayette alone.

During the strike years of 1902 and 1903 a record number of claims for compensation for mining injuries were filed by miners against coal companies in the Fayette County Circuit Court, even in the face of steadfast hostility to such claims by the West Virginia Court of Appeals. The coinciding of worker mobilization with record numbers of court claims suggests that union organizing may have affected workers' perceptions of the value of claims. Alternatively, unions may have increased the sense of efficacy of individual claimants who pursued legal remedies beyond the point at which they might otherwise have been dissuaded by an attorney. As described previously in Table 2, of the five, five-year periods between 1890 and 1915, the first, 1891 to 1895, had the highest litigation rate. This first period included the wave of strikes called by the United Mine Workers of America in 1895. The litigation rate is also high between 1901 and 1905, the period of greatest strike activity. Conversely, the litigation rate for the last period, 1906-1910, which had considerably less strike activity, is lower.

It should be noted that the remaining period, 1896 to 1900, had the lowest litigation rate, even though a major strike wave occurred in 1898. However, these strikes were motivated by a 20% reduction in wages dur-

the number of strikes in the three counties. The analysis revealed that there was a statistically significant relationship between trial outcomes and the other factors. The results indicated that the statistical relationship found by the analysis could be expected to occur by chance only 5% of the time.

70. See J. Thomas, *Coal Country: The Rise of the Southern Smokeless Coal Industry and its Effects on Area Development, 1872-1910*, at 232-71 (1971) (unpublished doctoral dissertation).

ing the preceding few years, not by issues which characterized the strikes of 1902 and 1903. These latter strikes focused on issues of union recognition, more proactive claims for checkweighmen, and an end to company store monopolies. Nonetheless, this distinction is not particularly persuasive as an explanation of the difference in litigation rates, because it does not explain why this particular difference between the strike waves would have had such a marked effect on the rate of litigation of accident claims. A more plausible explanation lies in the fact that the rates of all types of litigation decreased sharply during the depression years of the late 1890s. It appears that the rate of litigation of accident claims during the five year interval between 1896 and 1900 was affected by factors which depressed all litigation rates, and absent these factors the coal mine accident litigation rate would have resembled the two other periods of strike activity.

The argument for a strong relationship between collective action and tort litigation must also be qualified in light of other evidence. The issues raised in 1902 and 1903 by Fayette County strikers had nothing to do with safety.⁷¹ Indeed, safety was not an issue on the agenda of the United Mine Workers of America until after 1910, and then it focused on certification for miners, accepting the employers' own hypothesis that careless and incompetent miners caused mine accidents and disasters.⁷² It is possible to suggest that miners themselves accepted many of the values of self-reliance which were embodied in the common-law rules that emphasized employee responsibility.⁷³ What bothered West Virginia miners more than safety was the total domination by owners in the company towns. Even wages came out a poor seventh on the list of demands prepared by Fayette miners.⁷⁴ These characteristics of the 1902 and 1903 strikes hardly suggest that collective action had a direct effect on claims for liability. Rather, they suggest that because customary values of self-reliance formed the basis for many of the claims which miners did make, miners themselves may not have been the principal factor in the tort litigation patterns of 1900 to 1910.⁷⁵

71. *Id.* at 257.

72. See W. GRAEBNER, *supra* note 35, at 112-13, 115.

73. *Id.* at 112-18.

74. D. CORBIN, *supra* note 17, at 32-33.

75. An alternative interpretation is that miners felt a greater sense of personal importance, brought more cases to attorneys, and sought personal compensation regardless of union objectives. The relationship between collective and individual action is far from clear. One study of the complaints brought to the Massachusetts Commission Against Discrimination demonstrated that collective action can motivate and direct individual action. However, whether this affects individual behavior in other conflicts with the same adversaries is not clear from the study. L. MAYHEW, LAW

E. *Lawyers*

Attorneys may have had the most important influence on litigation trends. It is not known how they selected cases for litigation. It is known that they represented working class litigants in some causes of action, significantly torts. The contingent fee was utilized in other parts of the country, although its use was associated with a minority of attorneys who specialized in personal injury cases.⁷⁶ Consistent with this national pattern, representation in industrial accident cases in Fayette County was undertaken by a relatively small number of attorneys who specialized in such litigation. Only twenty-nine different attorneys handled accident cases in Fayette prior to 1900.⁷⁷ Moreover, one attorney, through a combination of partnerships with different lawyers, handled between 25% and 30% of all industrial accident litigation in the county. Not surprisingly, the same lawyer also represented the miners in the eviction cases in 1901.⁷⁸ Between 1900 and 1910, the number of plaintiffs' attorneys increased by only 40% while the number of accidents increased by about 300% and the number of cases brought by about 200%.⁷⁹ Several of the attorneys who represented plaintiffs prior to 1900 also represented the companies in similar litigation. Although many of the plaintiffs' attorneys continued their involvement with these types of cases after 1900, there were few who represented both sides, with many attorneys moving to exclusive representation of the companies.

An analysis of the claims brought before 1900 shows that 44% were for fatalities, while the remainder involved injuries which were nonfatal. After 1900, more than 63% of the cases were fatalities. The trend, it can

AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION (1968).

76. See J. HURST, *THE GROWTH OF THE LAW: THE LAW MAKERS* 295-300 (1950); Friedman & Ladinsky, *supra* note 34, at 60.

77. These proportions are based on an examination of the case files of one-third of the tort cases brought in Fayette County over the period of the study. See *supra* note 22.

78. To contemporaries concerned about the lapse in ethics of a rapidly expanding profession, the mention of an attorney who specialized in personal injury litigation often brought to mind an "ambulance chaser"—a member of the bar of low repute and loose professional morals. See J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 48-49 (1976). By contrast, C.W. Osenton, the member of the Fayette County bar referred to here, was an attorney of high repute. C. W. Osenton's career included distinctions equal to many of his Fayette contemporaries, and hardly follows the pattern of ambulance chasers which this description may have brought to mind. What may have set Osenton apart was his reputation as a criminal defense lawyer. This specialization may have provided an easy transition to the role of plaintiff's lawyer in accident litigation without loss of position in the local bar. See *BENCH AND BAR OF WEST VIRGINIA*, *supra* note 32, at 300-01.

79. See *supra* note 22.

be argued, showed an increasingly conservative selection of cases by attorneys, perhaps in response to the continuing hostility of the West Virginia Supreme Court of Appeals. The number of mine disasters in Fayette County between 1900 and 1910 must have given attorneys a macabre satisfaction since they provided many fatalities to litigate which would appeal strongly to a jury's sympathies. These figures also support the argument that the practice of accident litigation may have become more specialized after 1900. It might be argued, for example, that increasingly conservative case selection may explain the relative decline in the litigation rates between the first and last periods presented in Table 2. This argument would suggest that the cases brought between 1891 and 1895 are a fair representation of the injuries which actually occurred, while the cases brought by a more specialized bar after 1900 reflected more careful selection, since the actual number of injuries increased, while the number of cases decreased.

V. TORT LITIGATION AND THE POLITICAL ECONOMY OF TORT LAW REFORM

The mainstream and revisionist theories of reform in the law of industrial accidents both maintained that change in the common law was motivated in part by the costs of litigation, including the costs of nonrecovery.⁸⁰ Mainstream theory describes workmen's compensation as an example of "collective problem solving."⁸¹ This view holds that it is the function of law to provide clear rules for the determination of liability and the payment of compensation.⁸² According to this theory, the fellow servant rule initially provided such a guideline, but performed this task less and less well in the late nineteenth century, due to an accumulation of conflicting interpretations and an increasing dissatisfaction with the distributive effects of the rule at the trial court level. When the rule no longer performed efficiently, it was identified as a problem by employers, workers, and the public, resulting in a collective solution to the problem. This collective solution was embodied in legislative action adopting a rule consistent with the need of management and labor for a predictable, reliable, and fair form of compensation.⁸³ The revisionist theory of the

80. See *supra* notes 35 & 36.

81. Friedman & Ladinsky, *supra* note 34, at 51.

82. *Id.* at 62.

83. *Id.* at 71-72. This hypothesis fails to consider any alternative means of achieving predictability, such as insurance and manipulation of the settlement process by attorneys. See H. SMITH, LIABILITY AND COMPENSATION INSURANCE: A SERIES OF LECTURES DELIVERED BEFORE THE

adoption of workmen's compensation argues that social legislation was proposed by businesses to reduce the destructive effects of market conflict and class conflict.⁸⁴ According to this view, workmen's compensation may have appealed to mine owners for two reasons. First, as a means of reducing the unpredictable costs of litigation, and second, as a means of controlling an inflammatory issue in worker-employer relations.

These arguments about the importance of the costs of litigation can be examined in light of the West Virginia experience. The argument that recovery under the common law was increasingly inefficient, or unpredictable, is based on the fact that the fellow servant doctrine became increasingly complex at the end of the nineteenth century.⁸⁵ The argument presumes that increasing complexity in the doctrinal law necessarily results in an increased uncertainty of outcomes at the trial level.⁸⁶ Yet, in West Virginia, prior to the adoption of workmen's compensation there was a highly routinized system for handling cases arising from industrial accidents. In contrast to the bulk of the cases in the West Virginia circuit courts, most accident cases, both industrial and other types, were settled before trial.⁸⁷ This consideration, in conjunction with the facts that the regional bar was small in number, and that an even smaller number of attorneys represented the accident litigators, leaves little doubt that there existed a compensation system with a high degree of predictability.⁸⁸

No doubt the routinization of accident cases was to the great satisfaction of the defendant companies, since it minimized the intrusion of accident liability on the business of production and profit. In the correspondence of Justus Collins, a major coal mine owner of the period, there is little prior to 1910 to suggest that injuries to his employees, however frequent, were of great concern in his business planning.⁸⁹ Because in the

INSURANCE INSTITUTE OF HARTFORD 66-67 (1913) (commenting on settlement practices of insurance company lawyers).

84. See *supra* note 35.

85. This argument is documented in Friedman & Ladinsky, *supra* note 34, at 59-65.

86. For a lucid elaboration of the argument implicit in Friedman and Ladinsky's article see R. LEMPERT & J. SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 92-93 (1986).

87. See *supra* Section IV(B).

88. Notwithstanding the differences in capacity and interest between individual defendants and company defendants in tort litigation, the outcomes of tort suits brought against individuals were identical to the outcomes of tort suits against companies, suggesting that the tendency toward routinization was very strong.

89. The conclusion is based on an examination of the business correspondence of Collins through 1910. During this period his growing suspicion of unionization among miners led Collins to attribute mine explosions to union organizers. D. CORBIN, *supra* note 17, at 109. After 1910, as scientific evidence of the sources of coal dust ignition mounted, Collins revised his view of the causes of accidents. Similarly, as the concept of workmen's compensation became accepted, he and his

period up to 1910 the number of accidents closely parallels the number of tons of coal produced, it appears that accidents may have become just another cost of doing business. It may be concluded, therefore, that in West Virginia the outcomes of industrial accident litigation were not inefficient from the perspective of employers.

Revisionist theory argues that it was not unpredictability but the high cost of litigation which persuaded many employers to accept workmen's compensation. Under a revisionist analysis, as the number of industrial accidents increased, the potential liability of employers would also increase if accidents gave rise to litigation. However, the fact is that tort litigation, including industrial accident litigation, was a rare event. Because some recovery was typical in most cases filed in court, the system should have encouraged litigation of claims. Yet, only about five percent of all coal mine accidents resulted in litigation. At the peak rate, only about four accident cases were brought against coal companies for every million tons of coal produced.⁹⁰ Consequently, since coal employers faced relatively little accident litigation, the revisionist argument that litigation costs led them to workmen's compensation appears inaccurate.

It might be argued that the rate of industrial accident litigation was low because the common-law rules governing employer liability created defenses that few employees could hope to overcome.⁹¹ Doubt may be cast on this hypothesis, however, by the lack of evidence demonstrating the influence of appellate court doctrine on trial outcomes, or on the decisions of litigants to litigate. As previously noted, fluctuations in the rate of trial court litigation of industrial accident claims demonstrated no clear relationship to the pattern of decisions of the West Virginia Supreme Court of Appeals.⁹² The absence of a clear relationship between appellate decisions and the rate of litigation at the trial level suggests that appellate decisions could not have been the most important factor in producing fluctuations in the rate of litigation. Nevertheless, the barriers presented by the common law, and the perceived judicial hostility to employee accident claims at the appellate level, may have been daily concerns of the legal and the social systems deflecting many potential claims.⁹³

managers demonstrated growing support for both mine safety and an adequate compensation system for miners. W. GRAEBNER, *supra* note 35, at 144-45, 160.

90. *See supra* Section IV.

91. *See supra* Section IV(A).

92. *Id.*

93. The hypothesis that the legal culture at the trial court level was largely unaffected by appellate decisions and was based, in part, on the assumption that courts were hostile to employee claims,

Industrial accident litigation rates may have been low for reasons which had nothing to do with tort law. There is little evidence miners were frustrated by the ineffectiveness of litigation in obtaining compensation. We do not know whether miners were particularly conscious of their legal rights. That is, whether they thought that litigation was, or ought to have been, a basis for compensation for accidents. Their pattern of litigation does not suggest increasing discontentment with the system of recovery bases on common law. Further, the labor organizations which they formed did not view safety and the consequences of accidents as an issue until well after workmen's compensation had become a serious proposal through the efforts of other constituencies.⁹⁴ Ignorance of the law may explain part of this inaction. The behavior of the legal profession undoubtedly played a significant role. But it is also likely that the attitudes of many miners themselves made it difficult to view the solution of the problem in terms of government intervention. Factors such as a tradition of self-reliance, a sense of powerlessness in dealing with employers, and a tendency to blame accidents on foreign-born miners may all have contributed to this pattern.⁹⁵

Whatever the reason for the low rate of industrial accident litigation, contrary to the claims of revisionist theory, litigation may not have been onerous for mine owners. Examination of the dollar amounts which West Virginia mine owners risked losing through industrial accident litigation (exclusive of attorney's fees and court costs) suggests that litigation may have provided a financially manageable system for handling accident liability from the owner's perspective. Complaints filed in cases of injury or fatality due to accidents in mines prayed for what must have seemed substantial damages by contemporary standards, averaging about \$9,300 between 1890 and 1925.⁹⁶ However, a mine owner's gross revenue

irrespective of the variation in the doctrine that resulted from specific appellate decisions, is an empirically testable one. I offer no direct evidence here of such a sharp disjunction of legal cultures at the appellate and trial court levels. I suggest that it is a plausible and important hypothesis for further research.

94. See *supra* Section IV(D). See also Weinstein, *supra* note 35, at 156.

95. The defeatism of miners is explored in J. GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980). Targeting foreign-born miners as scapegoats was indirectly encouraged by the United Mine Workers of America, through its support of a program of miner certification as an answer to the problems of accidents. Ironically, this proposed remedy precisely followed the policy underlying the common law, by seeking to shift liability away from employers and toward foreign-born employees. Statistics were gathered on accidents with detailed breakdowns by ethnicity, reflecting the tendency to equate accidents with ethnicity. W. GRAEBNER, *supra* note 35, at 118.

96. Over this period, the maximum claim for personal injury liability in the three circuit courts was \$50,000. Claims against coal companies for property damage averaged \$900. Personal injury

for one million tons of coal was more than \$800,000 at the depth of the depression of the 1890s, and typically averaged more than \$1,200,000.⁹⁷ Thus, damage claims from injuries to miners averaged between 3% and 5% of an owner's gross revenue, even at the peak rate of litigation of four cases per million tons. In addition, at least 60% of all cases were settled, and payments to claimants in these settled cases were likely substantially below the amount claimed in the pleadings. Consequently, as suggested earlier, it appears that the revisionist hypothesis regarding the import of employers' litigation costs may be misguided. Nonetheless, in order to observe the specific effects of litigation costs on the coal industry, a more precise analysis is required.

Although the average personal injury damage claim was relatively low, the cost implications of accident litigation are related to the structure of the industry. The coal industry was highly competitive due to relatively low entry costs and a large number of competitors. Few details of the industry's financial structure are known.⁹⁸ We do not know typical net revenues for companies of different sizes, nor do we know whether coal companies could transfer some of the risk of such loss to insurance companies.⁹⁹ We can only estimate the total costs of litigation. Since accidents were only roughly proportional to production, we do not know whether more productive companies faced more claims than those less productive as a result of their higher productivity. Factors explaining why some companies faced higher damage claims than others may include management capabilities, production financial resources, the use of machinery, or the use of any other strategies which resulted in safer mining practices.

While the effects of accident litigation on some coal companies may have been small due to such factors as small claims and a high degree of routinization in handling claims, for others even a small number of claims may have had a critical bearing on survival. Small companies may have been more seriously jeopardized by litigation, while larger compa-

claims against railroads averaged \$9,882, and property claims against railroads averaged \$5,930. These figures are derived from a detailed examination of files of tort cases in Fayette County. See *supra* note 22.

97. WEST VIRGINIA DEP'T OF MINES, *supra* note 44. These prices were computed from the Annual Reports for the years 1883 through 1925, with the exclusion of the years 1884 to 1887.

98. For an extraordinary effort to specify the economic assumptions upon which an historical interpretation of coal industry support for coal mining safety legislation was based see Graebner, *Great Expectations: The Search for Order in Bituminous Coal, 1890-1917*, 48 BUS. HIST. REV. 49 (1974).

99. R. LUBOVE, *supra* note 35, at 51-52. See generally H. SMITH, *supra* note 83.

nies were not at all threatened by litigation costs. This suggests that larger firms were unlikely to have been motivated by the costs of litigation to support workmen's compensation, while smaller firms may have had a greater financial motive to advocate reform of the common law.

While the precise impact of the cost of litigation on legal reform will remain unclear, the effect of accidents on business economics and reform may be more calculable. The steadiness of the accident rate may create a false impression concerning miners' and mine owners' perceptions of the risk of accidents. Undoubtedly miners were unlikely to have been comforted by the poor odds of survival. Analogously, mine owners operating on a very small margin were unlikely to have been comforted by an actuarial view of the risk of a mine disaster. Mine disasters were costly to both groups because so many fatalities were involved in a single explosion. However, because of the potential loss of property and productivity, owners also had an economic loss to bear. Some mine owners considered economic loss to be more important than the loss of human lives.¹⁰⁰ Therefore, as disasters mounted in the early twentieth century, mine owners most likely had more than a business-as-usual view of their costs. For example, Justus Collins, the mine owner cited earlier as unconcerned about the accidents suffered by individual employees and any subsequent litigation, became highly concerned about explosions after their marked increase following 1900.¹⁰¹ The same forces which affected miners' and attorneys' desires to litigate also created a self-interested concern for disaster prevention on the part of mine owners.

Where do these interpretations leave mainstream and revisionist theories of early twentieth century tort-law reform? The collective problem-solving approach of mainstream theory fails to examine two important questions which were suggested by the litigation in West Virginia. First, who was motivated to bring about change? Second, who was in a position to bring it about? An examination of West Virginia's industrial accident litigation indicated that coal miners did not make mine safety or workmen's compensation a priority. In addition, West Virginia coal companies had great influence in the state legislature, and thus were in a far better position than miners to demand enactment of reform legislation.¹⁰² Therefore, more information about workers, coal mine owners, and the

100. See D. CORBIN, *supra* note 17, at 23-24; W. GRAEBNER, *supra* note 35, at 156-57; see also *supra* note 75.

101. Letter from J. Collins to A. M. Herndon (Nov. 20, 1911) (Winding Gulf Colliery Company Papers) (West Virginia University Library, Morgantown, West Virginia), cited in W. GRAEBNER, *supra* note 35, at 145 n.15.

102. See generally J. WILLIAMS, *supra* note 19, at 196-232.

impact of litigation on each must be obtained before any conclusions are drawn concerning their respective roles in the adoption of workmen's compensation legislation.

Revisionist theory assumes that the common-law system of compensation was costly to employers, and consequently that employers were willing to support a reform which would guarantee modest levels of compensation to employees.¹⁰³ Very little is actually known about which coal mine owners supported workmen's compensation and why. The West Virginia data suggest that the average cost of tort litigation was small, but that the burden may have posed a greater threat to owners of smaller mines. Does this suggest the conclusion that owners of small mines were particularly active and influential in tort reform? If owners of smaller mines were not particularly influential in tort law reform, then the question of which owners supported workmen's compensation and why still remains unanswered. Further, preference for litigation rather than regulation as a means of resolving claims for accident compensation reflects a value—the value attached to having the state play a minimal role in the affairs of business. Many business owners strongly espoused this view, while others adopted more progressive views on regulation.¹⁰⁴ Further examination of the relationship between accident litigation and the support for workmen's compensation may reveal a great deal about how this value collapsed or changed in the business community.

Finally, this Article suggested another reason for being cautious about assuming that the interests of coal owners were aligned with progressive opinion on social legislation. I believe that the motives of mine owners in supporting workmen's compensation legislation remained obscure because the issue was peripheral to the owners' main concern—avoiding disaster. As long as accident claims were relatively routinized, the source of problems of liability lay not in the cost of accident litigation, but ironically in the dynamics of capitalism. Reform may instead have been motivated by the costs of unpredictable explosions that accompanied high rates of production and new technology. This economic vulnerability was in turn aggravated by competition, and made it difficult

103. There is little agreement among revisionist historians on this point. Compare Wiebe, *Business Disunity and the Progressive Movement, 1901-1914*, 44 *MISS. VALLEY HIST. REV.* 665 (1958); J. WEINSTEIN, *supra* note 35, at 40-61; G. KOLKO, *supra* note 35. Each of these historians presents a different version of an elite theory of influence, identifying particular business leaders who were in favor of reform.

104. See J. WEINSTEIN, *supra* note 35. The theory that resistance to the growth of the bureaucratic state reflected North American political institutions and values, delaying regulation is advanced by S. SKOWRONEK, *supra* note 1.

for individual firms to spend money in order to improve safety. Consequently, the costs of doing business, not the costs of litigation, may have affected employers' support of legislative reform.

VI. CONCLUSION

This Article began with the familiar observation that appellate doctrine and legislative policy are not adequate guides to the role played by trial courts during industrialization. Examining trial court litigation in West Virginia at the turn of the century confirmed these doubts about the normative role of appellate doctrine. The social organization of the relationships between litigants and attorneys, and between litigants and their peers, are of equal or greater importance than appellate doctrine in explaining litigation.

This Article examined industrial accident litigation in an attempt to explain the steady or increasing rate of litigation, despite the barriers created by the common law. This Article also attempted to explain litigation's decline at a point prior to the adoption of workmen's compensation, when there was still no commensurate change in the law. Factors such as public perceptions of mine disasters, collective action by miners, and the beginnings of specialization among plaintiffs' attorneys in southern West Virginia were evaluated, and their roles in facilitating decisions to litigate were also examined. While some of these influences seem to have been strong, little is known about the reasons why particular classes of litigants chose to pursue litigation over other means of dispute resolution. Once conflict resolution was placed in the hands of an attorney, it appears that the social characteristics of particular litigants disappeared, since the settlement rate of tort cases was uniformly high regardless of the characteristics of the plaintiff, defendant, or the type of accident.

Theories of the relationship between industrialization and law have predicted that as a result of the breakdown of other, less formal, mechanisms of conflict resolution, litigation rates will rise during periods of industrialization.¹⁰⁵ This hypothesis rests upon assumptions about the kinds of alternatives available for conflict resolution in preindustrial society, and upon further assumptions of what happens to these alternatives as the work and the lives of workers change. Industrialization drastically changed the character of life in rural West Virginia. Yet trends in the

105. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 111 (1960); Grossman & Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 *LAW & SOC'Y REV.* 321, 322-25 (1975).

rate of tort litigation did not follow the pace of industrialization. Litigation was a rare event in the years examined in this Article. At its peak, in 1890, there were only about four tort cases per ten thousand inhabitants. Our understanding of the role of law and litigation in daily life is still so incomplete that we do not know whether to be surprised, or not, by this low rate. Although it is an observation which applies with greater force to some areas of social life than to others, the small number of cases underscores the continuing importance of alternative mechanisms of conflict resolution.

Despite its infrequency, I have tried to suggest how industrial accident litigation may have had an important bearing on the adoption of social legislation such as workmen's compensation. As the revisionist historians recognized, tort litigation was just one aspect of the continuing social conflict between operators and workers on the one hand, and operators and encroaching state authority on the other. In order to understand the role played by operators in the growth of regulation, it is necessary to progress beyond the calculation of the economic costs of accident litigation to a consideration of the values held by many businessmen who opposed the imposition of regulation. In order to understand the function of legal institutions in the transformation of the social relations between workers and owners, the effects of law and litigation in other, perhaps functionally equivalent, areas must be considered. These include the maintenance of company towns, the control of property, the formation of families and peer organizations, the suppression of individual and collective activity through criminal law enforcement, the establishment and governance of municipalities, the role of institutions of democratic government, the jury, and the vote.

Annie Jones and Harrison Fox were participants in the evolution of conflict resolution during this critical transition period in West Virginia. Circumstances of their lives, known to us only through court records, do not set them apart from the large and growing working class of their communities. Yet, the very fact that they brought their conflicts to lawyers, and subsequently to court, sets them apart from their peers. Court records help achieve a better understanding of their individual cases, but their motives remain as obscure as those of operators caught between the destructive effects of competition and their traditional resistance to regulation. In attempting to assess their motives, it would be a mistake to focus exclusively on the apparent calculus of advantage in litigation created by legal rules and their interpretations by lawyers. The motives for using courts are linked, rather, to litigants' expectations of the outcome

and to the values the parties attached to litigation or to other forms of conflict resolution. As this Article has demonstrated, these expectations and values may have had little to do with legal rules. In turn, these expectations and values concerning litigation are linked to the history of class and class conflict in particular communities. Historical research into the context of decisions to litigate may be difficult, but if the role of litigation in industrialization is to be understood, it is research which must be undertaken.