MORE TALES OF TWO COURTS: EXPLORING CHANGES IN THE "DISPUTE SETTLEMENT FUNCTION" OF TRIAL COURTS

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This article uses Friedman and Percival's (1976) longitudinal survey of the caseloads of two California courts as a vehicle for addressing two conceptual issues that must be resolved in studies of the dispute settlement function of courts. First, one must decide whether the focus of inquiry is on the way courts function (i.e., act) or on the function that courts fill for some larger community. The methodological implications of this decision are discussed. Second, one must decide what counts as judicial contributions to dispute settlement. Seven possible contributions are identified. This article then reanalyzes Friedman and Percival's data on the Alameda and San Benito County courts, controlling for adult population. Reanalysis indicates that these data do not support the conclusion that the courts Friedman and Percival studied became functionally less important to community dispute settlement with increasing socio-economic development. This portion of the article suggests possible causes of some of the patterns observed, and discusses some of the problems that arise in working with longitudinal data culled from court dockets.

I. INTRODUCTION

In an article published in Volume 10 (1976) of this review, Lawrence Friedman and Robert Percival survey the caseloads of two California trial courts at five points in time: 1890, 1910, 1930, 1950, and 1970. One purpose of their survey is to test the authors' hypothesis that over time trial courts have come to do less work in settling disputes and more work of a routine administrative nature (1976:267). Friedman and Percival interpret their data as providing support for this hypothesis. They believe their data show that the incidence of cases involving trial courts in dispute settlement has steadily shrunk as a proportion of the total trial court caseload. From this they conclude that the dispute settlement function of the trial courts has declined noticeably over time (1976: 296). The authors expected to find substantial differences between the two courts they studied, since one serves a rural county and the other an urban

* I would like to thank Shari Seidman Diamond, Lawrence Friedman, Thomas Green, Robert Percival, David Seidman, and Francis Zemans for commenting on earlier drafts of this paper. I believe this version has benefitted substantially from their remarks. I would also like to thank Peter Ward for his aid in exploring the data and Kenneth Gerver for his research assistance. Work on this paper was supported by the Cook Funds of the University of Michigan Law School.

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

area, but they conclude, to their surprise, that the data from the two courts tell a single story (1976: 267).

The Friedman and Percival study is an important one because few researchers have systematically examined the business of trial courts over time. As I hope to show, even its limitations are useful, for they alert us to the ambiguity that exists when we talk about the "functions of trial courts" or "judicial dispute settlement." They also nicely illustrate the way in which our ability to learn from data depends on the perspective in which the data are placed.

The heart of my article is an analysis of Friedman and Percival's data from a different perspective than that which they chose to employ. We will see that the change of perspective allows us to address certain interesting problems that Friedman and Percival could not properly address in their work. This reanalysis complements the original article, as there is no inherent inconsistency between it and what Friedman and Percival do. First, however, we must attend to certain conceptual problems and consider the reasonableness of particular assumptions. Clarifying these matters will emphasize the limits of Friedman and Percival's analysis and the possibility that certain of their conclusions are more weakly grounded than their discussion suggests. Here their work is used largely by way of illustration. It should aid us in appreciating the importance of conceptual clarity in this area and the value of the kind of work they have undertaken.

II. CONCEPTUAL PROBLEMS IN THE STUDY OF JUDICIAL DISPUTE SETTLEMENT

The Functions of Trial Courts

The word "function" is a slippery term. In sociology it has a teleological connotation. To ask what is the function of something is to ask how it contributes to the viability of some institutional arrangement or social system. But "function" also means "to operate" or "to act." To ask how something functions may be simply to ask what it does. Thus when Friedman and Percival (1976:268) propose to investigate how the functions of trial courts have changed over time, they have set themselves an ambiguous task. Some of their language suggests—at least to this reader—that they are concerned primarily with the way in which trial courts serve the larger society. They write, for example, "in both counties we find a decline in

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

formal resort to courts, to adjudicate disputes arising out of legal transactions" (1976:283). They talk of a shift "toward administration, away from dispute settlement" (1976:286). They assume that over time fewer disputes go to court (1976:298). And they conclude that "[q]uantitative indicators of court performance . . . confirm one general hypothesis: the dispute settlement function in the courts is declining" (1976:296). At other places Friedman and Percival say that what they attempted was "to measure how the work of these courts changed over time" (1976:267); and they pose such questions as "[w]hat kind of cases do the two courts hear?" (1976:280). These questions suggest that Friedman and Percival's primary interest is in what courts do.

The question of what courts do is not unrelated to the question of what functions they serve. When courts stop doing something—e.g., settling disputes—it is unlikely they will continue to fill the correlative function (e.g., dispute settlement) for some larger system. However, if we are interested in what courts do, we are likely to analyze our data differently than if our concern is with the functions courts serve. Specifically, if we are interested in the activity of courts, it makes sense to focus on their *mix* of business and the way that mix has changed over time. It is interesting to note, for example, that in 1890 family matters accounted for 19 percent of the judical docket in San Benito County, while in 1970 they accounted for 62 percent of the docket. If one can specify types of cases in which a court acts primarily as a dispute settler and other types of cases in which a court is primarily engaged in routine administration, such data might lead one to conclude that over time the business of courts has come to consist of relatively more routine administration and relatively less dispute settlement.

The Problem of the Base

The fact that the mix of judicial business involves proportionately less dispute settlement than it once did does not necessarily mean that the extent to which courts function as dispute settlers for society has diminished over time. When types of cases are viewed against a base consisting of all cases, our information is limited to that which is intrinsic to the judicial system. Hence, we must be cautious about reaching conclusions concerning a court's role in the larger society. A simple example illustrates the need for caution. Consider a community in which 100 disputes arise each year, all of which are resolved by the local court. This court would be handling

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

100 percent of the community's disputes, and if no other matters were brought to court 100 percent of the judicial docket would involve dispute settlement. Suppose the community's leaders are so satisfied with the way the court handles disputes that they decide to give the judges a second task involving routine administration. If 100 of these routine matters arise each year, cases involving dispute settlement will account for 50 percent of the court's docket. Yet the court's function as a dispute settler will not have diminished because the court will, by assumption, still be handling every community dispute. It may be that the increase in the court's workload will leave it less time to devote to dispute settlement, but it is also possible that the community leaders when assigning the new task to the court also assigned a new judge or two.[1]

The example illustrates why we cannot measure a court's changing involvement in community dispute settlement by examining the percentage variation in the kinds of cases docketed over time. Because percentages must total 100, a substantial increase in the incidence of one kind of case will make it appear that the incidence of some other kind of case has decreased even if the incidence of that other kind of case, when viewed against a base that better reflects judicial involvement in dispute settlement, has remained constant or increased less substantially. Once we appreciate the implications of the base against which docket data is analyzed, the ambiguity of Friedman and Percival's discussion diminishes. Their primary concern must be with what courts do, for they most often analyze their data against a base consisting of all cases docketed

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[1] Indeed, this could have happened in one of the counties Friedman and Percival studied. In 1910 approximately 3320 cases were filed in the six courts of Alameda County, about 553 per court. By 1970 the total number of cases filed had increased to 11,811, but the number of courts had increased to 23, and the number of cases per court had decreased to 513. It may be, as Friedman and Percival argue, that the bulk of recent filings involve routine administration, but the flood of new cases during this 60-year period appears not to have resulted in the diminution of judicial resources available for dispute settlement.

This information comes from Stanley R. Collis, the Court Administrator for Alameda County, in response to my request for information concerning the number of judges and other court staff who were primarily concerned with civil litigation. He wrote in a letter dated March 17, 1978 that there were three courts in Alameda County in 1890, six in 1910, 12 in 1950, 23 in 1970, and 30 today. Since he also notes that one court today "is vacant," I assume that the number of courts equals the number of judges. No information was provided for 1930. (I am informed by Lawrence Friedman that there is technically only one superior court in each California county. What I have treated as separate courts are more properly referred to as "departments" of the superior court.) The number of civil filings per court based on the data supplied by Friedman and Percival and the information provided by Mr. Collis is approximately 237 in 1890, 553 in 1910, 604 in 1950, and 513 in 1970. San Benito had only one court during this entire period, but it is possible that judging became more of a full-time task.

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

before the court.[2] Exploring what courts do is interesting, but I, at least, find it less interesting than exploring the degree to which trial courts function as dispute settlers for communities and the ways in which such functioning has changed over time. Later in this article I shall attempt to show that an important feature of Friedman and Percival's data is that they allow us to explore these questions, but first other conceptual problems must be addressed.

A fundamental problem is to develop a measure of judicial involvement in community dispute settlement that can vary over time. This means that court dockets should be measured against a base that allows one type of judicial activity to vary independently of other types of activity. For most purposes, the base should relate to the number of occasions on which the court might be asked to settle disputes.[3]

The ideal base is probably the number of cognizable disputes arising within a court's jurisdiction. At any point in time, the degree to which a court is functioning as a community dispute settler could be measured by the percentage of such disputes brought to it for resolution. Unfortunately, information on disputes that are not officially processed is seldom available over time.

In the absence of information pertaining to actual disputes, one might use the adult population within the jurisdiction of the court as a base against which to measure changes in a court's docket.[4] Population statistics have the virtue of being available over time. They may also serve in a loose sense as a proxy for the number of disputes arising at particular points in

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[2] This conclusion is reinforced by a letter from Friedman and Percival, responding to an earlier draft of this article, in which they wrote, "We looked at what courts *do* and how this has changed over time" (emphasis in original).

[3] One can distinguish two dimensions on which a court's involvement in dispute settlement might vary. One involves the kinds of disputes that are cognizable by a court. Some courts have a limited jurisdiction, while other courts have exceptionally broad jurisdiction. All else being equal, one would expect a court's functional importance as a dispute settler to vary directly with its jurisdiction. Thus a first step in examining changes in a court's functional importance as dispute settler is to examine changes in a court's jurisdiction over time. The second dimension measures the proportion of cognizable disputes whose resolution is attributable to judicial processes. The higher the proportion the more important the court's role in dispute settlement. The measure of the court's involvement in dispute settlement that is used in this article reflects changes along the second dimension. In explaining variation on this measure over time, one must consider the possibility that variation along the jurisdictional dimension—i.e., a change in the meaning of the measure—is a possible cause.

[4] Although minors are occasionally involved in disputes that could reach civil courts of general jurisdiction, they are much less likely to be involved in such disputes than adults. Thus it appears that adult population provides a better base for evaluating a civil court's role in dispute settlement over time than total population.

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

time, since, other things being equal, one would expect the number of disputes in society to vary with the number of potential disputants.

The weakness of population as a proxy for disputes is obvious. Even if the number of disputes is likely to vary directly with population size, there is no good reason to expect the relationship between disputes and population to be linear, nor is there any good *a priori* reason to expect that the relationship will have a particular non-linear form. Furthermore, it is likely that different kinds of disputes will vary differently with population. Property disputes, for example, might increase at a slower rate than population, while tort disputes might increase at a greater rate. Despite these drawbacks, adult population statistics will be used as a base in the analysis that follows. Nothing better is available, and where, as with torts, the relationship is likely to be direct but not linear, there is often reason to suspect nonlinearity.[5]

From another perspective, population figures are a quite adequate base against which to measure changing judicial involvement in dispute settlement. One may say that a court is functioning more as a dispute settler the greater the proportion of the community it serves regardless of the proportion of disputes it resolves. Consider, for example, two communities of 100 individuals where each person is embroiled in ten disputes. In one community the court resolves ten disputes for each of ten people. Thus ten percent of the people in the community

[5] In the regression analysis described in note 27, infra, the coefficient for population is significantly different from zero in the combined county model for all dependent variables except torts. This is consistent with a situation where there is a linear relationship between population and problems over time and a constant propensity to litigate. When the counties are examined separately, the coefficient for population is insignificant with family or tort cases dependent in Alameda County and with family, tort, and contract cases dependent in San Benito County. In addition, significance levels are marginal with contracts dependent in Alameda County (.08) and trials dependent in San Benito County (.06). Cases where the coefficient for population is not significant might reflect a non-linear relationship between population and problems and/or a changing propensity to litigate problems over time. It may also result from collinearity between the two variables in the model.

I also examined the correlation of the number of cases in each county by case type with population, population squared, and the log of population. Transforming population generally has little effect on the levels or the significance of observed correlations. In one case a correlation significant at the .05 level with population in log form was not significant when population was untransformed; in one case the situation was reversed; and in one case the relationship between population and cases was significant at the .05 level while the relationship between population squared and cases was not. These relationships between population and the number of cases do not prove anything about the relationship between population and the unmeasured variable "disputes." They are not, however, so inconsistent with the hypothesis of a general linear relationship between population and disputes that we must discard that possibility as unreasonable.

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are served by the court and ten percent of the community's disputes are resolved in the judicial forum. In the other community, 90 people each have one of their ten disputes resolved by the court. Thus 90 percent of the people in the community are served by the court but only nine percent of community disputes are resolved by court action. In which community is the court functioning more as a dispute settler? Either choice might be justified, but there is no reason to choose. Judicial involvement in dispute settlement may be measured both in terms of the percentage of disputes that a court plays some part in resolving and the percentage of people in a community who take disputes to court. Where the first measure is of interest, population statistics may be an uncertain proxy for changes in the number of interpersonal disputes over time. Where the second measure is of interest, population statistics are a natural and essential control in any investigation of changes in the court's functioning as a dispute settler.[6]

Dispute Settlement Activity

The second major conceptual problem that must be addressed before looking at the data is the problem of deciding when courts are engaged in dispute settlement and how dispute settlement activity relates to functioning as a dispute settler. The problem is complicated because the judicial system may contribute to the settlement of particular disputes without any court attempting to settle the dispute. At one extreme, disputes do not even attract judicial attention. For example, norms established in an appellate opinion resolving one dispute can lead other disputants to settle their quarrels without seeking the aid of courts or attorneys.[7] Similarly, the threat to file suit may lead to a civil settlement where the imminence of

[6] These statistics will be inaccurate to the extent that certain people or organizations [Galanter's (1974) "repeat players"] bring a disproportionate number of cases. However, it appears from the types of cases reported that most of the cases collected by Friedman and Percival involve individual "one timers" on at least one side of the litigation and often—if only nominally, as in tort cases defended by insurance companies—on both sides. The measure will also be inaccurate to the extent that individuals bring to court actions that either do not involve disputes or involve disputes that have been fully resolved by the parties. The prevalence of "repeat players" or of actions that require only routine administration may well vary by case type. Future studies of court records should be able to identify cases brought or defended by "repeat players." Other cases involve multiple parties. These cases tend to offset distortions caused by the factors previously discussed.

[7] Courts may, in a similar fashion, promote disputing, since the creation of new norms may lead to claims that would otherwise have seemed so untenable that they would not have been asserted. For example, the decision in *Roe v. Wade* invalidating statutes forbidding abortions led to a series of disputes concerning such matters as whether the federal government had to pay for abortions through its medicaid program and whether hospitals receiving federal

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

escalated costs encourages the parties to reevaluate their positions.

Even where disputes are recorded with a court, judicial processes that contribute to dispute settlement need not involve court officials. Discovery, for example, generally proceeds without active judicial involvement. This is because parties usually can predict how judges would react if discovery were resisted, and codes of civil procedure provide sanctions for frivolously refusing discovery. Discovery contributes to dispute settlement in two ways. It raises the cost of litigation to the parties, giving them a greater incentive to settle, and it provides each party with information about the opponent's case, enhancing the prospects of settlement by increasing the likelihood that the disputants will similarly value the case.

The next stage is where a judge only learns of the dispute after it has been tentatively resolved. Here too we must recognize the possibility that the court contributes to dispute settlement. This is often the case when the parties seek ratification of an agreement they have reached. The uncontested divorce is an example. Here one might argue that the court has no dispute settlement function because the parties would presumably reach the same agreement if a divorce did not require a court's imprimatur. In some cases, perhaps a substantial number, the presumption is mistaken. Judicial ratification of an agreement usually carries with it the probability of quick and certain sanctioning should the agreement be breached. Where parties do not trust each other or where it is crucial that they bind each other's future behavior, the parties might be unable to reach agreements, or they might reach very different agreements if judicial ratification were not possible. In a divorce, for example, a woman might be willing to accept alimony payments in lieu of valuable property because she knows that a man who stops paying alimony risks imprisonment. If courts were unable to ratify such agreements, full adjudication of divorces might be more common. The situation is similar with respect to other negotiations that do not involve an immediate exchange of valued goods. Thus even where a court routinely ratifies agreements reached by others, it may be filling a dispute settlement function.

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funds had to make facilities for abortions available. In addition, a court in clarifying certain norms may make other normative conflicts salient and thus more likely to be disputed. Thus *Roe* has also led to disputes over the issues of whether parents must consent to a minor's abortion and whether a husband can veto his wife's decision to abort a fetus.

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Finally, we come to situations where courts *act* as dispute settlers. The clearest case is where disputes are adjudicated and a settlement imposed after full trial. But judicial dispute settlement activity is not limited to cases that eventuate in trials. Agreements ratified by judges are often agreements the judge has helped bring about. The pre-trial conference, for example, is supposed to narrow areas of disagreement so the trial can focus on the core of the dispute. However, many judges use the conference to push for full settlement, and they often succeed. Judges may intervene in less formal ways as well. Some family judges note with pride the divorce suitors whom they have reconciled. Many lawyers report informal pressure from judges to settle even after litigation has commenced. Sometimes the pressure is coupled with a suggested solution. When judges apply pressure or suggest solutions—however informally—attorneys usually listen, even if they do not always reach the agreement the judge desires. Also, some issues are commonly resolved by judges before trial. Such pretrial rulings may convince one or both parties that there is nothing left to adjudicate or that it is in their interest to settle.

Thus, we can distinguish at least the following ways in which courts contribute to dispute settlement: (1) courts define norms that influence or control the private settlement of disputes; (2) courts ratify private settlements, providing guarantees of compliance without which one or both parties might have been unwilling to reach a private settlement; (3) courts enable parties to legitimately escalate the costs of disputing, thereby increasing the likelihood of private dispute settlement; (4) courts provide devices that enable parties to learn about each other's cases, thus increasing the likelihood of private dispute settlement by decreasing mutual uncertainty;[8] (5) court personnel act as mediators to encourage the consensual settlement of disputes;[9] (6) courts resolve certain issues in the case,

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[8] See Ross (1970:144-149) for a discussion of why private dispute settlement should be facilitated as parties come to agree more closely about the likely outcome of adjudication.

[9] Friedman and Percival (1976:268-270) suggest that among courts that settle disputes we can distinguish two polar types of procedure or attitude. One type is a "social harmony" style and the other a "legal" style. Where the social harmony style is followed, the aim is to "patch up a rift in the social fabric" (which will usually require a mediative approach), and the norms applied are those that generally prevail in society. Where the style of dispute settlement is legal, the norms applied are not the same as the social norms and the decision is likely to be formal (and authoritative). When a modern judge mediates a dispute his actions do not fit either of the suggested polar types very well. This is especially so in actions such as divorce where the mediator may attempt to promote an amicable parting of ways rather than the restoration of a relationship. I believe that in classifying modes of judicial dispute settlement it is sensible to separate the stance which the judge or tribunal takes toward the dispute from the source of the norms that are applied. Categorizing

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leading the parties to agree on the others, and (7) courts authoritatively resolve disputes where parties cannot agree on a settlement.

With courts able to contribute to dispute settlement in so many ways—and this list is not necessarily exhaustive—it is dangerous to generalize about changes in the dispute settlement function of courts over time. A diminution in one kind of contribution to dispute settlement (e.g., the authoritative resolution of disputes after trial) may reflect a change in the way courts function as disputes settlers (e.g., by pressing parties to achieve acceptable compromises) rather than the increasing irrelevance of courts as dispute settlement institutions. Efforts to explore changes in the dispute settlement function of courts must pay separate attention to the different ways that courts can help resolve disputes. Exploration is complicated by difficulties in measuring the various ways that courts contribute to dispute settlement, and these difficulties are compounded if the measures must allow comparisons over time. A completely satisfactory resolution of the measurement problem may prove impossible. Yet, difficulties in achieving precise measurement do not mean that research in this area is futile, nor do they mean that one cannot say something useful about gross trends in the ways in which and the degree to which courts are involved in dispute settlement.

Friedman and Percival's Approach

Friedman and Percival, for example, are interested primarily in the extent to which courts actively intervene to resolve disputes. Since their study is of trial courts, they are not inter-

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courts as to whether they act mediatively or authoritatively and whether they act by reference to legal or social norms gives rise to the following ideal types:

	Judicial Style	
Norms Applied	Mediative	Authoritative
Differentiated from social norms	e.g. judge in chambers	e.g. judge at trial
Undifferentiated from social norms	e.g. tribal court dealing with tribe members	e.g. tribal court dealing with strangers

It appears that Friedman and Percival's legal model is more closely associated with the court's authoritative stance toward the parties than it is to the source of the norms applied. Thus the judge in chambers may be acting more in accord with the social harmony style than is, e.g., a Lozi Kuta (Gluckman, 1955) that has acquired jurisdiction over a stranger. Following Trubek (1972), we may note that the situation where the norms applied are differentiated from social norms is akin to Weber's (Rheinstein, 1954) formal rationality, and the situation where the norms applied are undifferentiated from social norms is akin to Weber's substantive rationality.

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ested in the judiciary as norm definers. Because they are interested in what courts do and not in the functions they serve, they regard the ratification of private agreements as routine administration rather than as a contribution to dispute settlement, and they do not consider courts to be acting as dispute settlers where it is only access to the court and its processes that encourages parties to agree on a resolution of their disagreement.[10] Having implicitly adopted a narrow but reasonable conception of what it means for courts to act as dispute settlers, Friedman and Percival make the crucial assumption on which much of their analysis rests. This is that in the overwhelming majority of tort and family cases trial courts merely ratify decisions that have been reached by the parties, while in other kinds of actions courts actively involve themselves in achieving the final resolution. By showing that over time tort and family matters come to occupy proportionately more docket space, Friedman and Percival show—if their basic assumption is correct—that over time proportionately more of the trial courts' business involves routine administration rather than dispute settlement. This conclusion is reinforced by evidence that over time proportionately fewer cases go to trial and proportionately fewer cases are contested.[11] If true, this finding is an interesting one, even though, for the reasons sketched above, it does not mean that the courts studied have become less important to community dispute settlement than was once the case.

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[10] This is largely implicit rather than explicit in Friedman and Percival's analysis.

[11] In Alameda County in 1970, 18 percent fewer cases were resolved by contested judgments than was the case in 1890. In San Benito County the figure for contested judgments was 14 percent less in 1970 than in 1890. However, Friedman and Percival take a restrictive view of what it means for a case to be contested. Generally speaking, it means that the case must have reached trial. According to original Tables 6 and 7 (reporting contested judgments), 95 percent of what are coded as contested judgments to plaintiffs in Alameda County involved trials or hearings, as do 86 percent of what are coded as judgments to defendants. For San Benito County the figures are 90 percent and 82 percent respectively. Settlements, default judgments, and consent judgments are considered to be uncontested with the implications that the courts do not function as dispute settlers when these results are reached. Yet some of these cases or some cases that were dropped or incomplete must have involved trials, because comparing original Tables 6 and 7 with original Table 8 (reporting trials and hearings) reveals that cases coded as contested judgments to plaintiffs or judgments for defendant account for but 93 percent of the total number of trials and hearings recorded for Alameda County and only 83 percent of the total number of trials and hearings in San Benito County. Friedman and Percival also examine the proportion of plaintiff victories and the percentage of trials with formal opinions. They present only part of the data relating to the proportion of plaintiff victories. While this proportion appears to be extraordinarily high in 1970, the trend since 1890 has not been steadily upward.

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A major difficulty with Friedman and Percival's argument is that they present little data supporting the crucial assumption that in family and tort matters, unlike other causes of action, courts do not usually participate actively as dispute settlers. Nevertheless, this assumption is that of experienced observers of legal systems and should not be dismissed out of hand. My own view is that, at least for 1950 and 1970, the assumption is a defensible generalization.[12] However, it is dangerous to base an analysis on a generalization, since both authors and readers are likely to ignore the imprecision inherent in generalizations and to treat the conclusions reached as if they were based on an accurate characterization of virtually all cases. Clearly, the degree of imprecision is crucial, because if it is substantial, the conclusion of the analysis will considerably overstate the degree to which hypotheses are supported by data.

Friedman and Percival, in their conclusions, provide us with an example of such overstatement. Because their findings appear plausible to those who believe the dispute settlement capabilities of modern courts have atrophied, detailed examination of their premises is worthwhile. I do not necessarily dispute their characterization of the degree to which typical family, tort, contract, property and other cases are likely to involve courts actively in dispute settlement. Nevertheless, I believe that in each category deviant cases are common enough to make the observed connection between the changes in court caseloads and hypotheses that courts over time have come to do more routine administration and less dispute settlement considerably more attenuated than Friedman and Percival suggest.

Friedman and Percival tell us that the family cases in their sample "are primarily uncontested divorces in which the court basically does nothing except to stamp its approval on arrangements which the parties have already agreed to before coming to court" (1976:280). There are two ways in which this characterization tends to understate the degree to which dispute settlement is involved in family cases. First, it draws attention away from the fact that a large proportion of family cases are not uncontested divorces, but are cases that may well involve judicial efforts at dispute settlement. Table 1 presents the pertinent data. The proportion of cases that are uncontested divorces (i.e., default judgments) and so, if we accept Friedman and Percival's characterization, routine administrative matters,

[12] Except on the assumption that the past is like the present, I do not see a clear justification for extending this assumption to earlier years.

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

rose in both counties by only about 18 percent between 1890 and 1970. Furthermore, a substantial increase in the percentage of uncontested divorces occurred in both counties between 1890 and 1910, suggesting not a long-term secular trend but a phenomenon subject to substantial short-term or random variation. Looking just at the years 1890 and 1970, we see that in Alameda County only 55 percent of the increase in family cases is attributable to an increase in default judgments, and in San Benito County less than 45 percent of the increase is attributable to such judgments.

Table 1. Distribution of Family Cases Over Time* (As A Percentage of All Cases)

Alameda County	1890	1910	1930	1950	1970	DIFFERENCE 1970-1890
Divorce Cases	16	23	18	40.4	44.9	
Default Judgment	10	17	9	19.5	28.4	+18.4
Other	6	6	9	20.9	16.5	
Other Family	2	0	2	.7	6.8	
Total Excluding Default Judgments	8	6	11	21.6	23.3	+15.3
San Benito County						
Divorce Cases	16.1	31.0	23.8	35.3	49.5	
Default Judgment	12.9	24.1	8.9	12.0	31.4	+18.5
Other	3.2	6.9	14.9	23.3	18.1	
Other Family	3.2	6.9	4.0	5.3	12.2	
Total Excluding Default Judgments	6.4	13.8	18.9	28.6	30.3	+23.9

* Reconstructed from portions of Friedman and Percival's Tables 3, 4, 6, and 7.

Second, the fact that a divorce is ultimately uncontested does not necessarily mean that a court played only a perfunctory role in the dispute resolving process. Considerable strife may lie behind a judgment that is eventually uncontested, and a judge or others attached to the court may devote considerable effort to bringing about the agreement that is necessary for an uncontested judgment to be entered. The judge may also encourage reconciliation or refer couples to counseling services that promote reconciliation. Thus, it is conceivable that judicial action contributes to default and consent judgments as well as to dismissals—outcomes interpreted by Friedman and Percival as instances of routine judicial administration.

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

Friedman and Percival (1976:280) find in the fact that insurance companies settle most tort cases before trial justification for the conclusion that trial courts rarely resolve true disputes in the tort actions that they process. However, the conclusion does not necessarily follow, given what we know about the litigation process. As has been pointed out, judges at pretrial conferences and in other settings often encourage parties to settle their disputes. Friedman and Percival's tort data, like their family data, fail to capture instances where the court's contribution to dispute settlement is mediative rather than adjudicative. Motion practice is also important. In ruling on pretrial motions judges often resolve significant legal differences. This helps fix the value of the case and so enhances the prospects for settlement. Both the pretrial conference and "motion practice" have apparently increased in importance over time. Such changes may be in part responsible for the apparent decrease in fully tried tort cases.[13]

Just as we cannot tell from Friedman and Percival's data the precise extent to which cases in the family and tort categories involve the courts actively as dispute settlers, we also have no information, other than the hunches of the authors, about the extent to which litigation in such other areas as contracts or property actively involves the court in dispute settlement rather than routine administration. To the extent that such cases were—at the time they dominated the docket—settled without judicial involvement, the apparent decrease in judicial dispute settlement associated with the increasing concentration of tort and family matters is illusory.[14]

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[13] I do not know the extent to which such procedural changes provide a rival explanation for Friedman and Percival's data, since I do not know how the utilization of such procedures in the courts they have studied has varied over time. Focusing on Friedman and Percival's concern, I have only mentioned reasons to believe that judges may have been more actively engaged in dispute settlement than Friedman and Percival suggest. If the concern is not what courts do, but the functional contribution they make to dispute settlement, the existence of the court and its processes may, for reasons already discussed in the text, be important to the eventual settlement. It is clear that the availability of some devices that may conduce to pretrial settlement, such as discovery, has increased since 1890.

[14] A possibility supporting Friedman and Percival's hypothesis that they do not explicitly treat is the possibility that in 1890 all types of cases were relatively more likely to involve courts in dispute settlement than they are today. The Friedman and Percival data might illuminate these issues more fully if the data on type of dispositions reported in their Tables 6 and 7 were broken down by type of action. Unfortunately, sample sizes are small, given the categories of interest, and cell sizes in any cross-tabulation would probably be too small to be of much value. Friedman and Percival's data on cases going to trial might be thought to support this possibility, since the proportion of cases going to trial and hearing is 36 percent in Alameda County in 1890 and 16.1 percent in 1970, while in San Benito County the proportions are 25.8 percent and 11.7 percent respectively. However, in 1950, 29.1 percent of Alameda cases resulted in

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The cure for the ambiguities inherent in an analysis that relies on imperfect generalizations lies in the collection of data that bears specifically on the crucial aspects of such generalizations. Difficulties in collecting such data over time are obvious. For example, what data are available to resolve the essentially empirical differences between Friedman and Percival and myself? Unfortunately, generalizing over time from current practices and procedures is shaky, at best. The question is ultimately one of how far we may reasonably theorize from what we do know. In the instant case I believe that Friedman and Percival go too far and that readers should be cautious in accepting their conclusions.

III. EXPLORING THE DATA

Evidence on Dispute Settlement

Thus far this discussion, including the reservations expressed about Friedman and Percival's study, has been aimed at making certain conceptual and methodological points. Now I shall turn to the data to illustrate certain of the above points and to see what reanalysis can tell us about the way in which the function of courts as dispute settlers has changed over time. The data are reported as rates of filed cases per 1000 adults. Reasons for controlling for adult population in this way have already been given. My point about the importance of the base shall be illustrated by contrasting my choice of statistic with Friedman and Percival's. The focus on cases filed means that for purposes of this analysis a court is treated as filling a dispute settlement function whenever a case is brought to it. The limitations of this assumption are implicit in the preceding discussion. If our interest is in cataloguing all contributions that courts make to dispute settlement and the way these contributions have changed over time, a measure based on cases filed is likely to be both under- and over-inclusive. It neither captures contributions made by courts as norm definers nor reveals situations where the unconsummated threat of court action is crucial in achieving a settlement. At the same time it includes cases where there is no real dispute, as is the case with petitions for adoption, classified in the Friedman and Percival data as family matters.[15] It also includes cases where

trials or hearings, as did 20 percent of San Benito cases. This suggests that a large proportion of the decrease in trials between 1890 and 1970 is the result of changes that occurred between 1950 and 1970, rather than the result of some long-term trend.

[15] Private communication from Friedman and Percival. They argue that the point made earlier in the text regarding uncontested divorces is overstated

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judicial ratification of a private settlement is sought because ratification is required by law and not because one or both parties seek the guarantees that attach to judicially ratified agreements. So long as these limitations are kept in mind, an index of cases filed per 1000 adults is a rational and serviceable way of measuring changing judicial involvement in dispute settlement. Since I shall classify cases by type, one may always argue, as Friedman and Percival do, that some kinds of cases are considerably less likely to involve courts in dispute settlement than others.

Table 2 gives the adult populations of the two counties, Alameda and San Benito, whose courts were studied by Friedman and Percival. As these statistics indicate, Alameda has been a generally urban county throughout the period studied, while San Benito has remained strikingly rural.

Table 2. Adult Population of Alameda and San Benito Counties, 1890-1970*

	1890	1910	1930	1950	1970
Alameda	54,968	164,802	326,401	520,658	677,088
San Benito	3,403	5,107	6,890	9,073	10,518

* Adults are those age 21 and over. The figures for the years from 1930 through 1970 are taken directly from census data. For 1890 and 1910 the census only gives the number of males of age 21 and older. The number of adult females in 1910 was calculated from available census data by taking the number of females under age 20 in California, adding 1/5 of the number of females in the 15-19 year old bracket and using this number to calculate the percentage of adult females in California. The calculations were performed separately for rural and urban areas. In San Benito it was assumed the percentage of adult females was the same as it was in all rural areas of California. In Alameda a similar assumption was made with respect to the percentage of adult females in urban areas of California, after correcting for the fact that about 10 percent of Alameda County was considered rural in 1910. For 1890 the adult female population of the two counties was calculated by taking census figures for the number of females between the ages of 5 and 20, increasing these numbers by 5/16 to include ages 0-4. This provided estimates of the number of females under age 21 which were subtracted from the total female population of the two counties to determine their adult populations. When these same procedures were used to estimate the total adult male population in the two time periods, the estimates deviated from the figures reported in the census by .7 percent for Alameda in 1890, 2.4 percent for San Benito in 1890, 4.7 percent for Alameda in 1910, and .6 percent for San Benito in 1910. In 1890 the estimates of males over 21 were low when compared to census data, and in 1910 they were high. If the estimating procedures are as accurate for females as for males, the reported figures should be off from what a census of adults would have revealed by no more than about two percent, since estimated totals for females were added to the census figures for males, and males outnumbered females in both counties during this time period.

because "cooperative" divorces do not exhaust the list of family matters that are truly uncontested. Again a more detailed breakdown of family matters by type (how many involve adoption petitions?) might enable us to choose between the empirical hunches of Friedman and Percival and myself.

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Figure 1. Cases Reaching Trial or Hearing in the Two Courts as Rates Per 1000 Adults (solid line) and Percentages of All Cases (broken line)

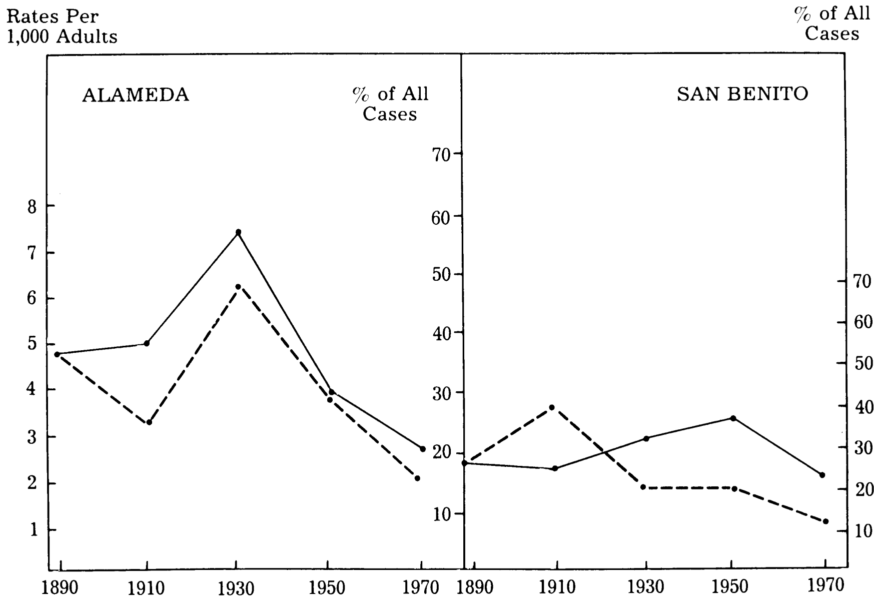

Figure 1 presents the data on cases reaching trial or hearing as a rate per 1000 adults (solid line) and as a percentage of all cases filed (broken line).[16] The statistics on which this

[16] Before discussing the information that is portrayed in this and subsequent figures, several words of caution are in order. I have followed Friedman and Percival in connecting the data points with lines. This makes the graphs easier to follow as it renders contrasts more visible. However, it is misleading to the extent that it suggests that there is information for more than five points in time or that trends in the data justify extrapolation to time periods not covered. Differences between time periods are often so slight that they could represent random fluctuations around a constant trend line. The points at which data are collected are marked with circles in the graphs to remind the reader of the discrete nature of what is presented. To facilitate comparison, I have in this and subsequent graphs (except Figure 4) standardized the percentages in each graph in terms of the number of cases per 1000 adults. The vertical distance equivalent to one percentage point is chosen for each graph so that for the year 1890 the height of the line portraying the number of cases in the category as a percentage of all cases is equal to that of the line portraying the number of cases per 1000 adults. Thus a proportionate change in the number of cases per 1000 adults is graphed in the same way as the equivalent proportional change in the percentage of all cases. For example, if the number of cases per 1000 adults decreased from four in 1890 to two in 1910, and the category of cases

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Table 3. Trials and Hearings Held--By Type

ALAMEDA COUNTY	1890	1910	1930	1950	1970
TRIALS & HEARINGS HELD	(265) 4.8 37%	(830) 5.0 25%	(2454) 7.5 48%	(2050) 3.9 29.1%	(1802)* 2.7 15.3%
Trials	(229) 4.2 3.2%	(730) 4.4 22%	(2454) 7.5 48%	(1950) 3.7 27.7%	(1702) 2.5 14.4%
Jury Trials	(14) .3 2%	0	(358) 1.1 7%	(250) .5 3.5%	(100) .15 .8%
Non-Jury w/o Opin. or Findings	(57) 1.0 8%	(299) 1.8 9%	(409) 1.3 8%	(950) 1.8 13.5%	(1051) 1.6 8.9%
Non-Jury with Opin. or Findings	(158) 2.9 22%	(432) 2.6 13%	(1687) 5.2 33%	(750) 1.4 10.6%	(551) .8 4.7%
Hearings	(36) .7 5%	(100) .6 3%	0	(100) .2 1.4%	(100) .1 .8%
Hearings w/o Opinion or Findings	(21) .4 3%	(66) .4 2%	0	(100) .2 1.4%	(100) .1 .8%
Hearings with Opinion or Findings	(14) .3 2%	(33) .2 1%	0	0	0

SAN BENITO COUNTY	1890	1910	1930	1950	1970
TRIALS & HEARINGS HELD	(8) 2.4 25.8%	(11) 2.2 37.9%	(20) 2.9 19.8%	(30) 3.3 20.0%	(2) 2.1 11.7%
Trials	(8) 2.4 25.8%	(9) 1.8 31.0%	(20) 2.9 19.8%	(29) 3.2 19.3%	(20) 1.9 10.6%
Jury Trials	(1) .3 3.2%	0	0	(9) 1.0 6.0%	(6) .6 3.2%
Non-Jury w/o Opin. or Findings	(2) .6 6.5%	(4) .8 13.8%	(14) 2.0 13.9%	(14) 1.5 9.3%	(10) 1.0 5.3%
Non-Jury with Opin. or Findings	(5) 1.5 16.1%	(5) 1.0 17.2%	(6) .9 5.9%	(6) .7 4.0%	(4) .4 2.1%
Hearings	0	(2) .4 6.9%	0	(1) .1 0.7%	(2) .2 1.1%
Hearings w/o Opinion or Findings	0	(2) .4 6.9%	0	(1) .1 0.7%	(2) .2 1.1%
Hearings with Opinion or Findings	0	0	0	0	0

*Friedman and Percival's Table 8 indicates that this should be 1902 and the figure for trials alone 1802, but the figures breaking down trials by type indicate a mistake in addition.

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involved accounted for 20 percent of all cases in 1890 and 10 percent of all cases in 1910, the lines portraying these two changes would be identical, since 20 percent would have been arbitrarily set equal in height to four cases per 1000 adults in 1890, and in both instances there was a 50 percent diminution between the two periods. This means that the percentage lines for different counties cannot be compared to each other since they are not measured in the same units. However, the vertical distance equivalent to one case per 1000 adults is the same in all graphs, so the lines portraying cases in these terms may be compared.

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graph is based are reported in Table 3. In Alameda County the picture presented by the two measures is remarkably similar except for 1910. The percentage of cases reaching trial and hearing appears to have diminished sharply between 1890 and 1910, although the number of tried cases per 1000 adults increased slightly. A possible explanation begins with the observation that in 1910 the Alameda courts received about seven more cases per 1000 adults than they did in 1890. It may be that a disproportionate percentage of the "new" filings did not involve matters requiring adjudication. However, there is little evidence for this in the data. Although there was a 12 percent drop in the proportion of tried cases, family cases which, accepting Friedman and Percival's characterization, are most likely to require only routine administration, increased their docket share by only 5 percent between 1890 and 1910, and there was a slight decrease in the percentage of cases involving torts.[17]

A more plausible explanation points to other kinds of pressures. In 1890 Alameda County had three courts to handle the 716 cases filed, or, on the average, 239 new cases per court. By 1910 the number of courts had doubled, but the number of new filings had more than quadrupled, so there was an average of 553 new cases per court. It is possible that the increased caseload pressure induced judges in 1910 to exert pressure for pretrial settlements that they had not exerted in 1890, and it is also possible that longer waiting periods in 1910 encouraged parties to settle cases that would have been taken to trial in 1890.[18] To the extent that the judiciary successfully encouraged pretrial settlements, the decrease in the proportion of cases reaching trial cannot be interpreted as a diminution in the dispute settlement activity of the trial courts. Instead, it reflects a change in the methods used to settle disputes.

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17 Trials in 1910 might reflect cases docketed in 1909, but there is no reason to believe that docket shares of different kinds of cases would differ dramatically between these two years.

18 I assume that the figures presented by Friedman and Percival indicate the percentage of cases docketed in the sample years that were tried either in the sample year or a subsequent year. If these figures represent the number of cases tried in each sample year as a proportion of cases filed during that year, it is possible that the percentage of opened cases that eventually reached trial was the same in 1890 and 1910, but that in 1910 a greater proportion of cases were not tried until some subsequent year.

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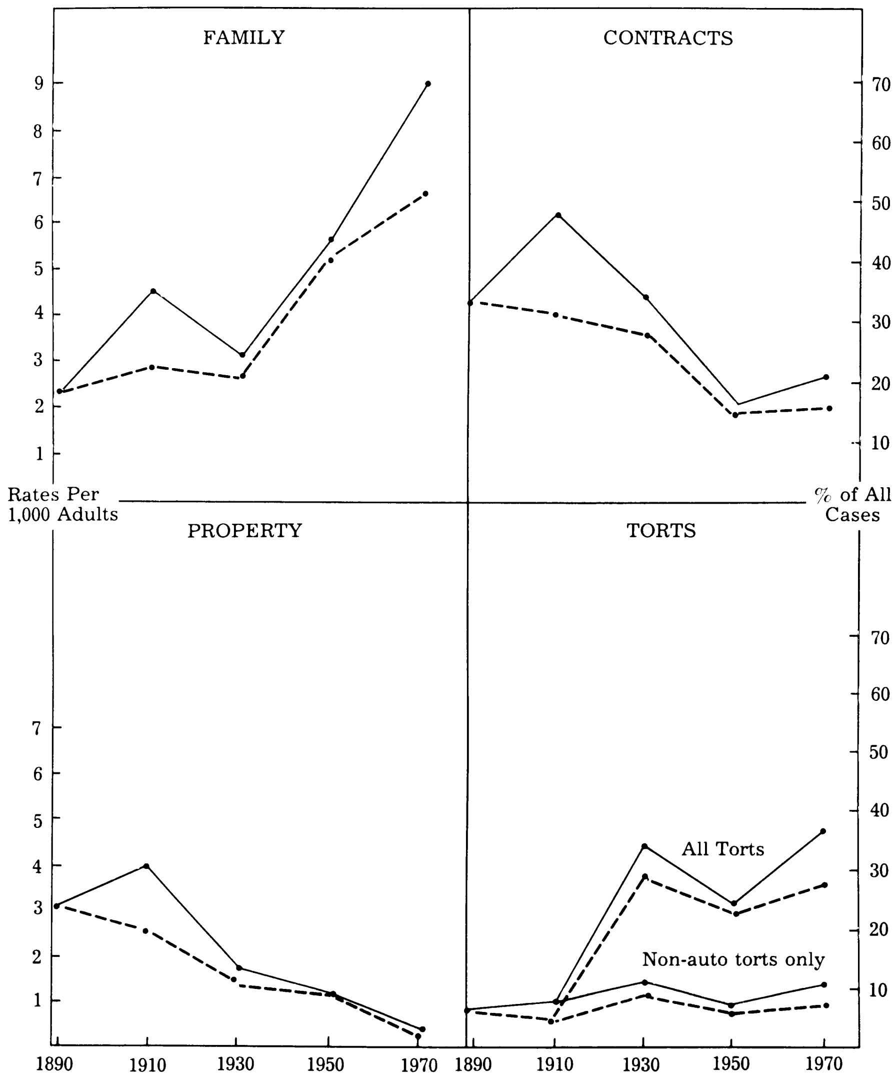
After 1910, changes in the two indices graphed in Figure 1 are remarkably similar. Changes in the percent of cases reaching trial are mirrored by changes in the rate of trials per 1000 adults. The average court caseload is relatively constant throughout this period.

In San Benito County the choice of indices makes a greater difference in the picture one acquires of the litigation process. The number of trials as a percentage of all cases rose between 1890 and 1910, decreased in 1930, remained at almost the same level in 1950, and decreased again in 1970. In 1970 the proportion of cases going to trial was less than half of what it was in

Figure 2. Alameda County Cases by Type as Rates Per 1000 Adults (solid line) and Percentages of All Cases (broken line)



1890. The rate of trials per 1000 adults diminished slightly between 1890 and 1910, increased in 1930 and again in 1950, and then diminished in 1970. There is no evidence of a substantial decrease between 1890 and 1970. The trial rate in 1970 is seven-eighths of what it was in 1890, and virtually identical to what it was in 1910. *Thus, for San Benito, changes in the ratio of trials per 1000 adults suggest that over the last eighty years there has been no diminution in the court's active involvement in community dispute settlement as measured by the likelihood that citizens will be involved in cases reaching trial.* However, over time the probability that a filed case will reach trial diminishes.

Table 4. Case Type by Number of Cases, Number of Cases Per Thousand Adults and Percentage of All Cases--Alameda County

	1890	1910	1930	1950	1970
Case Type (Total Number of Cases*)	716	3320	5112	7049	11811
Family (per 1000 adults) (% of all cases)	(129) 2.3 18%	(764) 4.6 23%	(1022) 3.1 20%	(2900) 5.6 41.1%	(6106) 9.0 51.7%
Divorce (per 100 adults) or Annulment (% of all cases)	(115) 2.1 16%	(764) 4.6 23%	(920) 2.8 18%	(2850) 5.5 40.4%	(5305) 7.8 44.9%
Other Family (per 1000 adults) (% of all cases)	(14) .3 2%	(-) 0 0%	(102) .3 2%	(50) .1 0.7%	(801) 1.2 6.8%
Contracts (per 1000 adults) (% of all cases)	(236) 4.3 33%	(1029) 6.2 31%	(1431) 4.4 28%	(1050) 2.0 14.9%	(1852) 2.7 15.7%
Property (per 1000 adults) (% of all cases)	(172) 3.1 24%	(664) 4.0 20%	(562) 1.7 11%	(650) 1.2 9.2%	(300) .4 2.5%
Torts (per 1000 adults) (% of all cases)	(43) .8 6%	(166) 1.0 5%	(1431) 4.4 28%	(1600) 3.1 22.7%	(3203) 4.7 27.1%
Auto Accident (per 1000 adults) (% of all cases)	(-) 0%	(-) 0 0%	(971) 3.0 19%	(1150) 2.2 16.3%	(2252) 3.3 19.1%
Other Torts (per 1000 adults) (% of all cases)	(43) .8 6%	(166) 1.0 5%	(460) 1.4 9%	(450) .9 6.4%	(951) 1.4 8.1%
Governmental (per 1000 adults) (% of all cases)	(93) 1.7 13%	(598) 3.6 18%	(409) 1.3 8%	(350) .7 5.0%	(150) .2 1.3%
Other Categories (per 1000 adults) (% of all cases)	(43) .8 6%	(100) .6 3%	(256) .8 5%	(500) 1.0 7.1%	(200) .3 1.7%
Total Cases per 1000 adults	13.0	20.1	15.7	13.5	17.4

*In Alameda County Friedman and Percival sampled cases. These figures are reconstructed by assuming that the percentage of cases in the court's total docket is equal to the percent of cases in the sample. Thus the figures may be distorted by sampling error. The number of cases calculated for each category is given in parentheses. For the years 1910, 1930, and 1950, the sum of the subtotals deviates from the total number of cases by one due to rounding error.

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Alameda County

Figure 2 graphs the statistics on cases brought in Alameda County broken down by case type. The data for Alameda County are presented in Table 4.[19] These data present much the same picture as the data on cases reaching trial and hearing. Except in 1910, the variation in the kinds of cases brought during the years sampled depends very little on whether we view the cases against a base consisting of the adult population in the community or against a base consisting of all cases filed. This means that the decrease in contract and property actions reported in Friedman and Percival's original article is not an artifact of the court's being overwhelmed with family and tort matters. The reasons for the decline must be found elsewhere.

Social Conditions

The decline might reflect changed social conditions. There may be relatively fewer contract and property disputes than there once were, or there may be social reasons why such disputes are less likely to be brought to court. Macaulay (1963) tells us, for example, that businesses seldom sue their trading partners in contract because they do not wish to jeopardize mutually profitable relationships. Automobile dealers are similarly reluctant to sue their suppliers except where their franchise has been terminated (Macauley, 1966). Perhaps the economy has changed over the last 80 years so that many more contractual relationships involve either regular trading partners or relationships so unequal that one party need not sue to protect its rights and the other party dare not. This explanation, although plausible, will not do. Contracts between merchants were never a common source of litigation in the Alameda Superior Court.[20]

Another possibility is that different ways of adjudicating contract disputes have grown in importance. For example,

[19] There are some minor discrepancies in the figures presented in Friedman and Percival's tables. At times, as in San Benito County in 1970, the figures of cases broken down by type do not add up to overall rates. The discrepancies are always very small and do not affect substantive interpretations. Where I felt I had spotted an error, I usually corrected it. This accounts for some small differences between the numbers in Friedman and Percival's tables and mine.

[20] They accounted for none of the contract actions in 1890, 10 percent of such actions in 1910, 11 percent in 1930, 5 percent in 1950, and 5 percent in 1970. See Friedman and Percival (1976:281), supra Note 1, at Table 3.

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before concluding that the number of contract disputes has diminished over the years or that changed conditions make it more likely that contract disputes will be resolved informally, one would want to know the rate at which contract disputes in Alameda County are taken to arbitration and how this rate has changed over the years. To the extent that arbitration only occurs in disputes between businesses, this explanation is also unlikely to explain these data.

The decline in property cases may reflect other social forces. Up to a point, increases in population may contribute to increased rates of property disputes; but after population density reaches a certain level the trend may be reversed as rights become more settled and it becomes harder to perfect title through adverse possession. The spread of title insurance may also lead to a decrease in disputes over property, both because individual litigants do not have as much at stake and because the requirement of an insurable title means that those transfers most likely to lead to litigation are consummated only after potential defects of title have been removed. Since most of the sampled property cases arose out of land transfers,[21] changes of this sort may well explain the decrease in property actions. In the landlord-tenant area the rate of disputes may diminish because of the legal implications of changes in patterns of interaction. If, for example, the typical lease in the counties studied changed over time from a term of years to a month-to-month tenancy, disputes between landlords and tenants may be much less likely to involve sums in excess of the Superior Court's jurisdictional amount than was once the case.

Legal Change

Changes intrinsic to the legal system may also affect the rates at which different disputes are brought to court. For example, the Superior Courts which are the subject of this study will not entertain cases where less than a certain amount of money is in controversy. This jurisdictional amount increased more than tenfold between 1890 and 1970. It is possible that suits on promissory notes or other debts which would have been resolved at the superior court level in 1890 now only reach the municipal court.[22] If so, this could explain the decrease in

[21] The proportion of property cases arising out of land transfers and marketing is 83 percent in 1890, 85 percent in 1910, 45 percent in 1930, 92 percent in 1950, and 50 percent in 1970.

[22] The Superior Court has always been a court of limited jurisdiction. Its $300 jurisdictional amount in 1890—while small by today's standards—must at

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contracts cases in Alameda County, because it appears that most contract litigation involves notes or other debts.[23]

Property cases may be less frequent because of changes in or the improvement of the title recordation system. Changes in statutes of limitations can also result in changes in litigation rates. When time limits for filing are extended, parties have a greater opportunity to settle before they must file suit under pain of losing their legal cause of action. A decrease in the limitation period should have the opposite effect. This is another possibility which must be considered in research of this sort, but it does not explain these data. California's limitation periods for different causes of action have changed little since 1890.

Other Litigation

One might also attribute the decrease in the rate of contract and property actions in Alameda County after 1910 to indirect effects of the increase in tort and family cases. These cases may, by crowding the docket, have discouraged others from filing suit. If this were so, one would have to ask why delay apparently inhibits the filing of contract and property actions to a greater extent than it does tort and divorce actions. Possible answers are found within the legal system. Many family matters—e.g., divorces and adoptions—must be taken to court, since the desired change in status cannot legally occur without judicial action. The filing of tort cases may be encouraged by the relatively short limitation periods on such

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that time have eliminated many disputes which the parties perceived as involving substantial amounts of money. The jurisdictional amount increased from $300 in 1890 to $3000 in 1950 and $5000 in 1970. The change in constant dollars is, of course, not as great because of the effects of inflation. I am indebted to David Seidman for calling my attention to some data that reflects the degree of inflation between 1890 and 1970. A Bureau of Labor Statistics series on consumer prices (*Historical Statistics Colonial Times to the Present* Vol. I, series E135) transforms $300 (1890) into $1111 (1967), and $5000 (1970) to $4291 (1967). Using implicit GNP price deflators (*Historical Statistics*, series F5) turns $300 (1890) into $1205 (1958), and $5000 (1970) into $3698 (1958). This suggests there has been a "real" increase in jurisdictional amount between 1890 and 1970, and that some controversies with enough at stake to be tried in Superior Court in 1890 would not be tried there today. However, expressing the jurisdictional amount as a percentage of per capita GNP in current dollars (*Historical Statistics* series F2) transforms $300 (1890) to 144 percent and $5000 (1970) to 104 percent. These figures might suggest (although the inference is very attenuated) that there would have been fewer disputes involving sums in excess of the jurisdictional amount in 1890 than in 1970.

[23] I cannot give precise figures because Friedman and Percival's subcategorizations do not permit this.

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actions. In California the right to bring a tort claim is typically lost if an action is not commenced within one year after the cause of action arose. For most other civil causes of action the limitation period is between two and five years. If it is the case that tort disputes tend to be settled after filing suit while contract and property disputes tend to be settled before suit is filed, the different limitation periods provide a plausible explanation. The explanation is ironic because one reason for establishing short periods of limitation is to limit the number of suits that may arise.

The difficulty with this explanation is that the increase in delay between 1890 and 1970 is almost all attributable to the period 1890-1910, (Friedman and Percival, 1976:291), yet the rates of contract and property actions rose between these two periods, and the percentage of cases involving contract or property matters did not decrease substantially. There are, of course, other reasons that can explain why tort litigation should continue to mount despite increasing delay, while property and contract actions diminish. It might be that with the increasing importance of the contingent fee and the disappearance of the family lawyer (if he ever existed), the profession is now organized so that lawyers are involved in relatively more tort disputes and relatively fewer property disputes than was once the case.

This effort to explain why the rate of contract and property actions per 1000 adults decreased in Alameda County after 1910 is speculative and inconclusive. It is offered more as an example of ways to think about the problem than as an explanation. It is encouraging to note that the kind of data that would allow one to choose between a number of the more plausible explanations is likely to be available over time. Relevant changes in the law are easiest to research. Annotated codes typically give a history of current statutes, including past versions of the statutes and various amendments.

Other explanations lead to relatively explicit predictions about the kinds of parties (e.g., individuals or corporations) likely to be involved in lawsuits at different points in time, the kinds of issues likely to be litigated, and the amounts of money likely to be involved. Friedman and Percival's data on delay undercut one possible explanation. Their breakdown of contract and property actions into principal subtypes (not reported in my tables) allowed a weak test of other plausible hypotheses. More detailed breakdowns will allow more refined testing. The need for detailed breakdowns does, however,

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require samples considerably larger than those that Friedman and Percival used. Sample sizes around one hundred place severe limits on what can be learned through subcategorization.

Table 5. Case Type by Number of Cases, Number of Cases Per Thousand Adults, and Percentage of All Cases--San Benito County

	1890	1910	1930	1950	1970
Case Type (Total Cases)	31	29	101	150	188
Family (per 1000 adults)	(6) 1.8	(11) 2.2	(28) 4.1	(61) 6.7	(116) 11.0
(% of all cases)	19.3%	37.9%	27.7%	40.7%	61.7%
Divorce or Annulment (per 1000 adults)	(5) 1.5	(9) 1.8	(24) 3.5	(53) 5.8	(93) 8.8
(% of all cases)	16.1%	31.0%	23.8%	35.3%	49.5%
Other Family (per 1000 adults)	(1) .3	(2) .4	(4) .6	(8) .9	(23) 2.2
(% of all cases)	3.2%	6.9%	4.0%	5.3%	12.2%
Contracts (per 1000 adults)	(10) 2.9	(11) 2.2	(31) 4.5	(41) 4.5	(17) 1.6
(% of all cases)	32.3%	37.9%	30.7%	27.3%	9.0%
Property (per 1000 adults)	(8) 2.4	(5) 1.0	(15) 2.2	(12) 1.3	(6) .6
(% of all cases)	25.8%	17.2%	14.9%	8.0%	3.2%
Torts (per 1000 adults)	(1) .3	(-) 0	(20) 2.9	(26) 2.9	(36) 3.4
(% of all cases)	3.2%	0%	19.8%	17.3%	19.1%
Auto Accidents (per 1000 adults)	(-) 0	(-) 0	(16) 2.3	(17) 1.9	(27) 2.6
(% of all cases)	0%	0%	15.8%	11.3%	14.4%
Other Torts (per 1000 adults)	(1) .3	(-) 0	(4) .6	(9) 1.0	(9) .9
(% of all cases)	3.2%	0%	4.0%	6.0%	4.8%
Governmental (per 1000 adults)	(2) .6	(1) .2	(2) .3	(4) .4	(2) .2
(% of all cases)	6.5%	3.4%	2.0%	2.7%	1.1%
Other Categories (per 1000 adults)	(4) 1.2	(1) .2	(5) .7	(5) .6	(8) .8
(% of all cases)	12.9%	3.4%	5.0%	3.3%	4.3%
Unknown				(1) .1	(3) .3
Total Cases per 1000 adults	9.1	5.7	14.7	16.5	17.9

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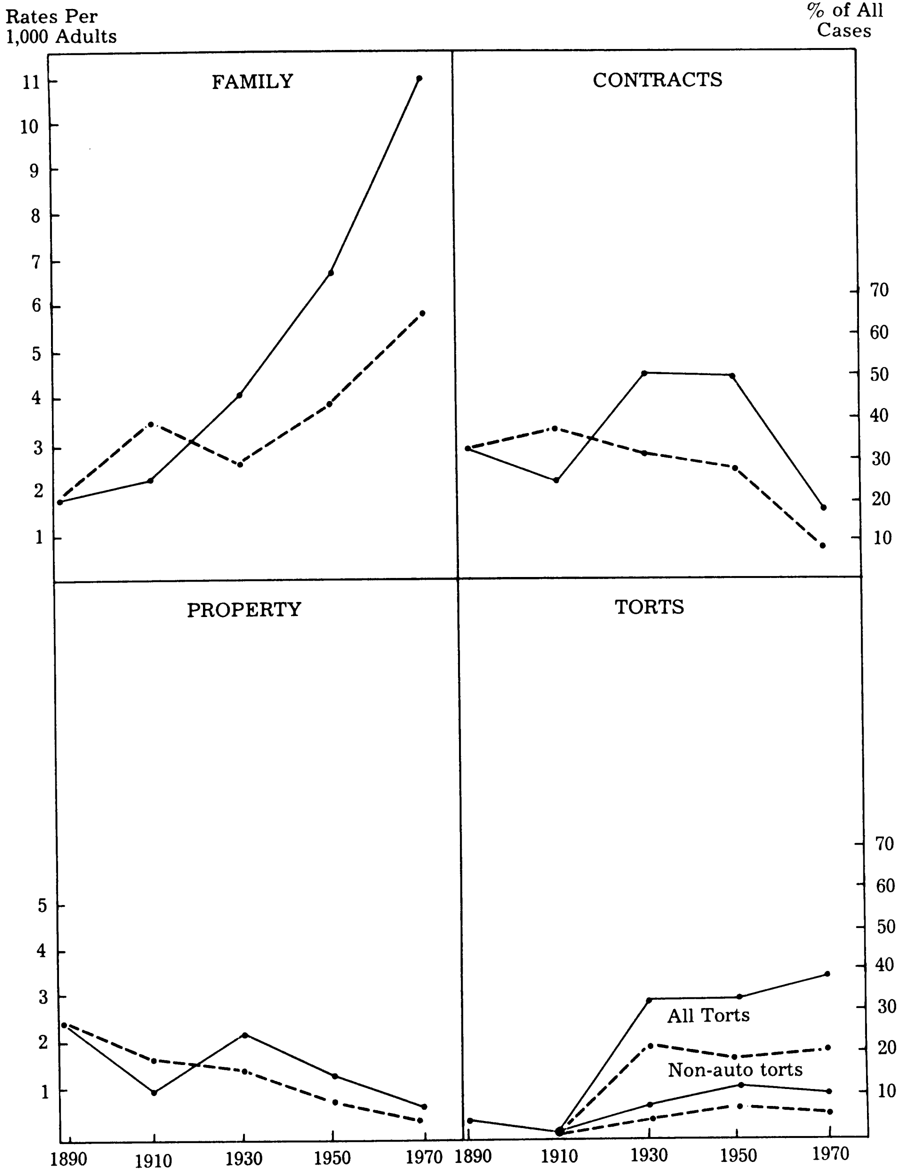
Figure 3. San Benito County Cases by Type as Rates Per 1000 Adults (solid line) and Percentages of All Cases (broken line)



San Benito County

San Benito County, unlike Alameda, dramatically illustrates how one's choice of measure affects the tale told by the data. The data are presented in Table 5 and graphed in Figure 3. Consider the family cases. The proportion of family cases increased between 1890 and 1910, decreased in 1930, and then increased in 1950 and again in 1970. By 1970, cases arising out of family matters accounted for more than 60 percent of the entire

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docket or three times what they accounted for in 1890. However, this increase seems attributable to the years following 1930. The data for the first three time periods show no clear trend.

When we look at case rates per 1000 adults, a different picture emerges. The rise in family cases between 1890 and 1970 appears much more dramatic, because the number of family cases per 1000 adults increased sevenfold over these eighty years. The percentage measure could never have shown a proportionate increase of this magnitude, since family cases in 1890 accounted for almost 20 percent of the docket; and no matter what occurred they could never account for more than five times that, or 100 percent of all cases. An even more important difference is the appearance of a smooth trend over the entire period. The percentage data suggested no trend during the first three time periods, but the rate data suggest an accelerating function. The important implication of this is that the trough in the proportion of family cases filed in 1930 does not reflect a decrease in the court's family business. It reflects instead an increase in the other kinds of cases brought to court. This contrasts with Alameda County, where the proportion of family cases decreased only slightly between 1910 and 1930, but the rate decreased by about one-third.

Property cases fall into a pattern that is almost the opposite of that presented by the family cases. The percentage of cases involving property matters decreased in a gentle linear fashion from 1890, while the rate of property actions fluctuated between 1890 and 1930, and then decreased. Although the rate of property cases was highest in 1890 and lowest in 1970, the data appear not to support the conclusion that the rate at which property actions are brought has decreased *steadily* over time. Instead of a steady diminution which would be expected, for example, if the use of courts to settle property disputes was inversely related to economic development, we find that there were almost as many cases per 1000 adults in 1930 as there were in 1890 (2.2/1000 vs. 2.4/1000), and more cases in 1950 than in 1910 (1.3/1000 vs 1.0/1000).

The contract cases convey the same message as the property data. Although the number of contract cases per 1000 adults is at its lowest in 1970, it reached a peak in 1930 and 1950 that was substantially higher than the rate in either of the two earlier time periods (4.5/1000 adults in both 1930 and 1950 vs. 2.9/1000 in 1890 and 2.2/1000 in 1910). Again we are cautioned against the easy assumption that contract litigation declines

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with economic development. The data on contract actions as a percentage of all cases invite such a conclusion.

One reason why the proportions of family, property, and contract cases diminished between 1890 and 1930, although the rates in each instance rose, is that there was a substantial increase in both the number and proportion of tort actions between these two dates. It is evident from the data that this increase was due almost entirely to the invention and spread of the automobile and the spate of tort actions this spawned.

Comparing the Two Counties

Friedman and Percival (1976:300) tell us that the "most surprising result of the study . . . is the striking similarity between the two counties." On the basis of the percentage data this is indeed the case. As a crude index of similarity, I calculated the number of times for the four major categories of cases that the direction of change between adjacent dates was the same for the two counties. Table 6 summarizes these data. In fourteen of the sixteen possible comparisons, changes in the percentage distribution of cases are parallel in direction if not magnitude.[24]

Changes in rates per 1000 adults show no such congruence. In only eight of sixteen comparisons is the direction of change in the two counties the same. This is the kind of consistency that one would expect from flipping a coin. However, instances of inconsistency are not randomly distributed over time. Six of eight comparisons for the periods 1890-1910 and 1910-1930 reveal inconsistent changes in direction, but only two changes after 1930 are inconsistent.

When we examine the magnitude of the rates, we see that in 1890 and 1910, regardless of the kind of case, rates per 1000 adults in San Benito County were noticeably lower than the rates in Alameda County. During the years 1930, 1950, and 1970, litigation rates, except the rate for contract cases in 1950, were generally quite close. This is reflected in the total number of cases filed in each court per 1000 adults. In 1890 Alameda County had 3.9 more filings per 1000 adults, and in 1910 it had 14.4 more filings per 1000 adults. By 1930 Alameda's advantage

[24] If, for example, the percentage of family cases was higher in 1910 than it was in 1890 for both Alameda and San Benito Counties, the direction of a change was considered the same. If the percentage of family cases in Alameda was higher in 1910 than in 1890 while the percentage of family cases in San Benito was higher in 1890 than in 1910, the direction of change was considered different. The same method was used in comparing rates. In two cases there was no change in the rate of a particular type of action between adjacent years. These were each scored as 1/2 for the purpose of counting instances of change.

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Table 6. Direction of Changes Between Adjacent Dates for Alameda and San Benito Counties*

A. Percent of All Cases

CASE TYPE	1890-1910		1910-1930		1930-1950		1950-1970	
County	Al.	S.B.	Al.	S.B.	Al.	S.B.	Al.	S.B.
Family	+	+	-	-	+	+	+	+
Contracts	-	+	-	-	-	-	+	-
Property	-	-	-	-	-	-	-	-
Torts	-	-	+	+	-	-	+	+

B. Rate Per 1000 Adults

County	Al.	S.B.	Al.	S.B.	Al.	S.B.	Al.	S.B.
Family	+	+	-	±	+	+	+	+
Contracts	+	-	-	+	-	±	+	-
Property	+	-	-	+	-	-	-	-
Torts	+	-	+	+	-	±	+	+

* + indicates the percentage or rate increased between the two years.
- indicates the percentage or rate decreased between the two years.
± indicates the percentage or rate did not change between the two years.

was down to one case per 1000 adults. In 1950 San Benito had three more cases filed per 1000 adults than Alameda, and in 1970 the overall rates were almost identical.

One can think of several reasons why the litigation rates in the urban and rural counties should be dissimilar in 1890 and 1910, and relatively close after that. While some reasons are arguably more plausible than others, the data do not allow us to distinguish between them. It could be that the people of San Benito County were involved in proportionately fewer disputes in 1890 and 1910. The difficulty with this explanation is that the most plausible reason for expecting proportionately fewer disputes in the rural county—lower population density—predicts to fewer disputes in the later years as well. Unless the residents of San Benito County were more likely than those of Alameda County to take disputes to court in 1930, 1950 and 1970, but not in the earlier years, this explanation is unsatisfactory.

Another plausible explanation is that in the earlier time period informal means of resolving disputes were more effective in San Benito County than in Alameda County, and/or pressures to ignore disputes were greater. This would be expected if relations in the rural county during these years tended more often to be multiplex than did relations in the urban area. The

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pattern after 1930 could be explained if the multiplex quality of rural relations began to break down during the Great Depression[25] and was largely shattered by the disruptions of World War II and the post-war advent of "mass society." A competing explanation is that courts and lawyers were readily accessible in Alameda County throughout the period studied because of the concentration of people in Oakland and the availablity of public transportation, but that they became easily accessible in San Benito County only after the invention and spread of the automobile.[26]

It is also possible that there is nothing to explain.[27] The great disparity between the counties occurred in 1910. In

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[25] One might expect people to draw closer together during a time of hardship such as the Depression. However, the stress of low income, migration from rural to urban areas, the foreclosure of farm property, and the temptation to be "hard-headed" in one's business dealings might all have contributed to a breakdown of traditional interpersonal dependencies. In addition the technological advances between 1910 and 1930 might have meant that by the latter year people in rural areas were much more likely to be interacting on the basis of single roles rather then multiple relationships. The plausibility of the hypothesis advanced in the text could be evaluated by careful historical investigation.

[26] In 1890, 19 percent of the people in San Benito County lived in the town of Hollister, San Benito's largest city and county seat. An additional 23 percent lived in the township of Hollister. For 1910 the figures are 29 percent and 26 percent respectively. In 1890, 52 percent of the population of Alameda County lived in Oakland, the county seat, and in 1910, 61 percent of Alameda County residents lived there. I have no information on public transportation, but I imagine transportation within Alameda County to Oakland was better than transportation within San Benito County to Hollister at this time. If so, it supports the hypothesis of differential accessibility before the spread of the automobile.

[27] This conclusion, that there really is no difference between the two counties, is consistent with the results of an analysis of covariance. In the course of preparing this article, I explored the possible contributions of regression analysis. The basic model examined was: cases = b_1(population) $+b_2$(population)(time) + error. This model was selected because, in the absence of error, it follows from the hypothesis that case rates are a function of time [i.e., it is algebraically equivalent to : $\frac{\text{cases}}{\text{population}}$ b_1+b_2(time).] "Cases" in this model is the number of cases of a particular type in a particular county at a particular point in time. Population is the adult population of the county at the same point in time. Time is an arbitrary variable defined to equal 1 in 1890, 2 in 1910, 3 in 1930, 4 in 1950, and 5 in 1970. The interaction term "(population)(time)" is conceived of as a proxy for social economic development. The dependent variable was, in turn, the number of each of the four kinds of cases that have been examined in this article and the number of cases reaching trial or hearing. The model appears to fit the data well. Looking at the counties separately, the model never explains less than 40 percent of the variance in the number of cases, and in seven out of ten equations it explains at least 75 percent of the variance. In most cases the regression is significant beyond .01. In the only equation where the significance level is above .05, it is .0567.

Applying analysis of covariance to this model suggests that neither independent variable is county dependent. The coefficients for the covariance terms never achieve a significance level beyond .90, and in no equation does knowledge of county increase the explained variance by so much as one tenth of one percent. However, this evidence for no county effect is confounded by wide confidence intervals around the covariance terms, which means that a true effect might well have been missed.

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Alameda County the total number of cases filed per 1000 adults was higher in 1910 than in any other year examined, while in San Benito in 1910 this total was at its lowest point. It is possible that adjacent years would not be nearly as extreme as the years examined, or that the rates for 1910 are attributable to causes that have no systemic relation to changes in the social or legal system. The latter explanation is more plausible for San Benito County than for Alameda County since San Benito, unlike Alameda, is small enough that changes in individual personnel may have a system-wide impact. For example, San Benito's one judge may have been sick for much of the year 1910, and lawyers may have seen no point in filing suit in his absence; or San Benito's most litigious attorney may have died during the year and his clients may have been in the process of seeking other attorneys. Since some years may be aberrational, it is wise in longitudinal studies of litigation to collect data for two or three years at each point in time. If resources do not permit this or if data is available for only one year, subdividing cases into monthly intervals will, to some degree, allow one to evaluate hypotheses like those expressed above.

Figure 4 compares the rates at which cases reached trial or hearing in the two counties. In 1890, 1910, and 1930 the trial rate in Alameda County was at least double that of San Benito County. In 1950 and 1970 the trial rates for the two counties were very close. The year 1930 presents something of a puzzle. In that year the number of cases filed per 1000 adults was almost the same in the two counties, yet in Alameda County the number of trials per 1000 adults was more than two and a half times that of San Benito County. It is tempting to view this as evidence for the "relational breakdown" hypothesis mentioned above. The year 1930 could be seen as a transition period. By

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The fit of the model to the combined data from the two counties is quite good. For every dependent variable the significance level for the regression is beyond .0001, and in no case does the model explain less than 89 percent of the variance. The assumption that there is no intercept term (i.e., when population goes to zero, the number of cases also goes to zero) is also supported. When an intercept term is added to the model it never achieves statistical significance and in no case increases the explained variance by as much as one tenth of one percent.

I have not presented the findings of the regression analysis in detail in this paper because I believe they are not worth the space this would require. The analysis controlled for county contains information at only five points and adds little to what we can learn from visual inspection of the data. The analysis combining the two counties suffers from the likely untenability of the assumption of homoskedastic error, the possibility of serial correlation within counties, the collinearity of the independent variables, and difficulties of interpretation resulting from the arbitrary way in which time (and by hypothesis socioeconomic development) was operationalized. I will be happy to provide more specific information regarding the results of this analysis to anyone who requests it.

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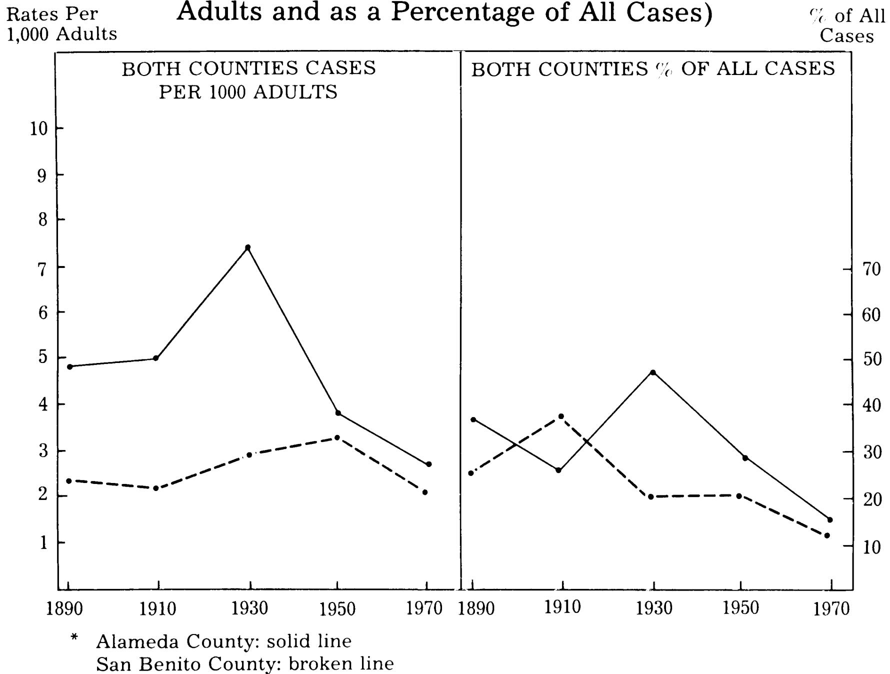
Figure 4. A Comparison of Cases Reaching Trial or Hearing in Alameda and San Benito Counties* (as a Rate Per 1000 Adults and as a Percentage of All Cases)



* Alameda County: solid line
San Benito County: broken line

this time, residents of San Benito County were as willing to file suit as residents of Alameda County, but they were still more reluctant to leave the final settlement of their disputes to a court. The difficulty with this interpretation is that the convergence of trial rates in the two counties in 1950 is due largely to a decrease in the rate at which cases were tried in Alameda County, not to an increase in the San Benito County trial rate.

This pattern is not necessarily inconsistent with the view that 1930 was a transitional year in San Benito County. San Benito County's trial rate in 1930 might be explained by social constraints not present in Alameda County, while the low rates in both counties during 1950 and 1970 might reflect a significant increase in the cost of litigation since 1930. Nevertheless, this pattern emphasizes the speculative nature of the task we are here engaged in and calls our attention to the fact that the data are insufficient to allow us to decide between the hypotheses I have advanced.

Family Cases

Other aspects of these data deserve our attention. The group of family cases, dominated by actions for divorce or annulment, is particularly interesting since it is likely that the

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parties bring to court most cases in which they believe that the only tenable solution to their marital problems is dissolution. Thus the change in the rate at which these cases are brought to court is a crude index of the changing rate at which marriages have been beset by serious problems and/or changes in the willingness of parties to define marital problems as so serious that dissolution is the appropriate remedy.[28]

In Alameda County for every 1000 adults there were 2.1 cases seeking divorce or annulment in 1890. This number increased to 4.6 in 1910, decreased to 2.8 in 1930, then shot up to 5.5 in 1950 and 7.8 in 1970. One wonders whether there was indeed no trend toward increasing marital dissolution between the years 1890 and 1930. It is possible that in 1930, the first year of the Great Depression, there was a substantial decrease in the proportion of couples seeking to terminate their marriages. The adversity of the depression years may have made husbands and wives more dependent on each other while at the same time placing formal court action financially beyond the reach of many troubled couples. If we are limited to the data that Friedman and Percival have collected, we can do no more than speculate on this matter, since no information is available for the years around 1930. However, divorce statistics have been routinely collected since 1920, and national data does suggest that the early years of the depression interrupted a trend of generally rising divorce rates. From 1922 until 1929 the divorce rate as measured by the number of divorces per thousand married females steadily increased. The rate dropped by 12 percent in 1930 and even more sharply in 1931. It was not until 1935 that the proportion of married women experiencing divorce exceeded that of 1929.[29]

We have already noted that in San Benito County the rate of divorces and annulments increased steadily over the time periods studied. Where the 1930 divorce rate in Alameda

[28] The index is only a crude one because other forms of marital dissolution were possible throughout this period. Separation without judicial action, desertion by one party or the other, divorce in another jurisdiction, and homicide are among the alternatives. To the extent these alternatives were more likely to be chosen in the earlier time periods—because, e.g., domestic divorce law was relatively stricter compared to the law of neighboring jurisdictions—the change in cases over time probably overstates the increase in the rate of marriages that were in fact dissolved. The rate of increase may also be overstated because in the earlier time periods the number of male adults was substantially in excess of the number of female adults. As this imbalance decreased over time, the percentage of adults who were married may have increased.

[29] See Historical Statistics of the United States, 1975: Part I, 64. The divorce statistics include annulments.

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County was only 60 percent of what it was in 1910, the 1930 divorce rate in San Benito County was almost double that of the earlier year. It is, of course, quite possible that the 1930 figures for San Benito County represent a decrease from the figures for the immediately preceding years, but even if this is the case, patterns of divorce appear to have been very different in the two counties during the years 1910 and 1930 and, by risky interpolation, the years in between. This suggests differences in the incidence of severe marital problems.

Contract and Property Cases

We have seen that both contract and property actions peaked in 1910 and then decreased markedly in Alameda County. The contract actions showed a trough in 1950, followed by a mild gain, while the rate of property actions trended steadily downward so that by 1970 there were only four actions filed for every ten thousand adults. In no period were property actions more prevalent than contract actions.

In San Benito County, as has been noted, the data are less suggestive of trends over time. The rate of contract actions per 1000 adults reached a high in 1930, remained at this level in 1950, then declined sharply so that the 1970 rate was lower than the rate at any previous point in time. The rate of property actions was highest in 1890, dropped by more than half in 1910, increased to about the 1890 level in 1930, dropped to about the 1910 level in 1950, and then dropped again. As in Alameda County the rate of property actions per 1000 adults was always below the rate for contract cases.

These data are difficult to interpret given the information available. They may reflect changes in the willingness of parties to bring certain kinds of disputes to court, which may in turn reflect the parties' judgments of the court's capacity to deal with such disputes, or they may reflect changes in the incidence and character of disputes which are not proportionately related to the increases in the adult population. I have discussed some of these possibilities when the data for Alameda County were examined. As a further example consider the increase in property actions that occurred in San Benito County in 1930. One might interpret this as reflecting a depression-linked increase in the number of cases in which rural land was subject to foreclosure, but it could also represent increased willingness to litigate, brought about either by the efforts of lawyers to generate business in a time of scarcity or by the reluctance of clients to forsake colorable claims when they

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needed money. The foreclosure explanation is more plausible because urban Alameda County did not show the same increase in cases of this kind. This is obviously a slender reed on which to base a judgment. Yet, with further investigation it might be possible to distinguish between the hypothesis that people were increasingly willing to litigate the problems they faced and the hypothesis that problems of a particular type (here property problems) were increasing at a faster rate than the population. One could look in more detail at the kinds of cases brought during the periods of interest, and one could also search titles to property in the two counties, monitoring rates of involuntary foreclosure. However great the magnitude of this task, it at least appears possible. In other situations where litigation rates have changed over time, it may not be possible to acquire reliable information that allows one to distinguish between explanations that hypothesize a change in the parties' willingness to litigate and explanations that posit differences in the overall incidence of disputes. The unavailability of control data is the shoal on which longitudinal studies of litigation rates are most likely to founder.

Tort Cases

The value of indices that directly measure disputes is best illustrated by the data on tort cases. In both Alameda and San Benito Counties, 1930 saw a substantial increase in the number of tort cases per 1000 adults. We can be sure that this reflects a change in the incidence of disputes rather than merely an increased willingness to litigate disputes, because we can identify a category of torts that existed in 1930 but not in 1910 or 1890: the automobile accident. In Alameda County there was one tort action filed per 1000 adults in 1910 and 4.4 actions per 1000 adults in 1930. Torts arising out of automobile accidents account for 88 percent of the increase. In San Benito County auto-related torts account for 79 percent of the increase from zero to 2.9 actions per 1000 adults.

One reason why cases arising out of automobile accidents come to dominate the tort docket may be that this is a category of torts that people are especially willing to litigate. Substantial amounts of money are often at stake, the presence of insurance guarantees that successful claims will be paid, the bar is organized to deliver services to accident victims, no norms suggest that such disputes are better settled out of court, and the tortfeasor and his victim are usually strangers. To generalize,

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an increase in the incidence of disputes may lead to a disproportionate increase in the judicial workload if the new disputes are likely candidates for adjudicative resolution or for the threat of adjudicative resolution that is implicit in filing suit.[30]

Separate examination of the torts arising from automobile accidents is also interesting because available figures on accident rates allow a crude control for the incidence of disputes. Comparing changes in the number of auto accident cases as a percentage of all cases with the auto accident litigation rate per 1000 adults and with the percentage of automobile accidents resulting in litigation, further illustrates how the choice of a control variable affects the way in which information about a court's changing docket is interpreted. Unfortunately, usable information on automobile accidents in the two counties is limited to accidents resulting in personal injuries or fatalities in the years 1950 and 1970.[31]

In Alameda County tort actions arising from automobile accidents constituted 16.3 percent of all cases in 1950 and 19.1 percent in 1970, an increase of 2.8 percentage points or a 17 percent increment over the 1950 figure. The increase in cases filed per 1000 adults is more dramatic, rising from 2.2 cases in 1950 to 3.3

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[30] When dealing with courts of limited jurisdiction, like those studied, the changing incidence of disputes will also have a greater effect on the judicial docket if the disputes are of a type that often leads to damages in excess of the jurisdictional amount. Thus a marked increase in petty assaults is less likely to be reflected in California Superior Court statistics than a similar increase in automobile accidents, because the damage done by the petty assault is less likely to exceed the court's jurisdictional amount.

[31] I sought information on fatal accidents, personal injury accidents, and accidents resulting in property damage over $100.00 from the National Safety Council, the Analysis Section of the California Highway Patrol, and the Office of the Traffic Engineers for Alameda and San Benito County. Information on fatal accidents was available by county for 1930, 1950, and 1970; information on personal injury accidents was available for 1950 and 1970; and information on property damage accidents was available only for Alameda County in 1970. The rates used in the text are based on one-half the total number of fatal and personal injury accidents in the years 1949 and 1950 and the years 1969 and 1970. I averaged the figures for two years because some proportion of accidents in a given year that lead to litigation do not result in cases being filed until the year after the accident occurs. Since accidents involving only property damage are excluded, the base used does not include every accident that might have resulted in litigation, but it is likely that most accidents resulting in property damage exceeding the court's jurisdictional amount ($3000 in 1950 and $5000 in 1970) also would have resulted in some personal injury. Similarly there must be a number of accidents included in the base which could not have resulted in litigation: e.g., where only one car was involved in the accident or where the total damage did not exceed the court's jurisdictional amount. These imperfections do not mean that an index relating the number of cases filed to the number of accidents is inadequate for comparing different time periods. It is adequate so long as the general ratio of accidents that might have been litigated to total accidents included in the base remained the same during the periods compared. I can think of no obvious reason why this should not have been the case. The imperfections mean that the index cannot be interpreted as the propensity of people within a county to litigate torts arising from accidents.

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in 1970, or by fifty percent. However, if we view the number of cases opened against a background of changing accident patterns, a different picture is presented.[32] The average annual number of fatal and personal-injury accidents for 1949 and 1950 is 4495. Extrapolating from sample data, about 1150 actions arising out of automobile accidents were filed in 1950. This figure is 25.6 percent of the average annual accident rate for 1949 and 1950. By 1969-1970 the average annual accident rate had risen to 8686, while the number of accident-related filings had increased to about 2252, a figure which is 25.9 percent of the annual accident total. Thus, it appears that the apparent increase in automobile tort litigation between 1950 and 1970 can be explained entirely by the increasing number of accidents. There is no need to posit an increased tendency to litigate auto-related torts, either absolutely or relative to other causes of action.

The situation is similar in San Benito County.[33] Tort actions arising out of automobile accidents constituted 11.3 percent of all cases in 1950 and 14.4 percent in 1970, an increase of

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[32] According to figures furnished by Robert Bieber, Commander, Analysis Section, California Highway Patrol, the accident picture in Alameda County during the years of interest was as follows:

Year	Fatal Accidents	Personal Injury Accidents	Total Fatal & Personal Injury Accidents
1949	108	4057	4165
1950	106	4719	4825
Average 1949-50	107	4388	4495
1969	183	8752	8935
1970	160	8277	8437
Average 1969-70	171.5	8514.5	8686

[33] Accident figures for San Benito County during the years of interest are:

Year	Fatal Accidents	Personal Injury Accidents	Total Fatal & Personal Injury Accidents
1949	6	70	76
1950	6	93	99
Average 1949-50	6	81.5	87.5
1969	9	160	169
1970	13	131	144
Average 1969-70	11	145.5	156.5

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3.1 percentage points or a rise of 27 percent between the two dates. The number of cases per 1000 adults increased from 1.9 to 2.6, or 37 percent. Yet cases filed, as a percent of fatal and personal injury accidents, decreased from 19.4 to 17.3. Again it appears that an apparent increase in litigation arising out of automobile accidents reflects a marked increase in the number of litigable disputes rather than an increased propensity to take disputes to court.

It is tempting to interpret the differences between the two counties in the rate of litigation per 1000 accidents as reflecting greater litigiousness in urban Alameda County. This interpretation is plausible only if the mix of accidents in the two counties contains more or less equal proportions of cases potentially resolvable through tort litigation. If, for example, serious single car accidents are more likely in rural than in urban counties, one might find differences in litigation rates of the sort we see here, given equal propensities to litigate.

Even if we could attribute the differences between the two counties to differences in litigiousness, we would not have explained very much, since in this context litigiousness is a very ambiguous term. It might reflect a "fighting spirit" that is more characteristic of urban than rural citizens; it might reflect the greater propensity of lawyers in urban areas to "chase" cases; or it might be that urban attorneys are more likely than their rural counterparts to file suit at an early stage in their negotiations with insurance companies.

The data on auto accidents demonstrate the potential value of information about the incidence and nature of disputes. Such information allows us to distinguish between the situation where an apparent change in the judiciary's involvement in dispute settlement results from the changed willingness of parties to bring disputes to court and the situation where the apparent change results from a change in the incidence of disputes. Unfortunately, precise information about the incidence of litigable disputes is rarely available over time. Most disputes do not leave recorded traces. Where they do, the record is often overinclusive in that it includes numbers of disputes that

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are not litigable under local jurisdictional standards. In the latter situation, the gross figures may serve as an index of changes in the number of litigable disputes if the proportion of litigable to nonlitigable disputes has remained relatively constant. In my discussion of the court's role in resolving disputes arising out of automobile accidents, I have assumed, in the absence of any obvious reason to believe otherwise, that the relationship between litigable and nonlitigable disputes in 1950 and 1970 was similar. The discussion suffers because data on accident and litigation rates are only available for two periods. Thus, I offer the analysis to illustrate the problems and potential of using dispute data rather than to provide substantial insight into changes that have occurred.

Summary

In the first part of this article, I use Friedman and Percival's longitudinal survey of the caseloads of two California courts as a vehicle for addressing two conceptual issues that must be resolved in studies of the dispute settlement function of courts. First one must decide what it means to inquire into this dispute settlement function. One focus of inquiry is on the way courts act. Do they take actual disputes and either impose a solution on the parties or assist the parties in reaching a solution, or do they merely rubber stamp the parties' private resolution of their disputes? If courts act in both ways, how has the mix of judicial activity changed over time? These are the issues that interested Friedman and Percival. A second focus is on the institutional position of courts in society. How important are courts as dispute settlers? What proportion of a society's serious disputes are taken to its courts for resolution? What proportion of the population takes disputes to court? How have these proportions changed over time? These are the questions I find most interesting.

The choice between these foci has important methodological implications. Statistics that address one set of questions are inappropriate if the other set is of interest. Thus if one has reason to believe that certain kinds of cases actively involve courts in dispute settlement while other kinds of cases demand only routine judicial administration, data on changes in the mix of a court's cases over time shed light on changes in the proportion of the court's business that requires dispute settlement activity. Such data do not necessarily indicate changes in the proportion of disputes brought to the court for resolution or in the proportion of the population who take disputes to court. To

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reflect these changes, case data must be controlled for changes in the incidence of disputes or changes in population.

The second conceptual issue discussed in this paper pertains to the ways courts "settle disputes." I point out that courts make a variety of contributions to dispute settlement. Their contributions range from defining norms that influence private agreements to authoritatively resolving disputes after full adjudication. Any general assessment of the institutional contributions of courts to dispute settlement should attend to the range of judicial contributions. Studies of the dispute settlement activity of trial courts should, at a minimum, consider mediative as well as adjudicative contributions. One reason I believe that Friedman and Percival's conclusions regarding the diminution in the dispute settlement activity of trial courts are overstated is because they neglect the mediative activity of trial judges and court staffs. Their neglect is, no doubt, attributable, in part, to the difficulty if not the impossibility of acquiring measures of mediative activity over the time period they examined.

In the second portion of this article, I examine Friedman and Percival's data from a different perspective than the one they chose. Since I am interested in the changing importance of trial courts as dispute settlement institutions rather than the changing activity of judges, I focus on rates of cases per 1000 adults rather than on the number of cases of a given type as a percentage of all cases filed. Although there is some "noise" in the rate data because of the existence of "repeat players," I believe they are a good index of the changing propensity of people to be involved in litigation. I also suggest that changes in population may be proxy for changes in the number of serious social disputes.

In Alameda County changes over time in case rates controlling for case type are remarkably similar to changes in the proportions of different type cases. Since 1890 there has been a marked increase in the rate of family and tort actions and a substantial decrease in the rate of contract and property litigation. The task is to explain these changes. In the family area it appears that the legal statistics reflect changed rates of family breakdown, and in the tort areas it appears that the increase is due to the dispersion of the automobile and the increase in the number of automobile accidents. This latter conclusion was confirmed by fragmentary data on the incidence of serious automobile accidents.

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Satisfactory explanations for the decline in contract and property actions are more elusive. One may explain the decline by reference to changes accompanying socio-economic development or to changes in the law and the organization of the court system. Obviously, social and legal explanations are not mutually exclusive. However, one should search for gross changes in the legal system, such as changes in the jurisdiction of courts, before seeking to establish social explanations for changes in litigation rates.[34] A number of plausible explanations for the diminution of contract and property actions were offered, but in most cases these explanations were inconsistent with available data. I find this to be encouraging rather than disheartening because it suggests that the available data allow us to distinguish between possible explanations for the trends that we perceive. Often we do not have to go beyond the case records, since many of the hypotheses that explain trends in litigation rates predict differently for different categories of cases.

The San Benito data are interesting because our choice of measure does matter. The number of property and contract actions, when viewed as a proportion of all cases, appears to have diminished more or less steadily since 1890, but the number of contract actions per 1000 adults shows no trend during the last 80 years, and a steady diminution in the rate of property actions appears not to have commenced until at least 1930. I have no ready explanation for these patterns, but the data in rate form caution us against too hastily accepting the conclusion that property and contract litigation decrease with economic development. This conclusion was invited by the percentage data. The choice of measure also makes a difference when we compare the counties. There is more congruence when we compare cases as a percentage of all cases filed than when we compare case rates per 1000 adults. These differences are much more pronounced during the period 1890-1930 than they are during the period 1930-1970. One can explain this observation in a number of ways, but the data do not allow us to choose between explanations.

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[34] Even if one could point to a clear legal change that seems to explain changing litigation, such as an increase in the jurisdictional amount accompanied by a diminution in the rate of contract cases, social explanations might not be irrelevant. They might explain the legal change and so be indirect explanations of the change in litigation. Plausible models might well contain a feedback loop, since the rate of litigation might lead to social pressures (e.g., through increased delay), which lead to legal changes (e.g., increases in jurisdictional amounts) that affect the rate of litigation.

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IV. CONCLUSIONS

Substance

Controlling Friedman and Percival's data for population confirms their finding that the mix of judicial business has changed over the years, but gives us little reason to believe that courts today are functionally less important as dispute settlers than they were in 1890. Indeed, the data from San Benito County support the opposite conclusion. In 1890 the San Benito Superior Court heard 9.1 cases per 1000 adults. In 1950, despite a substantial real increase in the jurisdictional amount, the overall case rate had increased to 16.5 per 1000 adults. By 1970 the rate was 17.9. While the mix of judicial business may have changed so that a smaller proportion of the court's business involved dispute settlement, it is unlikely that such changes account for the entire increase in the rate at which people went to court. Only property cases are filed at consistently lower rates in the later years than the earlier, and there is reason to believe that the rate of property disputes may have decreased over time.[35] Rates of trials and hearings also show no substantial diminution over time.

In Alameda County the data are more ambiguous. Case rates are 13.0 in 1890, 20.1 in 1910, 13.5 in 1950 and 17.4 in 1970. It is possible that changes in the court's business mean that despite similar case rates the Superior Court contributed less to dispute settlement in the later years than in the earlier ones. Trial rates, for example, are lower in 1950 and 1970 than they were in 1890 and 1910. However, the court may have been mediating more settlements in the later years than in the earlier ones and we should not forget that the court may have been functionally important to dispute settlement in ways that do not involve judicial activity. Overall, I do not believe that we can conclude from the Friedman and Percival data that the dispute settlement function of courts—as I use these words—has diminished over time.

This judgment and the data that support it may surprise some people, since the opposite conclusion—that the dispute settlement function of courts has indeed diminished—appears to follow from two recurring themes in the dispute settlement literature. The first is that in this country most contemporary courts are not very satisfactory dispute settlers[36] (e.g., Danzig,

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[35] See text at note 21.

[36] The best evidence that people accept this conclusion is the large sums of money that are being invested by the LEAA, the Ford Foundation and others in the exploration of "alternative" methods of dispute settlement.

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1973; Johnson, 1977; Yngvesson and Hennessey, 1975). The second is that in less developed societies courts and court-like institutions generally perform well (e.g., Gibbs, 1963; Gluckman, 1955; Nader 1969).[37] Since Alameda and San Benito Counties were considerably less developed in 1890 than in 1970, one might expect the dispute settlement function of the county courts to have diminished over this time period.[38]

Yet this expectation does not follow, even if the premises with which it appears to accord are correct. The Superior Courts in Alameda and San Benito Counties were, even in 1890, unlike the traditional courts of less developed societies. These courts were the highest courts in their respective counties. The judges who presided over them were trained lawyers, and those with business before the courts were, no doubt, well advised to hire lawyers. Although the courts were located in the population centers of their respective counties, access to the courts was probably difficult for those living in outlying areas. In addition, the jurisdictional amount of $300.00 which existed for civil cases in 1890 must have excluded the bulk of common disputes from the courts' cognizance. Even if the courts had been physically, psychologically, and financially more accessible, dispute settlement in these courts is likely to have been less effective than in the traditional courts of less developed societies. Such courts are effective, in part, because they operate in traditional societies where there is generally a high degree of consensus about the norms that govern disputes. In another article Friedman, (1975:697) tells us that "San Benito County was emphatically not a 'traditional' society." The comment almost certainly applies to Alameda County as well.

There is little reason to expect that courts of the kind studied by Friedman and Percival have ever played an important role in settling the ordinary disputes of businesses and citizens. The fact that California was less developed in 1890 than in 1970 does not imply that county courts played a more important role in dispute settlement at an earlier period, nor should the fact that rural areas are less well-developed than urban areas lead us to expect a greater dispute settlement role for the rural court. Indeed, had society been more traditional in 1890 than in

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[37] Thus much of the current investigation into alternative forms of dispute settlement focuses on community-based mediative procedures that more closely resemble the dispute settlement procedures of less developed societies.

[38] By the same token, it is surprising that there appears to be little difference in the dispute settlement role of the rural and urban courts. Friedman and Percival (1976:300).

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1970, or if rural society were more traditional than urban society throughout this period, one might expect the dispute settlement role of the court to be greater in 1970 than in 1890 and greater in the urban county than in the rural one. The reason is that the more traditional the society the greater the likelihood that disputes will be settled by informal social processes or by the local court closest to the people.[39] If we are to explain changes in litigation rates and the dispute settlement function of higher-level courts, we should probably look not at macro changes in the level of social development, but at changes likely to affect the incidence of specific disputes and the ways they may be resolved. Thus the increase in family cases over time reflects the increasing acceptability of divorce and the concomitant decrease in the costs associated with marital breakdown. Changes in the rate of contract actions may reflect changed economic conditions or structural changes in businesses that create incentives to excuse non-compliance with contracts. Differences between the two counties might reflect the different mix of contracts made in each.

Ironically, we cannot, on the basis of the data presented, confidently say that during the last eighty years the courts studied by Friedman and Percival were at no time responsible for considerable dispute settlement. We do not really know what it means for a court, particularly a second-level trial court, to engage in "considerable" dispute settlement. In 1970 in the two courts there were somewhere between 17 and 18 cases filed per 1000 adults and somewhere between 2 and 3 trials per 1000 adults. Are these rates high or low *for a court?* What, for example, are the litigation rates in the various traditional courts that anthropologists have studied? It appears that when disputes reach traditional courts they are effectively resolved, but what proportion of community disputes reach court? Do they ever process as high a portion of important disputes as the California Superior Courts do in the auto tort area? It will be recalled that in 1950 and 1970 there was approximately one tort case filed for every four fatal or personal-injury accidents in Alameda County and approximately one case for every five such accidents in San Benito County. While we cannot trace specific accidents to cases, these figures probably understate rather than overstate the tendency of auto torts to end up in

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[39] Studies of first-level courts might tell us more about the changing functional importance of courts as dispute settlers than studies of courts of limited jurisdiction. It will be the lower courts, if any, that hear of the petty grievances of everyday life. Unfortunately, lower court records are likely to be less complete than the records of higher tribunals.

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Court since not every serious accident results from arguably tortious behavior. Perhaps in the auto tort area modern courts, by any measure, process a high proportion of society's disputes. If so, the task is to explain why. I suggest some possibilities in my textual discussion of auto torts.

Procedure

When I began exploring these data I was more pessimistic about what might be learned from case data than I am at the conclusion of the enterprise. Case data are affected by social forces generally and by changes in the legal system. As such they cannot only be explained by changes in the socio-economic and legal systems, but can also serve as indices reflecting changes in these systems. Although a good deal of the socio-economic data that one would desire is not available for periods as far back as 1890, much of it is available after the first decade or so of the twentieth century.[40] Information about statutory changes and judicial precedent are available for as far back as one might reasonably want to collect data, and I have been able to uncover information to test certain specific hypotheses (e.g., information about caseloads per judge and about serious auto accidents) with a few inquiries to obvious authorities. Furthermore, detailed breakdown of the cases by outcomes and into subtypes should enable us to eliminate a number of possible explanations for the trends we observe, even if they do not always allow us to settle confidently on a preferred explanation.

This reanalysis of the Friedman and Percival data has been hampered by the small size of the samples at each data point and the fact that data are available only for five widely spaced years. The sample size precludes meaningful subcategorization and controlled analysis. We cannot, for example, determine whether some kinds of contract actions are more likely to be settled before trial than others. The obvious solution, which is to take larger samples, is only viable in urban counties. In rural San Benito County, Friedman and Percival collected information on every case filed. One corrective is to collect data in a number of rural counties and, so long as there are no marked

[40] In preparing this article, I tried exploring these data with the aid of regression analysis. An obvious model hypothesizes that the number of cases of each type is a function of population and socio-economic development. I was unable to uncover any data that might serve as an index of socio-economic development. Even the information needed to construct such a crude proxy as kilowatt hours (or horsepower equivalents) of energy produced for the entire state of California was not available in consistent form for each year of interest. County data reflecting socio-economic development was yet more scanty.

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county effects, combine the data for analysis. An even more attractive possibility is to sample data on a statewide rather than a county basis. An advantage of the state as a sampling frame is that census data and other data that might explain case rates are often available for states but not for counties within states.

The availability of data at only five widely separated points in time has proved even more frustrating than the small number of cases at each point in time. The idiosyncratic features of a particular year may disguise long-term trends in the data, and the spacing of the years means that we can neither spot short-term movement nor link marked changes in the data with important historical events. In 1910, for example, Alameda County had an unusually high number of cases per 1000 adults, while San Benito County had an unusually low number. Thus for most kinds of cases the rates in Alameda County increased between 1890 and 1910 and decreased between 1910 and 1930. In San Benito County directions of change were reversed. Does this mean that there was no consistent trend between 1890 and 1930, or is it possible that 1910 was aberrational for both counties and that change was more or less steady throughout the longer period? Furthermore, no data are available for any of the years of the World Wars, and there is information for only one year of the Great Depression. It would be interesting to see how, if at all, cataclysmic events such as these are reflected in legal cases. Finally, having data at more points in time facilitates the construction and testing of mathematical models that seek to identify principal sources of variation in the amount of litigation over the long run.

One nice thing about analyzing someone else's data is that one avoids the difficulties and the expense of collecting it. However, having worked with similar data, I can testify that there are often difficulties in uncovering and tracing case data as well as in coding even such apparently unambiguous information as case type. Thus, in calling for the statewide collection of data from large samples at many points in time, I am calling for the commitment of substantial resources into research of this type. I am uncertain whether the new knowledge generated by such research will be worth the energy and money it will require. However, unless we move in this direction, longitudinal studies of litigation will not progress far beyond what Friedman and Percival and I have been able to provide.

https://doi.org/10.2307/3053244 Published online by Cambridge University Press

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