Reality of Constitutional Tort Litigation

Theodore Eisenberg
Stewart Schwab

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THE REALITY OF CONSTITUTIONAL TORT LITIGATION

Theodore Eisenberg†
& Stewart Schwab††

TABLE OF CONTENTS

I. Perceptions of Constitutional Tort Litigation .......... 644
   A. Judicial Perceptions and Responses ................ 645
   B. The Perceived Fiscal Drain on Local Governments . 650
   C. The Effect on Individual Officials ................ 651

II. The Study’s Methodology ................................ 652
   A. The Central District of California as a Unit of Study 652
   B. Identifying Constitutional Tort Cases .............. 653
   C. Defining a Case ................................... 655
   D. Sources of Data ................................... 657
      1. National Published Statistics ...................
      2. The Parallel Results Based on Administrative
         Office Data ...................................... 657
      3. Central District 1980-81 Data ..................
      4. The Follow-up Attorney Study ...................
      5. Central District 1975-76 Data ..................

III. The Number of Constitutional Tort Cases .............. 658
   A. A Caveat on Prisoner Litigation ...................
   B. The Administrative Office Classification System and
      General Uses of Its Case Filing Statistics ........ 660

† Visiting Professor of Law, Stanford University; Professor of Law, Cornell
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(J. Lobel & B. Wolvovitz eds. 1987).
C. A Critique of Uses of Administrative Office Data... 662
D. The Number of Cases in the Central District........... 668

IV. Characteristics of Constitutional Tort Litigation .......... 671
   A. The Relative Burden of Constitutional Tort
      Litigation........................................ 671
      1. Time to Disposition.......................... 672
      2. Litigation Activity.......................... 673
   B. The Success of Constitutional Tort Litigants.......... 676
      1. Defining Success............................ 676
      2. Comparing Success in Cases of Known
         Outcome........................................ 677
      3. Absolute Success Rates........................ 681
      4. Unknown Outcomes: Accounting for
         Settlements..................................... 683
   C. The Fiscal Consequences of Constitutional Tort
      Litigation........................................ 684
      1. Total Dollars Transferred...................... 684
      2. Constitutional Tort Transfers vs. Other
         Transfers........................................ 686
   D. Attorney Fees and Constitutional Tort Litigation... 688
      1. Direct Evidence of Their Burden.............. 688
      2. Inferences from the Case Filing Data
         Concerning the Role of Attorney Fees........... 689
   E. Analysis of Subgroups of Constitutional Tort Cases 690
      1. Nonprisoner Cases............................. 690
      2. Prisoner Cases................................ 691

V. Reconciling the Reality and Perception of Constitutional
   Tort Litigation........................................ 693

In the public's mind, civil rights litigation continues to explode. Civil rights cases burden the federal courts, impeding by their very numbers the quality of justice in all cases. Supreme Court Justices bemoan the rise in filings and consequently restrict the remedies. Cities regard civil rights cases as a cause of fiscal distress. Individual officials cower for fear of personal liability. The legal and popular press join in the chorus.


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CONSTITUTIONAL TORT LITIGATION

The Administrative Office of the United States Courts and our findings about a key federal district suggest that the image of a civil rights litigation explosion is overstated and borders on myth. Although the typical constitutional tort case is longer and more involved than the average civil filing, civil rights litigation—including the core section 1983 cases—is not exploding. The explosion claim, usually based on a quick citation to Administrative Office statistics, lumps all civil rights cases together, sometimes even including prisoner habeas corpus filings. Because much of the growth in civil rights litigation comes from modern statutes, particularly title VII employment discrimination cases, these gross Administrative Office statistics are overinclusive and mask as much as they reveal. Detailed examination of the Administrative Office data and of the cases filed shows a more moderate picture.3

This study distinguishes between “civil rights litigation” and “constitutional tort litigation.” Civil rights litigation encompasses litigation under many federal statutes, including nineteenth- and twentieth-century antidiscrimination provisions.4 Constitutional tort litigation refers to a subset of civil rights litigation. The term encompasses both actions brought against state and local authorities under 42 U.S.C. § 19835 and similar actions brought against federal officials based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.6 Constitutional tort cases are worth separating...
out from the larger class of civil rights cases because they involve the distinctive feature of constitutional claims against the government and because they have become a matter of public debate. The Central District of California, covered in this article, is an attractive candidate for study because its size and location render it, standing alone, important, and because studying it allows comparisons with an earlier study of Central District section 1983 litigation.

Notwithstanding our findings, the growth of constitutional tort litigation is not a trivial matter. Constitutional tort litigation has developed from an insignificant part of the federal docket to become one of its important components. Nevertheless, a difference exists between being an essential part of the federal court system and engulfing both that system and local governments. The available evidence demands that this distinction be made.

Part I of this article documents the perception of a civil rights litigation explosion and suggests important consequences of that perception. Part II describes the study, the results of which are presented in Parts III and IV. Part III analyzes the number of constitutional tort cases. Part IV explores the judicial burden, success rates, and financial drain of constitutional tort cases, both in an absolute sense and as compared with other litigation. Findings in these areas conflict with some common perceptions, and suggest that the financial drain of constitutional tort litigation and the effect of attorney fees legislation are less drastic than many believe. They confirm the perception that constitutional tort litigation is more burdensome than other civil litigation.

I
Perceptions of Constitutional Tort Litigation

Section 1983 authorizes civil damages and injunctive actions against state officials who deprive others of constitutional or certain

7 With 6,377 civil filings in fiscal 1981, the Central District was the third busiest of the 95 federal districts, behind the Southern District of New York and the Northern District of Illinois. Its 500 civil rights filings were also the third highest, behind the Northern District of Illinois and the Eastern District of Michigan. Its 479 prisoner filings ranked 16th. As a percentage of the total docket, the civil rights and prisoner filings in the Central District are somewhat below the national median. In 1981, civil rights filings comprised 7.8% of the Central District's docket and prisoner filings comprised 7.5%. The corresponding national medians are 8.1% and 13.5%. All figures are derived from data in Administrative Office of the United States Courts, Management Statistics for United States Courts (1981) [hereinafter A.O. Management Statistics]. The fiscal year used for these rankings differs from the fiscal year used in part of this study. See infra note 80 and accompanying text.

federal statutory rights. Individuals bring constitutional tort actions against the full range of government officials, from the cop on the beat to the state governor. These actions are an important method for testing the legality of police behavior and conditions in prisons and mental hospitals. In cases involving government officials and constitutional rights, section 1983 actions supplement, if not replace, traditional state law tort systems.

Under the dominant articulated perception of constitutional tort litigation, section 1983 cases flood the federal courts with questionable claims that belong, if anywhere, in state court. An extension of this vision regards these cases as brought by attorneys either with radical personal visions of how society should treat citizens, or with an eye toward the fee award available to prevailing parties. One account terms fee awards to civil rights attorneys a “massive, nationwide giveaway” to “moral ambulance chasers.”

Such perceptions of constitutional tort litigation have shaped policy arguments in Congress, pleas by local governments for relief, and judicially developed constitutional tort doctrine. In 1980, Congress passed the Civil Rights of Institutionalized Persons Act largely because it believed that prisoner civil rights filings burdened the federal courts. Local governments believe that partial relief from their liability woes depends on relief from section 1983 actions, and Congress has considered modifying section 1983 to preserve municipal fiscal health. Emerging judicial doctrines limiting the liability of public officials are prompted by the perception that recent increases in actions against such officials may render them overly cautious.

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9 See supra note 5.

There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where “civil rights” of any kind are at best an afterthought. In this case, for example, the respondents added a § 1983 count to their complaint some years after the action was initiated, apparently in response to the enactment of the Civil Rights Attorney’s Fees Awards [sic] Act of 1976.

See also infra text accompanying notes 31-33 & 49-52.

13 See Eisenberg, supra note 8, at 522 n.167.
A. Judicial Perceptions and Responses

Support for the proposition that the perceived explosion of section 1983 litigation shapes doctrinal development in the Supreme Court comes from an extraordinary source—Justice Blackmun. Well situated to know the Court’s inner workings on section 1983 matters, Justice Blackmun is forbidden by custom from attributing nonpublic views to individual Justices. Nevertheless, in a revealing passage in a recent law review article, Justice Blackmun recognizes the claim that section 1983 cases are overburdening the federal courts, and states that recent Court opinions “reflect a growing uneasiness with the heretofore pronounced breadth of the statute and, in my view, a tendency to strain otherwise sound doctrines.”

Several Court opinions support Justice Blackmun’s concern. Beginning with Paul v. Davis, in which the Court held that a person’s reputation is not an interest protected by the fourteenth amendment’s due process clause, commentators have attributed the Court’s narrow constitutional constructions to the Court’s fear of increasing section 1983 litigation. In the area of procedural due process, this trend peaked with Parratt v. Taylor and its progeny, which held that the availability of an adequate state remedy precluded the finding of constitutional deprivation required to maintain a section 1983 cause of action.

Justice Powell’s concurring opinion in Parratt planted the seed for even greater restriction on access to federal court. Relying on the increase in section 1983 filings, he argued that negligent acts cannot cause deprivations of “life, liberty, or property” within the meaning of the fourteenth amendment’s due process clause. A contrary rule, warned Justice Powell, would “make . . . the Fourteenth Amendment a font of tort law.” This seed bore fruit five years later when, in Daniels v. Williams and Davidson v.

17 See, e.g., Note, Reputations, Stigma and Section 1983: The Lessons of Paul v. Davis, 30 Stan. L. Rev. 191, 202 (1977) (“Although the opinion in Paul pursued the ‘deprivation of liberty’ analysis, the scope of section 1983 appeared to be the Court’s major concern.”).
20 451 U.S. at 549 (Powell, J., concurring in result) (“[Section 1983] was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been . . . merely a negligent deed . . . ”).
21 Id. at 550 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).
Cannon, the Court adopted Justice Powell’s view of the due process clause.

In Maine v. Thiboutot, where the Court found section 1983 applicable to federal statutory claims, Justice Powell, in a dissent joined by Chief Justice Burger and Justice Rehnquist, relied on a similar “floodgates” argument to lay the groundwork for Thiboutot’s subsequent limitation:

No one can predict the extent to which litigation arising from today’s decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial.

Shortly thereafter, the Court effectively undermined much of Thiboutot’s holding by limiting section 1983’s applicability to federal statutory claims, even in the case of discrimination against the handicapped, a situation with strong civil rights overtones.

Concern about the number of constitutional tort filings persuaded several Justices that civil rights litigants should exhaust state administrative remedies before bringing a section 1983 action. Justice Powell, dissenting in Patsy v. Board of Regents, argued that an exhaustion requirement would conserve scarce judicial resources in light of the enormous growth of civil rights actions. Chief Justice

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23 474 U.S. 344 (1986) (prison official's failure to act on warning that fellow inmates might harm prisoner constituted negligence by officer and therefore did not state claim under § 1983).
24 448 U.S. 1 (1980).
25 Id. at 23 (Powell, J., dissenting).

Moreover, and highly relevant to the effective functioning of the overburdened federal court system, the rule conserves and supplements scarce judicial resources. In 1961, the year that Monroe v. Pape was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U.S. Courts, 238 (1961). In 1981, over 30,000 such suits were commenced. Annual Report of the Director of the Administrative Office of the U.S. Courts 63, 68 (1981). The result of this unprecedented increase in civil rights litigation is a heavy burden on the federal courts to the
Burger and Justices Rehnquist and O'Connor supported this view.\textsuperscript{29}

Dissenting Justices have also invoked case filing statistics to argue for absolute immunity for public officials. In \textit{Pulliam v. Allen},\textsuperscript{30} the Court limited judicial immunity to section 1983 actions. Justice Powell, joined in dissent by Chief Justice Burger and Justices Rehnquist and O'Connor, offered fear of harassing section 1983 litigation as a reason for denying attorney fees in injunctive actions against judges.\textsuperscript{31} After asserting that the attorney fees award statute "has become a major additional source of litigation,"\textsuperscript{32} Justice Powell stated that "[s]ince its enactment in 1976, suits against state officials under § 1983 have increased geometrically."\textsuperscript{33} In \textit{Cleavinger v. Saxner},\textsuperscript{34} Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented from a denial of absolute immunity to members of a prison disciplinary committee. The dissenters expressly relied on the increase in prisoner section 1983 litigation.\textsuperscript{35} In \textit{Butz v. Economou},\textsuperscript{36} Justice Rehnquist, joined by three Justices, dissented in part from a denial of absolute immunity to high federal executive officials. Pointing out that civil rights actions had increased from detriment of all federal-court litigants, including others who assert that their constitutional rights have been infringed.

\textit{Id.} (citation omitted). Footnote 20 states:


\textsuperscript{29} Chief Justice Burger joined, \textit{id.} at 519, in part two of Justice Powell's dissent, which discussed the exhaustion of remedies requirement. Justice O'Connor's concurring opinion, joined by Justice Rehnquist, stated:

As discussed in Justice Powell's dissenting opinion . . . considerations of sound policy suggest that a § 1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint. At the very least, prior state administrative proceedings would resolve many claims, thereby decreasing the number of § 1983 actions filed in the federal courts, which are now straining under excessive caseloads.

\textit{Id.} at 516-17 (O'Connor, J., concurring).


\textsuperscript{31} \textit{Id.} at 553-54 (Powell, J., dissenting).

\textsuperscript{32} \textit{Id.} at 555.

\textsuperscript{33} \textit{Id.} at 555-56. For another suggestion that the possibility of fee awards generated an increase in civil rights filings, see \textit{City of Riverside v. Rivera}, 106 S. Ct. 2686, 2701 n.4 (1986) (Powell, J., concurring). For a critique of this use of statistics, see \textit{infra} text accompanying notes 103-25.

\textsuperscript{34} 474 U.S. 193, 208 (1985) (Rehnquist, J., dissenting).

\textsuperscript{35} \textit{Id.} at 211. Citing Administrative Office statistics, Justice Rehnquist noted: "[P]risoners have made increasing use of § 1983 and \textit{Bivens}-type suits in recent years: 18,856 such suits were filed in federal court in the year ending June 30, 1984, as compared to just 6,606 in 1975."

\textsuperscript{36} 438 U.S. 478, 518 (Rehnquist, J., concurring in part and dissenting in part). The Court held that high-ranking federal executive officials may be made defendants in § 1983 actions.
296 in 1961 to 13,113 in 1977, he stated that the potential disruption of government by increased litigation was his "biggest concern."³⁷

The Court's empirical perceptions about constitutional tort cases transcend interpretations of raw data and the general effect of the attorney fees statute. They also pertain to details of litigation against government officials. In *Harlow v. Fitzgerald,*³⁸ the Court relied on empirical insights to expand the good faith defense afforded to governmental defendants in constitutional tort actions.³⁹ Before *Harlow,* an official who had violated another's constitutional rights was liable if the official subjectively knew, or objectively should have known, that the official's behavior violated the Constitution.⁴⁰ Justice Powell, writing for the Court, detected flaws in these dual bases for liability. In particular, he explained that the subjective component of the test allowed many cases to go to trial because the defense hinged on the factual state of the defendant's mind, and found the costs of these trials to be too great:

[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind.⁴¹

Sometime between the establishment of the earlier, narrower version of the good faith defense and the *Harlow* decision, the Court decided that the burden of civil rights litigation made officials suffer unduly. *Harlow* thus assumes that civil rights cases had become such a problem as to warrant modifying important legal doctrine.

As suggested by these opinions, some Justices believe it is axiomatic that constitutional tort cases are overloading the federal courts.⁴² At least as important is the growing sense that the Court

³⁷ *Id.* at 526.
³⁸ 457 U.S. 800 (1982).
³⁹ Technically, *Harlow* involved an action against federal officials, but the test it established applies to § 1983 actions against state officials as well.
⁴⁰ *Id.* at 815 (citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975)).
⁴¹ *Id.* at 816. Similar concerns informed the portions of the Court's opinion in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), allowing immediate interlocutory appeals of denials of qualified immunity.
⁴² *See also* *Rose v. Mitchell*, 443 U.S. 545, 584 (1979) (Powell, J., concurring in judgment) ("It is common knowledge that prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary."). Justice Powell offered the following statistical support: "In the year ending June 30, 1978, almost 9,000 of the prisoner actions filed were habeas corpus petitions. See 1978 Annual Report of the Director of the Administrative Office of the United States Courts 76." *Id.* These statements highlight a slightly different argument, focusing on actions brought by prisoners
as a body is operating under such an axiom.43

B. The Perceived Fiscal Drain on Local Governments

Local government officials regard constitutional tort actions as a serious threat to the fiscal health of cities and counties. Section 1983 cases, they believe, absorb undue shares of public budgets in three related ways. First, cities spend inordinate amounts of money to satisfy judgments for constitutional tort plaintiffs.44 Critics of section 1983 often point to the sheer number of actions to suggest that judgments are crushing cities.45 A single judgment against the police (and not even a section 1983 case) driving a small town to bankruptcy makes national headlines.46 More generally, municipal authorities complain of misuse of section 1983 by commercial entities.47 Critics also regard constitutional tort litigation as more intractable than other litigation because the social issues involved and not solely on constitutional tort litigation. See generally infra notes 87-92 and accompanying text (discussing relationship between constitutional tort and prisoner litigation).

43 In a recent constitutional tort case involving attorney fees, a central thrust of a litigant’s brief was to dispel the Supreme Court’s notions about the volume and burden of constitutional tort litigation. Brief for Respondents, City of Riverside v. Rivera, 106 S.Ct. 2686 (1986) (No. 85-224). The respondents prevailed.


46 See Couric, supra note 44, at 36, col. 1; Lindsey, supra note 44, at 1, col. 1, 28, col. 1; Mouat, supra note 44, at 7, col. 1; Ranii, supra note 44, at 20, col. 2. The case did not even involve a § 1983 claim, but rather was a common law tort action. Garcia v. City of South Tucson, 131 Ariz. 315, 640 P.2d 1117 (Ct. App. 1981).

47 An 1871 civil rights law aimed at the Ku Klux Klan [§ 1983] has been grounds for thousands of lawsuits—some occasioning multimillion-dollar awards—filed against local governments; the law, which prohibits states from depriving citizens of their rights, has been used instead “by commercial entities to enforce commercial rights” in disputes over things such as zoning and cable television franchises, bemoaned National Association of Counties counsel Frederick Lee Ruck. Solomon, Finger-Pointing Distinguishes Attempts to Fix Blame for Liability Crisis, Nat’l J., Feb. 15, 1986, at 378, 384; see also Ranii, supra note 44, at 21, col. 1 (civil rights actions said to be available for “anything”).
make the cases difficult to settle and expensive to litigate.  

Second, adding insult to injury, cities must pay the prevailing plaintiffs’ legal fees. Critics charge that attorneys often fail to represent the best interests of their civil rights clients for the sake of a higher fee, and abuse section 1983 to obtain a court-ordered award. One commentary regards fee shifting as a backdoor way of forcing state and local governments to fund federally created rights, and asserts that high hourly rates, bonuses, and multipliers inflate fees.

Third, increased costs of constitutional tort liability contribute to a general liability and insurance premium crisis. Some sources expressly tie this larger problem to section 1983 litigation. The general counsel for the U.S. Conference of Mayors has stated that in the larger liability crisis “‘[t]he civil rights area is far and away the most devastating one for cities.’”

C. The Effect on Individual Officials

The financial burden imposed on impersonal legal entities is only one aspect of constitutional tort litigation’s perceived effect on local government. Individual officials also face the threat of personal liability. Courts perceive this threat and adjust doctrines to protect officials against such liability.

From the beginning of its modern era, constitutional tort doctrine has protected misbehaving individual officials. It now grants absolute immunity to judges, legislators, prosecuting attorneys, witnesses, and presidents. Other executive officials benefit from a

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48 See, e.g., Blodgett, supra note 45, at 48.
50 Lauter, supra note 49, at S4, col. 1 (“The debate is freighted with suggestions of unethical practices . . .”).
51 Ranii, supra note 44, at 20, col. 4 (“A bright plaintiff’s lawyer . . . ‘can take almost any circumstances and allege deprivation of civil rights . . .’ . . . (quoting John W. Witt, city attorney, San Diego)).
52 Rose, Jones & Kelly, supra note 49, at 13, cols. 1-2, 17, col. 2.
54 See Blodgett, supra note 45, at 48.
55 Mouat, supra note 44, at 7, col. 2 (quoting Stephen Chapple). Mr. Chapple also asserts that “‘unlike antitrust suits, cities are losing most civil rights cases.’” Id. But see infra Table VIII (38% overall success rate for constitutional tort cases).
qualified, "good faith" immunity.57

Constitutional tort litigation’s possible adverse effect on official behavior is a fundamental tenet of modern public law doctrine.58 The Department of Justice takes this effect so seriously that it reimburses employees against whom constitutional tort actions are successfully brought.59 Professor Schuck neatly summarizes the logic underlying the effort to limit personal liability. He notes that officials faced with personal liability may refrain from acting, may delay their actions, may become formalistic by seeking to “build a record” with which subsequently to defend their actions, or may substitute “safe” actions for riskier, but socially more desirable, actions.60

In short, perceptions of constitutional tort litigation affect public policy in many ways. Independent of the obvious need to test these bases for policymaking, the constitutional tort system merits study. It is sound constitutional housekeeping to determine how assertions of constitutional rights fare in our courts, and an accurate picture of this portion of the legal system may provide a useful window on the system as a whole.

II
THE STUDY’S METHODOLOGY

A. The Central District of California as a Unit of Study

In addition to examining published national data, this study analyzes in detail the United States District Court for the Central District of California.61 Collecting complete data on all constitutional tort cases filed in the United States would be too costly; col-

57 E.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (president’s senior aides can raise qualified immunity as an affirmative defense). Harlow’s elimination of the subjective element of the good faith defense was an express effort to protect executive officials from excessive constitutional tort liability. Id. at 813-14.

58 Carlson v. Green, 446 U.S. 14, 21 (1980) (“It is almost axiomatic that the threat of damages has a deterrent effect . . .”).

59 Pear, U.S. Will Repay Aides in Rights Suits, N.Y. Times, Aug. 17, 1986, at 18, col. 1 (“[T]he policy was needed to allay employees’ ‘fear of personal liability’ for actions they may take in the line of duty [which may] ‘tend to intimidate all employees, impede creativity and stifle initiative and decisive action.’”) (quoting Attorney General Edwin Meese III).

60 P. SCHUCK, SUING GOVERNMENT 71-77 (1983).

61 See supra note 1 (describing larger project of which this study is one part).
lecting less detailed data would duplicate the efforts of the Administrative Office of the United States Courts. The Central District of California, which includes Los Angeles, was chosen because of its importance and as a representative of large metropolitan areas. Studying the Central District also permits comparison with findings from an earlier study of section 1983 actions in the same district.

B. Identifying Constitutional Tort Cases

There are two ways to identify civil rights cases filed in a federal district court. The first method requires reading the complaint in every civil action filed in the district and sifting civil rights cases from others. The second method relies on filing data collected by the Administrative Office of the United States Courts. These data derive from Form JS-44, which every plaintiff commencing a civil action in federal court must file. This form requests information about the action, including the nature of the case using the Administrative Office's "nature of suit" codes. There are five nature-of-suit code categories for nonprisoner civil rights cases, and five for cases brought by prisoners, including one for civil rights actions. The Administrative Office can produce lists of all cases with their nature-of-suit codes.

To eliminate categorization errors and ensure the most complete set of civil rights cases, one would examine every civil complaint filed and check every case that the Administrative Office coded as a civil rights or prisoner case. Budget and time constraints preclude such a procedure. Instead, the study relies on the Administrative Office lists to identify civil rights cases.

Relying on the lists probably does not sacrifice much in the way of completeness. An earlier study tried to locate all civil rights cases filed in a district by having law students examine and classify every civil complaint. Comparing these results against the Administrative Office list showed that approximately 20% of the cases on the Administrative Office list had not been identified by trying to read every complaint. More important, in the earlier study few cases not on the Administrative Office list were found by reading every com-

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62 See supra note 7 and accompanying text.
63 See Eisenberg, supra note 8.
65 The civil rights and prisoner categories and their Administrative Office codes are listed infra at text accompanying notes 94-95.
66 See Eisenberg, supra note 8, at 524, 595 n.237 (noting that some cases were found using Administrative Office lists despite trying to read every complaint filed).
plaint. Using the Administrative Office lists therefore affords substantial savings in time and money without sacrificing accuracy. Additionally, use of these lists ensures results that are based on the same Administrative Office case data typically relied upon by persons estimating the number of constitutional tort filings.

Having obtained the list of civil rights cases to examine, which of these cases should be classified as constitutional tort cases? This study classifies a case as a constitutional tort case when either the plaintiff's complaint expressly relies on section 1983, or when no logical alternative to reliance on section 1983 exists. Nevertheless, plaintiff reliance on section 1983 does not necessarily establish that section 1983 is the central claim in the case. Litigants often assert multiple statutory bases for their actions. Section 1983 may be the centerpiece of a police action, or a side show to a title VII claim that has progressed through the Equal Employment Opportunity Commission. To protect against understating the magnitude of constitutional tort cases, we categorize every case relying on section 1983 as a constitutional tort case.

This study also includes constitutional claims against federal officials as constitutional tort cases. Detecting such cases is difficult. Constitutional tort actions against federal officials rely on Bivens, in which the Supreme Court allowed a fourth amendment damages action against federal officers. The plaintiff's complaint, however, need not identify a statutory basis for a Bivens action and pleading rules do not require invoking the case by name. Identifying Bivens actions thus requires interpreting the factual summaries extracted from individual case files. We found relatively few Bivens actions.

A complete study of constitutional tort cases would include

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67 Id.
68 To avoid understating the volume of cases, we also included cases that erroneously relied on § 1983.
69 Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). A suit for injunctive relief brought against state or federal officials might trace its roots to Ex parte Young, 209 U.S. 123 (1908), and stand on grounds independent of § 1983 or Bivens. Nevertheless, today most such actions are brought under § 1983 and are therefore included in our list of § 1983 cases.
70 We classified 17 nonprisoner and 10 prisoner filings as Bivens actions filed in the Central District in 1980-81. By comparison, nonprisoners filed 192 § 1983 actions and prisoners filed 69 § 1983 actions. Two nonprisoner cases relied on both § 1983 and Bivens. National reports of Bivens filings suggest that these figures are reasonably accurate. The Justice Department reports that, from 1971 to 1986, 12,000 Bivens actions were filed. Pearson, supra note 59, at 18, cols. 1-2. This represents fewer than 9 filings per year per federal district. In 1981, the Justice Department reported that between 7,500 and 10,000 Bivens suits against government employees had been brought since 1971. P. S. Huck, supra note 60, app. 1 at 202 (citing Federal Tort Claims Act: Hearing on S. 1775 Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 160 (1982)) [hereinafter Tort Claims Hearing] (prepared statement of J. Paul McGrath, Assistant Attorney General).
constitutional tort activity in state courts.\textsuperscript{71} Gathering case filing data in all states, however, would be impractical. Two reasons suggest that excluding state cases will not greatly diminish the study's value. First, state cases have not been the source of complaints about the civil rights caseload. Second, the slim available evidence shows that constitutional tort filings in state courts lag far behind corresponding federal filings.\textsuperscript{72}

Assembling a control group of cases was simpler. We randomly sampled all non-civil rights cases filed in the Central District during 1980-81, the same period in which the civil rights cases were filed.\textsuperscript{73} The resulting sample of 468 cases is large enough to assure that a 95\% confidence interval is within five percentage points of the sample mean.\textsuperscript{74}

C. Defining a Case

Admittedly, even a study of every constitutional tort case filed does not provide a complete picture of all constitutional tort disputes occurring within the district. As work by the Wisconsin Civil Litigation Research Project emphasizes, the number of cases filed is likely to be only a small fraction of the actual number of disputes.\textsuperscript{75} Only extensive and expensive field work outside of the courthouse would permit a study of the larger class of disputes that never reach the court. This study is limited to litigated constitutional tort dis-


\textsuperscript{72} One study found only 45 appellate opinions in \$ 1983 cases throughout California in the 15-year period from 1969 to 1983. \textit{Id.} at 559-60 (even this low number of cases was second only to New York's 51 appellate opinions); see also Solimine & Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 HASTINGS CONST. L.Q. 213, 238 (1983) (sampling all West regional reporters for seven years and finding 608 first amendment, fourth amendment, and equal protection claims).

By comparison, our preliminary analysis of data on appellate constitutional tort cases shows that the Ninth Circuit published approximately 55 constitutional tort opinions in fiscal 1981 alone, and about 20 of those opinions came from California districts.

\textsuperscript{73} After eliminating civil rights cases from the Administrative Office list of all civil filings, we used a quasi-random procedure to obtain the sample. We randomly chose which of the first eight cases to examine, and from that point examined every eighth case. Thus, each non-civil rights case had an equal likelihood of being included in the sample. See N. CHANNELS, SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS 94 (1985).

\textsuperscript{74} See \textit{id.} at 106-12. The meaning of the confidence interval may be illustrated as follows: a finding of 50\% contracts cases in the control group sample lets us state, with statistically significant confidence, that between 45\% and 55\% of the control group of cases are contract cases. For a further explanation of confidence intervals, see J. KMENTA, ELEMENTS OF ECONOMETRICS \$ 6-3 (1971).

\textsuperscript{75} Trubek, Sarat, Felstiner, Kritzer & Grossman, The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 86-87 (1983) (finding only 11.2\% of all disputes result in the filing of a complaint and less receive further judicial action).
putes. Given the concern about the number and nature of constitutional tort litigation, this is an appropriate subset of disputes to examine.

Studying litigated disputes also requires deciding how to count each piece of litigation. Constitutional tort actions often do not consist of an individual plaintiff suing one defendant. A single suit against the police, for example, might involve two or three occupants of a car suing the police officers who stopped and arrested them, the sergeant who processed them at the station house, the lieutenant who supervised the subordinates, the precinct captain, higher level officials in the police hierarchy, the mayor, and the city.

On the other hand, a single incident involving three victims and several defendants might lead to three or more court “cases,” one filed by each plaintiff. Even if all plaintiffs file a single complaint, it may in some respects still be several distinct actions. A different attorney may represent each individual plaintiff and defendant; there may be cross-claims; the merits of each plaintiff’s action against each defendant may differ; and so on. The important point is that a certain arbitrariness exists in designating a “case.” In this area as well, the study probes no deeper than the court records. We treat every complaint filed as a single case regardless of the number of participants.

Because a single case may involve multiple parties, another problem arises in defining certain case characteristics. Different dispositions with respect to different plaintiffs and defendants make it difficult to determine when a case was “successful,” or how far it progressed. We measure the litigation progress of such cases by focusing on the defendant against whom the most progress was made. We use the proceedings against that defendant to determine the date of disposition in the district court.

76 For an example of judicial dissatisfaction with one attorney representing both a city and its police officers where their positions are potentially adverse, see Dunton v. County of Suffolk, 729 F.2d 903, 907-08 (conflict of interest requires attorney’s disqualification), amended on other grounds, 748 F.2d 69 (2d Cir. 1984).

77 This approach diminishes the stated impact of class actions, effectively treating each as a single case. But so few class actions were filed that treating them as single cases ought not distort the results. In our field data for the Central District (including the control group of 468 non-civil rights cases), plaintiffs filed 30 cases as class actions in 1980-81, of which six were certified as class actions. Ten of the class actions were constitutional tort cases, one of which was certified.

78 For example, assume that two civil rights plaintiffs sue a police officer and the police chief in a single lawsuit assigned a single docket number. The court dismisses both plaintiffs’ claims against the chief early in the proceedings, and later grants summary judgment for the officer against one of the plaintiffs. With only one plaintiff and one defendant, the case goes to trial. We designate such a case as one reaching trial and deem the case ended only when district court proceedings against the officer are concluded.
Administrative Office procedure, which treats cases as open despite intermediate dismissals of portions of the action or some defendants.\textsuperscript{79}

D. Sources of Data

We gathered our data from five sources: (1) national statistics for 1975 to 1984 published by the Administrative Office; (2) unpublished Administrative Office termination and filing data covering the Central District for the same period; (3) data gathered by reading case files of constitutional tort cases and a control group of non-civil rights cases filed in the Central District of California between October 1, 1980 and September 30, 1981;\textsuperscript{80} (4) a follow-up study addressed to attorneys who represented plaintiffs in constitutional tort cases in the Central District for which court records supply no firm information about ultimate outcome; and (5) data gathered in a study of Central District constitutional tort cases from 1975-76.\textsuperscript{81}

1. National Published Statistics

The Annual Report of the Director of the Administrative Office of the United States Courts publishes extensive statistics on case filings. These include tables on filings by type of case, including civil rights cases, and tables on types of civil rights cases. Most of the figures used by Supreme Court Justices and commentators come from this source.\textsuperscript{82}

2. The Parallel Results Based on Administrative Office Data

The Administrative Office of the United States Courts furnished us with computer tapes containing filing and termination data for all federal cases from 1974 to 1984.\textsuperscript{83} From these tapes we extracted filing and termination data for the Central District for 1980-81. These data provide alternative measures of certain aspects of constitutional tort litigation.

3. Central District 1980-81 Data

Law student research assistants worked from lists of civil rights cases constructed using Administrative Office case classification

\textsuperscript{79} See A.O. GUIDE, supra note 64, at II-24 (referring to single disposition per case).

\textsuperscript{80} Throughout the study, references to 1980-81 in the context of discussing the Central District data refer to this 12-month period.

\textsuperscript{81} Eisenberg, supra note 8.

\textsuperscript{82} On occasion, we use data from another annual publication by the Director of the Administrative Office, MANAGEMENT STATISTICS FOR UNITED STATES COURTS (1981). See, e.g., supra note 7.

\textsuperscript{83} We have been told that these data sets will be stored at the Institute for Social Research at the University of Michigan at Ann Arbor.
codes. For each case, they completed a detailed form, including a
description of the facts and outcome of the case. Based on the
textual descriptions, we classified each case within the subgroup of
constitutional tort cases and recorded its progress and outcome. To
obtain comparative results, we also gathered information on a con-
tral group of non-civil rights cases.

4. The Follow-up Attorney Study

To obtain additional information about the actual recoveries in
constitutional tort cases, we supplemented the courthouse study of
1980-81 Central District cases with an inquiry addressed to the
plaintiff’s attorney in each case where we could not ascertain the
disposition from court records. We sent out questionnaires on 170
cases, and received 62 responses containing useful data on the out-
come of those cases.

5. Central District 1975-76 Data

This study also uses data gathered in an earlier study of section
1983 litigation in the Central District. The earlier study covered
prisoner and nonprisoner section 1983 cases filed in calendar years
1975 and 1976. That data set was recoded, and in some cases cor-
rected, both to enable us to perform more sophisticated statistical
analyses than had been done earlier, and to allow for comparisons
over time with the new 1980-81 data set.

III
THE NUMBER OF CONSTITUTIONAL TORT CASES

Nearly all data on the volume of constitutional tort litigation
(usually section 1983 cases) come from Administrative Office statist-
ics on civil rights cases. A meaningful evaluation of how these data

84 They recorded the following information for each case: case name, district, Ad-
ministrative Office code, errors in pleading, errors in Administrative Office classifica-
tion, date of filing, date of disposition, docket number, statutory provisions relied on,
defenses and immunities pleaded, prisoner status, plaintiff’s position (individual, corpo-
rate, or government), defendant’s position, presence of counsel, name of judge, referred
to magistrate, magistrate name, any judicial departure from the magistrate’s recom-
mendation, pleadings and discovery matters, procedural progress, final disposition, class ac-
tion information, relief obtained, type of § 1983 or Bivens case, defendant paying
(individual or entity), and type of employment discrimination case (race, sex, religion, or
national origin). Some events that occur frequently (e.g., money settlements) are not
always discernible from court records. See infra Table VIII.

The data were then entered and analyzed using two microcomputer programs,
DBASE III Plus and SPSSPC+, and SPSSX Version 2.1, a mainframe version of SPSS.

85 In three cases the attorney had died, in four cases the attorney had not heard of
the case, in 36 cases the envelope was returned because the attorney had moved and
could not be located, and in 65 cases we received no response.

86 Eisenberg, supra note 8.
are used requires some knowledge of the Administrative Office's coding system and its limitations. Before we describe this system, however, one important qualification is in order.

A. A Caveat on Prisoner Litigation

Government officials express concern about the number of cases filed by prisoners as well as the number of constitutional tort cases. Because prisoners file many constitutional tort cases, there is substantial overlap between these categories that makes an independent study of either problematic. Lumping together non-prisoner and prisoner constitutional tort cases also creates difficulties. Prisoner litigation, while a significant proportion of constitutional tort filings, is one of the most unsuccessful classes of federal litigation.

In deciding whether to include prisoner cases, the perception of constitutional tort cases being tested should control. When examining the perception that constitutional tort cases shift substantial resources from governments to private citizens and their attorneys, for example, one must exclude prisoner constitutional tort cases in order to avoid understating the success rate of constitutional tort litigants. This highly unsuccessful class of cases reduces any measure of success, and may distort the analysis by making constitutional tort litigation appear more disfavored and less significant than it otherwise is. On the other hand, when testing the perception of overwhelming numbers of constitutional tort cases, one must include prisoner cases to avoid understating their volume and impact.

Viewing prisoner constitutional tort litigation as a class unto itself raises a different problem. To some observers, prisoner suits of all kinds represent a greater burden on federal courts than do constitutional tort cases. If prisoner litigation is the true problem then constitutional tort suits by prisoners should be grouped not with nonprisoner constitutional tort cases but with prisoner habeas corpus cases. This combination finds further support in the sometimes blurry line between habeas corpus and section 1983 actions.

87 See supra notes 28 & 35.

88 See Bailey, supra note 3, at 544-47; Eisenberg, supra note 8, at 526-33; Turner, supra note 3, at 621-24; infra note 207.

89 See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (§ 1983 impermissible alternative to habeas corpus where "very fact or duration" of imprisonment is at issue). Justice Brennan, joined by Justices Douglas and Marshall, argued in dissent that the distinction between § 1983 and habeas corpus is "analytically unsound" and "unworkable in practice." Id. at 501 (Brennan, J., dissenting); see also Richardson v. Fleming, 651 F.2d 366 (5th Cir. July 1981) (holding, in questionable application of Preiser, that complaint founded upon inadequacy of counsel and unfair trial goes to issue of legality of imprisonment and § 1983 is therefore unavailable even though remedy sought was monetary damages); Fulford v. Klein, 529 F.2d 377 (1976) (reaching same result as Richard-
We use this grouping when appropriate.\textsuperscript{90}

In general, however, adding habeas corpus cases to the prisoner constitutional tort cases would distort the analysis. Habeas corpus cases abound and the vast majority fail.\textsuperscript{91} Including habeas cases as part of the constitutional tort picture would increase the number of cases, but downplay the burden of the average constitutional tort case. Furthermore, there are reasons to distinguish habeas cases from section 1983 cases. First, habeas actions can only bring relief from the fact, length, or conditions of confinement.\textsuperscript{92} Second, unlike section 1983 actions, habeas claims yield neither monetary awards nor attorney fees. Thus, concerns about direct transfers of funds do not apply to habeas cases, civil rights attorneys cannot bring them to earn fee awards, and they pose no direct threat to the pocketbooks of officials or local governments.

There is, then, no "correct" treatment of prisoner cases in a study of constitutional tort litigation. For some purposes it is appropriate to include them and for others it is not. The perception being tested must guide the way.

\section*{B. The Administrative Office Classification System and General Uses of Its Case Filing Statistics}

Plaintiffs commencing civil actions file a form that the Administrative Office uses to classify cases.\textsuperscript{93} The form contains many different categories of cases.\textsuperscript{94} In the civil rights and prisoner areas, plaintiffs may choose one of the following categories:

\textit{son} where claim was founded upon withholding of exculpatory evidence at trial and only remedy sought was monetary damages), \textit{aff'd en banc}, 550 F.2d 342 (5th Cir. 1977). \textit{Compare} Dickerson v. Walsh, 750 F.2d 150 (1st Cir. 1984) (habeas proceeding is proper vehicle for challenging postconviction review procedure if release is ultimate relief sought) \textit{with} Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986) (explicitly rejecting Dickerson).

\textit{See infra Table II.}

\textsuperscript{90} Allen, Schachtman & Wilson, \textit{supra} note 3, at 683 (noting that federal courts grant relief in only 3.2\% of all habeas cases); Shapiro, \textit{supra} note 3, at 339-42 (noting that failure rate for habeas cases is 96\%). For the Central District in 1980-81, our expansive definition of success, \textit{see infra} text following note 167, shows that habeas litigants were successful in 23 of 355 cases. Only six of the cases were definite successes.

\textsuperscript{92} \textit{See} Preiser v. Rodriguez, 411 U.S. 475, 490 (1973) ("[H]abeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of \$ 1983.").

\textsuperscript{93} \textit{A.O. GUIDE, \textit{supra} note 64, at 11-6. An individual filing a civil action must complete a JS-44 civil cover sheet. This form has three versions, with varying degrees of comprehensiveness, and allows the court to gather basic report data on civil actions. For examples of the different JS-44 forms, see id. at II-79 to -83 (exhibits G-1 to -3).}

\textsuperscript{94} These include many subcategories for contract, tort, property, social security, civil rights, prisoner, and other types of cases. \textit{See id.} at II-88 (exhibit J).
### Civil Rights Cases

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>440</td>
<td>Other Civil Rights</td>
</tr>
<tr>
<td>441</td>
<td>Voting</td>
</tr>
<tr>
<td>442</td>
<td>Jobs</td>
</tr>
<tr>
<td>443</td>
<td>Accommodations</td>
</tr>
<tr>
<td>444</td>
<td>Welfare</td>
</tr>
</tbody>
</table>

### Prisoner Cases

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>510</td>
<td>Vacate Sentence (§ 2255)</td>
</tr>
<tr>
<td>520</td>
<td>Parole Board Review</td>
</tr>
<tr>
<td>530</td>
<td>Habeas Corpus</td>
</tr>
<tr>
<td>540</td>
<td>Mandamus and Other</td>
</tr>
<tr>
<td>550</td>
<td>Prisoner Civil Rights</td>
</tr>
</tbody>
</table>

Only two of the Administrative Office’s nonprisoner civil rights categories,[95] “other civil rights” (code 440) and “jobs” (code 442), contain a significant number of filings. During the eleven-year period ending in 1985, over 94% of all terminated civil cases classified as civil rights fell into one of these two categories.[96] Three prisoner categories are noteworthy. During the same eleven-year period, “prisoner civil rights” (code 550) accounted for 52% of all terminated cases among prisoners, “habeas corpus” (code 530) accounted for 38%, and “vacate sentence” (code 510) accounted for 6%.[97]

Commentators and Supreme Court Justices repeatedly group all nonprisoner civil rights cases into a single category. They then tend to characterize all of these cases as section 1983 cases,[98] bemow their large numbers and growth, and ignore data that might explain increased filings. Prisoner and nonprisoner cases sometimes are lumped together as well. Justice Powell’s dissenting opinion in *Patsy v. Board of Regents* exemplifies this use of case statistics:

> In 1961, the year that *Monroe v. Pape* was decided, only 270 civil rights actions were begun in the federal district courts. Annual Report of the Director of the Administrative Office of the U.S.

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[95] One also might expect some civil rights actions in the category termed “constitutionality of state statutes” (code 950). *Id.* Administrative Office tapes reveal, however, that from 1974 through 1985 this category accounted for only about three cases per year per district. In the Central District for 1980-81, this category contained six cases.

[96] This is based on a 25% random sample of all 1.8 million cases terminated in all districts from 1974 to 1985 (with partial data for 1985). The exact percentages are: code 440: 52.4%; code 441: 1.2%; code 442: 41.9%; code 443: 3.0%; and code 444: 1.5%.

[97] These figures are from the sample described *supra* note 96.

[98] *See infra* note 104 and accompanying text.
Courts, 238 (1961). In 1981, over 30,000 such suits were commenced.  

Justice Powell's reliance on Administrative Office statistics in *Pulliam v. Allen* provides another example:

Civil rights cases accounted for 8.3% of the total civil litigation in the Federal District Courts for the 12 months ended June 30, 1982, and in 1982 civil rights suits filed by state prisoners against state officials had increased 115.6% over the number of similar suits filed in 1977 before the prospect of a fee award under § 1988 became an added incentive to § 1983 claims.

In this crude form, as Table I shows, the statistics are startling. From 1961 to 1984 the number of nonprisoner civil rights filings increased by over 7,000%. In the ten-year period covering 1975 to 1984 such filings grew by over 10,000, more than the increase in the previous fourteen years. From 1975 to 1984 prisoner civil rights filings nearly tripled.

### Table I

**National Civil Rights Filing Statistics**

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Nonprisoner Civil Rights Filings</th>
<th>Prisoner Civil Rights Filings</th>
<th>Percent Increase Over 1961</th>
<th>Percent Increase Over 1975</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>296</td>
<td>not available</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1975</td>
<td>10,392</td>
<td>6,606</td>
<td>3,411%</td>
<td>-</td>
</tr>
<tr>
<td>1981</td>
<td>15,419</td>
<td>16,473</td>
<td>5,109%</td>
<td>48%</td>
</tr>
<tr>
<td>1984</td>
<td>21,219</td>
<td>18,856</td>
<td>7,069%</td>
<td>104%</td>
</tr>
</tbody>
</table>

C. A Critique of Uses of Administrative Office Data

Users of raw Administrative Office data often overlook several important factors. First, they ignore distinctions available on the

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99. 457 U.S. 496, 533 (1982) (Powell, J., dissenting) (citation omitted). Justice Powell does acknowledge that roughly half of the 1981 filings were prisoner cases. *Id.* at 533 n.20; see supra note 28.

100. 466 U.S. 522, 556 n.16 (1984) (Powell, J., dissenting). In addition, the statistical comparison Justice Powell used to support his assertion that fee awards have spurred increased filings is incorrectly drawn. The fee award incentive under § 1988 was created in 1976, not 1977. See infra text accompanying note 193. Thus, Justice Powell selected an improper base year for comparison. Section 1988 could have already been exerting effects on civil rights litigation by 1977. For comparative purposes he should have chosen time periods before and after § 1988's effective date.


102. The Administrative Office first classified prisoner civil rights cases as a separate category in 1966.
face of the data. Although the Administrative Office categories are
not finely drawn, they are more refined than many users of the data
seem to realize. Second, many people using the data to count con-
stitutional tort cases ignore limitations inherent in the data. Third,
they fail to account for factors, such as increases in prison popu-
lations and civil filings generally, that many uses of the data should
include.

Even when relying solely on the Administrative Office data,
commentators often fail to use the available data in a manner which
best reflects the number and growth of constitutional tort and pris-
isoner filings. Discussions about nonprisoner constitutional tort liti-
gation should use Administrative Office data on "other civil rights"
(code 440), rather than statistics on all nonprisoner civil rights
cases. The latter statistics include "jobs" filings (code 442). One
would expect actions brought under title VII and similar employ-
ment statutes to dominate the "jobs" category, whereas the
"other civil rights" category should contain most of the section
1983 and Bivens cases. Section 1983 and title VII protect different
bodies of rights, often against different kinds of defendants, and
under different statutory mandates enacted 100 years apart. Cases
arising under these statutes should not be grouped together as con-
stitutional tort cases.

Quoting a single figure for all "civil rights" cases often leads to
treating the cases as constitutional tort cases brought under section
1983 and overstates the number of constitutional tort filings. This
error has appeared in sources as varied and informed as the American
Bar Association Journal and the New York Times. Using the "other

103 The Administrative Office recommends that actions filed under the following
statutes be coded as "442": Age Discrimination in Employment Act of 1967, 29 U.S.C.
supra note 64, at 11-45 to -50. Our field data indicate that 75% of the 225 cases in the
Central District classified as "442" (jobs) cases in 1980-81 involved a title VII claim.

104 Blodgett, supra note 45, at 48 (treating all 19,553 civil rights cases filed in 1985 as
"cases... filed against state and local agencies and officers last year in federal district
courts under Section 1983, according to the Administrative Office of the U.S. Courts");
Greenhouse, After 111 Years, Federal Rights Law Faces Grilling, N.Y. Times, Mar. 7, 1982,
§ 4, at 2, cols. 3-4 (stating that "[s]ome 30,000 suits were filed under Section 1983 in the
United States District Courts last year, comprising 17 percent of the courts' entire civil
caseload"); see also Groszyk & Madden, Managing Without Immunity: The Challenge for State
and Local Government Officials in the 1980s, 41 PUB. ADMIN. REV. 265, 270 (1981); G. Bur-
bridge, Civil Rights Liability for Public Administrators: A Risk Management Approach 5
(Dec. 1983) (unpublished Ph.D. thesis); T. Madden & N. Allard, Advice on Official Li-
ability and Immunity 3-5 & n.11 (Oct. 20, 1982) (paper prepared by Kaye, Scholer,
Fierman, Hays & Handler for The Administrative Conference of the United States) ("In
1979, there were nearly 25,000 [§ 1983] filings in federal courts, as compared to 261 in
1961.").

It seems that the Administrative Office sometimes is confused about its civil rights
civil rights" category (code 440) rather than the figure for all civil rights filings eliminates most cases brought under these other civil rights statutes, and reduces by one-half the number of possible non-prisoner constitutional tort cases.105

Using statistics on all nonprisoner civil rights filings as a proxy for nonprisoner constitutional tort filings is particularly misleading when assessing growth rates from early base years. One commonly used base year is 1961,106 the year of Monroe v. Pape.107 Much of the civil rights litigation explosion since 1961, however, comes from statutes enacted since then—particularly title VII,108 enacted in 1964. When the issue is the growth in nonprisoner constitutional tort litigation since 1961, one should avoid using Administrative Office categories that combine that growth with litigation growth from modern civil rights statutes.

Even restricting the focus to the "other civil rights" category (code 440), one should recognize that the exact number of constitutional tort cases in this category is unknown. The Administrative Office "other civil rights" category includes, in addition to cases filed under section 1983, cases filed under 42 U.S.C. sections 1981, 1985, 1988, 2000a and 2000d; fifth amendment claims; claims under the Economic Opportunities Act;109 and, one assumes, civil rights claims not conveniently classifiable as anything else.110 Although one would expect section 1983 actions to dominate this category,

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105 In the period 1975-84, filings in the 440 category increased 93%, while civil rights cases as a whole increased 87%. For a case in which the Court recognized the "other civil rights" category, see Evans v. Jeff D., 106 S. Ct. 1531, 1543 n.30 (1986).

Of course, some may wish to make the point that civil rights litigation in general has increased since 1960 or 1961, without necessarily attributing this growth to relatively recent increases in § 1983 filings. For this different point, use of an early base year is appropriate. See, e.g., R. Posner, The Federal Courts 80-82 (1985); Bator, Judicial System, Federal (discussing growing role of federal courts in post-Civil War era), in 3 Encyclopedia of the American Constitution 1068-71 (L. Levy, K. Karst & D. Mahoney eds. 1986).

106 See supra Table I.
110 A.O. Guide, supra note 64, at II-53 (exhibit C). Form JS-44's instructions advise choosing the most definitive category in situations where the case fits more than one description.
the degree of such domination is far from certain.\textsuperscript{111}

Analysis of prisoner civil rights litigation also requires greater sophistication. For many purposes, assessment of the growth in prisoner civil rights litigation since 1975 is incomplete unless one recognizes the changes in habeas corpus litigation, another Administrative Office category, during that same time period.\textsuperscript{112} Recent case law has made habeas claims increasingly difficult to sustain by firming exhaustion requirements,\textsuperscript{113} by reducing prisoners' ability to overcome state procedural defaults,\textsuperscript{114} and by limiting the power to challenge fourth amendment violations.\textsuperscript{115} Table II reveals that from 1975 to 1984, prisoner litigation shifted dramatically from habeas corpus to civil rights (section 1983) actions. While prisoner civil rights filings increased by 185\%, habeas litigation decreased over this period. The net impact has been a more moderate 61\% increase in total prisoner filings since 1975.\textsuperscript{116}

\begin{table}
\centering
\caption{National Increases in Prisoner Filings by Type\textsuperscript{117}}
\begin{tabular}{lcccrr}
\hline
\textbf{YEAR} & \textbf{PRISONER CIVIL RIGHTS (A.O. CODE 550)} & \textbf{HABEAS \\ & & & & & \& RELATED TOTAL PRISONER FILING} & \textbf{PERCENT INCREASE OVER 1975} \\
\hline
1975 & 6,606 & 12,701 & 19,307 & & & \\
1981 & 16,473 & 11,238 & 27,711 & 149\% & -12\% & 44\% \\
1984 & 18,856 & 12,251 & 31,107 & 185\% & -4\% & 61\% \\
\hline
\end{tabular}
\end{table}

Comparing the growth in civil rights and prisoner litigation with other growth rates also reveals a more moderate picture of civil rights litigation than the commonly used figures suggest. If one considers the increase in total federal civil filings and the increase in prison populations, the relative growth in civil rights litigation seems not "geometric," but rather tame. This does not mean that the raw increase in filings is not important. For some purposes, such as the absolute burden of constitutional tort cases on the fed-

\begin{footnotes}
\item[111] See infra Table V (suggesting that only 70\% of code 440 (other civil rights) cases contain constitutional tort allegations).
\item[112] Prisoner civil rights cases regularly rely on § 1983. See infra Table V. Thus, this figure, unlike the overall nonprisoner civil rights figures, does not greatly overstate the number of constitutional cases. See infra text accompanying notes 129-33.
\item[113] See, e.g., Rose v. Lundy, 455 U.S. 509 (1982).
\item[116] The percentage increase for total prisoner filings is less than the increases in total civil filings and in per capita prisoner filings during the same period. See infra Table IV.
\item[117] Source: 1984 Report, supra note 101, at 143 (table 24).
\end{footnotes}
eral courts, the increase is all that matters. But for other purposes, such as why the increase is occurring, and whether the forces driving it differ from the forces driving general civil litigation, the interesting comparison is with growth relative to other kinds of civil actions, not absolute growth rates.

Table III compares the annual increase in nonprisoner civil rights filings with the annual increase in all federal civil filings from 1975 to 1984. It reveals that, between 1975 and 1984, “other civil rights” filings (category 440) declined as a fraction of the civil docket. In fact, “other civil rights” filings either remained constant or decreased relative to all civil filings in all but two years during that ten-year period, and in only one of those two years did the relative increase exceed five percentage points.

### TABLE III

National Increases in “Other Civil Rights” Filings Compared with National Increases in All Other Civil Filings, Fiscal Years 1975 to 1984

<table>
<thead>
<tr>
<th>FISCAL YEAR</th>
<th>&quot;OTHER CIVIL RIGHTS&quot; FILINGS (A.O. CODE 440)</th>
<th>ALL OTHER CIVIL FILINGS</th>
<th>% INCREASE IN 440 FILINGS OVER PRIOR YEAR</th>
<th>% INCREASE IN ALL OTHER FILINGS OVER PRIOR YEAR</th>
<th>% 440 INCREASE MINUS % OTHER INCREASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>5,532</td>
<td>111,788</td>
<td>10%</td>
<td>11%</td>
<td>-1%</td>
</tr>
<tr>
<td>1976</td>
<td>6,079</td>
<td>124,578</td>
<td>4%</td>
<td>6%</td>
<td>0%</td>
</tr>
<tr>
<td>1977</td>
<td>6,318</td>
<td>124,249</td>
<td>2%</td>
<td>6%</td>
<td>4%</td>
</tr>
<tr>
<td>1978</td>
<td>6,475</td>
<td>132,295</td>
<td>7%</td>
<td>12%</td>
<td>-5%</td>
</tr>
<tr>
<td>1979</td>
<td>6,917</td>
<td>147,749</td>
<td>4%</td>
<td>9%</td>
<td>5%</td>
</tr>
<tr>
<td>1980</td>
<td>7,213</td>
<td>161,576</td>
<td>17%</td>
<td>7%</td>
<td>10%</td>
</tr>
<tr>
<td>1981</td>
<td>8,433</td>
<td>172,143</td>
<td>3%</td>
<td>15%</td>
<td>-12%</td>
</tr>
<tr>
<td>1982</td>
<td>8,727</td>
<td>197,466</td>
<td>14%</td>
<td>17%</td>
<td>-3%</td>
</tr>
<tr>
<td>1983</td>
<td>9,938</td>
<td>231,904</td>
<td>8%</td>
<td>8%</td>
<td>0%</td>
</tr>
<tr>
<td>1984</td>
<td>10,738</td>
<td>251,107</td>
<td>94%</td>
<td>125%</td>
<td>-31%</td>
</tr>
</tbody>
</table>

Table IV presents similar data about prisoner civil rights filings (code 550), the Administrative Office category that includes prisoner constitutional tort filings. This table accounts for both the increase in prison population and the increase in non-civil rights filings. It reveals that prisoner civil rights filings increased 185% from 1975 to 1984.119 The prison population grew 85% during this period. One would expect, therefore, an 85% increase in prisoner filings even if the rate of filings per prisoner remained constant.120

---

118 The figures for all civil filings and all “other civil rights” filings are from 1984 REPORT, supra note 101, at 145 (table 25).

119 Recall that prisoner habeas corpus filings declined during this period. See supra Table II.

120 See Turner, supra note 3, at 625-37, for a more detailed discussion of factors, including prisoner population, affecting the volume of prisoner litigation.
If one assumes that per capita filings among prisoners increased at the same rate as other civil filings, then one would expect an additional 119% increase in prisoner civil rights filings.\textsuperscript{121} Taken together, prison population growth and the national growth in litigiousness might explain all the growth in prisoner civil rights filings over the ten years covered.

**TABLE IV\textsuperscript{122}**

**National Increases in Prisoner Civil Rights Filings Adjusted for Increases in Prison Population and Increases in All Other Civil Filings**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>PRISON CIVIL RIGHTS FILINGS (A.O. CODE POPUL.)</th>
<th>ALL OTHER CIVIL FILINGS</th>
<th>% INCREASE IN FILINGS OVER PRIOR YEAR</th>
<th>% PRISON POPUL. INCREASE</th>
<th>% PRISON POPUL. INCREASE BETWEEN %550 &amp; %550 OVER PRIOR YEAR</th>
<th>% INCREASE IN ALL OTHER FILINGS OVER PRIOR YEAR</th>
<th>POPUL. ADJUSTED %550 FILINGS INCREASE MINUS % ALL OTHER FILINGS INCREASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>6,606</td>
<td>241</td>
<td>110,714</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>7,460</td>
<td>263</td>
<td>123,137</td>
<td>13%</td>
<td>9%</td>
<td>4%</td>
<td>11%</td>
</tr>
<tr>
<td>1977</td>
<td>8,235</td>
<td>278</td>
<td>122,392</td>
<td>10%</td>
<td>6%</td>
<td>5%</td>
<td>-1%</td>
</tr>
<tr>
<td>1978</td>
<td>10,366</td>
<td>294</td>
<td>128,404</td>
<td>26%</td>
<td>6%</td>
<td>20%</td>
<td>5%</td>
</tr>
<tr>
<td>1979</td>
<td>11,783</td>
<td>301</td>
<td>142,883</td>
<td>14%</td>
<td>2%</td>
<td>11%</td>
<td>11%</td>
</tr>
<tr>
<td>1980</td>
<td>13,000</td>
<td>316</td>
<td>155,789</td>
<td>10%</td>
<td>5%</td>
<td>5%</td>
<td>9%</td>
</tr>
<tr>
<td>1981</td>
<td>16,473</td>
<td>353</td>
<td>164,103</td>
<td>27%</td>
<td>12%</td>
<td>15%</td>
<td>5%</td>
</tr>
<tr>
<td>1982</td>
<td>17,575</td>
<td>394</td>
<td>188,618</td>
<td>7%</td>
<td>12%</td>
<td>-5%</td>
<td>15%</td>
</tr>
<tr>
<td>1983</td>
<td>18,477</td>
<td>420</td>
<td>223,365</td>
<td>5%</td>
<td>7%</td>
<td>-1%</td>
<td>18%</td>
</tr>
<tr>
<td>1984</td>
<td>18,856</td>
<td>425</td>
<td>242,989</td>
<td>2%</td>
<td>6%</td>
<td>-4%</td>
<td>9%</td>
</tr>
</tbody>
</table>

**TOTAL SINCE 1975** 185% 85% 101% 119% -19%

\textsuperscript{121} Justice Powell's use in *Pulliam* of statistics on actions filed against state officials, see *supra* text accompanying note 33, is thus questionable on another ground. His figures are from the Administrative Office of the United States Courts, 1982 Annual Report of the Director 100-05 [hereinafter 1982 Report]. The last entry in Table 20 of that report, id. at 103, contains the 115.6% figure relied on by Justice Powell. Justice Powell does not quote the part of the report that notes the substantial increase in prison population that occurred during the same period. *Id.* at 102.

The number of state prisoners under sentence of more than one year in state prisons increased from 235,853 on Dec. 31, 1976, U.S. Dep't of Justice, Prisoners in State and Federal Institutions on Dec. 31, 1977, at 10 (table 1), to 372,420 on Dec. 31, 1982. U.S. Dep't of Justice, Prisoners in State and Federal Institutions on Dec. 31, 1982, at 15 (table 1). This 57.9% increase alone plausibly explains half of the perceived "geometric" growth rate. Furthermore, adjusted for state prison population increases, the number of habeas corpus petitions by state prisoners declined between 1977 and 1982. Taking habeas corpus and civil rights petitions together, state prisoner petitions during the period increased 68.2%, 1982 Report, supra, at 103 (table 20), an annual noncompounded growth rate only 2-3% higher than the growth rate in prison population. During the same period, the federal docket as a whole grew by 57.9%. *Id.* at 98 (table 16). Thus, treating habeas corpus and prisoner civil rights petitions as a single group, and factoring in the large prison population growth relative to general population growth, less growth has occurred in this area than in the federal docket generally. On analyzing prisoner civil rights and habeas corpus actions as a single category, see *supra* text accompanying notes 87-92.

The growth rates portrayed in Tables III and IV put the civil rights "explosion" in perspective. The data on the changes in all federal civil filings can be regarded as crudely reflecting the effects of increases in population, lawyer population, and litigiousness in society. Growth attributable to these factors is not peculiar to civil rights filings. Nevertheless, these tables do not eliminate the possibility that civil rights litigation is an increasing percentage of the federal district court burden. A more detailed analysis that held all other factors constant (such as the state of the law) might well reveal that some factor obscures a civil rights litigation explosion. Others have attempted more sophisticated explanations of filing rates in relation to various social factors. The data presented here merely suggest that a claim of a civil rights litigation explosion requires more support than the heedless invocation of raw filing data can provide.

D. The Number of Cases in the Central District

Because the Administrative Office maintains no separate "constitutional tort" category, determining the number of constitutional tort cases requires study of courthouse records. We examined every case filed in the Central District of California that the Administrative Office listed as a civil rights or prisoner case. For 1980-81, the Administrative Office filing data reveal 485 nonprisoner civil rights cases in the Central District, broken down as follows:


For example, the number of government civil actions for overpayment of veterans' benefits and for collection on government-insured student loans has grown enormously. See 1984 REPORT, supra note 101, at 132, 135 (table 20). This combined category grew by 6,683% from 1975 to 1984 (from 681 cases to 46,190 cases). If one excludes these cases from the total civil filings, nonprisoner civil rights actions have grown 10 percentage points faster than the remaining civil filings over the 10-year period. This contrasts with the 31% decrease shown in Table III.

See Goldman, Hooper & Mahaffey, Caseload Forecasting Models for Federal District Courts, 5 J. LEGAL STUD. 201 (1976) (using 159 variables, ranging from lawyer population to cargo tonnage of waterborne imports, to forecast filing rates in various classes of cases, including civil rights); Grossman & Sarat, Litigation in the Federal Courts: A Comparative Perspective, 9 LAW & SOC'Y REV. 321 (1975) (measuring growth in federal litigation relative to attorney population and other social, economic, cultural, and political characteristics of United States from 1890-1960).
The data also show 101 prisoner civil rights filings, for a total of 586 possible constitutional tort cases.

Several factors reduce this total. The Administrative Office data list four cases twice, leaving 582 possible cases. We exclude 19 cases from the study because they were not filed in or transferred to the Central District during the fiscal year studied, leaving 563 cases. Of the 563 remaining cases, courts transferred eight to other districts before substantial activity occurred in the Central District, and three were actually bankruptcy cases. To this we add four civil rights cases that the Administrative Office data did not categorize as civil rights cases, leaving 556 possible cases for analysis.

Our assistants located data on 552 of these 556 cases (over 99%). As Table V shows, only 50.7% of the Administrative Office’s “civil rights” or “prisoner civil rights” cases actually contain constitutional tort claims. The rest are actions based on a variety of other statutes, primarily title VII.

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126 These cases, formerly suspended for statistical purposes, were reinstated for statistical purposes after being revived. See A.O. Guide, supra note 64, at II-13 (explaining “origin” code 4).

127 We discovered these cases when examining the control group of non-civil rights cases.

128 We treat consolidated cases as single actions represented by the case into which they were consolidated. Thus, the number of cases reported in some tables is less than the total number of cases for which data were found.

129 The number of possible constitutional tort cases in the left-hand column of Table V (564) differs from the 556 figure used in the text for the number of possible constitutional tort cases. This is because Table V accounts for all cases that might be constitutional tort cases within the Administrative Office civil rights and prisoner classifications, and does not make the adjustments, noted in the text, for transferred cases and bankruptcy cases. In addition, Table V includes two cases categorized as civil rights cases (Administrative Office code 440) that do not appear on Administrative Office computer lists, and excludes one case categorized as a civil rights case that does not appear
TABLE V

NUMBER OF CONSTITUTIONAL TORT CASES (C.D. CAL. 1980-81),
ADMINISTRATIVE OFFICE DATA COMPARED WITH FIELD DATA

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>NUMBER OF CASES (ADMIN. OFF.)</th>
<th>TRUE CONSTITUTIONAL TORT CASES</th>
<th>% OF ADMIN. OFF. NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>OTHER CIVIL RIGHTS</td>
<td>220</td>
<td>154</td>
<td>70.0%</td>
</tr>
<tr>
<td>VOTING</td>
<td>2</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>JOBS</td>
<td>225</td>
<td>46</td>
<td>20.4%</td>
</tr>
<tr>
<td>ACCOMMODATIONS</td>
<td>9</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>WELFARE</td>
<td>9</td>
<td>5</td>
<td>55.6%</td>
</tr>
<tr>
<td>PRISONER CIVIL RIGHTS</td>
<td>99</td>
<td>79</td>
<td>79.8%</td>
</tr>
<tr>
<td>COLUMN TOTAL</td>
<td>564</td>
<td>286</td>
<td>50.7%</td>
</tr>
</tbody>
</table>

One might further reduce the 50.7% figure of Table V by excluding cases that probably are not primarily section 1983 or Bivens cases, even if the complaints have section 1983 counts. Thirty-six of the constitutional tort cases are employment discrimination claims against a government entity that included a title VII allegation. Because of the lower burden of proof in many title VII cases, such hybrid cases probably are driven by the title VII claim. Excluding these 36 from the 287 leaves 251 (46.1%) non-title VII constitutional tort cases filed in the Central District in 1980-81. This figure can be further reduced by excluding fourteen cases in which plaintiffs erroneously relied on section 1983, leaving 237 (41.9%) nonerroneous, non-title VII constitutional tort cases. In comparison, plaintiffs filed 935 non-civil rights tort cases in the Central District during the same period.

---


131 This figure is one higher than the 286 total in Table V because it includes one constitutional tort case not classified by the Administrative Office as a civil rights case.

132 These were usually cases in which no government action was alleged and no government actor was named as a defendant. This test probably understates erroneous reliance because it does not encompass cases in which a plaintiff names a government actor as a defendant but fails to allege a proper constitutional violation.

133 This figure is from the Administrative Office computer tapes. The tapes actually
In sum, the total number of constitutional tort cases in the Central District is smaller than the Administrative Office data or the dire warnings based on the data would indicate. The seventeen judges in the Central District in 1980-81 each averaged slightly more than one constitutional tort filing per month. To put this figure in the perspective of the Central District's workload, in 1980-81 the Central District had 6,707 total civil filings.\textsuperscript{134} Combined prisoner and nonprisoner constitutional tort filings thus comprised approximately 3.5\% of the District's civil caseload. This figure rises to 4.1\% if the hybrid title VII/section 1983 cases are included.\textsuperscript{135}

These findings reinforce those of an earlier study of section 1983 litigation in the Central District. For calendar years 1975-76, only one-half to one-third of the nonprisoner civil rights filings were section 1983 cases.\textsuperscript{136} Similarly, the absolute burden per judge was about one constitutional tort case filing per month.\textsuperscript{137}

\section*{IV}
\textbf{Characteristics of Constitutional Tort Litigation}

\subsection*{A. The Relative Burden of Constitutional Tort Litigation}

To determine whether a group of cases imposes an undue burden on the federal court system one must first select appropriate criteria by which to measure the burden. An individual litigant might measure a case's burden largely in terms of time and money. From the system's point of view, both time and money are relevant, but ascribing the system's money costs to specific types of cases is difficult. The more easily measurable standards are time (the time a case requires for processing), procedural progress (how far a case proceeds within the system), and activity (the number and nature of events that the case generates). These are not, of course, perfect measures of burden for every case. A successful pre-answer motion to dismiss, for example, can consume more time, energy, and money than the meager procedural progress would indicate. When list 942 non-civil rights torts cases, but five cases are listed twice and one case is listed three times.

\textsuperscript{134} This figure is based on Administrative Office tapes for cases filed in the Central District from October 1, 1980 to September 30, 1981. The tapes show 6,725 cases but 18 are listed twice.

\textsuperscript{135} This ratio of constitutional tort cases to total litigation in the Central District did not change substantially from that found in an earlier study. An earlier study of \textsection 1983 cases in the same district found 265 \textsection 1983 cases filed in calendar year 1975 and 225 \textsection 1983 cases filed in calendar year 1976. These cases comprised 5.6\% of all civil filings in the Central District during these two years. Eisenberg, \textit{supra} note 8, at 526-31. Recall, though, that the Central District is somewhat below the median district in civil rights filings as a percentage of the civil docket. \textit{See supra} note 7.

\textsuperscript{136} Eisenberg, \textit{supra} note 8, at 593.

\textsuperscript{137} Id. at 591.
applied to large numbers of cases, however, time, procedural progress, and activity provide one reasonable measure of the relative burdens of cases.

Information on time and procedural progress is drawn from two sources. Administrative Office data furnished to us on computer tapes provided one source of data, and individual analysis of each constitutional tort case and each control group case in our field data provided the other. Both gauges suggest that the typical constitutional tort case takes more judge and lawyer time than the typical non-civil rights case on the federal docket, although not every measure is statistically significant.

1. **Time to Disposition**

One indication of burden is the time between a case's filing and its disposition. In analyzing the time to disposition of cases in the control group, we eliminate cases ending in default judgments. Twenty-three percent of the non-civil rights cases ended in default, while constitutional tort plaintiffs did not win any cases by default. These default cases are hardly “real” contests that burden the system; including them in the analysis would undertate the burden of more typical non-civil rights cases.

Table VI suggests that constitutional tort cases take longer to resolve than contested cases in the control group. The median disposition time is 10.8 months for constitutional tort cases and 8.2 months for the control group. Moreover, a greater proportion of constitutional tort cases survive at the end of each of the four six-month intervals represented, and a greater percentage of constitutional tort cases remain pending at the end of the study, some five years after filing.

More sophisticated analysis of survival patterns confirms the differences in survival rates. Survival analysis examines the time separating the beginning and termination dates of a given sample of cases and allows statistical comparisons of the survival distributions for two independently drawn samples. Given our samples, the probability that constitutional tort cases and non-civil rights cases have the same cumulative survival distributions is .008, well below the normal .05 threshold of statistical significance for deeming the survival distributions to be different.


\[\text{The Lee-Desu statistic can be used to test the significance of the difference in survival rates between two groups of cases. The greater the Lee-Desu statistic, the more likely the groups come from different survival distributions. The Lee-Desu statistic has an asymmetrical chi-square distribution. A chi-square table of probabilities can deter-}\]
TABLE VI

Comparative Survival Table, Constitutional Tort Cases vs. Control Group (C.D. Cal. 1980-81)

<table>
<thead>
<tr>
<th>INTERVAL START TIME</th>
<th>CONSTITUTIONAL TORT</th>
<th>CONST. TORT WITH COUNSEL</th>
<th>CONTROL GROUP</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 months</td>
<td>64%</td>
<td>71%</td>
<td>57%</td>
</tr>
<tr>
<td>12 months</td>
<td>44%</td>
<td>52%</td>
<td>31%</td>
</tr>
<tr>
<td>18 months</td>
<td>29%</td>
<td>37%</td>
<td>21%</td>
</tr>
<tr>
<td>24 months</td>
<td>20%</td>
<td>26%</td>
<td>12%</td>
</tr>
<tr>
<td>10% of cases remain</td>
<td>36 mos.</td>
<td>38 mos.</td>
<td>25 mos.</td>
</tr>
<tr>
<td>Median Survival Time</td>
<td>10.8 mos.</td>
<td>13.8 mos.</td>
<td>8.2 mos.</td>
</tr>
<tr>
<td>Number of cases</td>
<td>279</td>
<td>172</td>
<td>299</td>
</tr>
<tr>
<td>Percent pending as of August 1986</td>
<td>1.1%</td>
<td>1.2%</td>
<td>0.7%</td>
</tr>
</tbody>
</table>

Administrative Office data, presented in Table VII, also suggest that constitutional tort cases last longer. The table compares possible constitutional tort cases with non-civil rights cases. Taken together, the categories most likely to include constitutional tort litigation (Administrative Office codes 440 and 550) show longer mean and median times to disposition than the group of non-civil rights cases.

2. Litigation Activity

Table VIII presents other comparisons, derived from our field data, between constitutional tort cases and the control group. The

mine the confidence with which one can assert that the two samples have significantly different cumulative distributions. See id. at 95-102. For an explanation of tests of statistical significance, see W. MENDENHALL, J. REINMUTH, R. BEAVER & D. DUHAN, STATISTICS FOR MANAGEMENT AND ECONOMICS 299 (5th ed. 1986).

The probability of similar distributions drops to .0001 if uncounseled constitutional tort cases are eliminated; this suggests even more emphatically that constitutional tort cases have a significantly longer survival pattern.

140 “Possible” constitutional tort cases are those in the Administrative Office categories “other civil rights” (code 440) and “prisoner civil rights” (code 550). See supra text accompanying notes 94-95. Although not every case in these categories is a constitutional tort case, the vast majority of constitutional tort cases will appear in one of these two categories. See supra Table V.

141 The control group is a sample drawn from a population that excludes cases filed under any of the civil rights codes and prisoner codes.

142 Using the Administrative Office data, if one eliminates cases in which the disposition occurs before issue is joined (i.e., before an answer is filed or motion made), the difference in median or mean times to disposition between civil rights cases and noncivil rights cases all but disappears. Screening out these early dismissals yields the following results (values in months):

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>Median</th>
<th>Std. Dev.</th>
<th># of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possible Const. Tort</td>
<td>14.3</td>
<td>10.8</td>
<td>12.0</td>
<td>248</td>
</tr>
<tr>
<td>Non-civil Rights</td>
<td>13.5</td>
<td>10.8</td>
<td>10.5</td>
<td>2,832</td>
</tr>
</tbody>
</table>
Table VII

Time to Disposition (in Months), Possible Constitutional Tort Cases vs. Non-civil Rights Cases

Source: Administrative Office Data (C.D. Cal. 1980-81)

<table>
<thead>
<tr>
<th>KIND OF CASE</th>
<th>MEAN</th>
<th>MEDIAN</th>
<th>STD. DEV.</th>
<th># OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>POSSIBLE CONST. TORT</td>
<td>12.4</td>
<td>9.3</td>
<td>11.5</td>
<td>315</td>
</tr>
<tr>
<td>NON-CIVIL RIGHTS</td>
<td>8.8</td>
<td>5.0</td>
<td>9.4</td>
<td>5531</td>
</tr>
<tr>
<td>NON-CIVIL RIGHTS (EXCLUDING DEFAULT JUDGMENTS)</td>
<td>10.2</td>
<td>7.0</td>
<td>9.9</td>
<td>4388</td>
</tr>
</tbody>
</table>

The table shows the percentage of cases possessing the relevant characteristic in each of four groups: (1) all constitutional tort cases; (2) nonprisoner constitutional tort cases; (3) all control group cases; and (4) control group cases not ending in default judgments. Columns one and three allow comparisons of all cases in both groups. Columns two and four permit comparisons that avoid overstating the success of the control group because of the uniformly successful default judgment cases and understating the success of the constitutional tort cases because of the highly unsuccessful prisoner civil rights cases.

Table VIII

Comparison of Constitutional Tort & Control Group Cases (C.D. Cal. 1980-81)

<table>
<thead>
<tr>
<th>CASE CHARACTERISTICS</th>
<th>CONSTITUTIONAL TORT</th>
<th>CONTROL GROUP</th>
<th>STATISTICALLY SIGNIFICANT DIFFERENCE?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>ALL</td>
<td>NONPRIS.</td>
<td>ALL</td>
</tr>
<tr>
<td>SUCCESS</td>
<td>38%</td>
<td>46%</td>
<td>86%</td>
</tr>
<tr>
<td>ANSWER</td>
<td>54%</td>
<td>63%</td>
<td>42%</td>
</tr>
<tr>
<td>INTERROGATORIES</td>
<td>27%</td>
<td>32%</td>
<td>10%</td>
</tr>
<tr>
<td>HEARING</td>
<td>48%</td>
<td>58%</td>
<td>22%</td>
</tr>
<tr>
<td>PRETRIAL CONFERENCE</td>
<td>22%</td>
<td>27%</td>
<td>16%</td>
</tr>
<tr>
<td>DEPOSITIONS</td>
<td>32%</td>
<td>40%</td>
<td>26%</td>
</tr>
<tr>
<td>TRIAL COMMENCED</td>
<td>13%</td>
<td>16%</td>
<td>8%</td>
</tr>
<tr>
<td>PRODUCTION OF DOCUMENTS</td>
<td>8%</td>
<td>10%</td>
<td>11%</td>
</tr>
<tr>
<td>DISCOVERY EVENT</td>
<td>38%</td>
<td>46%</td>
<td>29%</td>
</tr>
<tr>
<td>MONEY JUDGMENT</td>
<td>2%</td>
<td>2%</td>
<td>31%</td>
</tr>
<tr>
<td>MONEY SETTLEMENT</td>
<td>4%</td>
<td>3%</td>
<td>8%</td>
</tr>
<tr>
<td>FEES AWARDED BY COURT</td>
<td>3%</td>
<td>4%</td>
<td>3%</td>
</tr>
<tr>
<td>TOTAL CASES</td>
<td>276</td>
<td>202</td>
<td>406</td>
</tr>
</tbody>
</table>

As Table VIII indicates, the average constitutional tort case

\(\textsuperscript{143}\) We exclude transferred and pending cases from the constitutional tort group.

\(\textsuperscript{144}\) In addition to excluding transferred and pending cases, we exclude from the control group various classes of cases not suitable for comparison with a traditional "plaintiff vs. defendant" action. These excluded cases comprise those involving district court review of agency action, cases in which the primary issue is removal, bankruptcy cases, actions reviewing arbitration, cases suspended for statistical purposes, actions to enforce summonses or quash subpoenas, and forfeiture actions.

\(\textsuperscript{145}\) The comparisons in Table VIII are significant at the following levels:
generates more documents requiring a lawyer's time than the average non-civil rights case. Defendants in constitutional tort cases file answers somewhat more often than in non-civil rights cases. Lawyers in constitutional tort cases are somewhat more likely to take depositions and significantly more likely to file interrogatories than in other cases. If one ignores default cases, lawyers are as likely to file an answer or take depositions in a non-civil rights case as in a constitutional tort case, but significantly more likely to file interrogatories in constitutional tort cases. Following Grossman, we compute a "discovery event" statistic for each case. A case has a discovery event value of "1" if any discovery events occurred and a value of "0" if no discovery events occurred. This method thus tests for any discovery activity rather than for a specific kind or volume of discovery activity. Ignoring default cases, discovery events occur somewhat more often in nonprisoner constitutional tort cases than in control group cases.

Our data also reveal the relatively greater burden of constitutional tort cases on the court time of judges. Judges are significantly more likely to hold a hearing in a constitutional tort case than in a non-civil rights case. Judges are somewhat more likely to have a pretrial conference or conduct a trial in a constitutional tort case. These results remain true even if default judgments are ignored.

We conclude that the average constitutional tort case is more burdensome than the average non-civil rights case. This finding is consistent with the 1979 District Court Time Study, which found civil rights cases to be substantially more time-consuming for judges than the "average" case, and with earlier findings on civil rights

<table>
<thead>
<tr>
<th></th>
<th>all const. tort vs. all cont. grp.</th>
<th>all const. tort vs. nonpris. const. tort vs. nondefault cont. grp.</th>
</tr>
</thead>
<tbody>
<tr>
<td>success</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
</tr>
<tr>
<td>answer</td>
<td>.01</td>
<td>.24</td>
</tr>
<tr>
<td>interrogatories</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
</tr>
<tr>
<td>hearing</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
</tr>
<tr>
<td>pretrial conference</td>
<td>.05</td>
<td>.25</td>
</tr>
<tr>
<td>trial commenced</td>
<td>.05</td>
<td>.28</td>
</tr>
<tr>
<td>discovery event</td>
<td>.02</td>
<td>1.000</td>
</tr>
<tr>
<td>money judgment</td>
<td>&lt;.001</td>
<td>.005</td>
</tr>
<tr>
<td>money settlement</td>
<td>.05</td>
<td>.003</td>
</tr>
</tbody>
</table>

146 Grossman's study of common law cases also found a correlation between case type and frequency of discovery. Grossman, supra note 138, at 109 (case characteristics explain discovery variance between cases in state and federal courts).

147 Id. at 107-09. Grossman identified a discovery event as "a deposition, interrogatory, discovery motion or similar document—whatever the technical name given to it in local practice." Id. at 108.

148 S. Flanders, The 1979 Federal District Court Time Study 4 (Federal Judicial Center 1980) (table I). The study found that during 1977-79 "other civil rights" cases (the Administrative Office category that includes the bulk of nonprisoner § 1983 cases)
cases in the Central District.\textsuperscript{149}

B. The Success of Constitutional Tort Litigants

1. \textit{Defining Success}

Various criteria may test whether a case succeeds; some of these criteria bear no relation to the formal outcome of the case in court. At one extreme, even a case lost on the merits may be "successful." Consider a prisoner who, beaten by a prison guard, brings a constitutional tort action against the guard. Even if the guard prevails, the action may deter the guard the next time he contemplates beating the prisoner or other prisoners. If so, the prisoner may have brought a "successful" lawsuit.\textsuperscript{150}

At the other extreme, even formally successful actions might be net failures. An economically rational litigant succeeds only if the resources expended yield a recovery greater than the alternative possible uses of those resources. Winning the case is not enough. Although the system regards the litigant as successful, the litigant may brand the action a failure.

As Professor Galanter has noted, a litigant's view of success may vary depending on whether the litigant is a "one-shot" or a "repeat" player. The one-shot player cares little about "that element of the outcome which might influence the disposition of the decision-maker next time around."\textsuperscript{151} For a repeat player, such as an insurance company litigating an issue that is bound to recur in similar cases, "anything that will favorably influence the outcomes of future cases is a worthwhile result."\textsuperscript{152}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{149} Eisenberg, \textit{supra} note 8, at 532-33 (1975-76 study of civil rights cases in same district reveals that civil rights cases take slightly longer). When compared with litigation in the state courts, however, civil rights cases seem less burdensome. \textit{Id.} at 532. In addition, prisoner constitutional tort litigation is substantially less burdensome than nonprisoner constitutional tort litigation. The Bailey and Turner studies of prisoner § 1983 cases also conclude that the burden of prisoner filings is not nearly as great as the numbers might initially indicate. Bailey, \textit{supra} note 3, at 544-45 ("A careful study of the characteristics of our section 1983 samples casts considerable doubt on the proposition that these petitions are an unreasonable burden on the courts."); Turner, \textit{supra} note 3, at 637 ("The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate.").
\item \textsuperscript{150} Cf. Shapiro, \textit{supra} note 3, at 340-42 (describing usefulness of some habeas cases even when relief requested is not granted).
\item \textsuperscript{151} Galanter, \textit{Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change}, 9 LAw & Soc'y REV. 95, 100 (1974).
\item \textsuperscript{152} \textit{Id.}
\end{enumerate}
\end{footnotesize}
Indicia of success or failure that transcend the formal outcome of a case may be the most important criteria for assessing success. But debate over constitutional tort litigation has yet to reach this sophisticated level. For the most part, critics are content simply to complain, in general terms, that there are too many section 1983 cases, that they bankrupt cities, or that attorneys recover too much in the way of fees. Given the simplistic level of current debate, as well as the inability of our data to assess other indicia of litigative success, we employ more pedestrian definitions of success. Our goal is to establish an upper limit on how often constitutional tort litigants succeed and to compare their success rate with that of other classes of litigants. It is not our task here to explain these differences in success rates.

2. Comparing Success in Cases of Known Outcome

Our field data and the Administrative Office data provide several different ways to measure the absolute and relative success of constitutional tort cases. From the cases in our constitutional tort group and control group, we recorded the disposition of each case and whether the case led to a money judgment, nonmonetary relief, settlement, or a fee award. For each category in which a monetary amount is relevant, we recorded the amount. The Administrative Office records whether the plaintiff or the defendant obtained judgment, whether there was a monetary award and/or nonmonetary relief, and the amount of any judgment.

Tables IX to XI present these indicia of success as reported by the Administrative Office tapes. The findings suggest that constitutional tort plaintiffs do significantly worse than non-civil rights litigants in every measurable way. Table IX shows that, in cases in which the district court clerks report a favorable outcome for either side, 22 out of 162 cases (13.6%) show the plaintiff prevailing. In non-civil rights litigation, plaintiffs reportedly succeeded in 1,735 out of 2,195 cases (79%). If one excludes default judgments, non-civil rights plaintiffs prevailed in 642 of 1,096 cases (58.6%).

This general pattern holds regardless of the manner of disposition. The Administrative Office recognizes eleven disposition categories: (1) transferred; (2) remanded; (3) dismissed for want of prosecution; (4) dismissed, discontinued, settled, withdrawn, etc.; (5) judgment on default; (6) judgment on consent; (7) motion before trial; (8) judgment on jury verdict during or after trial;
TABLE IX

PARTY OBTAINING JUDGMENT IN POSSIBLE CONSTITUTIONAL TORT CASES COMPARED WITH NON-CIVIL RIGHTS CASES
Source: Administrative Office Data (C.D. Cal. 1980-81)

<table>
<thead>
<tr>
<th></th>
<th>POSSIBLE CONST. TORT CASES</th>
<th>NON-CIVIL RIGHTS</th>
<th>NON-CIVIL RIGHTS (EXCLUDING DEFAULT JUDGMENTS)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PLAINTIFF</strong></td>
<td>22</td>
<td>1735</td>
<td>642</td>
</tr>
<tr>
<td></td>
<td>13.6%</td>
<td>79.0%</td>
<td>58.6%</td>
</tr>
<tr>
<td><strong>DEFENDANT</strong></td>
<td>140</td>
<td>460</td>
<td>454</td>
</tr>
<tr>
<td></td>
<td>86.4%</td>
<td>21.0%</td>
<td>41.4%</td>
</tr>
<tr>
<td><strong>COLUMN TOTAL</strong></td>
<td>162</td>
<td>2195</td>
<td>1096</td>
</tr>
</tbody>
</table>

(9) judgment on directed verdict during or after trial; (10) judgment during or after court trial; and (11) other.  

Table X indicates the success of constitutional tort plaintiffs relative to non-civil rights plaintiffs in all but the “transferred” category. In cases disposed of by motion before trial, unconstitutional tort plaintiffs prevailed in nine percent of the cases while non-civil rights plaintiffs prevailed 42% of the time. In cases disposed of by jury trial, constitutional tort plaintiffs prevailed in 17% and non-civil rights plaintiffs in 66%. In bench trials constitutional tort plaintiffs prevailed in 38% and non-civil rights plaintiffs prevailed in

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153 See supra notes 140-41 for the meaning of the “constitutional tort” and “non-civil rights” headings as applied to Administrative Office data.


155 The Administrative Office instructs clerks to report a case as disposed of on motion before trial if:

   The action was disposed of by a final judgment based on one of the following:
   (a) an agreed statement of facts;
   (b) a motion under Rule 12(b), F.R.Cv.P., including:
       1. lack of jurisdiction over the subject matter;
       2. lack of jurisdiction over the person;
       3. improper venue;
       4. insufficiency of process;
       5. insufficiency of service of process;
       6. failure to state a claim; or
       7. failure to join an indispensable party.
   (c) a motion for judgment on the pleadings, as defined in Rule 12(c), F.R.Cv.P.;
   (d) a motion for summary judgment, as defined in Rule 56, F.R.Cv.P.;
   (e) any other contested motion which results in disposition before trial; or
   (f) an order dismissing a prisoner petition.

Id. at II-25 to -26.

156 Out of the 67 nonprisoner constitutional tort cases disposed of by motion before trial, plaintiffs prevailed in nine (13%), defendants prevailed in 54 (81%), and four (6%) had unclear outcomes.

157 Out of 12 nonprisoner constitutional tort cases disposed of by jury trial, plaintiffs
TABLE X\(^{159}\)

DISPOSITION OF POSSIBLE CONSTITUTIONAL TORT CASES COMPARED WITH NON-CIVIL RIGHTS CASES

Source: Administrative Office Data (C.D. Cal. 1980-81)

<table>
<thead>
<tr>
<th>DISPOSITION</th>
<th>POSSIBLE CONST. TORT CASES(^{160})</th>
<th>NON-CIVIL RIGHTS CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>P WINS</td>
<td>D WINS</td>
</tr>
<tr>
<td>Remanded</td>
<td>N %</td>
<td>N %</td>
</tr>
<tr>
<td>Dismissed for want of prosec.</td>
<td>0</td>
<td>1 33%</td>
</tr>
<tr>
<td>Dismissed, discontinued, settled,</td>
<td>12 9%</td>
<td>120 87%</td>
</tr>
<tr>
<td>Judgment on Default</td>
<td>2 17%</td>
<td>9 75%</td>
</tr>
<tr>
<td>Judgment on Consent</td>
<td>2 67%</td>
<td>1 33%</td>
</tr>
<tr>
<td>Judgment on Motion Before Trial</td>
<td>3 38%</td>
<td>4 50%</td>
</tr>
<tr>
<td>Judgment on Court Trial</td>
<td>1 17%</td>
<td>3 50%</td>
</tr>
<tr>
<td>Other</td>
<td>22 7%</td>
<td>140 44%</td>
</tr>
</tbody>
</table>

Examining the cases by type of relief obtained reinforces the finding that code 440 cases (other civil rights) are less successful than non-civil rights cases. Table XI contains the Administrative Office nature-of-judgment statistics, including the relief obtained for cases disposed of by judgments. The table excludes settlements and other cases of unknown outcome. The Administrative Office recognizes six types of relief: (1) no monetary award; (2) monetary award only; (3) monetary award and other; (4) injunction; (5) other, foreclosure, condemnation, remand, etc.; and (6) costs only.\(^{161}\)

This table reveals that “other civil rights” plaintiffs received some form of favorable judgment in only 19% of the cases whereas non-civil rights plaintiffs obtained some form of favorable judgment in

prevailed in two (17%), defendants prevailed in nine (75%), and one (8%) had an unclear outcome.

\(^{158}\) Nonprisoner constitutional tort plaintiffs prevailed in three out of eight cases (37.5%) disposed of by courts after or during trial. Defendants prevailed in four cases (50%). One case (12.5%) had an unclear outcome.

\(^{159}\) The percentage statistics are relative to the total number of terminated cases, including the 151 possible constitutional tort cases and 3,310 non-civil rights cases in which the identity of the prevailing party is unclear.

\(^{160}\) See supra notes 140-41.

\(^{161}\) A.O. Guide, supra note 64, at II-26 to -27.
75% of the cases. "Other civil rights" plaintiffs received injunctive relief in 1.8% of the cases, versus 6.2% for non-civil rights plaintiffs.

TABLE XI

NATURE-OF-JUDGMENT IN POSSIBLE CONSTITUTIONAL TORT CASES COMPARED WITH NON-CIVIL RIGHTS CASES

<table>
<thead>
<tr>
<th></th>
<th>POSSIBLE CONST. TORT CASES</th>
<th>NON-CIVIL RIGHTS CASES</th>
<th>ROW TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO MONETARY AWARD</td>
<td>132</td>
<td>583</td>
<td>715</td>
</tr>
<tr>
<td></td>
<td>81.0%</td>
<td>25.0%</td>
<td>28.7%</td>
</tr>
<tr>
<td>MONETARY AWARD</td>
<td>8</td>
<td>1306</td>
<td>1314</td>
</tr>
<tr>
<td></td>
<td>4.9%</td>
<td>56.0%</td>
<td>52.7%</td>
</tr>
<tr>
<td>MONETARY AWARD &amp; OTHER</td>
<td>1</td>
<td>76</td>
<td>77</td>
</tr>
<tr>
<td></td>
<td>.6%</td>
<td>3.3%</td>
<td>3.1%</td>
</tr>
<tr>
<td>INJUNCTION</td>
<td>3</td>
<td>144</td>
<td>147</td>
</tr>
<tr>
<td></td>
<td>1.8%</td>
<td>6.2%</td>
<td>5.9%</td>
</tr>
<tr>
<td>OTHER</td>
<td>4</td>
<td>141</td>
<td>145</td>
</tr>
<tr>
<td></td>
<td>2.5%</td>
<td>6.0%</td>
<td>5.8%</td>
</tr>
<tr>
<td>COSTS ONLY</td>
<td>15</td>
<td>82</td>
<td>97</td>
</tr>
<tr>
<td></td>
<td>9.2%</td>
<td>3.5%</td>
<td>3.9%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>163</td>
<td>2332</td>
<td>2495</td>
</tr>
</tbody>
</table>

Our field data confirm the relative failure of constitutional tort litigants demonstrated in Tables IX-XI. In cases resolved by trial, constitutional tort plaintiffs prevail significantly less often than other plaintiffs. They also obtain significantly fewer money judgments or settlements.

Our data allow control of an important factor not included in the Administrative Office data. Constitutional tort litigants are less likely to have counsel than other litigants. As Table XII shows, prisoner constitutional tort plaintiffs obtain counsel in less than nine percent of the filed cases, as compared to roughly 80% of all non-prisoner constitutional tort plaintiffs and 98% of all non-civil rights plaintiffs. These figures raise the possibility that the presence of counsel partially explains the higher success rate of plaintiffs in non-

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162 See supra notes 140-41.
163 See supra Table VIII ("success" row).
164 Constitutional tort plaintiffs prevailed in eight of 30 (26.7%) actions that went to trial. Non-civil rights plaintiffs in the control group prevailed in 18 of 26 (69.2%) trials. The difference is significant at the .004 level.
165 See supra Table VIII.
166 The percentage of constitutional tort plaintiffs represented by counsel has not increased significantly since 1975. In the Central District in 1975, 72.8% of nonprisoner plaintiffs and 6.2% of prisoner plaintiffs had counsel. In 1976, the corresponding figures were 71.4% and 3.6%, respectively. The increase in percentage of counseled cases from 1975-1976 to 1980-81 is not significant at the .05 level.
### TABLE XII
Comparative Rates of Representation by Counsel, Constitutional Tort Cases vs. Control Group, C.D. Cal. 1980-81

<table>
<thead>
<tr>
<th></th>
<th>NO COUNSEL</th>
<th>COUNSEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONTROL GROUP</td>
<td>7</td>
<td>397</td>
</tr>
<tr>
<td></td>
<td>1.7%</td>
<td>98.3%</td>
</tr>
<tr>
<td>CONST. TORT NONPRISONER</td>
<td>39</td>
<td>164</td>
</tr>
<tr>
<td></td>
<td>19.2%</td>
<td>80.8%</td>
</tr>
<tr>
<td>CONST. TORT PRISONER</td>
<td>67</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>91.8%</td>
<td>8.2%</td>
</tr>
</tbody>
</table>

civil rights cases. Perhaps attorneys are more effective either at litigating these cases, or in discouraging plaintiffs from pursuing weaker cases.

Attorney representation, however, is only part of the explanation for the lower success rates of constitutional tort plaintiffs. Even after controlling for the presence of counsel, significant differences remain between the recovery rates of constitutional tort plaintiffs and others.\(^{167}\)

#### 3. Absolute Success Rates

Comparing constitutional tort cases with other types of cases provides a measure of relative success, but such comparisons cannot provide a complete picture of success. Just as the absolute number of constitutional tort filings supplies insights into the magnitude of constitutional tort litigation, the absolute success of constitutional tort litigation provides a more complete perspective on the impact of constitutional tort cases.

One factor hinders detecting absolute success rates: many litigated cases settle or terminate in some manner that prevents ascertaining winners or the nature of recoveries from court records. Cases settled without indicating settlement terms in the court records and other unclear dispositions introduce uncertainty in describing case outcomes. This uncertainty affects both the Administrative Office data and our data.

To account for plaintiffs’ successes not reflected in court records, our study adopts a broad measure that functions as an upper limit of success. It defines a case as successful if (1) the plaintiff wins after trial, (2) the parties settle their dispute, (3) the court grants a stipulated dismissal, or (4) the plaintiff dismisses the case voluntarily. According to this definition, a case fails only if the court

\(^{167}\) This is true even excluding default judgment cases and prisoner cases.
dismisses the claim on the merits or for lack of prosecution, or if a court or jury renders an adverse verdict after trial. This definition overstates success because some cases not dealt with by the court terminate simply because the plaintiff gives up. The assumption underlying the definition is that a plaintiff who files an action usually receives something for withdrawing it, in contrast to having it dismissed. The definition also avoids excluding from the successful class of cases those settlements that appear in the court records as voluntary plaintiff dismissals or stipulated dismissals.\textsuperscript{168}

Under the study's broad measure of success, constitutional tort plaintiffs succeed about one-third of the time.\textsuperscript{169} The success rate for counseled cases (which eliminates nearly all prisoner cases) is about one-half.\textsuperscript{170} These rates do not vary significantly from those found in the 1975-76 study.\textsuperscript{171} By contrast, plaintiffs in contested\textsuperscript{172} non-civil rights cases succeed over 80% of the time.\textsuperscript{173}

Even if one assumes that all cases labeled "successful" under our broad definition actually did succeed, then no more than 104 constitutional tort cases achieved some success in 1980-81 in the Central District.\textsuperscript{174} The 1980 census shows that the Central District

\textsuperscript{168} To check the extent to which the definition of success affects the study's findings, we have run separate analyses of the data that exclude cases categorized as voluntary dismissals and stipulated dismissals. These analyses show that the wide gap in success between constitutional tort litigation and other litigation remains highly significant, as measured in Table VIII's comparisons of success rates, money judgments, and settlements. In general, excluding these dismissal classes of cases narrows the difference in burden between constitutional tort litigation and other litigation, as measured by rates of answers, interrogatories, and hearings, reported in Table VIII. There is no clear effect on differences in rates of pretrial conferences.

\textsuperscript{169} See supra Table VIII ("success" row indicates 38% success rate).

\textsuperscript{170} Id. (46% success rate).

\textsuperscript{171} See Eisenberg, supra note 8, at 536-38.

\textsuperscript{172} A shockingly high percentage (19.8%) of non-civil rights cases in this study are student loan default cases brought by the federal government. Our control group confirms what others have suggested—the federal courts function to a large degree as collection agencies for the United States government. Almost by definition, the plaintiff will win a default case. Including these default cases, plaintiffs succeeded in 86% of the non-civil rights cases. See supra Table VIII.

\textsuperscript{173} Id. In other non-civil rights settings, plaintiffs also succeed overwhelmingly. Studies of personal-injury tort cases, for example, show that plaintiffs obtain a "successful" outcome (some amount of recovery through settlement, trial, or the like), in approximately 90% of the cases filed. See A. Conard, J. Morgan, R. Pratt, C. Voltz & R. Bombaugh, Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation 155-56 (1964); H. Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment 217 (1980); Danzon & Lillard, Settlement Out of Court: The Disposition of Medical Malpractice Claims, 12 J. Legal Stud. 345, 365 (1983); Franklin, Chamin & Mark, Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation, 61 Colum. L. Rev. 1, 13-14 (1961) (approximately 84% of personal injury plaintiffs in New York City achieve some recovery); Schwartz & Mitchell, An Economic Analysis of the Contingent Fee in Personal-Injury Litigation, 22 Stan. L. Rev. 1125, 1155 n.45 (1970) (96% of all personal injury plaintiffs achieve some recovery).

\textsuperscript{174} This represents 38% of the 276 constitutional tort cases shown in Table VIII.
had a population of 10.26 million people. Rounding out the successful litigant figure to 100, and the population figure to 10 million, not more than one person in 100,000 brought a successful constitutional tort case in the Central District in 1980-81.

4. Unknown Outcomes: Accounting for Settlements

To obtain a more complete picture of the outcome and burden of constitutional tort litigation, we conducted a follow-up study using a questionnaire mailed to the plaintiff’s attorney in every civil rights case in the study with an unclear disposition. These dispositions include consent decrees, stipulated dismissals, dismissals by plaintiffs, and settlements where the court record does not include any monetary relief, injunctive relief, or fees. As noted above, we define these cases as successful.

Of the 170 attorneys mailed questionnaires, 62 responded with useful information. Of those, 28 reported bringing a constitutional tort action; the rest reported an action based on Title VII or another civil rights statute. Of the 28, only 24 reported a successful outcome (using our definition of success), and eighteen reported obtaining some relief.

These results suggest two important qualifications of our expanded measure of success. First, according to plaintiffs’ attorneys, courts disposed of some cases in a clear negative manner even when court records failed to indicate a clear disposition. For constitutional tort cases, only 86% (24 of 28) of the unclear cases had arguably favorable outcomes. Fourteen percent of the unclear cases, which we label “successful,” were reported as losers by the attorneys. Second, about one-third of the unclear cases (10 of 28) led to no monetary or nonmonetary relief and probably should be considered unsuccessful.

This additional information confirms that our definition of success merely establishes an upper limit on plaintiffs’ actual success rates, and is not a precise measure of case outcomes. According to

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176 See supra note 85 and accompanying text. Attorneys who brought more than one case were mailed forms for each case. The statements in the text treat each case as brought by a different attorney.
177 To reduce ethical conflicts that might attend revealing information about a client’s case and to encourage maximum response to our request for information, we offered attorneys a blind form that prevents associating an attorney’s response with a particular case. This precludes us from correcting our individual case data based on the responses. Even with assurances of anonymity, one assumes that attorneys who were successful were more likely to respond to the questionnaire. Thus, in this respect, this study errs on the side of overstating the fiscal burden and success rates of constitutional tort litigation.
the attorney study, plaintiffs were successful in only 64% (18 of 28) of the settled cases or other cases with unclear dispositions. Combining the 24 cases that the court records reveal as clearly successful with 64% of the 80 ambiguous constitutional tort cases[^178] yields a rough estimate that constitutional tort plaintiffs succeeded in approximately 76 of the 276 cases (28%) they filed in 1981.[^179]

C. The Fiscal Consequences of Constitutional Tort Litigation

Much of the concern about constitutional tort litigation comes from government authorities bemoaning skyrocketing damages awards and increasing insurance rates.[^180] Both Administrative Office case termination data and our field data suggest that the perceptions about damages are overstated.

Just as there is no standard way of assessing the procedural burden of constitutional tort litigation, there is no unique way to quantify its fiscal consequences. Again, we offer absolute and comparative estimates of fiscal burden. The first estimates the total dollar amount transferred as the direct result of constitutional tort litigation (excluding internal litigation costs). The second relies on Administrative Office data to contrast the amounts transferred in possible constitutional tort cases with amounts transferred in other litigation.

1. Total Dollars Transferred

Table XIII presents data on the twenty-one constitutional tort cases in which the court records reflect a monetary award (including settlement) or an award of attorney fees. These cases yield a total recovery (including fees) of just under $900,000. To this we add recovery data obtained through our follow-up survey. These responses show that, of the 28 constitutional tort cases for which we received data, eighteen resulted in monetary relief for the plaintiff. These eighteen cases yielded a total monetary damages recovery of $379,000, plus $112,500 in attorney fees for a total transfer of

[^178]: In five of these “unclear” cases we learned of the case outcome after we had conducted the attorney study.

[^179]: We exclude pending and transferred cases. The estimated actual success rate for all civil rights plaintiffs (including habeas petitions) is about 20%. The total of 276 constitutional tort cases comes from Table VIII. The 24 clearly successful cases are those cases for which the court records show favorable judgments, awards of attorney fees, or nonmonetary relief, plus settlements or other dispositions the terms of which appear in the court files. The remaining 80 possibly successful cases, see supra note 174 and accompanying text, are multiplied by .64 (the figure derived from the attorney follow-up study) to yield slightly more than 51 cases of unclear disposition as true successes. We round the 51.2 figure to 52, and add it to the 24 known successes to arrive at the figure of 76 total successes.

[^180]: See supra notes 44-55 and accompanying text.
roughly $500,000.181

TABLE XIII

<table>
<thead>
<tr>
<th>TOTAL AMOUNT RECOVERED: CASES WITH CLEAR DISPOSITION, CONSTITUTIONAL TORT CASES, C.D. CAL. 1980-81</th>
</tr>
</thead>
<tbody>
<tr>
<td>MONEY JUDGMENTS</td>
</tr>
<tr>
<td>SETTLEMENTS</td>
</tr>
<tr>
<td>FEES AWARDED BY COURT</td>
</tr>
<tr>
<td>FEES BY SETTLEMENT</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>

Extrapolating from these figures, we estimate the total dollars transferred directly as a result of constitutional tort litigation.182 The cases of known disposition set forth in Table XIII led to transfers of about $900,000. In cases of unclear disposition, applying the recovery rate of $500,000 per 28 cases to all 81 constitutional tort cases of unclear disposition yields a projected total recovery of $1.4 million in these 81 cases. Combining the figures for known and unknown case outcomes produces an "order of magnitude" estimate on total recoveries, now including all settlements, of $2.3 million.183

A further issue in constitutional tort litigation is who pays for these recoveries. Many are concerned that the threat of personal fiscal loss adversely affects individual official behavior.184 This study does not directly assess such effects because doing so requires knowing individuals' perceptions of the threat of personal liability and their behavioral responses to it, information beyond the scope of this project.185 We can, however, offer some guidance about the

181 This number may be unrepresentative because it includes a settlement of $166,000, plus an attorney fee award of over $80,000.
182 We have no direct measure of defense costs.
183 To put this $2.3 million figure in perspective, it comes to about twenty cents per person in the Central District. As a fraction of the combined city and county budgets for the seven counties comprising the Central District, the figure represents less than 0.02% of the total local government revenues of over $17 billion. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, LOCAL GOVERNMENT FINANCES IN SELECTED METROPOLITAN AREAS AND LARGE COUNTIES: 1980-81 (tables 2 & 5). The City of Los Angeles allocated a greater share of its budget for Bingo regulation. CITY OF LOS ANGELES, BUDGET, FISCAL YEAR 1980-1981, at A-71, A-74 (showing $311,225 appropriated for Bingo regulation out of a $1.324 billion budget).
184 See supra notes 56-60 and accompanying text.
magnitude of this threat. In cases in which court records showed payments to plaintiffs, we recorded the defendant's status as an institution or individual. We found no case in which court records showed that an individual official had borne the cost of an adverse constitutional tort judgment.

This does not mean that there were no such cases, nor does it reflect the legal costs incurred by a defendant in the unusual case in which a government employer does not furnish its officials with an attorney. Nevertheless, it does suggest that rampant official fear of personal liability may be an overreaction.

2. Constitutional Tort Transfers vs. Other Transfers

To assess the amounts transferred in constitutional tort cases relative to other cases, a second test of fiscal burden, we rely on Administrative Office data. The Administrative Office data on terminated cases, which are necessarily sketchy for settled cases, include an item entitled "amount received." For the Central District in 1980-81, the Administrative Office data show awards totaling $82.8 million in cases in which the plaintiff prevailed. Of this total, $201,000 (0.24%) was awarded in code 440 (other civil rights) cases.

A caveat about the use of this figure is in order. It does not reflect all amounts transferred as the result of civil litigation in the


For a sketch of indemnification provisions, see P. Schuck, supra note 60, at 85-88. To these provisions one might add the common practice of supplying officials with publicly paid counsel. See Harlow v. Fitzgerald, 457 U.S. 800, 827 n.7 (1982) (Burger, C.J., dissenting) ("The Executive Branch may as a matter of grace supply some legal assistance. The Department of [Justice] has a longstanding policy of representing federal officers in civil suits involving conduct performed within the scope of their employment. In addition, the Department provides for retention of private legal counsel when necessary."); supra note 59 and accompanying text.

As described in the Administrative Office's guidelines, this is the amount awarded by the court, and should be reported along with the nature-of-judgment data. A.O. Guide, supra note 64, at II-27.

The actual figure probably is higher. The Administrative Office's data scheme only allows for figures up to $9,999,000. Eight cases show amounts received of $9,999,000. Of these, six are listed as judgments for plaintiff, one is listed as a judgment for defendant, and one lists the prevailing party as unknown.

The awards figure does not include default judgments.

See supra note 140.
Central District. Our field data detected many cases with money recoveries that the Administrative Office did not detect. Nevertheless, if the Administrative Office figures do not systematically exclude data from any one class of cases over another, the excluded recoveries should affect all case categories similarly. If so, these figures should provide a fairly accurate appraisal of the relative amounts transferred as the result of litigation.

A more focused and perhaps more meaningful comparison is also possible. The Administrative Office data enable us to identify cases in which the United States was a defendant. Focusing only on these cases, we can compare amounts received from the federal government in possible constitutional tort actions\textsuperscript{191} with amounts received from the federal government in simple tort actions. Table XIV presents the comparison.

\textbf{TABLE XIV}

\begin{tabular}{lcc}
& \textbf{POSSIBLE CON. TORT CASES} & \textbf{TORT CASES IN WHICH U.S. IS A DEFENDANT} \\
\textbf{NO. OF CASES:} & 7 & 14 \\
\textbf{AVERAGE:} & $28,710 & $69,790 \\
\textbf{MEDIAN:} & 8,000 & 18,500 \\
\textbf{TOTAL:} & 201,000 & 977,000 \\
\end{tabular}

Although based on a small number of cases, Table XIV suggests that constitutional tort litigation is no more fiscally burdensome than simple tort litigation against the United States.\textsuperscript{192}

A final caveat—the numerical comparisons offered here ought to be taken at something less than face value. They are crude estimates. They do not include defense costs, insurance costs, or the administrative costs of complying with injunctions. We offer the numerical comparisons merely as points of reference. We cannot say

\textsuperscript{191} Possible constitutional tort actions are all cases in Administrative Office categories 440 (other civil rights) and 550 (prisoner civil rights). \textit{See supra} notes 140-41. Because the United States is the defendant for all cases in this comparison, the possible constitutional tort cases should be \textit{Bivens} actions rather than § 1983 actions.

\textsuperscript{192} Because the sample was small, we conducted a similar analysis of all constitutional tort cases and all other tort cases in which the United States was a defendant for the period 1975 to 1985 (with partial data on 1985). We included only cases in which the plaintiff is listed as the prevailing party. The computer tapes show that plaintiffs in possible constitutional tort cases received monetary awards in 2,697 cases. The mean award was $313,892, the median award was $11,000, and the sum of all awards was $846,566,000. In tort cases in which the U.S. was a defendant, there were 1,987 awards. The mean award was $382,018, the median award was $32,000, and the sum of all awards was $731,825,000.
that they establish that constitutional tort litigation is an insubstantial drain or that it is not providing more than the socially optimal level of deterrence and compensation. Nor can one be sure that such comparisons will apply to other districts. We do suspect that some observers will be surprised by the low level of constitutional tort activity suggested by the figures.

D. Attorney Fees and Constitutional Tort Litigation

Attorney fees figure prominently in the apocalyptic vision of constitutional tort litigation and its effect on the public fisc. The Civil Rights Attorney's Fees Awards Act of 1976, effective October 1, 1976, permits prevailing plaintiffs in civil rights cases to recover, at the court's discretion, their reasonable attorney fees. Critics often attribute the civil rights litigation explosion to the availability of fees, and accuse civil rights attorneys of pursuing fee awards at the expense of their clients' interests. Local governments seem especially upset about having to pay plaintiffs' legal bills. Four Supreme Court Justices recently warned that the Fees Act was in danger of becoming "a relief act for lawyers." Nevertheless, some of our results suggest that attorney fees play a lesser role in inducing civil rights litigation than these opinions suggest.

1. Direct Evidence of Their Burden

The dominant American rule in non-civil rights cases is that each party bears the cost of its legal counsel. Controlling for external factors, such as the year and district, one would expect fees to be awarded in a higher percentage of civil rights cases than non-civil rights cases. If there is no such disparity, then attorneys flocking to civil rights cases in the hope of fee awards may be making economic errors.

We find no evidence that fee awards in civil rights cases are

194 The statutory entitlement extends to "prevailing parties," a seemingly neutral term. But the standard for awarding attorney fees to a prevailing defendant is sufficiently high to warrant treating the 1976 Act as a "one-way" fee-shifting statute, one in which plaintiffs recover fees if they prevail, but need not pay fees if they do not prevail. Cf. Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n (EEOC), 434 U.S. 412, 416-17 (1978) (only unreasonable, frivolous, or groundless claim will support fee award to prevailing defendant in title VII cases; prevailing plaintiff receives fee award unless there are "' special circumstances [which] would render such an award unjust" (quoting Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968))).
195 See supra note 50 and accompanying text.
196 See supra notes 49-52 and accompanying text.
CONSTITUTIONAL TORT LITIGATION

higher or more common than in non-civil rights cases. Only a handful of court-mandated fee awards occurred in constitutional tort cases during 1975, 1976, and 1980-81. For 1980-81, the year for which we have a control group of non-civil rights cases, court records do not reveal a significantly higher percentage of fee awards in civil rights cases than in the control group of non-civil rights cases.

2. Inferences from the Case Filing Data Concerning the Role of Attorney Fees

The surprising relative decrease in nationwide civil rights filings challenges the notion that fee awards drive constitutional tort litigation. One would expect that a system under which only prevailing plaintiffs recover fees would lead to more cases and more awards.

Contrary to this expectation, the Fees Award statute has not generated a burst of civil rights litigation. Our data over time for the Central District, which includes more precise data on the number of constitutional tort cases, show no dramatic increase from pre-Fees Act filing rates. Fully isolating the effect of the Fees Act would require controlling for other factors that affect filings. Changes in legal doctrine or social circumstances, for example, may contribute to changes in filing or fee award patterns. Although our analysis does not attempt to isolate the effect of the various factors that might influence the level of filings or fee awards, the figures do suggest that reassessing the effect of the Fees Act is in order.

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199 See supra Table VIII. For the combined years 1975 and 1976, Central District judges awarded fees in five of the 262 nonprisoner constitutional tort cases, and in none of the prisoner cases.

200 Court records reveal fee awards in only about three percent of each class of cases. See supra Table VIII. Counsel also report court-awarded fees in one of the 28 cases of unclear disposition that formed the subject of the follow-up study. See supra text accompanying notes 85 & 176-77.

201 See supra Table III.

202 See Rowe, Predicting the Effects of Attorney Fee Shifting, LAW & CONTEMP. PROBS., Winter 1984, at 139, 147. Although expressing no doubt about the direction of the effect, Professor Rowe notes the difficulty in assessing its magnitude. Id.; see also Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55 (1982) (examining plaintiff behavior under four possible fee allocation regimes). The effect of a two-way fee-shifting scheme, one in which losing plaintiffs pay the fees of prevailing defendants, is less clear. Rowe, supra, at 147.

203 See supra note 135; cf. G. Burbridge, supra note 104, at 141, 185-89 (showing insubstantial differences between pre-1978 and post-1978 with respect to the number of § 1983 actions: (a) filed by a group of tort attorneys in one Utah County; (b) received by a national sample of defendants; and (c) won or lost).
E. Analysis of Subgroups of Constitutional Tort Cases

Preoccupation with the overall number and impact of constitutional tort cases may obscure important differences among them. Constitutional tort litigation encompasses varied causes of action, ranging from school desegregation actions to police misconduct cases, from procedural due process actions to first amendment claims, and beyond. This section explores these distinctions. First it distinguishes between prisoner and nonprisoner cases.

1. Nonprisoner Cases

We classify nonprisoner constitutional tort cases into nine categories: actions against the police, employment claims, other discrimination claims, due process claims, malicious prosecution claims, tax claims, miscellaneous claims (which includes cases for which no other category was recorded), first amendment claims, and claims alleging judicial error or misconduct. Although the categories overlap, it is helpful to have a unique principal designation for each case. Table XV, which presents the relative success of claims under each of these categories, reveals differences among them.

### TABLE XV

**Success of Nonprisoner Const. Tort Cases by Subgroup**

<table>
<thead>
<tr>
<th>CASE TYPE</th>
<th>NO.</th>
<th>SUCCESS</th>
<th>MONEY JUDGMENT</th>
<th>MONEY SETTLEMENT</th>
<th>FEES BY COURT</th>
<th>REPRESENTED BY COUNSEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>POLICE</td>
<td>170</td>
<td>57%</td>
<td>3%</td>
<td>5%</td>
<td>2%</td>
<td>85%</td>
</tr>
<tr>
<td>EMPLOYMENT</td>
<td>76</td>
<td>62%</td>
<td>5%</td>
<td>7%</td>
<td>5%</td>
<td>88%</td>
</tr>
<tr>
<td>OTHER DISCRIM.</td>
<td>22</td>
<td>55%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>68%</td>
</tr>
<tr>
<td>DUE PROCESS</td>
<td>58</td>
<td>31%</td>
<td>2%</td>
<td>3%</td>
<td>2%</td>
<td>74%</td>
</tr>
<tr>
<td>MALIC. PROSEC.</td>
<td>6</td>
<td>17%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>50%</td>
</tr>
<tr>
<td>TAX</td>
<td>3</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>MISC. &amp; MISSING</td>
<td>70</td>
<td>19%</td>
<td>1%</td>
<td>1%</td>
<td>3%</td>
<td>53%</td>
</tr>
<tr>
<td>1ST AMENDMENT</td>
<td>43</td>
<td>51%</td>
<td>0%</td>
<td>2%</td>
<td>7%</td>
<td>95%</td>
</tr>
<tr>
<td>JUDIC. ERROR</td>
<td>16</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>13%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>464</td>
<td>45%</td>
<td>2%</td>
<td>4%</td>
<td>3%</td>
<td>76%</td>
</tr>
</tbody>
</table>

In numbers of cases filed, actions against the police dominate. During the three years studied, they constituted 170 out of 464 (37%) of nonprisoner constitutional tort cases. Police actions were more than twice as numerous as actions in the next highest category, employment, of which there were 76 cases (16%).\(^{204}\) No other category accounted for more than 16% of those filed.

Limiting analysis to categories with more than twenty cases

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\(^{204}\) In 1980-81, the only year for which we have data on title VII claims, two-thirds of employment-based constitutional tort claims also had a title VII claim. Title VII probably drives most of these cases. *See supra* text accompanying note 130.
over the three years, success rates range from 62% for employment cases to 19% for "miscellaneous" constitutional tort cases. The two dominant categories, police and employment, while accounting for 53% of the cases, accounted for 68% (143 out of 209) of the possibly successful cases. The average success rate for all other categories of constitutional tort litigation was 30% (66 out of 218). For no category, including employment cases and police actions, was the success rate as high as the success rate for non-civil rights cases.205

Table XV also shows that plaintiffs obtained counsel at differing rates, which may explain their differing success rates. Table XVI presents success rates for counseled cases in each category. It shows that, even controlling for the presence of counsel, statistically significant differences among success rates remain. Police and employment cases were still the most successful of the larger categories of cases, although controlling for the presence of counsel eliminates most of the difference between them.

### TABLE XVI

<table>
<thead>
<tr>
<th></th>
<th>NO SUCCESS</th>
<th>SUCCESS</th>
<th>ROW TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>NO. %</td>
<td>NO. %</td>
<td>NO. %</td>
</tr>
<tr>
<td>POLICE</td>
<td>52 35.9</td>
<td>93 64.1</td>
<td>145 41.1</td>
</tr>
<tr>
<td>EMPLOYMENT</td>
<td>24 35.8</td>
<td>43 64.2</td>
<td>67 19.1</td>
</tr>
<tr>
<td>OTHER DISC.</td>
<td>3 20.0</td>
<td>12 80.0</td>
<td>15 4.3</td>
</tr>
<tr>
<td>DUE PROCESS</td>
<td>28 65.1</td>
<td>15 34.9</td>
<td>43 12.2</td>
</tr>
<tr>
<td>MALIC. PROSEC.</td>
<td>2 66.7</td>
<td>1 33.3</td>
<td>3 .9</td>
</tr>
<tr>
<td>MISC. &amp; MISSING</td>
<td>26 70.3</td>
<td>11 29.7</td>
<td>37 10.5</td>
</tr>
<tr>
<td>1ST AMENDMENT</td>
<td>19 46.3</td>
<td>22 53.7</td>
<td>41 11.6</td>
</tr>
<tr>
<td>JUDICIAL ERROR</td>
<td>2 100.0</td>
<td>0 0.0</td>
<td>2 .6</td>
</tr>
<tr>
<td>COLUMN TOTAL</td>
<td>156 44.2</td>
<td>197 55.8</td>
<td>353 100.0</td>
</tr>
</tbody>
</table>

Police and employment cases also dominate in the area of procedural progress. Table XVII shows that, among categories with substantial filings, police and employment cases had the highest rates of answers, interrogatories, pretrial conferences, depositions, and trials. In rate of hearings, on the other hand, due process actions tied with employment actions for the highest rate, and first amendment cases also outpaced police cases.

2. Prisoner Cases

Many believe that most prisoner civil rights cases are frivolous, or so inarticulately pleaded as to preclude serious consideration. Prior studies, revealing an abysmally low success rate in prisoner

205 See supra Table VIII.
TABLE XVII


<table>
<thead>
<tr>
<th>KIND OF CASE</th>
<th>NO.</th>
<th>ANSWER</th>
<th>INTERROG.</th>
<th>HEARING</th>
<th>CONF.</th>
<th>DEPOS.</th>
<th>TRIAL</th>
<th>PROD.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Polícia</td>
<td>170</td>
<td>68%</td>
<td>41%</td>
<td>36%</td>
<td>24%</td>
<td>38%</td>
<td>14%</td>
<td>4%</td>
</tr>
<tr>
<td>EMPLOYMENT</td>
<td>76</td>
<td>87%</td>
<td>54%</td>
<td>55%</td>
<td>29%</td>
<td>43%</td>
<td>20%</td>
<td>9%</td>
</tr>
<tr>
<td>OTHER DISC.</td>
<td>22</td>
<td>36%</td>
<td>23%</td>
<td>23%</td>
<td>0%</td>
<td>9%</td>
<td>0%</td>
<td>5%</td>
</tr>
<tr>
<td>DUE PROCESS</td>
<td>58</td>
<td>36%</td>
<td>19%</td>
<td>55%</td>
<td>9%</td>
<td>19%</td>
<td>5%</td>
<td>3%</td>
</tr>
<tr>
<td>MALIC. PROS.</td>
<td>6</td>
<td>67%</td>
<td>50%</td>
<td>33%</td>
<td>17%</td>
<td>0%</td>
<td>17%</td>
<td>0%</td>
</tr>
<tr>
<td>TAX</td>
<td>3</td>
<td>67%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>MISC. &amp; MISSING</td>
<td>70</td>
<td>31%</td>
<td>14%</td>
<td>39%</td>
<td>3%</td>
<td>17%</td>
<td>4%</td>
<td>4%</td>
</tr>
<tr>
<td>1ST AMEND.</td>
<td>43</td>
<td>49%</td>
<td>21%</td>
<td>47%</td>
<td>12%</td>
<td>23%</td>
<td>12%</td>
<td>2%</td>
</tr>
<tr>
<td>JUDIC. ERR.</td>
<td>16</td>
<td>25%</td>
<td>0%</td>
<td>19%</td>
<td>0%</td>
<td>6%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>464</td>
<td>57%</td>
<td>32%</td>
<td>41%</td>
<td>16%</td>
<td>29%</td>
<td>11%</td>
<td>5%</td>
</tr>
</tbody>
</table>

civil rights cases, amply support this view.206 The stereotypical view of a prisoner civil rights action is of an action filed as an act of recreation or protest, not as a serious dispute.

At first blush, our findings support this view. Prisoners do markedly worse than nonprisoners in litigating constitutional tort claims.207 It may be wise, however, to separate counseled prisoner cases from uncounseled prisoner cases. Over the three years studied, only seventeen prisoner constitutional tort cases were counseled, a number small enough to preclude firm conclusions.

Nevertheless, controlling for counsel in this manner yields interesting results. Table XVIII shows that, except for one characteristic, there is no statistically significant difference between counseled prisoner constitutional tort cases and counselled nonprisoner constitutional tort cases. Using our broad definition of success,208 prisoner constitutional tort claimants succeeded in 53% of the cases filed by counsel, whereas nonprisoner constitutional tort claimants succeeded 56% of the time. The one exception is for cases reaching trial: 41% of the counselled prisoner cases reached trial, compared to only 13% of the counselled nonprisoner cases.

These observations suggest that if a lawyer is willing to take a case, prisoner claims are as successful as nonprisoner claims. On the other hand, our sample size may be too small to reveal significant differences. Firmer conclusions must await data from other districts.

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206 Bailey, supra note 3, at 531-36; Eisenberg, supra note 8, at 526-32; Turner, supra note 3, at 624-25.

207 Table VIII, supra, shows that nonprisoners succeeded in 93 of 202 cases (46%) and that all constitutional tort plaintiffs succeeded in 104 of 276 cases (38%), leaving prisoners successful in only 11 of 74 cases (15%).

208 See supra text following note 167.
TABLE XVIII
COMPARISON OF COUNSELED PRISONER & NONPRISONER

<table>
<thead>
<tr>
<th>CASE CHARACTERISTICS</th>
<th>NONPRISONER</th>
<th>PRISONER</th>
<th>SIGNIFICANT DIFFERENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUCCESS</td>
<td>197 56%</td>
<td>9 53%</td>
<td>No</td>
</tr>
<tr>
<td>ANSWER</td>
<td>233 66%</td>
<td>12 71%</td>
<td>No</td>
</tr>
<tr>
<td>INTERROGATORIES</td>
<td>137 39%</td>
<td>10 59%</td>
<td>No</td>
</tr>
<tr>
<td>HEARING</td>
<td>163 46%</td>
<td>7 41%</td>
<td>No</td>
</tr>
<tr>
<td>PRETRIAL CONFERENCE</td>
<td>70 20%</td>
<td>4 24%</td>
<td>No</td>
</tr>
<tr>
<td>DEPOSITIONS</td>
<td>125 35%</td>
<td>7 41%</td>
<td>No</td>
</tr>
<tr>
<td>TRIAL COMMENCED</td>
<td>47 13%</td>
<td>7 41%</td>
<td>Yes</td>
</tr>
<tr>
<td>PRODUCTION OF DOCUMENTS</td>
<td>20 6%</td>
<td>0 0%</td>
<td>No</td>
</tr>
<tr>
<td>DISCOVERY EVENT</td>
<td>177 50%</td>
<td>10 59%</td>
<td>No *</td>
</tr>
<tr>
<td>MONEY JUDGMENT</td>
<td>9 3%</td>
<td>1 6%</td>
<td>No</td>
</tr>
<tr>
<td>MONEY SETTLEMENT</td>
<td>15 4%</td>
<td>1 6%</td>
<td>No</td>
</tr>
<tr>
<td>FEES AWARDED BY COURT</td>
<td>12 3%</td>
<td>0 0%</td>
<td>No</td>
</tr>
<tr>
<td>TOTAL CASES</td>
<td>353 100%</td>
<td>17 100%</td>
<td></td>
</tr>
</tbody>
</table>

V
RECONCILING THE REALITY AND PERCEPTION OF
CONSTITUTIONAL TORT LITIGATION

Nationwide in 1981, nonprisoner civil rights cases comprised about 8.5% of the federal civil docket.\textsuperscript{209} Prisoners filed about 15.3% of the civil cases.\textsuperscript{210} The significance of these percentages is in the eye of the beholder. Since 1975, the percentage of the docket devoted to nonprisoner civil rights filings has decreased,\textsuperscript{211} and total filings per prisoner (civil rights plus habeas corpus) have increased more slowly than civil filings in general.\textsuperscript{212} Detailed examination of Central District civil rights and prisoner cases reveals that only about 42% are constitutional tort cases. These cases comprise only about four percent of the Central District’s civil docket and result in the transfer of relatively small amounts of money.

These figures are smaller than the dire warnings and common perceptions suggest. Several factors may help explain the divergence between reality and perception. First, observers tend to merge different classes of prisoner and nonprisoner civil rights

\textsuperscript{209} A.O. MANAGEMENT STATISTICS, \textit{supra} note 7, at 129 (showing 15,419 civil rights cases among 180,576 total civil filings).

\textsuperscript{210} \textit{Id.} (showing 27,711 prisoner petitions among 180,576 total filings).

\textsuperscript{211} Table III, \textit{supra}, establishes this for “other civil rights” cases. It holds for total civil rights filings as well. 1984 REPORT, \textit{supra} note 101, at 145 (table 25).

\textsuperscript{212} Table II, \textit{supra}, shows combined habeas corpus and prisoner civil rights filings as increasing 61% from 1975 to 1984. Table III, \textit{supra}, shows total civil filings increasing at twice this rate.
cases together,\textsuperscript{213} often including prisoner habeas filings as well. Nationally in 1981 nonprisoner civil rights cases were only about half (55.6\%) of the total prisoner filings.\textsuperscript{214} In addition, many observers fail to distinguish between constitutional tort cases and other civil rights cases.\textsuperscript{215} Among civil rights cases, constitutional tort cases are the headline-grabbers—police misconduct, first amendment claims, school desegregation, and the like. Nevertheless, our data suggest that, in the Central District, nonprisoner constitutional tort cases are less than half of all nonprisoner civil rights cases.\textsuperscript{216}

Second, our findings on burdens and success rates may explain some of this divergence between the perception and reality of the litigation explosion. The average constitutional tort case spends more time on the docket than the average non-civil rights case, is more likely to generate discovery, more likely to require a hearing, and at least as likely to reach trial. Thus, the average constitutional tort case probably consumes more lawyer and judge time than do other cases. Yet constitutional tort plaintiffs are less likely to succeed than other plaintiffs. This combination of relatively complicated cases and low success rates may foster the impression that constitutional tort cases are frivolous burdens. In addition, the psychological tendency to overestimate quantity based on a few unrepresentative but memorable cases is well documented.\textsuperscript{217} From a few highly visible constitutional tort cases, observers may perceive an avalanche.

Finally, public impressions of constitutional tort litigation come largely from published appellate or Supreme Court opinions or secondary sources such as newspaper accounts. These sources may well relatively emphasize constitutional tort cases over other types of litigation that reach the federal district courts.

In the interest of clearly presenting the data, we seek here neither to explain the differences between constitutional tort litiga-

\textsuperscript{213} See supra text accompanying note 99.
\textsuperscript{214} Table I, supra, shows 15,419 nonprisoner filings and Table II, supra, shows 27,711 prisoner filings.
\textsuperscript{215} See supra note 98 and accompanying text.
\textsuperscript{216} See supra text accompanying notes 128-33. Constitutional tort filings by prisoners constitute 79 of 459 (17.2\%) prisoner filings in the study.
tion and other litigation nor to suggest the public policy implications of our findings about the numbers, burden, and fiscal impact of constitutional tort cases. Our primary goal has been simply to report our findings.

Nevertheless, one broad conclusion does emerge. National filing data refute the myth of a recent civil rights litigation explosion. On other issues, such as relative success, burden, and fiscal drain, conclusions necessarily are restrained by this article’s limitation to a single district. More comprehensive findings may emerge when further data become available. For now we suggest only that decision makers demand evidence to support assertions about constitutional tort cases, and that they not act in the empirical void that has dominated discussion to date.