Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant

Stewart J. Schwab
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EXPLAINING CONSTITUTIONAL TORT LITIGATION: THE INFLUENCE OF THE ATTORNEY FEES STATUTE AND THE GOVERNMENT AS DEFENDANT

Stewart J. Schwab†
& Theodore Eisenberg††

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Our earlier study in this Review examined three years of federal constitutional tort litigation in the Central District of California. It sketched the perceptions that dominate public and professional debate about constitutional tort litigation and included several find-
ings questioning and explaining those perceptions: the national decline from 1975 to 1984 in civil rights filings as a percentage of the federal civil docket,\(^3\) the lower success rates and generally greater burden of constitutional tort litigation compared with other civil litigation,\(^4\) the few successful constitutional tort actions per capita,\(^5\) and the modest direct fiscal drain of constitutional tort litigation.\(^6\)

This Article has two purposes. The first, pursued in Parts I and II, is to report the results of a study of constitutional tort litigation in two other districts, the Eastern District of Pennsylvania and the Northern District of Georgia, that replicates the California study. The study covers one of the same time periods as the California study, a fiscal 1980-81 year,\(^7\) and, for most purposes, presents results aggregated across the three districts.\(^8\)

Briefly, the aggregate findings confirm most of the earlier California study's major findings. Constitutional tort cases are less numerous than popular perceptions suggest. A much smaller fraction of constitutional tort plaintiffs prevail—either by settling or winning a court judgment—than do other civil plaintiffs. Court awards of attorney fees in constitutional tort cases are surprisingly infrequent and, as a percentage of cases filed, courts award them no more often than in other cases. Courts do award fees, however, in a higher per-

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\(^3\) Eisenberg & Schwab, supra note 1, at 658-68.
\(^4\) Id. at 671-81.
\(^5\) Id. at 681-83.
\(^6\) Id. at 684-88. Eisenberg & Schwab, The Importance of Section 1981, 73 CORNELL L. REV. 596 (1988), uses the same field data as this study to assess the number and nature of actions brought under 42 U.S.C. § 1981 (1982).
\(^7\) The earlier California study covered cases filed in calendar years 1975 and 1976. Eisenberg & Schwab, supra note 1, at 657.
\(^8\) Together, these districts include, for 1980-81, 8.1% of all federal nonbankruptcy civil filings, 7.9% of all nonprisoner civil rights filings, and 5.1% of all prisoner civil rights filings. The districts also include 8.7% of the 1980 United States population. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE MONTH PERIOD ENDED DEC. 31, 1981, at A-8 to A-11 [hereinafter FEDERAL JUDICIAL WORKLOAD STATISTICS]. These figures are for a year slightly different than that used in the field portion of this study. The relatively low percentage of prisoner civil rights filings represented by the three districts is in part a consequence of the concentration of prisoner civil rights filings in a few districts. For example, the Eastern District of Virginia and the Middle District of Florida had, respectively, 7.6% and 5.7% of all prisoner civil rights filings for the period. Id. The Administrative Office of U.S. Courts, using preliminary census data, reported the 1980 population of the three districts to be: 11,950,211 (Central District of California), 5,017,194 (Eastern District of Pennsylvania), 2,985,912 (Northern District of Georgia). Id. at A-92. The combined population figure for the three districts is 19,863,317. The same data show the total U.S. population to be 229,910,565. Other reports of census data differ slightly from these figures.
centration of successful constitutional tort cases than in other successful cases.

We can refine some of our prior findings in light of the new larger study. The earlier study suggests that the average constitutional tort action imposes a greater burden on the courts than other cases impose.\(^9\) The new study highlights the importance of distinguishing between the average prisoner and nonprisoner constitutional tort action when assessing this burden. Although the typical nonprisoner constitutional tort action is more burdensome than other civil actions, the typical prisoner constitutional tort action is less burdensome. The larger sample also permits deeper exploration of constitutional tort litigation in which attorneys represent prisoners. It reveals that counselled prisoner constitutional tort cases are virtually indistinguishable in success rates and other major characteristics from nonprisoner constitutional tort actions.

Our second goal, pursued in Parts III through V, is to explain the findings. The findings suggest that a distinctive feature of constitutional tort actions—their challenge to government or official behavior—may contribute to plaintiffs' low success rates, though further study is needed. The findings also question both some assumed effects of the Civil Rights Attorneys Fees Award Act of 1976,\(^10\) and Judge Posner's assumption of a working market satisfying prisoners' needs for attorneys.\(^11\) Examining the actors and their incentives generates implications beyond the constitutional tort context. The analysis based on these findings provides new insights into the influence of attorney fees statutes on litigation, the market for attorneys, and the government as defendant.

The study provides neither a comprehensive picture of the burden and impact of constitutional tort litigation nor a normative assessment of the level of constitutional tort activity. Important omissions include the full impact of institutional litigation, often cast as constitutional tort actions, and the full measure of defense costs. With respect to normative matters, the study does not examine the optimal level of constitutional tort litigation or its effect on social welfare.

A preliminary word on data sources is helpful in interpreting the results that follow. The data come from three primary sources: (1) national statistics from 1975 to 1984 published by the Administrative Office; (2) unpublished Administrative Office termination and filing data covering the same period furnished to us on computer tapes; and (3) data gathered by reading case files of constitu-

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9 Eisenberg & Schwab, supra note 1, at 671-76.
11 See infra notes 194-96 and accompanying text.
tional tort cases and a control group of non-civil-rights cases in the three studied districts. Where the tables that follow do not indicate a source, the findings are based on our field data.\(^\text{12}\)

1

**THE NUMBER OF CONSTITUTIONAL TORT CASES**

Data gathered by the Administrative Office do not identify constitutional tort litigation as a separate lawsuit category. The Administrative Office’s civil rights categories do contain nearly all possible constitutional tort actions but these categories also contain cases other than constitutional tort actions. The Administrative Office data therefore supply a list of cases that, when culled, can be used to identify constitutional tort actions.\(^\text{13}\)

In 1980-81 litigants filed 1,241 nonprisoner civil rights cases in the three districts studied. The Administrative Office data on civil rights categories show the following breakdown of these cases:

<table>
<thead>
<tr>
<th>Administrative Office Code</th>
<th>Name of Category</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>440</td>
<td>Other Civil Rights</td>
<td>660</td>
</tr>
<tr>
<td>441</td>
<td>Voting</td>
<td>8</td>
</tr>
<tr>
<td>442</td>
<td>Jobs</td>
<td>536</td>
</tr>
<tr>
<td>443</td>
<td>Accommodations</td>
<td>23</td>
</tr>
<tr>
<td>444</td>
<td>Welfare</td>
<td>14</td>
</tr>
</tbody>
</table>

The data also show 727 prisoner civil rights filings, for a total of 1,968 possible constitutional tort cases. Several factors, including double counting, transferred cases, and miscategorization, reduce the number of possible constitutional tort filings to 1,858.\(^\text{14}\) Our assistants located full or partial data on 1,837 of these cases (about

\(^\text{12}\) For further discussion of data sources, see Eisenberg & Schwab, *supra* note 1, at 657-58.

\(^\text{13}\) The study used such a list to identify constitutional tort cases through a field inspection of court records. See *Id.* at 652-55.

\(^\text{14}\) The Administrative Office data list 19 cases twice, leaving 1,949 possible cases. Forty-eight cases on the lists were not filed in or transferred to the three districts during the fiscal year studied, leaving 1,901 cases. These are cases formerly suspended for statistical purposes but reinstated for statistical purposes after being revived. See **ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES** transmittal 64, vol. XI, at II-13 (Mar. 1, 1985) [hereinafter A.O. GUIDE]. Courts transferred 45 cases to other districts before substantial activity occurred in the studied districts, and six cases were bankruptcy cases miscategorized as civil rights cases, leaving 1,850 cases. We add to this eight civil rights cases that the Administrative Office data do not categorize as civil rights cases and therefore failed to include on the civil rights case list, which we discovered when compiling our control sample of non-civil-rights cases.
Table I shows that 49.2% of the Administrative Office’s non-prisoner “civil rights” cases are constitutional tort cases and that 89.0% of the Administrative Office’s “prisoner civil rights” cases are constitutional tort cases. Combining the prisoner and non-prisoner categories, 64.1% of the civil rights cases are constitutional tort cases. The rest are actions based on various other statutes, the largest number being title VII employment discrimination cases.

Many constitutional tort cases are employment discrimination claims against a government that also include a title VII allegation. Because of the lower burden of proof in some title VII cases, such hybrid cases probably are driven by the title VII claim and should therefore be excluded from the constitutional tort category. Excluding these 60 cases from the 582 constitutional tort cases leaves 522 (or 44% of the Administrative Office civil rights cases) “pure” nonprisoner constitutional tort cases or 1,151 (61%) prisoner and nonprisoner constitutional tort cases filed in the three districts in 1980-81. This figure could be further reduced by the 61 cases in which plaintiffs erroneously relied on section 1983, leaving 461
TABLE I
NUMBER OF CONSTITUTIONAL TORT CASES, 3 DISTRICTS, 1980-81
ADMINISTRATIVE OFFICE DATA COMPARED WITH FIELD DATA

<table>
<thead>
<tr>
<th>Administrative Office Label (Code)</th>
<th>Non. of Cases (Admin. Off.)</th>
<th>Constitutional Tort Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No. of Cases</td>
<td>Number Found</td>
</tr>
<tr>
<td>Other Civil Rights (440)</td>
<td>631</td>
<td>467</td>
</tr>
<tr>
<td>Voting (441)</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Jobs (442)</td>
<td>509</td>
<td>95</td>
</tr>
<tr>
<td>Accommodations (443)</td>
<td>22</td>
<td>6</td>
</tr>
<tr>
<td>Welfare (444)</td>
<td>13</td>
<td>9</td>
</tr>
<tr>
<td>Subtotal</td>
<td>1183</td>
<td>582</td>
</tr>
<tr>
<td>Nonprisoner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prisoner Civil Rts. (550)</td>
<td>707</td>
<td>629</td>
</tr>
<tr>
<td>COLUMN TOTAL</td>
<td>1890</td>
<td>1211</td>
</tr>
</tbody>
</table>

(39% of the Administrative Office civil rights cases) true non-prisoner cases and 1,090 (58%) cases in the combined category. In comparison, plaintiffs filed 3,406 non-civil-rights tort cases in the three districts during 1980-81.21

Using the above figures, each of the 47 judges in the three districts22 received about two constitutional tort filings per month.23 To put this figure in perspective, in 1980-81 civil filings in the three districts totaled 14,989.24 The nonprisoner constitutional tort filings thus comprised about three percent of the districts' civil caseload, and the combined prisoner and nonprisoner constitutional tort filings comprised approximately seven percent.25

*ant. This understates erroneous reliance because it accepts cases in which plaintiff names an official actor as defendant but fails to allege a constitutional violation.
21 The tort case filing figure is from the Administrative Office computer tapes.
22 For fiscal 1981, the Central District of California had 17 judgeships, the Northern District of Georgia had 11, and the Eastern District of Pennsylvania had 19. ADMIN. OFFICE OF THE U.S. COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 1981, at 33, 55, 105.
23 This figure includes the many prisoner constitutional tort actions that are quickly dismissed.
24 This figure is based on Administrative Office tapes for cases filed in the three districts from October 1, 1980, to September 30, 1981. The tapes show 15,075 cases, but 86 are listed more than once.
25 The fraction of the docket consisting of constitutional tort cases in the three districts under study here is somewhat below the national average unless in the three studied districts actual constitutional tort cases constitute an unusually high proportion of cases in the Administrative Office's civil rights category. See supra note 8 and accompanying text. If one discounts the nationwide Administrative Office data by the percentages in the last column of Table I, then in fiscal 1980-81 nonprisoner constitutional tort cases comprised 8.9% of the nationwide federal docket, and prisoner constitutional tort cases comprised an additional 17%. The figures to which the Table's percentages are
II
CHARACTERISTICS OF CONSTITUTIONAL TORT LITIGATION

A. The Success of Constitutional Tort Litigants

1. Defining Success

Our field data and the Administrative Office data provide measures of both the absolute and the relative success of constitutional tort cases. Before presenting the results, however, some discussion of the meaning of “success” is in order. There are several plausible definitions of a successful case. They range from purely economic analyses of investment in and return from a lawsuit to more subjective approaches. Limited to courthouse records, however, we employ more pedestrian measures of success.

As perhaps the most obvious measure of success, we determine the percentage of cases in which the plaintiff obtained a favorable court judgment. Even here, however, there is room to interpret whether a case succeeded. Juries may award nominal or other damages that are trivial in comparison to the amount the plaintiff expended in the litigation. Full assessment of such a case would deem it unsuccessful even though the plaintiff was victorious at trial and the keepers of statistics must record the victory in plaintiff’s column. A truer measure of success might compare the magnitude of plaintiffs’ recoveries to their investments in the litigation.

We do not limit ourselves to court judgments, however, because doing so ignores the many cases that the parties settle privately. We thus estimate the percentage of cases that settle and count these as successful as well. Of course, many settlements

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26 For example, a prisoner who sues because a guard has been beating him may be “successful” if the action deters the guard from beating prisoners, even though the prisoner received no economic recovery. See Eisenberg & Schwab, supra note 1, at 676-77. See generally H. Kritzer, A. Sarat, D. Trubek, & W. Felstiner, Winners and Losers in Litigation: Does Anyone Come Out Ahead? (paper presented at Annual Meeting of the Midwest Political Science Ass’n, Apr. 18-20, 1985) (noting ambiguity of concepts “winning” and “losing” civil litigation).


28 See e.g., H. Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment 136 (2d ed. 1980); Trubek, supra note 27, at 86.
suit in de minimis or disproportionately small payments to plaintiffs compared with their investment. But, given the insufficient detail about most individual settlements, we probably distort reality less by assuming that plaintiffs succeed in settled cases than by assuming they do not succeed. To obtain a fuller picture of constitutional tort litigation, it is preferable to account for differences in settlement patterns as well as trial outcomes.  

Under our broad measure of success, then, a successful case is any one in which (1) the plaintiff wins after trial or on summary judgment, (2) the parties settle, (3) the court grants a stipulated dismissal, or (4) the plaintiff dismisses the case voluntarily. Under our broad definition a case is unsuccessful only if the court dismisses the claim on the merits or for lack of prosecution, or if the plaintiff receives an adverse verdict after a bench or jury trial.

The intuition driving this broad definition is that plaintiffs who go to the trouble of commencing lawsuits do not usually settle them or voluntarily withdraw them without gaining something in return. This can be true even if the action is filed without a serious intention of pursuing it to trial. For example, if the mere filing of a lawsuit changes the defendant's practices (e.g., the defendant guard no longer beats a prisoner), the plaintiff might withdraw the action. A further justification for using a broad measure of success is that, when testing the impression of burden and fiscal drain of constitutional tort litigation, it is important not to understate its success rate.

The broad definition of success misclassifies cases filed and later settled or withdrawn in which the plaintiff receives nothing. This probably occurs infrequently in settled cases, by far the largest category of cases with unclear resolutions. But the plaintiff who files an action to test who the judge might be, or who files to satisfy some psychological need to file, or who files because filing is about as interesting as anything else the plaintiff has to do, may file a case and withdraw it. These cases ought not count as having succeeded. Counting them as successful probably distorts the prisoner results.

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29 Trubek, supra note 27, at 83.
30 For an estimate of the magnitude of the overstatement this definition of success introduces, see Eisenberg & Schwab, supra note 1, at 683-84.
31 H. Ross, supra note 28, at 215-16.
32 Even though here, too, some of these plaintiffs got what they wanted. They just did not want very much more than to file the action. Professor Galanter effectively marshals studies suggesting that, in general, "litigants do not act as if propelled by an unappeasable appetite for contest or public vindication," and that litigants find litigation an unpleasant experience. Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3, 8-9 (1986).
(by overstating success) more than it distorts the nonprisoner results.

The control group ensures that constitutional tort plaintiffs' success rates are not overly distorted. For many purposes, one need only focus on the success rate of constitutional tort cases relative to the success rate of other cases. The randomly selected control group's success rate provides a baseline for such comparative purposes even if it, too, overstates success rates.

2. The Data on Success

Table II presents Administrative Office data relating to success for the Administrative Office categories of cases called “other civil rights” and “prisoner civil rights,” the categories that most nearly correspond to constitutional tort litigation. The Administrative Office data, displayed in Table II, suggest that constitutional tort plaintiffs do significantly worse than non-civil-rights litigants. Table II shows that constitutional tort plaintiffs prevailed in 59 out of 468 (12.6%) cases in which the district court clerks report an outcome in favor of a plaintiff or a defendant. This figure rises to 22.1% (48 of 217 cases) if one limits the sample to nonprisoner cases. In non-civil-rights cases, plaintiffs were reportedly successful in 2,979 out of 4,069 cases (73.2%). If one excludes cases resulting in default judgments, non-civil-rights plaintiffs still prevail in 1,394 of 2,475 cases (56.3%).

<table>
<thead>
<tr>
<th>TABLE II</th>
</tr>
</thead>
<tbody>
<tr>
<td>PARTY OBTAINING JUDGMENT IN POSSIBLE CONSTITUTIONAL TORT CASES COMPARED WITH NON-CIVIL-RIGHTS CASES</td>
</tr>
<tr>
<td>SOURCE: Administrative Office Data, 3 Districts, 1980-81</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Possible Constitutional Tort Cases</th>
<th>Non-civil-rights</th>
<th>Non-prisoner Constit. Tort</th>
<th>Non-civil-rts. Without Defaults</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>59</td>
<td>2979</td>
<td>48</td>
</tr>
<tr>
<td>12.6%</td>
<td>73.2%</td>
<td>22.1%</td>
<td>56.3%</td>
</tr>
<tr>
<td>Defendant</td>
<td>409</td>
<td>1090</td>
<td>169</td>
</tr>
<tr>
<td>87.4%</td>
<td>26.8%</td>
<td>77.9%</td>
<td>43.7%</td>
</tr>
<tr>
<td>COLUMN TOTAL</td>
<td>468</td>
<td>4069</td>
<td>217</td>
</tr>
</tbody>
</table>

33 Examining cases by what the Administrative Office labels “disposition,” see A.O. GUIDE, supra note 14, at II-24 to II-26, and again limiting the analysis to cases showing a prevailing party, the same pattern emerges. In cases disposed of by motion before trial, described in id. at II-25, II-26, constitutional tort plaintiffs prevailed in 8% of the cases while non-civil-rights plaintiffs prevailed in 40% of the cases. In cases disposed of by jury trial, constitutional tort plaintiffs prevailed in 18% of the cases and non-civil-rights plaintiffs prevailed in 49% of the cases. In cases disposed of by the court during or after trial, constitutional tort plaintiffs prevailed in a much lower percentage of the cases. Similar results emerge when one examines nonprisoner constitutional tort cases separately.

34 Possible constitutional tort cases are those in the Administrative Office category “other civil rights” (code 440) and “prisoner civil rights” (code 550). See supra Table I.
Applying our definition of success to our field data confirms the relative failure of constitutional tort litigants. One can be more confident about the results from the field data than from the Administrative Office Data because only cases determined to be constitutional tort cases are treated as such in the field data. As noted above, the Administrative Office categories do not cut finely enough to assure this.

According to the field data, nonprisoner constitutional tort plaintiffs succeeded (i.e., settled or received a favorable court judgment) in 50% of the cases filed. Control group plaintiffs succeeded in 84% of the cases they filed. Most of these successes are not the result of favorable court judgments. For nonprisoners, 45% of the cases are settled, withdrawn, or given a stipulated dismissal, while only 5% obtain a favorable court judgment. For prisoners, 17% of the cases are settled, withdrawn, or given a stipulated dismissal, while only 1% (a total of 7 cases) obtain favorable court judgment.

Our sample of non-civil-rights cases indicates that 73% of the cases

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35 See supra notes 13-14 and accompanying text.
36 See infra Table IV ("success" row, nonprisoner column). Whatever the shortcomings of our definition of success, our control group success rate is consistent with the rates observed by scholars in other types of cases. In personal injury tort cases and medical malpractice actions, for example, scholars report that plaintiffs obtain some amount through settlement or trial in over 80% of the cases filed. 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, supra note 28, at 217; DANZON & LILLARD, SETTLEMENT OUT OF COURT: THE DISPOSITION OF MEDICAL MALPRACTICE CLAIMS, 12 J. LEGAL STUD. 345, 365 (1983); Franklin, Chanin & Mark, Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation, 61 COLUM. L. REV. 1, 10-11, 13-14 (1961); Schwartz & Mitchell, An Economic Analysis of the Contingent Fee in Personal-Injury Litigation, 22 STAN. L. REV. 1125, 1155 n.45 (1970). In a study of ten courts, 88% of the cases settled. D. TRUBEK, J. GROSSMAN, W. FELSTINER, H. KRITZER & A. SARAT, CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT, PART A, at II-82 (1983) [hereinafter CLRP]. In antitrust cases, many commentators emphasize the poor success rate in adjudicated disputes. But their data also suggest some success, through settlement or otherwise, in the 75% to 80% range. See Baxter, supra note 27, at 16, 17 table 1-1; Perloff & Rubinfeld, Settlements in Private Antitrust Litigation, in PRIVATE ANTITRUST LITIGATION 149, 163 (L. White ed. 1988) [hereinafter PRIVATE ANTITRUST LITIGATION]; Salop & White, Private Antitrust Litigation: An Introduction and Framework, in id. at 3, 10-11. In class and derivative actions, the success rate in filed disputes is close to the 80% figure. See Jones, An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Suits, 60 B.U.L. REV. 542, 545 (1980) (75.3% of suits led to some recovery). But see F. Wood, Survey and Report Regarding Derivative Suits 32 (1944), as reported in Conard, A Behavioral Analysis of Directors' Liability for Negligence, 1972 DUKE L.J. 805, 901 n.21 (lower success rate in filed cases).
37 See infra Table IV. One can look within court judgments to the success of plaintiffs at trial. Control group plaintiffs prevailed in 27 of 48 (56.3%) trials. Nonprisoner constitutional tort plaintiffs prevailed in 17 of 62 (27.4%) trials, while prisoner constitutional tort plaintiffs prevailed in 5 of 27 (18.5%) trials. The differences between the control group trial success rate and both categories of constitutional tort litigation are significant at the .01 level. See infra note 52.
38 Id.
are settled, withdrawn, or given a stipulated dismissal, and plaintiffs obtain a favorable court judgment in an additional 11% of the cases.\textsuperscript{39} Constitutional tort plaintiffs also obtained a money judgment or money settlement in a significantly lower percentage of cases than other plaintiffs did.\textsuperscript{40}

Computing an upper limit on the number of successful constitutional tort actions provides one insight into the constitutional tort litigation problem. Nonprisoner constitutional tort cases succeed about half the time.\textsuperscript{41} Prisoner constitutional tort cases succeed about 18% of the time.\textsuperscript{42} Under our broad definition of success, not more than 364 constitutional tort cases achieved some success\textsuperscript{43} in 1980-81 in the three districts. The 1980 census shows that the three districts had a population of 19.86 million.\textsuperscript{44} Thus, not more than one person in 54,000 brought a successful constitutional tort case in 1980-81.

\textsuperscript{39} Id.

\textsuperscript{40} See infra Table IV. The field data allow control for an important factor, representation by counsel, not included in the Administrative Office data. Prisoner constitutional tort plaintiffs obtain counsel in 20% of the filed cases. (The aggregate three-district figure is misleading here. See infra text accompanying notes 198-200.) Counsel represent nonprisoner constitutional tort plaintiffs in about 87% of the filed cases. Non-civil-rights litigants have counsel 98% of the time. Counseled plaintiffs ought to have higher success rates both because of greater litigation skills and because counsel may refuse to bring the weaker constitutional tort cases. \textit{Cf.} H. Ross, supra note 28, at 193-98 (in bodily injury claims, representation by counsel is major influence on outcome). But less frequent representation by counsel can explain only a small part of the lower success rates of constitutional tort plaintiffs. Controlling for the presence of counsel, significant differences remain between the rate of recoveries by constitutional tort plaintiffs and others. This is true even if one screens out default judgment cases and ignores all prisoner cases.

\textsuperscript{41} See infra Table IV. This is similar to the result obtained earlier for a single district. See Eisenberg & Schwab, supra note 1, at 682 (success rates for counseled constitutional tort cases is about one-half).

\textsuperscript{42} We suspect that this overstates prisoner success rates. An independent study of prisoner civil rights suits suggests extremely low prisoner success rates. Contact Center, Inc. surveyed 33 state correction systems and the Federal Bureau of Prisons. Using data mostly for the years 1983 and 1984, the systems reported on suits lost or settled resulting in monetary damages to an inmate, and suits lost or settled in which an inmate's attorney was awarded fees. For the 34 jurisdictions during the two-year period, departments reported 91 monetary damages suits lost, 159 monetary damages suits settled, and 56 suits in which attorney fees were awarded. \textit{Contact Center, Inc., INMATE LAWSUITS} (1985) \textit{[hereinafter Contact Center]}. The inmate lawsuits study may underestimate prisoner success rates. \textit{See} Letter to Gary Hill (of Contact Center, Inc.) from Jim Thomas, Northern Illinois University Department of Sociology (questioning methodology and data) (Apr. 4, 1986) \textit{[on file at Cornell Law Review]}. It should also be noted that the study did not receive data from several states with large prison populations, including California, Florida, New York, Ohio, Texas, and Virginia.

\textsuperscript{43} Table IV's percentages are based on 108 prisoner cases that were settled, voluntarily dismissed, or withdrawn and 7 that obtained a favorable court judgment, and 229 nonprisoner cases that were settled, voluntarily dismissed, or withdrawn and 25 that obtained a favorable judgment.

\textsuperscript{44} See supra note 8.
B. The Relative Burden of Constitutional Tort Litigation

As explained in our earlier work, time to disposition, procedural progress, and litigation activity can be used to assess the relative burdens imposed by constitutional tort and non-civil-rights cases.\(^{45}\) Both our field data and the Administrative Office data suggest that the typical nonprisoner constitutional tort case takes more judge and lawyer time than the typical non-civil-rights case on the federal docket. In contrast, the typical prisoner constitutional tort case takes about the same time as a non-civil-rights case and is less burdensome in other respects.

1. Time to Disposition

Table III shows that nonprisoner constitutional tort cases take longer to resolve than contested control group cases. The median disposition time of 11.2 months for nonprisoner constitutional tort cases exceeds the 9.2 month median for the control group. Additionally, a greater proportion of nonprisoner constitutional tort cases survive at the end of each of four six-month intervals.

Prisoner constitutional tort cases present a less clear pattern. A lower percentage of prisoner cases than control group cases survive at the end of six months, but a greater percentage survive at the end of eighteen months and twenty-four months. Thus, relatively many prisoner cases end quickly, but the remaining cases take longer, on average, to dispose of than non-civil-rights cases. Prisoner cases have a lower median time to disposition than control group cases.

More sophisticated analysis of the case survival patterns confirms the differences in survival rates. Survival analysis examines the time separating the starting date (filing a case) and ending date (terminating a case) of a given sample and allows statistical comparisons of the survival distributions for two independently drawn samples.\(^{46}\) The probability that our samples would be this different if the nonprisoner constitutional tort and control group populations had the same cumulative survival distributions is only .0004.\(^{47}\) Furthermore, a greater percentage of constitutional tort cases remain pending at the end of the study, five years after filing. For prisoner constitutional tort cases, the probability of a cumulative survival dis-

\(^{45}\) Eisenberg & Schwab, \textit{supra} note 1, at 671-75.


\(^{47}\) The traditional threshold for statistical significance is .05. We thus reject the null hypothesis that constitutional tort cases and non-civil-rights cases have the same cumulative survival distributions. The .0004 probability is based on a Lee-Desu statistic of 12.435 with one degree of freedom. For a discussion of the Lee-Desu statistic, see Eisenberg & Schwab, \textit{supra} note 1, at 672 n.139.
TABLE III
COMPARATIVE SURVIVAL LIFE TABLE CONSTITUTIONAL TORT CASES
VS. CONTROL GROUP, 3 DISTRICTS, 1980-81

<table>
<thead>
<tr>
<th>Interval Start Time</th>
<th>Constitutional Tort (prisoner)</th>
<th>Control Group-weighted (excluding defaults)</th>
<th>Constit. Tort (nonprisoner)</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 months</td>
<td>54%</td>
<td>62%</td>
<td>68%</td>
</tr>
<tr>
<td>12 months</td>
<td>35%</td>
<td>35%</td>
<td>46%</td>
</tr>
<tr>
<td>18 months</td>
<td>24%</td>
<td>23%</td>
<td>30%</td>
</tr>
<tr>
<td>24 months</td>
<td>15%</td>
<td>15%</td>
<td>21%</td>
</tr>
<tr>
<td>10% of cases remain</td>
<td>35 mos.</td>
<td>27 mos.</td>
<td>36 mos.</td>
</tr>
<tr>
<td>Median survival time</td>
<td>8.2 mos.</td>
<td>9.2 mos.</td>
<td>11.2 mos.</td>
</tr>
<tr>
<td>Number of Cases</td>
<td>629</td>
<td>649</td>
<td>520</td>
</tr>
<tr>
<td>Pending as of August 1986</td>
<td>1.0%</td>
<td>0.3%</td>
<td>1.5%</td>
</tr>
</tbody>
</table>

Cumulative proportion of cases surviving to end of interval

Distribution similar to the control group is .013, with prisoner cases showing a faster termination rate.\textsuperscript{48} Administrative Office data also suggest that nonprisoner constitutional tort cases last longer than other cases.\textsuperscript{49}

2. Litigation Activity

Table IV presents other comparisons between constitutional tort cases and the control group of non-civil-rights cases. The constitutional tort columns\textsuperscript{50} show the percentage of both prisoner constitutional tort cases and nonprisoner constitutional tort cases for each relevant characteristic. The control group column shows the percentage of cases with the relevant characteristic for all control group cases that did not result in default judgments. The three columns allow separate comparisons of both the prisoner cases and the nonprisoner cases with the control group. They also permit (1) comparisons that avoid overstating the control group cases' success because of the uniformly successful default judgment cases,\textsuperscript{51} and (2) comparisons that avoid understating the constitutional tort cases.

\textsuperscript{48} This is based on a Lee-Desu statistic of 6.156 with one degree of freedom.

\textsuperscript{49} Possible nonprisoner constitutional tort cases had a mean disposition time of 12.8 months with a median of 9.7 months. Non-civil-rights cases (excluding default judgments) had a mean disposition time of 10.8 months and a median of 8.0 months. Possible prisoner constitutional tort cases had a mean disposition time of 11.6 months and a median time of 8.2 months. Large standard deviations, all greater than 10 months, make these measures less helpful than a survival distribution for comparing classes of cases.

\textsuperscript{50} In Table IV we exclude transferred and pending cases from the constitutional tort group. For some categories, the total number of cases differs slightly from the number shown in the "Total Cases" row.

\textsuperscript{51} 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 versus defendant action. The excluded categories are cases involving district court review of agency action, cases in which the primary issue is removal, bankruptcy
cases' success because of the highly unsuccessful prisoner civil rights cases. The two right-hand columns show the degree of statistical significance for the two comparisons.\(^5\)

### TABLE IV

**COMPARISON OF CONSTITUTIONAL TORT & CONTROL GROUP CASES, 3 DISTRICTS, 1980-81**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Success (^6)</td>
<td>18%</td>
<td>84%</td>
<td>50%</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
<td></td>
</tr>
<tr>
<td>by Success in Court</td>
<td>1%</td>
<td>11%</td>
<td>5%</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
<td></td>
</tr>
<tr>
<td>by Settlement, etc.</td>
<td>17%</td>
<td>73%</td>
<td>45%</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
<td></td>
</tr>
<tr>
<td>Answer</td>
<td>46%</td>
<td>67%</td>
<td>72%</td>
<td>&lt;.001</td>
<td>.135</td>
<td></td>
</tr>
<tr>
<td>Interrogatories</td>
<td>20%</td>
<td>29%</td>
<td>38%</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
<td></td>
</tr>
<tr>
<td>Hearing</td>
<td>9%</td>
<td>17%</td>
<td>39%</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
<td></td>
</tr>
<tr>
<td>Pretrial Conference</td>
<td>9%</td>
<td>18%</td>
<td>31%</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
<td></td>
</tr>
<tr>
<td>Depositions</td>
<td>14%</td>
<td>37%</td>
<td>42%</td>
<td>&lt;.001</td>
<td>.080</td>
<td></td>
</tr>
<tr>
<td>Trial Commenced</td>
<td>5%</td>
<td>10%</td>
<td>15%</td>
<td>.002</td>
<td>.006</td>
<td></td>
</tr>
<tr>
<td>Production of Documents</td>
<td>10%</td>
<td>17%</td>
<td>23%</td>
<td>.002</td>
<td>.012</td>
<td></td>
</tr>
<tr>
<td>Discovery Event</td>
<td>26%</td>
<td>46%</td>
<td>53%</td>
<td>&lt;.001</td>
<td>.022</td>
<td></td>
</tr>
<tr>
<td>Money Judgment</td>
<td>1%</td>
<td>10%</td>
<td>2%</td>
<td>&lt;.001</td>
<td>&lt;.001</td>
<td></td>
</tr>
<tr>
<td>Money Settlement</td>
<td>1%</td>
<td>7%</td>
<td>4%</td>
<td>&lt;.001</td>
<td>.072</td>
<td></td>
</tr>
<tr>
<td>Fees Awarded by Court</td>
<td>0%</td>
<td>3%</td>
<td>5%</td>
<td>&lt;.001</td>
<td>.315</td>
<td></td>
</tr>
<tr>
<td>TOTAL CASES</td>
<td>626</td>
<td>653</td>
<td>509</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Our earlier one-district study suggested a clear picture in which constitutional tort litigation seemed more burdensome than other civil litigation.\(^5\) That single district understated the role of prisoner cases.\(^5\) Aggregate results for the three districts suggest a sharper division between prisoner and nonprisoner constitutional

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\(^5\) For a discussion of "success," see supra notes 26-29 and accompanying text. In Table IV the control group cases have been weighted because different percentages of the non-civil-rights case population were sampled in the three districts. The weighting factors for control group cases are .9070 (C.D. Cal.), 1.7460 (E.D. Pa.), and .6054 (N.D. Ga.).

\(^6\) Eisenberg & Schwab, supra note 1, at 672-76.

\(^7\) See supra text following note 9.
tort cases. In nearly all measurable respects, the average non-prisoner constitutional tort case is more burdensome than the average case in the control group. Yet the average prisoner constitutional tort case is distinctly less burdensome.

We first compare nonprisoner constitutional tort cases with the control group. The average constitutional tort case has more documents requiring a lawyer's time than does the average non-civil-rights case. Defendants file answers in constitutional tort cases somewhat more often than in non-civil-rights cases. Discovery events occur more often in constitutional tort cases than in other cases. Lawyers in nonprisoner constitutional tort cases take depositions more often, and file interrogatories significantly more often, than in other cases.

Isolating prisoner constitutional tort cases presents a different picture. As Table IV shows, prisoner constitutional tort cases lead to significantly fewer answers, interrogatories, hearings, depositions, and trials than other litigation.

Examination of the data also suggests the relative burden of constitutional tort cases on judges' court time. Judges are significantly more likely to conduct a hearing in a nonprisoner constitutional tort case than in a non-civil-rights case. Furthermore judges are more likely to have a pretrial conference or conduct a trial in a constitutional tort case. These results remain true even when ignoring default judgments. Prisoner cases again suggest the reverse pattern.

We conclude that the average nonprisoner constitutional tort case is more burdensome than the average non-civil-rights case, while the average prisoner case is less so.

C. Subgroups of Constitutional Tort Cases

Constitutional tort actions cover such a broad range of behavior that it is helpful to examine subcategories of such cases. Table V presents the categories of possible success of nonprisoner constitutional tort cases by subcategory. It suggests that cases brought against the police are the largest and most successful class of constitutional tort litigation. However, the difference in the overall success of cases brought against the police is not statistically significant when compared with most other categories. The success rate is rel-

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56 A discovery event value of "1" is assigned to a case if any discovery events have occurred and a value of "0" is assigned if no discovery events occurred. It thus tests for any discovery activity rather than for a specific kind of discovery activity.

57 For a study reaching a similar conclusion, see S. Flanders, THE 1979 FEDERAL DISTRICT COURT TIME STUDY 4-6 (Federal Judicial Center 1980).

58 These are false arrest cases, assault cases, and wrongful search and seizure cases.
atively flat, ranging from 48% to 60% across all major categories of constitutional tort litigation.

### TABLE V

**SUCCESS OF NONPRISONER CONSTITUTIONAL TORT CASES BY SUBGROUP, 3 DISTRICTS, 1980-81**

<table>
<thead>
<tr>
<th>Case Type</th>
<th>N</th>
<th>Success</th>
<th>Money Judgment</th>
<th>Money Settlement</th>
<th>Fees by Court</th>
<th>Percent Counseled</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>156</td>
<td>60%</td>
<td>3%</td>
<td>9%</td>
<td>1%</td>
<td>93%</td>
</tr>
<tr>
<td>Employment</td>
<td>83</td>
<td>48%</td>
<td>2%</td>
<td>4%</td>
<td>5%</td>
<td>88%</td>
</tr>
<tr>
<td>Other Discrimination</td>
<td>21</td>
<td>52%</td>
<td>0%</td>
<td>0%</td>
<td>10%</td>
<td>90%</td>
</tr>
<tr>
<td>Due Process</td>
<td>100</td>
<td>49%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>99%</td>
</tr>
<tr>
<td>Malicious Prosecution</td>
<td>7</td>
<td>43%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>71%</td>
</tr>
<tr>
<td>Tax</td>
<td>3</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>33%</td>
</tr>
<tr>
<td>Miscellaneous &amp; Missing</td>
<td>87</td>
<td>33%</td>
<td>3%</td>
<td>0%</td>
<td>3%</td>
<td>68%</td>
</tr>
<tr>
<td>1st Amendment</td>
<td>52</td>
<td>54%</td>
<td>2%</td>
<td>4%</td>
<td>13%</td>
<td>98%</td>
</tr>
<tr>
<td>Judicial Error</td>
<td>4</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>50%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>513</td>
<td>50%</td>
<td>3%</td>
<td>4%</td>
<td>5%</td>
<td>87%</td>
</tr>
</tbody>
</table>

Interestingly, Table V reveals a modest number of nonprisoner actions against the police, yet constitutional tort actions figure prominently in the debate about alternative mechanisms for enforcing the fourth amendment.59 Crude extrapolation from Table V suggests that nonprisoners annually file roughly 2,000 constitutional tort actions against the police in federal court.60 This must be a tiny fraction of all contested fourth amendment issues.61 If this extrapolation accurately depicts the low number of constitutional tort actions against the police, their possible role as an alternative to the exclusionary rule needs reevaluation.

Table VI provides data on the procedural progress of nonprisoner constitutional tort cases by subcategory and permits a comparison of constitutional tort case subclasses to see whether any subclass is especially burdensome. No clear pattern emerges. Actions against the police generate the highest percentage of answers, interrogatories, depositions, and document production requests, but employment cases are close to the same rates in each area. Additionally, employment cases, due process cases, and first amendment cases lead to higher rates of hearings.

---


60 The 2,000 figure comes from multiplying 156 by 12.5 and then rounding the result. It is based on the assumption that the three covered districts comprise about 8% of federal constitutional tort filings. See supra note 8.

TABLE VI
PROCEDURAL PROGRESS OF NONPRISONER CONSTITUTIONAL TORT CASES BY SUBGROUP, 3 DISTRICTS, 1980-81

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>156</td>
<td>85%</td>
<td>53%</td>
<td>30%</td>
<td>39%</td>
<td>60%</td>
<td>21%</td>
<td>32%</td>
</tr>
<tr>
<td>Employment</td>
<td>83</td>
<td>83%</td>
<td>52%</td>
<td>46%</td>
<td>42%</td>
<td>59%</td>
<td>22%</td>
<td>24%</td>
</tr>
<tr>
<td>Other Discrimination</td>
<td>21</td>
<td>71%</td>
<td>33%</td>
<td>38%</td>
<td>33%</td>
<td>19%</td>
<td>5%</td>
<td>14%</td>
</tr>
<tr>
<td>Due Process</td>
<td>100</td>
<td>59%</td>
<td>19%</td>
<td>42%</td>
<td>20%</td>
<td>24%</td>
<td>11%</td>
<td>4%</td>
</tr>
<tr>
<td>Malicious Prosecution</td>
<td>7</td>
<td>71%</td>
<td>43%</td>
<td>14%</td>
<td>43%</td>
<td>29%</td>
<td>29%</td>
<td>29%</td>
</tr>
<tr>
<td>Tax</td>
<td>3</td>
<td>33%</td>
<td>0%</td>
<td>33%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>33%</td>
</tr>
<tr>
<td>Miscellaneous &amp; Missing</td>
<td>87</td>
<td>55%</td>
<td>25%</td>
<td>40%</td>
<td>22%</td>
<td>29%</td>
<td>10%</td>
<td>20%</td>
</tr>
<tr>
<td>1st Amendment</td>
<td>52</td>
<td>71%</td>
<td>31%</td>
<td>42%</td>
<td>25%</td>
<td>33%</td>
<td>12%</td>
<td>17%</td>
</tr>
<tr>
<td>Judicial Error</td>
<td>4</td>
<td>50%</td>
<td>0%</td>
<td>75%</td>
<td>0%</td>
<td>25%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>513</td>
<td>72%</td>
<td>38%</td>
<td>38%</td>
<td>31%</td>
<td>42%</td>
<td>15%</td>
<td>23%</td>
</tr>
</tbody>
</table>

D. The Fiscal Consequences of Constitutional Tort Litigation

Our prior work documents the perceived fiscal distress that constitutional tort litigation causes state and local governments.62 Three different measures of fiscal burden test this perception. The first estimates the total amount of dollars, excluding internal litigation costs, transferred as the direct result of constitutional tort litigation. The second relies on Administrative Office data to contrast the amounts transferred in constitutional tort litigation with the amounts transferred in other litigation. The third compares the estimated amounts transferred as a result of constitutional tort litigation with the budgets of the relevant local government entities.

Table VII’s summary includes all 70 cases in which the court records reflect a monetary award (including settlement) or an award of attorney fees. These constitutional tort cases yield a total recovery, including fees, of about $2 million. One must add to this the awards achieved through settlements or similar dispositions not reflected in court records. Although based on crude calculations, we estimate recoveries of $4.8 million in these cases.63 Combining the

---

62 Eisenberg & Schwab, supra note 1, at 650-51.
63 For the Central District of California, relying on a follow-up study addressed to plaintiffs’ attorneys, we estimated that $1.4 million was transferred in the 81 cases with settlements or other dispositions not reflected in the court records. Id. at 685. Assume that the same amount, about $17,300, was transferred per case in the other two districts in the expanded study. (This assumption probably overstates settlement figures in the Eastern District of Pennsylvania and the Northern District of Georgia. Of cases with some monetary transfer reflected in the court records, the average transfer was $28,735 in the C.D. Cal. and only $23,451 in the E.D. Pa. and N.D. Ga. One would expect, therefore, that settlements in the E.D. Pa. and N.D. Ga. would be somewhat less than in C.D. Cal.) The E.D. Pa. and the N.D. Ga. had a combined total of 196 cases with settlements or similar dispositions not revealed in court records. Then 196 times $17,300 or $3.4 million changed hands as a result of the unclear E.D. Pa. and N.D. Ga. cases. Adding this to the $1.4 million dollar figure for the C.D. Cal. yields $4.8 million.
CONSTITUTIONAL TORT LITIGATION

figures for known and unknown case outcomes produces an "order of magnitude" estimate on total recoveries, including all settlements, of $6.8 million. Based on the population of the three districts,\textsuperscript{64} the amount transferred is about 35 cents per person.

**TABLE VII**

**TOTAL AMOUNT RECOVERED:**

**CONSTITUTIONAL TORT CASES WITH CLEAR DISPOSITION, 3 DISTRICTS, 1980-81**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Money judgments</td>
<td>$718,511</td>
</tr>
<tr>
<td>Settlement</td>
<td>767,077</td>
</tr>
<tr>
<td>Fees awarded by court</td>
<td>472,795</td>
</tr>
<tr>
<td>Fees by settlement</td>
<td>76,358</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>$2,034,741</strong></td>
</tr>
</tbody>
</table>

To assess the second test of fiscal burden, the relative amounts transferred as the result of constitutional tort cases versus other cases, we rely on a figure in the Administrative Office's data. The Administrative Office's data on terminated cases, which are necessarily sketchy for settled cases, include an item entitled "amount received." As described in the Administrative Office's guidelines, this is the amount awarded by the court and should be reported with the nature-of-judgment data described above.\textsuperscript{65} For the three districts in 1980-81, the Administrative Office data show awards totaling $358.1 million in cases in which the plaintiff prevailed.\textsuperscript{66} Of this total, $640,000 or .18% was awarded in cases that might have been constitutional tort cases.\textsuperscript{67}

One may also compare the kinds of cases filed against the government. The Administrative Office data identify cases in which the United States was a defendant. Table VIII compares these constitutional tort cases with other tort cases in which the United States was a defendant. It thus compares constitutional tort litigation with a related class of cases, simple tort litigation against a governmental entity. The table suggests that constitutional tort litigation against all government entities is less fiscally burdensome than is simple tort litigation against the United States.

\textsuperscript{64} See supra note 8.

\textsuperscript{65} A.O. GUIDE, supra note 14, at 11-26 to 11-27.

\textsuperscript{66} Id. at II-15. The actual figure probably is higher. The Administrative Office's data scheme only allows for figures up to $9,999,000. The number in the text excludes default judgments.

\textsuperscript{67} For an explanation of cases deemed possible constitutional tort cases, see Eisenberg & Schwab, supra note 1, at 673 n.140. For a caveat about using the Administrative Office's monetary data and doubts about its including all amounts transferred as the result of civil litigation in the three districts, see id. at 686-87.
Table VIII

<table>
<thead>
<tr>
<th></th>
<th>Possible Constit. Tort Cases</th>
<th>Tort Cases in Which U.S. is a Defendant</th>
</tr>
</thead>
<tbody>
<tr>
<td>N of cases</td>
<td>21</td>
<td>23</td>
</tr>
<tr>
<td>Average</td>
<td>$30,480</td>
<td>$77,300</td>
</tr>
<tr>
<td>Median</td>
<td>8,000</td>
<td>20,000</td>
</tr>
<tr>
<td>TOTAL</td>
<td>640,000</td>
<td>1,778,000</td>
</tr>
</tbody>
</table>

The third measure of constitutional tort litigation's fiscal drain compares the amounts transferred in constitutional tort litigation with the budgets of the relevant government entities. Table IX presents Census Bureau budget data for the counties comprising the three districts for the fiscal year closest to the fiscal year covered by this study. The figures, subject to noted exceptions, “represent a summation of local government finances within each county unit, including the county, cities and towns, and school and special districts.”

Table IX

Budget Data for 1980-81 for Local Governments Comprising the Three Districts

Source: Bureau of the Census

<table>
<thead>
<tr>
<th></th>
<th>General Revenue</th>
<th>Expenditures</th>
<th>Police Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central Dist. Calif.</td>
<td>$17,531</td>
<td>$19,317</td>
<td>$1,000</td>
</tr>
<tr>
<td>Eastern Dist. Pa.</td>
<td>5,308</td>
<td>6,488</td>
<td>317</td>
</tr>
<tr>
<td>Northern Dist. Ga.</td>
<td>3,546</td>
<td>4,510</td>
<td>146</td>
</tr>
<tr>
<td>TOTAL</td>
<td>$26,385</td>
<td>$30,315</td>
<td>$1,463</td>
</tr>
</tbody>
</table>

---


69 See Eisenberg & Schwab, supra note 1, at 685 n.183 for the derivation of the C.D. Cal. figures. The source Census publication is BUREAU OF THE CENSUS, supra note 68, tables 2 & 5.

70 Data for one E.D. Pa. county include only county data and do not include figures for other local governmental units.

71 For the N.D. Ga. counties for which we found fiscal data, the general revenues were $2.357 billion, the expenditures were $2.998 billion and the police protection budgets were $97 million. The population of these counties totaled 1,984,742. The figures for the district that appear in the Table are based on the assumption that similar expenditures and revenues applied for the total district population of 2,985,912.
Table IX shows aggregate local government revenues of $26.4 billion,\textsuperscript{72} and aggregate local government expenditures of $30.3 billion. The estimated $6.8 million transferred as a direct result of constitutional tort litigation thus represents about .02% of local government expenditures. Expenditures for police protection, the line item in the census budget data most closely related to constitutional tort litigation, totalled roughly $1.5 billion. Constitutional tort litigation payments thus comprised about .46% of local government police protection expenditures.\textsuperscript{73}

Comparing any particular cost to an overall budget can underestimate the significance of that cost. In particular, the costs studied include only direct transfers from constitutional tort litigation. They exclude the costs of defending lawsuits, which may be significantly higher. The comparisons with budget data can, however, suggest the extent of fiscal relief that local governments might obtain from changes in constitutional tort litigation. The study indicates that even completely abolishing constitutional tort litigation might not provide substantial fiscal relief to stressed local governments.

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\textsuperscript{72} The Census Bureau defines "general revenue" as follows:
All revenue of a government except utility revenue, liquor stores revenue, and insurance-trust revenue . . . . All tax revenue and all intergovernmental revenue even if designated for employee-retirement or local utility purposes is classified as general revenue.

\textit{Bureau of the Census, supra} note 68, at 169. The Bureau defines "expenditure" as:
All amounts of money paid out by a government—net of recoveries and other correcting transactions—other than for retirement of debt, investment in securities, extension of credit, or as agency transactions. Expenditure includes only external transactions of a government and excludes noncash transactions such as the provision of perquisites or other payments in kind. Aggregates for groups of governments exclude intergovernmental transactions among the governments involved.

\textit{Id.} It defines "police protection" as:
Preservation of law and order and traffic safety. Includes police patrols and communications, crime prevention activities, detention and custody of persons awaiting trial, traffic safety, vehicular inspection, and the like.

\textsuperscript{73} These percentages are based exclusively on local governments' budgets. The constitutional tort recovery amounts include actions against state and federal officials. Constitutional tort litigation's relative fiscal impact would be substantially reduced if one included statewide budget data to account for the constitutional tort actions brought against state officials. A study of prisoner monetary damages litigation found modest sums transferred as a result of prisoner lawsuits. During the years 1983 and 1984, 34 correction departments transferred to prisoners totals of $2,917,392 in compensatory damages, $113,196 in punitive damages, $2,719,215 in settlements, and $777,119 in attorney fees. CONTACT CENTER, supra note 42, at 14.
Several findings about constitutional tort litigation stand out. Under any measure of tangible success, constitutional tort plaintiffs are less successful than non-civil-rights plaintiffs. The parties settle fewer constitutional tort cases, and plaintiffs win fewer court judgments. In contested cases brought by counsel, constitutional tort plaintiffs are successful about one-half the time while non-civil-rights plaintiffs are successful more than 80% of the time. The rate at which constitutional tort cases are filed relative to other cases is lower than expected. And their relative burden to the judicial system, though not surprising, also is worth trying to explain.

It is helpful to employ models of litigation to illuminate these results, and to test explanations against the data. The early dispute selection models of Professors Gould, Landes, and Judge Posner have been expanded by Professor Baxter and Professors Priest and Klein to predict judgment rates in litigated cases. These works explore which filed actions are likely to be settled and who will win the cases going to trial. Professor Shavell extends the analysis by combining, in a two-stage decision tree, the decision to file suit with the decision to settle. First, the plaintiff must decide whether to file suit, based on the expected costs and return from trial. Second, given that the plain-

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74 Eisenberg & Schwab, supra note 1, at 674 table VIII; supra text accompanying notes 33-45.
75 Eisenberg & Schwab, supra note 1, at 658-71; see supra text accompanying notes 14-25.
77 Landes, An Economic Analysis of the Courts, 14 J. Law Econ. 61 (1971).
79 Baxter, supra note 27, at 18-21.
80 Priest & Klein, supra note 27, at 6-30.
82 Shavell, supra note 81, at 56-57. Shavell assumes that all plaintiffs filing suit are willing to go to trial if necessary and do not consider the possible settlement value in the decision to file an action. But see H. Ross, supra note 28, at 215-16 (filing an action as a negotiating tactic). Others build on the works of these theorists by positing situations in which the parties have asymmetric information about the litigation and assessing the consequences on litigation and settlement decisions. Bebchuk, Litigation and Settlement under Imperfect Information, 15 Rand J. Econ. 404, 414 (1984); Nalebuff, Credible Pretrial Negotiation, 18 Rand J. Econ. 198 (1987); P'ng, Strategic Behavior in Suit, Settlement, and Trial, 14 Bell J. Econ. 539 (1983).
tiff has filed suit, the parties must decide whether to settle or have the court decide the case. A model similar to Shavell's may help probe for empirically testable differences between constitutional tort litigation and other litigation. Such a two-stage decision model assumes that parties never settle disputes before filing suit, or that the only disputes for purposes of the legal system are those generating a lawsuit.\(^3\)

Extending the analysis to a three-stage decision tree would account for the potential plaintiff complaining outside of the court system to the defendant, thereby creating a dispute. The parties could then either resolve the dispute between themselves or the plaintiff would file a formal lawsuit. Presumably, the decision to resolve the dispute or file a lawsuit depends on the parties' differing expectations on the outcome of a formal lawsuit as well as the costs of the litigation. Once the plaintiff files suit, the parties must make a similar decision whether to settle the lawsuit or proceed to trial. Professor Trubek and others, building on the expectations models, used this approach in their pyramid model of grievance/claim/dispute/litigation/trial.\(^4\) Such a model accounts for the decision to file suit and provides a basis for predicting what types of disputes might have relatively many filings. Testing such models empirically requires data on the number of disputes outside the courtroom, a

\(^3\) Shavell finessed this problem by using an amorphous definition of lawsuit. He defined "bringing suit" as any action that results in a settlement or trial. See Shavell, supra note 81, at 56 n.5. He thus combined actual filings leading to settlement or trial with informal threats leading to settlement (and presumably excludes filings later withdrawn from the term "bringing suits"). We define a lawsuit as the filing of a complaint in district court. Our model therefore eliminates pre-filing discussions with the defendant that resolve the claim. All settlements occur after filing. We adopt this limitation because pre-filing empirical data are extremely difficult to collect, and most commentators focus on the number of filings.

\(^4\) CLRP, supra note 36, at S-19 (pyramid in which, per 1,000 grievances, 718 lead to claims, 449 lead to disputes, 103 lead to retention of lawyers, and 50 lead to court filings); P'ng, supra note 82, at 540-44; Trubek, supra note 27, at 87 (same pyramid as in CLRP); see also H. Ross, supra note 28, at 136 (19 of 20 automobile injury claims are disposed of without court action). For studies of the nature of disputes, how they develop, and their relationship to litigation, see Coates & Penrod, Social Psychology and the Emergence of Disputes, 15 LAW & Soc'y REV. 655 (1981); Felstiner, Abel & Sarat, The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ., 15 LAW & Soc'y REV. 631 (1981); Kritzer, Studying Disputes: Learning from the CLRP Experience, 15 LAW & Soc'y REV. 503 (1981); Miller & Sarat, Grievances, Claims, and Disputes: Assessing the Adversary Culture, 15 LAW & Soc'y REV. 525 (1981); Trubek, The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword, 15 LAW & Soc'y REV. 727 (1981).

The CLRP authors acknowledge the expectations model origins of the model they use. Trubek, supra note 27, at 76 n.9 (using the term "optimism" model). Further evidence of the model's widespread use in discussion of litigation may be gleaned from acceptance of its basic tenets in a critical legal studies discussion of litigation. See M. Kelman, A GUIDE TO CRITICAL LEGAL STUDIES 44 (1987). But see Schuck, The Role of Judges in Settling Complex Cases: The Agent Orange Example, 53 U. Chi. L. REV. 337, 346 n.30 (1986) (anecdotal evidence questioning expectations model).
vast undertaking. Lacking such data, we follow Shavell and use a two-decision model: (1) the plaintiff decides whether to file suit or forego the claim; and (2) given the lawsuit, the parties together decide whether to settle or have the court decide the lawsuit.

1. The Decision to File Suit

Consider a potential plaintiff deciding whether to file suit. The plaintiff will file suit if the expected recovery from the suit outweighs the expected costs. Following Shavell, the expected recovery is the plaintiff’s estimate of the amount awarded if the plaintiff wins at trial, $J_p$, discounted by the plaintiff’s estimate of the likelihood that he will win, $P_p$. The costs, $C_p$, are all the plaintiff’s expected litigation costs, including the plaintiff’s costs of filing, discovery, lawyers, and the plaintiff’s time and aggravation. Assume that the plaintiff pays for its costs whether it wins or loses the case (the American rule). The plaintiff, then, will file suit if and only if

$$P_p J_p > C_p.$$ (1)

2. The Decision to Litigate or Settle

Once the plaintiff files the lawsuit, the parties must decide whether to settle it privately or have the court adjudicate the dispute. Settlements save court costs but are not likely to occur if the parties differ in their expectations of what the court will do. The risk-neutral plaintiff will ask in settlement at least the net expected benefit of a court judgment—otherwise, proceeding to judgment is preferable. Call the minimum amount the plaintiff will settle for “A.” If the plaintiff’s settlement costs are $S_p$ (which we assume to be less than $C_p$, the plaintiff’s costs of proceeding to judgment), then

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85 See CLRP, supra note 36, at S-17 (surveying 5,000 households to study how frequently disputes lead to litigation); H. Ross, supra note 28, at 20, 136 (many interviews with adjusters to find that vast majority of automobile insurance claims are resolved without court action); Trubek, supra note 27, at 85-87.

86 We have no illusion that the models used here come close to capturing the complexity of the factors influencing real-world litigation. As with any model, we hope that insights gained by the simplifying assumptions inherent in the models provide some insight into real phenomena.

87 $J_p$ could be a set of expected recoveries, each with its own probability of occurring and its own expected expenses. For example, a plaintiff may estimate an overall chance of prevailing to be .5. The plaintiff may believe that, if it prevails, there is a .1 chance of recovering $100 and a .9 chance of recovering $500. See Shavell, supra note 81, at 73-74 (viewing expected amount to be recovered as an integral of product of amount and a probability density function).

A = P_p J_p - (C_p - S_p).  \hspace{1cm} (2)

The defendant at this stage must also assess the relative benefits of settlement or court judgment. The defendant will offer as a settlement figure no more than the expected judgment it must pay after trial plus its extra costs of proceeding to judgment. Call the maximum offer of the defendant “B.” If \( P_d \) is the defendant’s estimate that the defendant will lose, \( J_d \) is the cost of losing, and \( C_d \) and \( S_d \) are the defendant’s costs of trial and settlement, respectively, then

\[
B = P_d J_d + C_d - S_d. \hspace{1cm} (3)
\]

If \( B \) exceeds \( A \), both parties can be better off by settling the case. We assume that the parties will indeed settle if the defendant offers more than the minimum the plaintiff is willing to accept. Thus, the parties will settle if and only if

\[
B > A, \quad \text{or} \quad C - S > P_p J_p - P_d J_d, \hspace{1cm} (4)
\]

where \( C = C_p + C_d \) (total costs of trial to both parties) and \( S = S_p + S_d \) (total settlement costs to both parties). Equation (4) states the familiar result that parties will settle rather than seek judgment from the court if the costs to the parties of judicial judgment exceed the difference in the parties’ expected return from judicial judgment.89 The difference in expected returns has two possible sources. First, the parties can differ in their predictions of the likely success of the plaintiff before the court (i.e., the estimates of \( P \) can differ). Second, the parties can have differing stakes in the lawsuit (i.e., \( J_p \) differs from \( J_d \)).

IV

DEVELOPING TESTABLE HYPOTHESES

This skeletal framework provides a structure for explaining the characteristics—filing rates, litigation rates, rates of judgment for plaintiffs—of constitutional tort cases. Using the variables in equa-

89 See, e.g., Baxter, supra note 27, at 13 (“litigation will occur only when the expectations that the parties hold about the probability of outcome or about the magnitude of the award, or both, differ substantially”). For an interesting alternative model of litigation, see Cooter, Marks & Mnookin, Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 J. LEGAL STUd. 225 (1982). Their model places greater emphasis on the influence of the parties’ bargaining positions on the outcome of negotiation. Their predictions of litigation behavior do not differ substantially from the predictions of the “different expectations” theorists.
tions (1) and (4), which describe the plaintiff's decision whether to file a lawsuit and the parties' decision to settle or litigate after plaintiff has filed, this Part examines the relationship between a fee-shifting statute and filing rates, litigation rates, and judgment rates. It then develops possible explanations for these relationships, based on the nature of the defendant (government or government official) in constitutional tort cases. As detailed below, this could mean that the P or J terms in equations (1) and (4) differ between constitutional tort cases and other cases. Part V then tests the hypotheses developed in this Part.

A. The Influence of Attorney Fees

Two plaintiff-lawyer features may explain constitutional tort litigation's distinctive results. First, the fee-shifting rule favoring plaintiffs separates constitutional tort litigation from the bulk of contract, tort, and property litigation, all of which are dominated by the American fee rule. Second, the civil rights lawyer (and client) may be less motivated by prospects of monetary reward than the traditional tort lawyer. Of course, less concern for money does

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90 Ideally, one would separate the goals and incentives of clients and lawyers. Too much is known about the possible divergence of their interests to assume they can always be treated as a single actor or that the lawyer is a perfect agent. E.g., Clermont & Currivan, Improving on the Contingent Fee, 63 CORNELL L. REV. 829, 594-97 (1978); Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 COLUM. L. REV. 669, 677-84 (1986); Johnson, Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 LAW & SOC'Y REV. 567, 575-77 (1981); Miller, Some Agency Problems in Settlement, 16 J. LEGAL STUD. 189, 193-95 (1987). For the vast majority of litigants, however, a lawyer holds both the key to the courthouse and a monopoly on the skills necessary to forecast a favorable outcome for any litigation.

The agency problems that arise in class actions such as shareholder derivative actions may not occur as commonly in constitutional tort litigation. Few class actions are filed and fewer are certified. For the three districts in 1980-81, plaintiffs filed 79 constitutional tort class actions and the courts certified 14. These figures include both prisoner and nonprisoner filings.

This is not to deny that agency problems can affect civil rights class actions. See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470, 483-95 (1976); Rhode, Class Conflicts in Class Actions, 94 STAN. L. REV. 1183, 1210-12 (1982); Yeazell, Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case, 25 UCLA L. REV. 244, 252-56 (1977).


92 J. Casper, Lawyers in Defense of Liberty: Lawyers Before the Supreme Court in Civil Liberties and Civil Rights Cases, 1957-66 (unpublished Ph.D. thesis 1968) [hereinafter J. Casper, Ph.D. thesis] presents an interesting array of reasons given by lawyers who brought civil liberties cases in the Supreme Court. Id. at 1-3, 27-48. These include (1) being appointed and therefore having no choice, (2) desire for victory, (3) personal outrage, (4) religious belief, (5) desire to argue before the Supreme Court, and (6) desire for excitement. Further discussion of lawyers' motivations appears in the book that grew out of Dr. Casper's thesis. J. CASPER, LAWYERS BEFORE THE WARREN COURT (1972) [hereinafter J. CASPER, WARREN COURT].
not necessarily translate into a less successful litigation record. Even publicly spirited counsel or public interest law firms, who may have less concern with short-term victories than with long-term goals, have a strong preference for winning. Indeed, achieving the long-term victories, to a certain extent, requires short-term victories. Moreover, few entities have their reputations enhanced, or their budgets increased, by consistently losing.

1. **Effect on Filing Rates**

Most dispute resolution models assume that lawyers respond to traditional monetary incentives, such as fees from clients or fee awards from courts. Holding other factors constant, these models predict an increase in constitutional tort filings after enactment of the 1976 Fees Award Act, a fee-shifting statute favorable to plaintiffs.

Some cases in which the plaintiff’s expected judgment, absent a fee-shifting rule, would be reduced by attorney fees now become attractive to plaintiffs. Because the plaintiff is not forced to pay the victorious defendant’s attorney’s fees, the plaintiff faces no increased offsetting risk. Therefore, the expected result is an increase in such cases. One problem with this prediction is that courts sometimes applied a judge-made fee-shifting rule to constitutional tort cases before 1976. Although this might mute the effect of the fees statute, it should not eliminate it. The nonstatutory rule, unlike the Fees Award Act, generally required a finding that the successful litigant acted as a “private attorney general.”

Equation (1), which describes the plaintiff’s economic decision whether to file suit, demonstrates the prediction of increased filings. Under a statute that awards fees to prevailing parties, a successful plaintiff incurs no costs of litigation. This reduces the expected costs of litigation by the likelihood of success. Under a fee-shifting statute, then, the plaintiff will file suit if

\[ P_p J_p > (1 - P_p) C_p. \]  

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93 If constitutional tort plaintiffs have above-normal amounts of spite, this might push them toward lower settlement rates. Cooter, Marks, & Mnookin, supra note 89, at 239.

94 See supra notes 10 & 91.

95 R. Posner, supra note 78, § 21.9, at 538-39; Rowe, Predicting the Effects of Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS., Winter 1984, at 139; Shavell, supra note 81, at 74. Professor Katz explores the effect of a shift to the English rule, under which the losing party pays the winner’s legal costs in Katz, Measuring the Demand for Litigation: Is the English Rule Really Cheaper?, 3 J. LAW ECON. & ORG. 143 (1987).


97 References to fee-shifting statutes are to one-way statutes favorable to plaintiffs.
Because the expected costs of suits are lower than under the American rule, the plaintiff will file more cases under a fee-shifting regime. Graphing equations 1 and 1', as is done in Figure 1, illustrates this result. Disputes have many combinations of possible plaintiff's judgments ($J_p$) and likelihood of the plaintiff prevailing as estimated by the plaintiff ($P_p$). Figure 1 separates, for a given plaintiff's litigation cost, those disputes in which expected recoveries make filing a lawsuit worthwhile from those disputes not worth filing. As seen from equation 1', the fee-shifting statute, by allowing plaintiffs to avoid incurring attorney's fees if they prevail, increases the proportion of disputes that plaintiffs are willing to bring as lawsuits. The darkly shaded portion of Figure 1 represents those filings induced by the fee-shifting statute.

The Shavell-based model employed to predict filing rates obviously simplifies the plaintiff's real-world decision to file suit. It considers only the expected return rate from suits pursued to trial discounted by the probability of winning at trial. Thus, it ignores the possibility that plaintiffs do take into account settlement returns in their filing calculus. Provided, however, that plaintiffs receive at-

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98 This assumes that the distribution of disputes in society is unaffected by the fees statute. Eventually, increased lawsuits might deter governments from creating constitutional tort disputes. With fewer disputes, there may be less litigation even though the ratio of filings to disputes is increased by the fees statute. Cf. R. Coover & T. Ulen, Law and Economics 481-82 (1988) (suggesting that number of suits is largest when expected judgment is neither small nor large).
torney fees awards in settled cases, we doubt that the model's simp-
ifying assumptions distort the predicted effect of a fees statute. A
fees statute should encourage filings even under a more complex
model.

2. Effect on Success Rates

A fee-shifting statute may affect not only the volume of litiga-
tion but also the quality of the claims brought. A fees statute will
encourage both some weak claims (low $P_p$) and some strong claims
(high $P_p$) that plaintiffs would not bring absent a fee-shifting rule.
But as seen from Figure 1, the effect is not symmetrical. The fee-
shifting statute has the greatest effect on cases that the plaintiff is
most likely to win (high $P_p$). Figure 1 suggests that if the distribu-
tion of claims is uniform, the fees statute will induce plaintiffs to
file cases with greater chances of obtaining a favorable court
judgment.\footnote{A uniform distribution of disputes in P-J space is a
sufficient condition, but not a
necessary condition, for the average $P, \text{ to rise. As long as the dis-
tribution of cases is not
weighted so heavily toward long-shot cases as to counteract the effect
discussed in the
text, a fee statute should lead to greater success in judgments. Again, this also assumes
that the fees statute does not alter the distribution of disputes. See supra note 98.}

There is no direct evidence about the distribution of claims, but
Congress probably had some views on the matter when it enacted
the fee-shifting statute. The low-stakes case with a high probability
of success cannot be brought without fee-shifting, yet the
probability of success indicates constitutional rights quite likely have
been violated. Assuming Congress had a less strong interest in fos-
tering long-shot cases with potentially high payoffs,\footnote{For a proof of this statement, see Appendix A to this Article. The increase in
cases brought after enacting a fees statute might deter governments from engaging in
behavior leading to constitutional tort grievances. See supra note 98. This would then
affect the distribution of underlying claims, and may mute the fees statute's long-run
effect.} it may be
viewed as having enacted the fee-shifting statute to encourage high-
probability cases where expected costs are high in relation to ex-
pected recoveries. If this assumption is correct, then Congress,
without necessarily studying the distribution of cases not brought
before fee-shifting, might have hoped that post-fee-shifting cases
would show an increased likelihood of success at trial.

3. Effect on Litigation Rates

The dispute resolution model predicts that the pro-plaintiff fee-
shifting statute would increase, among the filed cases, the percent-
age of cases that are litigated through trial rather than settled (the
\footnote{This might depend on why a case is a long shot.}
Professor Shavell states that, subject to qualifying assumptions, the likelihood of trial under a fee-shifting system favoring the plaintiff is greater than under the American fee rule. Fee-shifting results in a greater likelihood of trial because in cases in which the plaintiff’s estimate of the probability of success exceeds the defendant’s, the joint expected legal costs are lower than under a system with no fee-shifting. As equation (4) illustrates, the lower expected litigation costs reduce the incentive to settle once a case is filed.

To illustrate, assume that after filing the plaintiff assigns a case a 90% chance of success ($P_p = .9$) and the defendant assigns it an 80% chance of plaintiff’s success ($P_d = .8$). The stakes are symmetrical ($J_p = J_d$). The plaintiff then foresees a 10% probability of paying its own fees, while the defendant anticipates only an 80% probability of paying the plaintiff’s legal fees. Both parties assume that the defendant will pay its own fees. Accordingly, the plaintiff’s expected legal costs are $0.1C_p$ while the defendant’s expected legal costs are $0.8C_p + C_d$. The sum of the expected legal costs is then $0.9C_p + C_d$. Due to the parties’ different estimates of plaintiff’s likely success, the combined expected legal costs is less than when both parties know they will pay their own fees. The lower expected costs push towards filing over nonfiling, and towards litigation over settlement.

In sum, the dispute resolution model predicts that a pro-plaintiff fee-shifting statute will increase the number of filings, perhaps

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102 Shavell’s analysis assumes that the parties do not differ in their estimation of the size of the likely judgment and his conclusion about the likelihood of trial is conditional on suit having been brought. Shavell, supra note 81, at 67. If one assumes that the parties agree about the probability of a judgment for plaintiff but disagree as to the amount, one model suggests that a fee-shifting statute (or other rule allocating costs) will not affect the settlement rate. Reinganum & Wilde, Settlement, Litigation, and the Allocation of Litigation Costs, 17 RAND J. Econ. 557, 562 (1986). But even this model suggests that cost reallocation (fee-shifting) will affect the settlement rate when the plaintiff keeps less than the full amount of the settlement. Id. at 562-63.

103 Id. Professors Salop and White agree in the antitrust context. Salop & White, Economic Analysis of Private Antitrust Litigation, 74 GEO. L. REV. 1001, 1026-27 (1986). Professor Bebchuk, after taking into account the bargaining process and possible informational asymmetries, also concludes that a system with a pro-plaintiff rule would lead to fewer settlements (and more litigated cases) than a system with the American rule. Bebchuk, supra note 82, at 412. Similarly, in analyzing Rule 68 offers of settlement, Judge Posner concludes that limiting reimbursement to a prevailing plaintiff will lead to more litigation than under the American fee rule. R. Posner, supra note 78, § 21.10, at 542.

104 Plaintiff’s expected costs are $(1 - P_d)C_p$. Defendant’s expected costs are $P_dC_p + C_d$. Total expected costs are thus $(1 - P_d)C_p + P_dC_p + C_d$. When $P_d > P_p$, total expected costs are less than total realized costs.

105 R. Posner, supra note 78, § 21.9; Shavell, supra note 81, at 67.
raise the probability of plaintiffs’ succeeding at trial,\textsuperscript{106} and lower the settlement rate of filed cases (increase the litigation rate).

B. The Civil Rights Bar

A further possibility why civil rights plaintiffs file relatively unsuccessful suits is that they or their lawyers differ from other plaintiffs and lawyers. We have already suggested that civil rights lawyers may be less motivated by monetary returns and thus more willing to pursue risky cases.\textsuperscript{107} Even accepting the assumption that the civil rights plaintiff (or lawyer) is a rational profit-maximizing actor, the market for civil rights lawyers may contain features that depart from a model in which lawyers respond to fee signals and success rates. Other factors, beyond the model of when a case will be filed or litigated, may shape the performance of attorneys.

For example, one factor is the imperfect transmission of information about the lower success rates of such actions to the lawyers bringing constitutional tort actions. If the lawyers do not know that they are less likely to succeed in a constitutional tort action, they cannot adjust their decisions to file constitutional tort actions accordingly. Alternatively, civil rights lawyers may acquire accurate information about lower success rates but be unable to act on it. Assuming that there are different levels of competence in the bar, weaker lawyers ought to have lower success rates regardless of the field in which they specialize.

C. The Government as Defendant

A constitutional tort case is either a section 1983 case (a suit against a state or local government or officer alleging a deprivation of constitutional or some statutory rights) or a \textit{Bivens} case (a suit against the federal government or officer alleging a deprivation of constitutional rights).\textsuperscript{108} Thus, by definition, the government or its officials are the defendants in constitutional tort cases. One hypothesis to explain lower success rates of constitutional tort plaintiffs is that a private person suing the government is in a weaker position than a private person suing another private person. This explanation has promise because the government has proven to be a more formidable litigator than private parties in other contexts.\textsuperscript{109}
Although those contexts differ from the civil rights context, the common feature of a government defendant may partially explain low success rates across a range of cases. The dispute resolution model suggests that one would fare worse against the government than against other defendants if predictions of expected outcomes differ more than usual when the government is the defendant, and differ in a way that depresses success rates. Equation (1) shows that a plaintiff files suit only when the expected recovery exceeds the expected costs of the litigation. Equation (4) indicates that, given the plaintiff’s decision to file suit, the parties will opt for a court judgment rather than a settlement when the parties’ predictions of expected outcomes differ by more than their extra costs of pursuing a court judgment. Several factors suggest that forecasting case outcomes is more difficult than usual when the government is a defendant.

1. Differences in Accuracy of Assessing Claims

Plaintiffs contemplating a suit against the government may have greater difficulty than other plaintiffs in accurately assessing the costs of litigation. In assessing litigation costs, plaintiffs must anticipate defendants’ responses. Such predictions may be more difficult when the defendant is a government because governments may have more complex settlement criteria beyond the financial gains and losses of settlement versus trial. Governments may respond to inputs less readily quantifiable than profit maximization. Plaintiffs unfamiliar with the mysteries of government incentives may inaccurately predict government behavior more often than they do the behavior of private defendants. This may lead them to misestimate litigation costs.

Interestingly, plaintiff inaccuracy in assessing costs should not alter filing rates. Underestimating true costs may lead the plaintiff to file suit in a case with an expected judgment too low for filing were the cost estimate accurate. Likewise, overestimating costs may cause the plaintiff not to file suit in a case with a high expected judgment. If, however, plaintiffs are unbiased in making errors, they will make as many overestimates as underestimates and inaccurate estimation of costs will not affect filing rates. The average judgment,


Other work speculates about the mechanism through which government behavior might translate into impressive litigation performance. Posner, The Behavior of Administrative Agencies, 1 J. LEGAL STUD. 305 (1972); Priest & Klein, supra note 27, at 53.

Likewise, if the errors are uncorrelated with P or J (i.e., the size of the error is not affected by the size of P or J), the strength of filed cases will be unaffected.
However, will decrease because erroneous filings will lose relatively frequently.\textsuperscript{111}

The relative ability of plaintiffs and defendants to assess claims will affect case results after filings. After the case is filed, the defendant must assess the strength of the plaintiff's case in deciding whether to settle or litigate. If the gap between plaintiff and defendant accuracy is greater when the government is the defendant, the model predicts more settlements and more court victories for government defendants than other defendants.

There is reason to believe that government defendants are unusually good at assessing the strength of claims against them. The government defending a constitutional tort action may possess greater litigation experience than other defendants. Governments repeatedly defend lawsuits and presumably learn through experience how to fend off claims. At some levels, the government official will do nothing but litigate a particular class of disputes.\textsuperscript{112} Unless the plaintiff, or plaintiff's attorney, in constitutional tort actions also has an above-average amount of experience with this kind of case, the gap between plaintiff-defendant expertise may be greater in constitutional tort cases than in other kinds of litigation.\textsuperscript{113}

To incorporate these considerations into the model, assume that plaintiffs and defendants in all types of cases have identical stakes that they assess without error (i.e., $J_p = J_d = J$).\textsuperscript{114} Assume further that plaintiffs and defendants differ in their estimates of plaintiffs' likelihood of success at trial, $P$, which generates the possibility of trial rather than settlement. With this simplification, rewrite the decision-to-settle equation as

$$C - S > (P_p - P_d)J.$$ \hfill (5)

Finally, assume that because governments are more difficult to fathom than other defendants, constitutional tort plaintiffs make

\begin{itemize}
  \item \textsuperscript{111} These predictions remain even if we assume the government defendant in constitutional tort cases has equal difficulty in assessing its costs. The filing decision in our model is made solely by the plaintiff, and the comparison is between plaintiffs in constitutional tort cases and plaintiff in other cases. Even if there is no greater gap between plaintiff and defendant accuracy of estimating costs in constitutional tort cases and other cases, the model predicts lower average judgments from the inability of constitutional tort plaintiffs to assess costs accurately.
  \item \textsuperscript{112} A similar analysis might apply to certain corporate defendants.
  \item \textsuperscript{113} Similarly, the defendant-government (or official) may have private information about its own behavior that creates an information asymmetry between plaintiff and defendant; the asymmetry in favor of the defendant may reduce the chances of settlement, Bechuk, supra note 82, at 409, and thereby presumably increases the chances of plaintiff litigating to conclusion a losing case.
  \item \textsuperscript{114} In the next section, we explore the effects of differential stakes ($J_p \neq J_d$) in constitutional tort litigation.
\end{itemize}
more errors in assessing $P$ than do other plaintiffs. When the plaintiff overestimates the strength of its case, equation (5) indicates that the parties are more likely to litigate. In litigation against private defendants, there is a countervailing effect of litigating relatively strong cases when the defendant underestimates the strength of the plaintiff’s case. If the plaintiff misestimates $P$ more when the government is a defendant than when a private party is the defendant or if the government is an unusually accurate predictor of $P$, this countervailing effect is reduced in constitutional tort litigation. As a result the parties will be more likely to settle strong cases and to litigate weak cases than when the opposing parties are equally skilled at assessing claims. The government defendant is better at recognizing a strong case and so will settle for an amount the less confident plaintiff will accept rather than risk a court judgment. Conversely, when the case is weak the government defendant knows this with confidence as well, and will therefore be quite willing to go to trial, while the plaintiff, unsure whether the case is weak, will also press for trial, and be more likely to lose.

Thus, if government defendants can predict $P$ more accurately than other defendants, or if constitutional tort plaintiffs face a problem in predicting government behavior not encountered in litigation against private defendants, constitutional tort plaintiffs will lose more of the litigated cases than other plaintiffs, because the nonsettled constitutional tort cases will tend to be weaker than other nonsettled cases.

2. Different Resources and Stakes

Expected returns from litigation depend on what a party invests in an action as well as on what it expects to gain or pay in damages. Both the costs and the stakes may differ from the norm when the government is the defendant. The models recognize few restrictions on the resources that plaintiffs or defendants are able to invest in litigation. In cases in which the parties’ resources are a factor

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115 One can view $P_p$, the plaintiff’s prediction of success at trial, as being based on the true $P$ with some error $u$, where $u$ is distributed with a mean zero and some variance. $P_p = P + u$. Our assumption is that $u$ has a higher variance for constitutional tort plaintiffs than other plaintiffs.

116 Placing great weight on different experience levels would go too far. Governments are capable of hiring modest legal talent. Ultimately, the experience differential’s role depends on knowledge of the civil rights bar and government lawyers. The thin available evidence about the civil rights bar is discussed infra notes 174-88 and accompanying text.

117 Sometimes the formal models imply that parties will spend only the minimum amount necessary to file and appear in court. E.g., Priest & Klein, supra note 27, at 9 n.27, where they assume that parties cannot influence how the court will judge the case, and thus parties have no incentive to spend resources on lawyers and discovery.
(as when plaintiff or plaintiff's lawyer cannot borrow enough money to carry the case for years) the probability of plaintiff's success becomes inversely related to the expenses of litigation, and becomes zero when plaintiff or the plaintiff's lawyer cannot or will not spend more on the action.

Perhaps in the "average" constitutional tort case the gap between the plaintiff's and the defendant's resources available for litigation is wider than in other litigation. The effect of differential resources is likely to become more apparent as the case progresses and to be least apparent at the filing stage. If there is a wider than usual resource gap between plaintiffs and government defendants, plaintiffs may be less able to forecast its effect at the filing stage, thereby leading to unusually low success rates.

On the return side of expected return, formal model analysts explain many departures from expected patterns of litigation success by invoking the concept of differential stakes. Differential stakes may be the transaction costs of the selection-for-litigation world. Departures from idealized litigation models, like departures from predictions that assume costless transacting, are quickly attributed to differential stakes the parties have in the outcome. If one defines differential stakes broadly enough, they can explain many departures from theoretical predictions. But at some point the explanation becomes a truism. As in the case of transaction costs, there is a danger of overworking the concept to explain away large classes of untidy results and, perhaps more importantly, preempting further probing for explanations.

Having noted possible overuse of differential stakes, we unabashedly invoke it as a possible explanation for the discrepancy between models' predictions for and empirical results of constitutional tort litigation. Equal stakes for plaintiffs and defendants assume a unique plaintiff seeking a one-time money judgment that the defendant may pay without worrying about the effects on other actors. The government, as a repeat player, may have more complex con-

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118 See R. Posner, supra note 78, § 21.5, at 525. Baxter hypothesized that widely different success rates between plaintiffs and defendants in antitrust trials may be explained by the potentially greater cost of a loss to the defendant. Baxter, supra note 27, at 18-21. Priest and Klein echoed this theme when they sought to explain variations from their predicted success rate of 50% in tried cases by hypothesizing differential stakes to the parties. Priest & Klein, supra note 27, at 24-29, 37-44, 52-54. Coffee generated a model of class actions and derivative law suits based on the assertion that they involve inherently asymmetric stakes. Coffee, supra note 90, at 700.

119 The literature often assumes that defendants have higher stakes than plaintiffs, and tends to give insufficient attention to the full stakes on the plaintiff's side. The expected return to a plaintiff's attorney might include the good will and future prospects that attend a successful action. In this sense, the stakes for many plaintiffs' attorneys transcend the immediate action.
cerns than most other defendants about the impact of settlements and adverse precedents. Present litigation can have varying effects on the government's litigation future. If the government refuses to settle a case it will lose, the case may produce a precedent on which future plaintiffs can rely. But settling what would have been a winning case will encourage other plaintiffs to bring suit. As Baxter summarizes the matter, "the weaker [the] plaintiff's case . . . the stronger is the defendant's incentive to litigate in order to deter similarly situated parties. As plaintiff's case grows stronger, however, the [added burden on the defendant] becomes an additional force for settlement." ¹²⁰

Differential stakes are even more likely when the plaintiff seeks injunctive relief, a common feature of constitutional tort litigation. Although the individual plaintiff benefits from the injunction (and thus has an interest in the litigation), the government often has a higher stake in the litigation because a broad injunction will force the government to alter its dealings not only with the particular plaintiff but also with other similarly situated persons. Thus an injunction may have an effect on the fisc that far exceeds the plaintiff's stake in the lawsuit.

To incorporate the idea that the government in constitutional tort litigation has a higher stake than the plaintiff does, we follow Priest and Klein by assuming that in constitutional tort cases $J_d > J_p$ but that in other cases $J_d = J_p$. Then, letting $\bar{P} = (P_p + P_d)/2$ and $\bar{J} = (J_p + J_d)/2$, we can rewrite the settlement criterion of equation (5) for constitutional tort cases as

$$C - S > (P_p - P_d)\bar{J} + (J_p - J_d)\bar{P}.$$  (6)

while the settlement criterion for equal-stakes cases is

$$C - S > (P_p - P_d)\bar{J}. \quad (6')$$

The criteria differ by the last term in (6). If $J_d > J_p$, this last term reduces the value of the right-hand side, making settlement more likely in unequal-stakes cases, other things being equal. The extra impetus for settlement will be most pronounced when $P$ is large (i.e., when the plaintiff is likely to win). Thus, parties to a strong constitutional tort claim are more likely to settle than parties to other strong claims. Accordingly, of the cases reaching judgment, constitutional tort plaintiffs should win a smaller percentage of cases than plaintiffs in equal-stakes cases.

¹²⁰ Baxter, supra note 27, at 20. The effect Baxter discusses is also treated in Perloff & Rubinfeld, supra note 36, and in Noll, Comment: Settlement Incentives and Follow-on Litigation, in PRIVATE ANTITRUST LITIGATION, supra note 36.
To summarize, we suspect that asymmetrical stakes are more pronounced when the government rather than a private party is the defendant, and that the effect is strongest when the plaintiff seeks an injunction against the government. If so, the government should be settling a higher proportion of the filed cases, other things being equal, and should win a higher proportion of the cases proceeding to judgment.

3. Risk Aversion

Governments may be less risk averse than most other defendants and therefore be more apt to reject a sure, moderate settlement in favor of vindication through trial. Several theorists predict that plaintiffs will fare less well when their opponents are less risk averse than normal. As Priest and Klein have noted, the formal analysis is similar to the analysis of differential stakes. A risk-averse defendant discounts the expected value of proceeding to trial, while a risk-neutral defendant will settle only for the actuarial value of trial (plus trial costs). Thus, compared with other defendants, a less risk-averse government has a relatively greater stake in the dispute. As before, differential stakes lead the government to settle more cases and win a higher proportion of cases that do not settle.

V. Testing the Hypotheses

A. The Influence of a Pro-plaintiff Fees Statute

Are lawyers bringing constitutional tort cases because of the fee-shifting statute? And does this affect settlement and judgment rates? The evidence is ambiguous but three sets of comparisons indicate that attorney fees play a lesser role in civil rights litigation than one might expect. The first comparison examines information about fee awards themselves. The second comparison focuses on changes in filing rates and litigation rates that might be attributable to the fees statute. The third comparison examines plaintiff settlement and judgment rates as indirect measures of the effect of fee shifting.

121 On the other hand, a government (run by politicians who dislike adverse publicity) may be sensitive to court findings of liability—particularly findings that the government has violated a citizen's civil rights. This may lead the government to settle more cases and thus to plaintiffs being relatively successful against the government. The government's fear of potentially wide-reaching injunctions and precedents may compound this sensitivity.

122 E.g., Shavell, supra note 81, at 61.

123 Priest & Klein, supra note 27, at 27.
1. Direct Tests

We first compare the prevalence of fee awards in constitutional tort cases with fee awards in other types of cases. Our control group of non-civil-rights cases includes cases such as simple contract and tort claims, in which the American rule on attorney fees applies. Because constitutional tort plaintiffs are entitled to fees, one expects a higher percentage of constitutional tort cases than of other cases to lead to fee awards.

There is little evidence that court-mandated fee awards in civil rights cases are higher or more frequent than in non-civil-rights cases. Only 25 cases resulted in court-mandated fee awards in constitutional tort cases. The 1980-81 court records do not reflect fee awards in a significantly higher percentage of civil rights cases than in the control group of non-civil-rights cases.

The fees statute does, however, have some direct effect. There are at least as many fee awards as there are constitutional tort cases successfully litigated to money judgment, a trend not apparent in the control group of cases. Moreover, constitutional tort cases do lead to fee awards in a greater percentage of successful cases than do nonconstitutional tort cases. The statute's most important direct effect probably is the pressure it exerts to include fees in settlement negotiations, where the fees need not necessarily be separately stated and need not show up in court records.

2. Filing and Litigation Rate Tests

The second comparison focuses on changes in filing and litigation rates attributable to the fees statute. If the possibility of fee awards encourages constitutional tort litigation, one would expect civil rights filings to increase after the effective date of the Civil Rights Attorney's Fees Award Act of 1976. The Act, effective October 1, 1976, promises prevailing civil rights plaintiffs recovery of their reasonable attorney fees.

Yet our earlier work reveals a general nationwide decline in civil

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124 The percentages in Table IV are based on 24 nonprisoner fee awards cases and one prisoner fee awards case.
125 Court records reveal fee awards in only about 4% of each class of cases. See supra Table IV.
126 Id.
127 Id. (awards in 10% of successful nonprisoner civil rights cases and in about 4% of successful cases in control group; significantly different at the .01 level).
129 The promise is to prevailing parties but the standard for awarding attorneys fees to a prevailing defendant is sufficiently high, cf. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), to warrant treating the 1976 Act as a "one-way" fee-shifting statute.
rights filings as a percentage of all federal civil filings. Data over time for the Central District of California, which include more precise data on the number of constitutional tort cases, confirm this national trend. Thus a first stab at detecting increased filing rates fails.

We examine filing rates more deeply by analyzing the Administrative Office national data using time periods designed to test the impact of the 1976 Fees Act. Figure 2 graphs changes in nationwide nonprisoner civil rights filings in the Administrative Office category that most closely corresponds to constitutional tort actions ("other civil rights") during periods ending shortly before, and beginning shortly after, the effective date of the Act. It compares changes in these filings with nationwide non-civil-rights civil filings other than those initiated by the United States. The time periods are twelve-month periods ending three months before October 1976, and twelve-month periods beginning three months after its enactment. The periods are chosen to avoid the effect of attorneys who knew of the Act's imminent passage, waiting to file until after the effective.

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**Figure 2**

PERCENT CHANGE IN FILINGS
Other Civil Rights vs. All Private

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130 Eisenberg & Schwab, supra note 1, at 660-70.
131 Id. at 671 & n.135.
132 We included the government-initiated cases in our earlier analysis. Id. at 666-67. We find no major change in the result by deleting them and this does control for major increases in certain types of litigation (student loan defaults, social security overpayments) unique to the government. As to recent increases in these classes of cases, see id. at 668 n.124.
date of the Act, and to allow the Act's existence to be absorbed by the legal community.

The graph shows eight percent growth in "other civil rights" filings from the period most nearly preceding the fees act (1976) to the period most nearly following it (1977). In the perspective of the growth of civil rights filings over time, however, the eight percent growth rate for that period seems ordinary. Larger growth rates occurred from 1975 to 1976, over a year before the effective date of the Act, and from 1979 to 1980, three years after the effective date of the Act. The overall growth rate of nonprisoner civil rights filings relative to all nongovernment filings again is negative. In no year did the civil rights growth rate exceed the overall growth rate by more than nine percentage points.

Some observers would plausibly argue that the fees act's effect should take a few years to appear. If attorneys finance cases out of fee awards, they must win old cases before they can bring new ones. Under this view, the fees statute would cause little immediate effect, but substantial growth a few years after its effective date. The data do not clearly show this.

A different comparison with overall filing trends, however, yields an interesting result. Relative to all filings, the largest increase in civil rights filings (nine percentage points) occurred from the last period before the effective date (1976) to the first period after the effective date of the fees act (1977). We cannot reject the existence of any effect of the fees act on filings because of this crest in the filing rate. A nine percentage point relative growth rate over any significant period of years would substantially recast the federal courts' business. If, however, change over a long period is the predicted effect of a fee-shifting statute, the available data cannot confirm it.

Following Professor Shavell, we hypothesize that the fees act should increase the proportion of filed cases that are litigated. Figure 3 explores this effect by comparing the rate of litigation for

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133 Courts eventually applied the Act to pending cases anyway. E.g., Corpus v. Estelle, 605 F.2d 175, 177 (5th Cir. 1979), cert. denied, 445 U.S. 919 (1980).

134 The numbers underlying the graphs in Figures 2, 3, and 4 are contained in the tables in Appendix B.

135 Note the importance of the endpoint chosen. The overall growth rates could be made mildly positive by ending one or two years earlier.

136 The formal models do not forecast the shape of the effect of fee-shifting on filing rates. They generally are content with forecasting only the direction of the effect.

137 See supra text accompanying notes 102-06. Litigation rates are measured in Figure 3 by examining the rate at which cases terminate by trial. An alternative measure would include the rate at which cases are resolved by courts, and thereby include cases resolved on motions to dismiss, summary judgment, and the like. Shavell's prediction is in fact one based on trial rates. Shavell, supra note 81, at 56-57.
civil rights cases, as measured by cases completed at trial, with the rate of litigation in other actions filed by private parties. The figure graphs the percent that end in trial of "other civil rights" terminations and of all non-civil-rights terminations. It shows a decline in litigation rates across all cases but a more substantial decline in non-civil-rights cases than in the "other civil rights" category.

Figure 3 shows the growing gap between the percent of other civil rights cases resolved at trial and the percent of non-civil-rights cases resolved at trial. Some of the greatest increases in this gap occurred a few years after the effective date of the fees act, which is when one would expect cases filed around its effective date, and later filed cases influenced by it, to reach trial. Moreover, since 1978 or 1979 the relationship between litigation rates has diverged. In general, the results portrayed in Figure 3 support the prediction of increased litigation rates.

Other figures underscore the continuous and substantial shift in the federal trial docket. Administrative Office tapes show that in fiscal 1975, the "other civil rights" category accounted for 4.7% of all federal terminations and 7.2% of all cases completed by trial. In fiscal 1984, this category accounted for only 4.1% of all terminations but for 9.0% of all cases completed by trial. 138

3. Success Rate Tests

Subject to important simplifying assumptions, expectations models predict that fee-shifting should increase plaintiff judgment rates. Figure 4 graphs data bearing on fee-shifting's effect on judgment rates. It shows, for private non-civil-rights cases and "other civil rights" cases, the percentage of cases in which the plaintiff prevailed after judgment minus the percentage of cases in which the defendant prevailed after judgment. We call this the "P-D spread" and use it to monitor plaintiffs' success over time and across classes of cases.

The non-civil-rights line in the graph provides a baseline measuring the relative success of plaintiffs and defendants in a wide range of civil litigation. Figure 4 suggests underlying changes over time in plaintiffs' overall success. The two lines in the graph track the extent to which the civil rights P-D spread has changed over time relative to underlying changes in plaintiffs' success in normal

138 Some of these figures differ in minor respects from those published by the Administrative Office in its Annual Reports. These differences do not affect the conclusions in text.

139 The Figure is limited to cases in which the Administrative Office data report a judgment, so figures graphed are percents of cases with judgments, not percents of all cases filed.
litigation. One can use the difference between the civil rights and non-civil-rights P-D spreads to assess the declining fortunes of civil rights plaintiffs.

The P-D spread is consistently negative for civil rights plaintiffs because they consistently lose more cases ending in judgment than they win. The spread is nearer to zero for other actions because less difference exists between plaintiff and defendant judgment rates. The graph shows that the plaintiff-defendant spread in court judgments became sharply more negative for civil rights plaintiffs in the two years (1977 and 1978) immediately following enactment of the fees act, at a time when the P-D spread for non-civil-rights actions was increasing sharply. Perhaps the divergence is attributable to cases brought because of the fees act.

On the whole, scant evidence exists to support a filing increase attributable to the fees act. The increase in filings, if any, is detectable only when we isolate a single year and compare growth in civil rights filings to private filings. Over the long term, even this comparison shows civil rights cases increasing at a slower rate. The evi-

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140 The civil rights P-D spread also declined between 1975 and 1976, the last year before Congress passed the fees statute, making uncertain the effect the fees statute had on the decline.
dence more strongly suggests that the fees act may have lowered settlement rates and lowered the percentage of court judgments favorable to plaintiffs.

4. Accounting for Changes in Law

Isolating the fees act's effect requires accounting for filings made during different time periods. Changes in legal doctrine or social circumstance could also contribute to changes in filing patterns or fee award patterns. To take an extreme example, assume that the Supreme Court overruled *Monroe v. Pape* at the same time that the fees act was enacted. One would expect such a change in law to conceal the effect of the fees statute, so constitutional tort filings would not increase despite the statute's enactment.

Three kinds of intervening events are relevant: (1) events outside the legal system, such as changes in population, police practices, or the economy; (2) changes in the interpretation of constitutional tort causes of action or constitutional provisions by the courts; and (3) statutory developments. The study assumes that events outside the legal system did not substantially influence the

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number or success rate of constitutional tort filings. The analysis
proceeds on the assumption that the effects of outside events cut in
both directions and balance out, that the overall effect is de minimis,
or that the overall effect would be to increase constitutional tort fil-
ings and, therefore, not cancel out the expected effect of the fees
statute.\footnote{142}

Discussing changes in case law and statutory provisions re-
quires identifying a relevant time period during which to study pos-
sible influences. This study relied on national filing data covering
1975 to 1984. It is therefore necessary to examine changes in law
during that period.

One would expect the number of constitutional tort filings to
remain constant or to increase slightly from the mid-1970s to the
early 1980s due to case law changes directly affecting constitu-
tional tort cases. Two major constitutional tort cases might be expected to
increase filings. The first, \textit{Maine v. Thiboutot},\footnote{448 U.S. 1 (1980).}
decided during the
summer of 1980, formally opened section 1983 to causes of action
based on federal statutory claims against state officials. It was the
most significant decision affecting a plaintiff’s ability to state a sec-
tion 1983 cause of action. The enormous range of federal statutes
involving state officials threatened to allow section 1983 statutory
actions to dwarf section 1983 constitutional causes of action.
Although \textit{Thiboutot}’s likely effect would be to increase the number of
section 1983 filings, two factors indicate that no massive shift in fil-
ings should have been expected. First, the case’s broadest implica-
tions were quickly undermined by opinions in 1981 suggesting that
the availability of a section 1983 cause of action would be deter-
mined on a statute-by-statute basis.\footnote{Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Middlesex
County Sewerage Auth. v. National Sea Clammers Ass’n, 453 U.S. 1 (1981).} The subsequent cases also
indicated that the outcome of that determination was at least as
likely to be against finding a section 1983 cause of action as in favor
of finding one. Second, \textit{Thiboutot}’s implications may be most im-
portant for cases outside the civil rights area because civil rights plain-
tiffs already had many federal statutes to invoke in federal court.\footnote{Other plaintiffs, such as federal securities plaintiffs, may have been the biggest potential
beneficiaries of \textit{Thiboutot}’s most far reaching implications. Plaintiffs in such
cases often may recover attorney’s fees only if their cases can be brought under § 1983.}
The second case, *Monell v. Department of Social Services*, for the first time allowed a section 1983 plaintiff to sue cities and counties. This decision gave constitutional tort plaintiffs a governmental deep pocket that they could name as a defendant. *Monell* would not drastically increase the number of filings because the case increased the number of possible defendants rather than the number of possible causes of action.

With respect to defenses to constitutional tort claims, matters are less clear. Several cases acknowledged or expanded the scope of judicial and legislative immunity. These cases might be expected to discourage plaintiffs from bringing marginal section 1983 actions against defendants qualifying for the expanded individual immunities. For state defendants, *Quern v. Jordan* established that plaintiffs could not name states as defendants in section 1983 actions. Its net effect is muted because, until *Monell* found cities amenable to suit in 1978, nearly everyone assumed that states were immune from section 1983 actions anyway. Perhaps *Milliken v. Bradley*, which held that the eleventh amendment does not prevent a school desegregation order from requiring the state to bear millions of dollars of cost to assure future compliance with the Constitution, and *Hutto v. Finney*, which authorized attorney fees awards against the state in section 1983 cases, should be regarded as potentially more influential than *Quern*. Both cases established situations in which the sover-

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147 Owen v. City of Independence, 445 U.S. 622 (1980), heightened *Monell*’s impact by denying cities the good faith defense available to individual state officials. *Monell* offered an important defense to cities by requiring that wrongful behavior constitute “official city policy.” The net effect, however, was to increase local civil rights exposure.
Taken together, the section 1983 cases decided during the relevant time period had no predictable substantial effect on the number of filings. As a result of intervening cases it would be difficult to predict either a dramatic increase or decline in section 1983 filings. If the cases must be classified, they seem slightly favorable to constitutional tort plaintiffs, and thus might be expected to generate a modest increase in constitutional tort litigation.

One also must take account of cases not directly interpreting section 1983 that may influence the flow and outcome of section 1983 cases. Section 1983 merely provides a remedy for violations of federal rights. If the underlying set of federal rights changes, the expected number and nature of section 1983 cases also may change.

Much has been written about the Burger Court's retrenchment on Warren Court era decisions. Several opinions might be expected to reduce constitutional tort filings. Narrow constructions of the cruel or unusual punishment clause and the procedural due process clause should decrease filings. Requiring illicit intent to establish violations of the equal protection clause discourages some plaintiffs from filing. Restrictive criminal procedure opinions reduce the opportunities for constitutional tort actions against the police. Finally, decisions on matters such as justiciability and standing have not favored civil rights litigants.

The period from the mid-1970s to the early 1980s was, however, not one of uniform constitutional contraction. It was also marked by increased due process protection of family interests.

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1.52 *Milliken* limited the Edelman v. Jordan, 415 U.S. 651 (1974), bar to retrospective relief against state officials to cases in which plaintiff sought retroactive damages relief. Courts could require states to pay the cost of future compliance with the Constitution.


1.54 U.S. Const. amend. VIII; see Ingraham v. Wright, 430 U.S. 651 (1977).


1.58 E.g., City of Los Angeles v. Lyons, 461 U.S. 95 (1988); Rizzo v. Goode, 423 U.S. 362 (1976); see Neuborne, *Justiciability, Remedies, and the Burger Court*, in *The Burger Years, supra* note 153, at 3-17. Professor Neuborne notes, however, that "the Burger Court's remedial decisions did, on balance, improve the lot of plaintiffs seeking judicial redress for violations of constitutional rights." Id. at 17.

increased scrutiny of gender discrimination\(^{160}\) and of discrimination against illegitimate children,\(^{161}\) and confusing signals about remedies for school segregation.\(^{162}\) During this period the Court created the doctrine of commercial speech, a new possible fertile source of litigation, without otherwise eliminating large classes of first amendment cases.\(^{163}\) Additionally, the Court's mixed signals about affirmative action could not be expected to reduce litigation.\(^{164}\)

Those summing up the Burger Court's decisions have not found a sufficiently uniform trend to warrant predicting noticeable decreases in constitutional tort litigation. Professor Gunther has noted the Burger Court's surprisingly modest impact on preexisting constitutional law.\(^{165}\) Anthony Lewis, in his foreword to a major work assessing the Burger Court, states that the most controversial Warren Court doctrines became more secure, that no countermovement occurred, and that the reach of earlier decisions on racial equality and the first amendment were expanded.\(^{166}\)

Professor Kamisar in writing about criminal procedure, the area of perhaps the greatest tension between the Burger Court and its predecessor, has indicated that the major retrenchment occurred prior to the period of interest here.\(^{167}\) Eleanor Holmes Norton, for-

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\(^{164}\) Fulilove v. Klutznick, 448 U.S. 448 (1980); Board of Regents v. Bakke, 438 U.S. 265 (1978); see Burns, supra note 156, at 95, 102-06.


\(^{166}\) Lewis, Foreword, in The Burger Court, supra note 153, at vii; cf. W. McLaiuchlan, Federal Court Caseloads 69 (1984) (discussing Supreme Court caseload and noting that filings were down but rejecting explanation based on general differences between Warren Court and Burger Court). The editor of another book on the Burger Court has noted the "unexpected degree of continuity" between the Warren and Burger Courts. Schwartz, Preface, in The Burger Years, supra note 153, at xii.

mer chair of the Equal Employment Opportunity Commission, sum-
mimg up some of the civil rights work of the Burger Court, found no
clear trend against civil rights plaintiffs.\textsuperscript{168} During the relevant pe-
riod, in fact, significant case-law-generated contractions of civil
rights litigation probably did not occur.\textsuperscript{169}

On the statutory front, Congress enacted few provisions that
might substantially reduce section 1983 constitutional tort litiga-
tion. In 1980 Congress abolished the $10,000 jurisdictional amount
limitation for federal question cases,\textsuperscript{170} a change that could only in-
crease constitutional tort filings. The Civil Rights of Institutional-
ized Persons Act\textsuperscript{171} may eventually impose a widespread exhaustion
of state administrative remedies requirement on state prisoners, but
during the period studied, no state had in place a remedial system
that would trigger the statute's exhaustion requirement.\textsuperscript{172}

In summary, enactment of the 1976 fees statute dominates
other statutory developments\textsuperscript{173} and might have been expected to
dominate nonstatutory developments as well. There is no "smoking
gun" case law development that predictably would mask the effect
of a statute that would otherwise lead to increased filings. The de-
cline of constitutional tort filings relative to other civil filings after
the fees act's effective date cannot easily be explained
by changes in
law. The most hopeful explanation is that government officials have

\textsuperscript{168} She stated, for example: "Contrary to predictions, the Burger Court will be
remembered as the judicial architects of a strong and broad interpretation of employ-
ment discrimination statutes." E. Norton, Association of American Law Schools, Work-
shop on Teaching Civil Rights (Sept. 27, 1986) (on file at Cornell Law Review). She did
suggest that, after 1976, employment discrimination plaintiffs were on the defensive in
the Supreme Court. But, even here, she noted that the most important test, affirmative
action, survived even in the late Burger Court period. \textit{Id.}

\textsuperscript{169} See also Berger, \textit{The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead
End?}, 86 Colum. L. Rev. 9, 17 (1986) (by the late 1970s, the Court was taking a "some-
what less expansive approach to the right to counsel than one might have extrapolated
from... the Warren era" but the basic right remained firmly established).

Those institutional plaintiffs with the luxury of choosing when and where to sue
may have been influenced by the generally more conservative Court.

(1982)).


\textsuperscript{172} And such a system would have no effect on nonprisoner civil rights filings.

\textsuperscript{173} Another statutory development worth noting is enactment of the Equal Access to
amended at 5 U.S.C. § 504 (Supp. IV 1986)).
improved their compliance with the Constitution or are more amenable to nonlitigation dispute resolution.

B. The Civil Rights Bar

Differences between constitutional tort lawyers and other lawyers may partly explain why constitutional tort litigation differs from other litigation. Constitutional tort lawyers may use different filing criteria, have different abilities, and pursue cases to trial for different reasons than other lawyers. Systematic data about constitutional tort lawyers do not exist, and it is doubtful that there is a distinct "constitutional tort" bar in the sense that there is a securities law bar, a tax bar, or a plaintiff's tort bar. The most detailed study to date of any major bar shows little in the way of a civil rights bar.

Given the lack of information about the "civil rights bar," our discussion is by necessity constrained to hypotheses and more limited data. Based on the identity of the lawyers filing the actions in the field study, we hypothesize that the constitutional tort bar has four components: (1) visible institutional actors such as the Legal Defense Fund or the American Civil Liberties Union, (2) typical lawyers of the kind that bring most cases of all kinds, (3) occasional players such as major law firms engaging in pro bono activity, and (4) government lawyers working in legal services offices.

Some explanations of how the constitutional tort bar differs from other bars depend on which component of the constitutional tort bar one examines. Explanations that rely on different experience ring hollow when referring to an institutional actor or an attorney that is part of a legal services office. Explanations that rely on different resources seem implausible when focusing on large firm pro bono activity or government lawyers. Experience- and resource-based explanations probably are more helpful when addressed to the general bar.

It is likely, however, that the institutional civil rights litigator, 174 Unless bringing a constitutional tort case, standing alone, qualifies one for membership in such a bar, the approach taken by a study of civil rights litigation in the Supreme Court. J. Casper, Warren Court, supra note 92; Casper, Lawyers Before the Supreme Court: Civil Liberties and Civil Rights, 1957-66, 22 STAN. L. REV. 487 (1970) (noting dominance of NAACP Legal Defense Fund in civil rights litigation before Supreme Court).

175 J. Heinz & E. Laumann, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982). Although expanding the category further to include all "public interest" lawyers makes more data available, little of it relates to constitutional tort activity.


177 If anything, the Legal Defense Fund and the ACLU would seem to have an edge over typical government attorneys.
the major-law-firm pro bono case, and the government-funded legal services case are the exceptions rather than the rule. These segments of the bar may dominate the important test cases, but one theme in the literature that our data confirm is that most civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity. Even a leading institutional litigator that might be expected to bring constitutional tort actions could afford to bring at most a handful of cases in a single district in one year, and only some of those cases would be constitutional tort cases. More importantly, the institutional litigators tend to favor important test cases rather than servicing the population at large so that they can maximize the impact of their resources and efforts. On the pro bono front, the slim available evidence suggests that less activity exists than one might assume. The Heinz and Laumann Chicago bar study states:

While some elite lawyers may devote small amounts of their time to civil rights law, however, the data on the 14 lawyers in our sample who devote 25 percent or more of their time to work that they label “civil rights” suggest that [the assumption of elite lawyer participation in civil rights matters] should be examined. If the nature of the bar does help explain success rates, the relevant

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178 Even at the Supreme Court level the bulk of civil rights litigation is by small private law firms and solo practitioners. J. Casper, Ph.D. thesis, supra note 92, at 207.
180 The Legal Defense Fund, for example, expends much of its time and funds on title VII litigation, death penalty litigation, and defending affirmative action programs. R. Mnookin, supra note 176, at 46-47; see also Rabin, supra note 179, at 217-18. Of these classes of cases, only title VII cases against government defendants might generate many constitutional tort cases, without necessarily generating many cases in one district.
181 R. Mnookin, supra note 176, at 46-48 (noting the orientation of public interest litigators, including the ACLU, the Legal Defense Fund, and the Legal Services Program, toward large test cases).
182 Some perceive civil rights litigation as being conducted primarily by corporate lawyers from large, prestigious firms. J. Heinz & E. Laumann, supra note 175, at 78-79 n.18 (noting and questioning the perception); Corbin, Democracy and Education for the Bar, 4 AM. L. SCH. REV. 725, 732 (1922).
183 J. Heinz & E. Laumann, supra note 175, at 79 n.18. The distribution of civil rights lawyers by practice area was as follows:
bar is the local, small-firm lawyer who brings the bulk of constitutional tort litigation.184

Perhaps constitutional tort cases are brought by less skilled or experienced attorneys than other cases. For a young, untrained attorney, a constitutional tort case may be tempting ground on which to gain valuable experience, regardless of expected outcome. However, the Chicago bar study poses difficulties for this theory. Although Heinz and Laumann found that the civil rights practitioner had a low mean age relative to practitioners in other areas of law, this was not a statistically significant difference.185 Other areas with low mean ages included antitrust defense and business tax, specialties not usually associated with lawyers of undeveloped skills.186 The most statistically significant fact about the civil rights practitioners was their extraordinarily high connection to elite law schools. Only antitrust and securities lawyers had a greater percentage of practitioners from the elite group.187 In terms of how their peers perceive them, the civil rights lawyers were regarded as "average."188

Another explanation for the lower success rates of constitutional tort cases might be that constitutional tort lawyers are less "success oriented" than other lawyers in accepting cases. Although

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>government lawyers</td>
<td>50%</td>
</tr>
<tr>
<td>practitioners in firms of &lt; 10 lawyers</td>
<td>29%</td>
</tr>
<tr>
<td>practitioners in firms of &gt; 30 lawyers</td>
<td>13%</td>
</tr>
<tr>
<td>corporate law departments</td>
<td>7%</td>
</tr>
<tr>
<td>solo practitioners</td>
<td>0%</td>
</tr>
</tbody>
</table>

Id. at 443 table B.3. Because of the small number of civil rights practitioners found, the authors properly caution against drawing conclusions from these data.

184 Matters may change at the Supreme Court level. See J. Casper, Ph.D. thesis, supra note 92, at 499 (noting dominance of NAACP Legal Defense Fund in civil rights litigation before Supreme Court).

185 J. Heinz & E. Laumann, supra note 175, at 446-49 table B.5.

186 Id. And in these two areas the relatively low mean age was statistically significant.

187 Id. at 444-45 table B.4. The elite schools were defined to be Chicago, Columbia, Harvard, Michigan, Stanford, and Yale. Id. at 445 table B.4 (note 2). Casper's data show that civil rights litigators at the Supreme Court level had slightly higher attendance rates at elite colleges and had more frequently appeared in the top 10% of their college class than had other Supreme Court litigators. J. Casper, Ph.D. thesis, supra note 92, at 204. They show the civil rights litigator to have attended full-time law schools at about the same rate as the other litigators, and to have performed almost exactly as well in law school. Id. at 206. There were substantial differences between firm size and income. Id. at 207-08.

188 On a scale where the mean "prestige score" was 50, the civil rights bar was perceived by a random sample of 224 attorneys to have a prestige score of 46. This was .4 standard deviation units below the mean. J. Heinz & E. Laumann, supra note 175, at 91 table 4.1. The prestige score was arrived at by asking the lawyers to rate, on a 5-point scale, the "general prestige within the profession at large" each of 30 fields of law. Id. at 90.
we have no direct evidence on this, process of elimination suggests that this is a promising explanation worthy of further study.

C. Attorney Fees and Prisoner Civil Rights Cases

Much of the prior analysis either focused on nonprisoner constitutional tort actions or disregarded differences between prisoner and nonprisoner actions. Yet important differences exist between these two classes of constitutional tort actions. Both their measurable characteristics and the likely role of attorneys may shift when one moves from nonprisoner to prisoner litigation. Attorneys' impact on prisoner cases may differ from their influence in nonprisoner cases. Prisoners encounter practical hurdles to finding a lawyer and preparing a case while in jail. Prisoners are less able than others to pay lawyers. Whether or not they can obtain lawyers, prisoners have little incentive not to file actions.

Judges may be more dissatisfied with prisoner civil rights litigation than with nonprisoner civil rights litigation. Prisoner civil rights is one area where the vision of large numbers of frivolous actions is strongest. Perhaps as a result of this perception, the one formal exhaustion-of-remedies requirement in section 1983 actions applies only to prisoners. 189

At one level, the data show a reduced role for attorneys and support dissatisfaction with prisoner litigation. Nationally, although prisoners bring about as many constitutional tort actions as nonprisoners do, 190 a much higher fraction of the prisoners' cases are unsuccessful, and counsel bring relatively few of the actions. 191 Prisoners also obtain fewer money judgments, money settlements, and attorney fee awards. 192 Although the data seemingly confirm entrenched notions about prisoner litigation, there is more to the story about the role of counsel.

1. The Effect of Counsel

When one controls for the presence of counsel in prisoner civil rights cases, findings change dramatically. Table X compares prisoner and nonprisoner constitutional tort litigation in cases in which the plaintiff is represented by counsel. Excluding the uncounseled prisoner actions eliminates significant differences between success rates, the rates at which pretrial conferences, depositions, and trials occur, and the rates at which plaintiffs obtain money judgments and money settlements. The significant or near-significant differences

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190 Eisenberg & Schwab, supra note 1, at 662 table V.
191 See supra Table IV; Eisenberg & Schwab, supra note 1, at 681 table XII, 692 n.207.
192 See supra Table IV.
that remain suggest no clear picture. Nonprisoner cases result in more hearings but prisoner cases have more active discovery through interrogatories and production of documents. Controlling for counsel suggests a radically different relationship between prisoner and nonprisoner constitutional tort litigation. As measured by the characteristics tracked here, they become almost indistinguishable.

### TABLE X
**Comparison of Counseled Prisoner & Nonprisoner Constitutional Tort Cases, 3 Districts, 1980-81**

<table>
<thead>
<tr>
<th>Case Characteristics</th>
<th>Nonprisoner</th>
<th>Prisoner</th>
<th>Signif.¹⁹³</th>
</tr>
</thead>
<tbody>
<tr>
<td>Success</td>
<td>244 55%</td>
<td>63 52%</td>
<td>.661</td>
</tr>
<tr>
<td>Answer</td>
<td>342 77%</td>
<td>106 87%</td>
<td>.014</td>
</tr>
<tr>
<td>Interrogatories</td>
<td>186 42%</td>
<td>71 59%</td>
<td>.014</td>
</tr>
<tr>
<td>Hearing</td>
<td>173 39%</td>
<td>26 22%</td>
<td>&lt;.001</td>
</tr>
<tr>
<td>Pretrial conference</td>
<td>152 34%</td>
<td>47 38%</td>
<td>.395</td>
</tr>
<tr>
<td>Depositions</td>
<td>209 47%</td>
<td>56 46%</td>
<td>.975</td>
</tr>
<tr>
<td>Trial commenced</td>
<td>76 17%</td>
<td>23 19%</td>
<td>.719</td>
</tr>
<tr>
<td>Production of documents</td>
<td>112 25%</td>
<td>42 34%</td>
<td>.048</td>
</tr>
<tr>
<td>Discovery event</td>
<td>258 58%</td>
<td>83 68%</td>
<td>.044</td>
</tr>
<tr>
<td>Money judgment</td>
<td>12 3%</td>
<td>5 4%</td>
<td>.603</td>
</tr>
<tr>
<td>Money settlement</td>
<td>20 4%</td>
<td>5 4%</td>
<td>1.000</td>
</tr>
<tr>
<td>Fees awarded by court</td>
<td>24 5%</td>
<td>1 2%</td>
<td>.055</td>
</tr>
<tr>
<td>TOTAL CASES</td>
<td>445 100%</td>
<td>121 100%</td>
<td></td>
</tr>
</tbody>
</table>

The implications of these findings depend on whether the meritorious cases find their way to counsel. If they do, it matters little that large numbers of unsuccessful prisoner cases remain. They can still be viewed as the nuisances they are presumed to be. If, however, many prisoners with valid claims lack representation, then the finding of indistinguishability between counseled cases suggests a problem in securing counsel for prisoners. Our data can partially test whether valid prisoner claims fail to succeed for want of counsel.

2. **Judge Posner's Theory of the Market**

Judge Posner argues that no problem exists because the market for attorneys works at the jailhouse door and valid claims will attract counsel. In *McKeever v. Israel*¹⁹⁴ Judge Posner argued against appointment of counsel in prisoner section 1983 cases. His argument,

¹⁹³ For an explanation of the significance column, see supra note 52.
¹⁹⁴ 689 F.2d 1315 (7th Cir. 1982) (Posner, J., dissenting).
repeated or alluded to in subsequent opinions,\textsuperscript{195} is that the private market system of allocating attorneys ought to determine which prisoner section 1983 plaintiffs obtain counsel. Those prisoners with meritorious claims should be able to find counsel because private counsel will be attracted by the prospect of the fee award promised by section 1988.\textsuperscript{196}

The results reported above bear on Judge Posner's perceptions about prisoner section 1983 litigation. First, little evidence supports the assumption that the rates at which plaintiffs receive court-awarded fees in section 1983 litigation exceed those in other litigation. Section 1983 plaintiffs receive court-awarded fees in five percent of the nonprisoner cases and in almost none of the prisoner cases. Non-civil-rights plaintiffs receive such fees in four percent of cases. There is no significant difference between the nonprisoner constitutional tort figure and the control group figure. Second, only sketchy evidence exists that enactment of the fee award statute induced attorneys to bring more prisoner section 1983 actions.\textsuperscript{197}

One of the studied districts, the Eastern District of Pennsylvania, had an active program of appointing counsel in prisoner civil rights cases, so we were able to explore the matter more directly.\textsuperscript{198} Neither the Central District of California nor the Northern District of Georgia had such a program. California and Georgia

\textsuperscript{195} Lenard v. Argento, 808 F.2d 1242 (7th Cir. 1987); Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983), cert. denied, 464 U.S. 986 (1983).
\textsuperscript{196} Where damages are sought, the prisoner should have no difficulty finding a lawyer willing to take his case on a contingent-fee basis, provided the case has some merit. Even if only injunctive relief is sought, he should be able to retain counsel to assist him with a claim having substantial merit, because 42 U.S.C. § 1988 allows the court to award the winning party in a civil rights case a reasonable attorney's fee, and the award is made as a matter of course when the plaintiff is the winner.

\textsuperscript{197} See supra text accompanying notes 128-36.
\textsuperscript{198} The program began in 1977. Periodic reports to the Clerk of the Court show the number of participating firms, the number of participating attorneys (in the earlier reports), and the cumulative number of cases in which counsel was appointed:

<table>
<thead>
<tr>
<th>Date of Report</th>
<th>Individual Attorneys</th>
<th>Firms</th>
<th>N of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>8/26/77</td>
<td>67</td>
<td>24</td>
<td>26</td>
</tr>
<tr>
<td>6/15/78</td>
<td>58</td>
<td>20</td>
<td>91</td>
</tr>
<tr>
<td>11/4/80</td>
<td>—</td>
<td>17</td>
<td>243</td>
</tr>
<tr>
<td>7/28/81</td>
<td>—</td>
<td>32</td>
<td>322</td>
</tr>
<tr>
<td>5/3/82</td>
<td>—</td>
<td>29</td>
<td>388</td>
</tr>
<tr>
<td>4/12/84</td>
<td>—</td>
<td>26</td>
<td>483</td>
</tr>
</tbody>
</table>

Plaintiff's counsel in these cases can apply for fees although few seem to avail them-
are districts in which we assume the private market, as influenced by section 1988’s fee provision, determined which prisoners would obtain lawyers. Table XI shows that, in California in 1980-81, 6 of 73 (8.2%) prisoner constitutional tort cases had counsel. Similarly, in Georgia, prisoners obtained counsel in 33 of 292 (11.3%) constitutional tort cases filed. In Pennsylvania, interference with the market led to counsel’s participation in 82 of 253 (32.4%) constitutional tort cases. Sixty-six of the Pennsylvania cases involved appointed counsel. The differences between the Pennsylvania figures and those from California and Georgia are highly significant.

TABLE XI
COMPARISON OF PRISONER CONSTITUTIONAL TORT CASES,
3 DISTRICTS, 1980-81

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>Prisoner cases with counsel</td>
<td>6</td>
<td>82</td>
<td>33</td>
</tr>
<tr>
<td>% prisoner cases with counsel</td>
<td>8.2%</td>
<td>32.4%</td>
<td>11.3%</td>
</tr>
<tr>
<td>Total prisoner cases</td>
<td>73</td>
<td>253</td>
<td>292</td>
</tr>
<tr>
<td>Success rate counseled cases</td>
<td>33%</td>
<td>55%</td>
<td>49%</td>
</tr>
<tr>
<td>Success rate appointed cases</td>
<td>N/A</td>
<td>58%</td>
<td>50%</td>
</tr>
</tbody>
</table>

The Eastern District of Pennsylvania’s greater willingness to appoint counsel might explain the differences in rates of representation. If it were appointing counsel willy nilly, however, one would expect success rates in Pennsylvania appointed counsel cases to be lower than success rates in Pennsylvania retained counsel cases because the private market would be more selective about accepting cases. For Pennsylvania to achieve its high rate of representation for prisoners, it would have to be appointing counsel in a less meritorious class of cases. Yet, as Table XI suggests, the success rate in Pennsylvania appointed counsel cases differs sharply neither from Pennsylvania private counsel cases nor from Georgia cases. The counsel-appointing process in Pennsylvania reasonably reproduces the private market’s success rates. The process does not result in appointing counsel in an unusually weak set of cases, which would depress success rates, or in an unusually strong set of cases, which would inflate success rates.

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199 Six Georgia prisoner cases had appointed counsel.
200 If one is troubled by the relatively small number of Central District constitutional tort cases, three-year data for the same district are also available. During a nonconsecutive three-year period prisoners obtained counsel in 17 out of 293 (5.8%) constitutional tort cases filed.
Several other explanations for the lower number of counseled prisoner cases in California and Georgia are possible. Perhaps the market is working and California and Georgia prisoners have fewer bona fide claims than their Pennsylvania counterparts. Perhaps the Pennsylvania courts are more favorable to civil rights litigants than the California or Georgia courts. Although one must remain open to such explanations, a simpler explanation initially appears more plausible. Assuming that California, Georgia, and Pennsylvania prisons and courts do not differ enormously, the private legal market fails to supply counsel in California and Georgia for many meritorious prisoner constitutional tort actions.

D. The Government as Defendant

If the government-as-defendant hypothesis is correct, a key to understanding lower success rates or greater burden of constitutional tort cases is the identity of the defendant, not the subject matter of the lawsuit. Much in our analysis of the government as defendant, including plaintiffs’ relative inability to forecast governmental behavior and expenditures, does not depend on the case being a constitutional tort case. One way to test this thesis is to compare how other suits against the government fare and how long they take to resolve.

The Administrative Office data identify every case in which the federal government is either a defendant or plaintiff. It is tempting to tally up the success rates and length of time in cases in which the government is a defendant and compare them with the success rates and length of time in cases in which the government is not a defendant. This approach, however, has major weaknesses. First, the Administrative Office category of non-federal-government defendants includes state government defendants. Thus one cannot be confident that the federal government defendant/other defendant dichotomy accurately tests the government/private defendant hypothesis. Second, combining all cases against the government can mislead because the government is a defendant in many social security cases, in which plaintiffs are relatively unsuccessful. In nonprisoner cases, we do find significant differences in success rates between the Eastern District of Pennsylvania and the two other districts. But these differences are not great enough (roughly 10% differences in success rates) to explain the larger disparity in counsel rates for prisoners. The greater success rates between the E.D. Pa. and the other districts extends to the control group of non-civil-rights cases.

Of cases terminated in the three districts for 1980-81, Administrative Office data show that social security plaintiffs obtained a favorable judgment in 59 of 573 cases (10.3%) and that the defendant obtained a favorable judgment in 214 of 573 cases (37.3%). In three cases both parties obtained judgment. The other cases are of unknown outcome (presumably settlements and the like). The gap between plaintiff and defendant judgment rates in social security cases is much less favorable to plaintiffs than in
Comparing tort actions filed against the federal government with tort actions filed against other defendants is more helpful. Several features make tort actions useful. First, tort actions against the United States are based on the law of the state in which the tort occurs.\textsuperscript{203} They are therefore closely analogous to diversity tort actions brought in federal court against private defendants. Second, they involve government behavior that is the same as private behavior. Thus, if private-defendant tort litigation differs from government-defendant tort litigation, the nature of the defendant may be a major contributing factor. Third, tort actions are the class of non-civil-rights cases most analogous to constitutional tort litigation. Indeed, government officials often walk a fine line between constitutional violations and mere torts.\textsuperscript{204} Finally, few tort actions brought in federal court can be against state defendants.\textsuperscript{205} Therefore, the non-U.S. defendant category cannot blur the distinction between government-as-defendant cases and other cases by including cases with state defendants in the comparison group.

1. \textit{Success Rates Against Government and Nongovernment Defendants}

Table XII presents the court judgments in tort actions in the three districts. It shows that, when the government is not defending an action, plaintiffs obtain judgments in 7.1\% of the cases and defendants obtain judgments in 9.1\% of the cases, a slight margin in favor of defendants. When the United States is a defendant, the plaintiff judgment rate climbs to 8.1\% but the defendant judgment rate climbs to 14.9\%. The gap between plaintiffs and defendants widens from two percentage points to nearly seven points. National data over a nine-year period confirm these results.\textsuperscript{206}

Our field data suggest a similar trend. In tort cases in the con-

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{203} Federal Tort Claims Act, 28 U.S.C. \textsect{1346(b)} (1982).
    \item \textsuperscript{204} In several cases the Court has refused to hold that negligence rose to the level of a constitutional violation. See Daniels v. Williams, 474 U.S. 327 (1986); Parratt v. Taylor, 451 U.S. 527 (1981); Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693, 701 (1976).
    \item \textsuperscript{205} Eleventh amendment limitations on actions against states in federal court make it unlikely that many tort defendants in federal court will be state governments or officials. Thus, the danger is reduced that the U.S./other defendant dichotomy does not correspond to a government/nongovernment defendant categorization.
    \item \textsuperscript{206} All federal cases terminated from 1975 through part of 1984 show plaintiffs obtaining judgment in 18,346 out of 194,436 (9.4\%) tort cases terminated against private defendants and plaintiffs obtaining judgment in 2,273 out of 19,177 (11.9\%) tort cases in which the U.S. was a defendant. Defendants obtained judgment in 20,018 (10.3\%) of the private cases and 3,880 (20.2\%) of the actions against the U.S.
\end{itemize}
\end{footnotesize}
trol group of non-civil-rights cases, plaintiffs succeeded in 159 of 194 (82.0%) cases brought against private defendants. In tort cases against government defendants, plaintiffs succeeded in 11 of 17 (64.1%) cases.\textsuperscript{207} And in employment discrimination cases against government defendants plaintiffs succeeded in 93 of 201 (46.3%) cases.\textsuperscript{208}

The trend, though not highly significant in any single comparison, is always in the same direction. The results suggest greater difficulty in obtaining judgments against the government, but they are tempered by two factors. First, the bulk of the cases for which the Administrative Office reports termination data fall into the "unknown" category, presumably because there is no known judgment for cases that settle. Second, with respect to the results in tort cases, the effect in favor of government defendants may not necessarily carry over to state and local defendants. The federal government may be a more imposing litigator than other governments.

\begin{table}
\centering
\caption{Comparison of Case Outcomes in Tort Cases Brought Against U.S. With Tort Cases Brought Against Other Defendants}
\textit{Source: Administrative Office Data, 3 Districts, 1980-81}
\begin{tabular}{lcc}
\hline
Party Obtaining Judgment & Non-U.S. & U.S. Government
\hline
Plaintiff & 203 & 25 \\
& 7.1\% & 8.1\% \\
Defendant & 258 & 46 \\
& 9.1\% & 14.9\% \\
Both & 12 & 1 \\
& .4\% & .3\% \\
Unknown & 2368 & 236 \\
& 83.4\% & 76.6\% \\
\hline
\end{tabular}
\end{table}

Chi-Square significance = .017

2. \textit{Litigation Rates and Valuing Constitutional Tort Claims}

The relative emphasis on injunctive relief in actions against governments may exacerbate parties' difficulty in predicting expected litigation outcomes. If the parties have more difficulty valuing constitutional tort claims than other claims, there will be a wider

\textsuperscript{207} The difference is only significant at the .132 level. For a discussion of statistical significance, see supra note 52.

\textsuperscript{208} The difference is only significant at the .121 level.
than usual divergence between expected returns and actual returns from constitutional tort litigation. This would lead to higher litigation rates for constitutional tort claims, a result noted above. Two sets of data bear on the possibly greater difficulty of valuing constitutional tort claims.

First, examining the nature of the constitutional tort claims suggests that a large fraction could be placed in the “difficult to value” category. About thirty percent of the cases are due process or first amendment claims.\(^2\)\(^0\)\(^9\) Actions against the police account for another thirty percent of the constitutional tort actions.\(^2\)\(^1\)\(^0\) Some substantial fraction of these actions are claims for false arrest or loss of liberty. Pure damages claims are probably only about fifty percent of constitutional tort filings.

Second, both the Administrative Office data and the field data suggest that injunctive remedies, which generally are more difficult to value than other remedies, play a larger role in constitutional tort litigation than in other litigation. Table XIII compares the percentage of successful constitutional tort cases leading to nonmonetary relief with the percentage of successful cases in the control group leading to such relief. It shows that 14.6% of the successful non-prisoner constitutional tort cases yielded some nonmonetary relief compared with only 7.4% for the control group.\(^2\)\(^1\)\(^1\) Administrative Office data confirm this at the national level and over time. From 1975 to 1984, in cases for which the Administrative Office data show a judgment, 3.7% of the “other civil rights” cases resulted in injunctive relief. For the same period, the comparable figure for tort litigation was well under one percent.

Part of the explanation for lower success rates in constitutional tort actions may rest with the nature of the defendant, and be, to this extent, independent of the subject matter of the case.\(^2\)\(^1\)\(^2\) Further...
ther study of the effect at the state and local level is necessary. The magnitude of any government-as-defendant effect found here, however, is insufficient to explain much of the difference in success rates. Higher litigation rates in constitutional tort cases may stem in part from the larger-than-normal proportion of difficult-to-value claims.

3. Burden of Government Defendant Cases Compared with Nongovernment Defendant Cases

Comparisons similar to those used to test factors influencing success can also be used to test whether the government as defendant partially explains the added burden of nonprisoner constitutional tort cases. The results of these comparisons are mixed.

Table XIV shows that in our sample of tort cases against government and nongovernment defendants, the mean time to disposition for cases in which the government was a defendant was 12.3 months, while tort cases against private defendants had a mean disposition time of 13.8 months. This suggests that the nature of the defendant does not help explain the greater time burden of constitutional tort cases. Administrative Office data confirm that this is a long-term national trend.\(^\text{213}\)

When comparing employment discrimination cases against government and nongovernment defendants, however, the results

\(\text{denied, 439 U.S. 1003 (1978) (question of good faith defense for U.S. when its officials act in good faith). Third, people seem to be less likely to file a complaint against the government than against some other defendants. Trubek, supra note 27, at 87 table 1. This, one suspects, would lead to greater rather than lower success rates in actions against the government.}\(^\text{213}\)

\(\text{In every year from 1976 to 1983 the median time for tort cases terminated against the U.S. was less than the median time for tort cases terminated against private defendants. In four of the years, the survival patterns were statistically significantly shorter.}\)
change. Table XIV shows that in employment discrimination cases the mean time to disposition against government defendants was 17.5 months compared with 13.9 months for private defendants.\textsuperscript{214}

Thus, in general, tort cases against the government end more quickly than cases against private defendants. In employment discrimination litigation, however, the reverse is true. This suggests that the government may litigate civil rights cases differently than it litigates other cases. Perhaps the government more firmly resists civil rights claims than other claims.

CONCLUSION

These findings suggest several conclusions regarding constitutional tort litigation. First, with respect to the burden of constitutional tort litigation, this study uncovered little evidence that the number of constitutional tort cases should be a cause for special concern. Constitutional tort filings are not growing rapidly in relation to the rest of the federal docket. If there has been a constitutional tort litigation explosion, it seems to be part of a larger, and also debatable,\textsuperscript{215} litigation explosion. Under some views of the numbers, constitutional tort litigation declined during a period when it was widely perceived as growing. The average nonprisoner constitutional tort case, however, does take up more court and lawyer energy than the average civil case, and such cases comprise an increasing percentage of the cases tried in federal court. In contrast, the average prisoner constitutional tort case takes up considerably less energy than the average civil case.

This study does not fully account for the fiscal consequences of constitutional tort cases. Direct transfers of funds as a result of constitutional tort actions do not seem to be an alarming phenomenon. Relative to other measures of government expenditures, the direct costs of constitutional tort litigation appear modest.

\textsuperscript{214} Six cases against government defendants and two cases against private defendants remained pending in August 1986, over five years after filing.

\textsuperscript{215} See Galanter, supra note 32.
Second, constitutional tort cases, both nonprisoner and prisoner, are a relatively unsuccessful class of cases. A smaller proportion of cases settle, and plaintiffs win a smaller proportion of court judgments. Some portion of the higher failure rate is attributable to the nature of the defendant, the government. There is also modest evidence that the 1976 fee award statute led to a decline in success rates, and an increase in litigation rates, relative to other civil actions. Surprisingly, there is little evidence that the fees statute led to significantly increased filings or to increased access for prisoners to the private attorney market.

These last findings suggest that attorney fees statutes may have less of an effect on filing rates than is commonly believed. In the area of prisoner litigation, whatever effect the fees statute has had seems to pale in comparison with the effect of the Pennsylvania appointed counsel program.

This study also suggests some strengths and shortcomings of litigation models. The models firmly predict an increase in filings as the result of a fee-shifting statute. Yet of all the effects of the fees statute, the evidence provides the least support for this predicted increase. There is evidence supporting predictions with respect to the effect of the fees statute on litigation rates. Even here, however, critical simplifying assumptions are necessary and the models necessarily lack quantitative predictive power. The models predict the direction of changes not the magnitude. When presented with ambiguous real-world evidence, it may be too easy to detect support for such general predictions.

The findings suggest at least two interesting areas for future research. First, before concluding that one-way fee shifting statutes have less effect than is commonly believed, one should study the effect of other fees statutes on filing rates. Second, models of litigation might be expanded to accommodate the agency problems that affect the attorney-client relationship. If fee-shifting statutes have less than the expected effects, it may be due to differences between the attorney-client as an entity and the attorney and client as distinct entities.

The picture of constitutional tort litigation suggested by this study has important implications for policymakers. Absent more evidence about the relative burden and ideal level of constitutional tort litigation, this study could not support new legislative or judicial restrictions on constitutional tort litigation in the name of re-

\[216\] See Clermont & Currivan, supra note 90; Coffee, supra note 90; Miller, supra note 90. For a study of the effect of hourly versus contingent fees on lawyer effort, see Kritzer, Felstiner, Sarat & Trubek, The Impact of Fee Arrangement on Lawyer Effort, 19 Law & Soc'y Rev. 251 (1985).
ducting the federal docket or decreasing the fiscal drain on state and local defendants. This study also suggests the need to reassess whether the current system of constitutional remedies is working. The low success rates and surprisingly low number of true constitutional tort cases may be evidence of increased official compliance with constitutional norms. But it may also be evidence of a marginally effective system in which many valid claims go unremedied. Without some sense of the number and seriousness of constitutional disputes not being filed, no clear interpretation of the evidence can be made.\textsuperscript{217}

Those who think there are many valid claims without remedy must reassess the efficacy of the existing fee mechanism to promote constitutional remedies. Perhaps a more carefully crafted fee mechanism would better serve congressional goals.\textsuperscript{218} It may be that methods employed in other fields, such as minimum amounts of damages,\textsuperscript{219} or double or treble damages,\textsuperscript{220} would improve the system's overall performance.

\textsuperscript{217} See Trubek, supra note 27.
\textsuperscript{218} See Clermont & Currivan, supra note 90.
\textsuperscript{220} See Perloff & Rubinfeld, supra note 36 (analyzing effect of reduction of damage multiplier in antitrust cases).
APPENDIX A

Referring to Figure 1, we assume that cases are uniformly distributed with respect to P and J. Before fee-shifting, the cases filed are those with combinations of P and J that lie above the curve \( PJ = C \) (graphed in Figure 1 as \( J = C/P \)), which prescribes plaintiff's minimum expected return before filing a case. All cases below the curve will not be brought because the expected return (the product of J and P) is less than the expected expenses, C. After fee-shifting, the cases filed are those with combinations of P and J that lie above the curve \( PJ = C(1-P) \) (graphed as \( J = C(1-P)/P \)). One predicts an increase in success rates if the average value of P after enactment of fee-shifting exceeds the average value of P before fee-shifting.

The average value of P for cases not filed before fee-shifting \( \bar{P}_b \) is the average value of P for all cases under the curve \( J = f_b(P) = C/P \).

\[
\bar{P}_b = \frac{\int P f_b(P) dP}{\int f_b(P) dP} = \frac{\int P \left( \frac{1}{P} \right) dP}{\int \left( \frac{1}{P} \right) dP} = \frac{\alpha - \beta}{\ln(\alpha) - \ln(\beta)}
\]

The average value of p for cases not filed after fee-shifting \( \bar{P}_s \) is the average value of p for all cases under the curve \( J = f_s(P) = C(1-P)/P \).

\[
\bar{P}_s = \frac{\int P f_s(P) dP}{\int f_s(P) dP} = \frac{\int P \left( \frac{1-P}{P} \right) dP}{\int \left( \frac{1-P}{P} \right) dP} = \frac{(\alpha - \beta) - \frac{1}{\alpha}(\alpha^2 - \beta^2)}{1\ln(\alpha) - 1\ln(\beta) - (\alpha - \beta)}
\]

\( \bar{P}_b > \bar{P}_s \) for all \( \alpha \) and \( \beta \), where \( 1 > \alpha > \beta > 0 \).

This establishes that, for any C, the average value of P for all cases not brought after fee-shifting is less than the average value of P for all cases not brought before fee-shifting. Therefore, the average value of P for cases filed as a result of fee-shifting must be higher than the average value of P for cases that are brought absent fee-shifting. In other words, the probability of success, were all cases to go to trial, increases after fee-shifting.
Tables B1, B2, and B3 supply the numbers underlying the graphs in Figures 2, 3 and 4.

### TABLE B1 (to accompany Figure 2)

**NATIONAL FILINGS BEFORE AND AFTER THE 1976 FEES ACT: NONPRISONER "OTHER CIVIL RIGHTS" FILINGS VS. PRIVATE FILINGS**

Source: Administrative Office of U.S. Courts

<table>
<thead>
<tr>
<th>Year</th>
<th>Other Civil Rights</th>
<th>All</th>
<th>Other Civil</th>
<th>All</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>5,294</td>
<td>73,790</td>
<td>13</td>
<td>12</td>
</tr>
<tr>
<td>1976</td>
<td>5,982</td>
<td>82,638</td>
<td>7</td>
<td>-2</td>
</tr>
<tr>
<td>1977</td>
<td>6,420</td>
<td>81,092</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>1978</td>
<td>6,636</td>
<td>81,330</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>1979</td>
<td>6,778</td>
<td>86,098</td>
<td>12</td>
<td>6</td>
</tr>
<tr>
<td>1980</td>
<td>7,594</td>
<td>91,202</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>1981</td>
<td>8,091</td>
<td>97,447</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>1982</td>
<td>8,205</td>
<td>108,637</td>
<td>-4</td>
<td>7</td>
</tr>
<tr>
<td>1983</td>
<td>7,894</td>
<td>116,585</td>
<td>-10</td>
<td>-11</td>
</tr>
</tbody>
</table>

TOTAL % CHANGE: Other Civil Rights vs. All Private

- 49% vs. 58% vs. -9%

Figure B1 shows graphically the growth in civil rights filings (possible constitutional tort) compared with the growth in all private civil filings.

### ANNUAL NUMBER OF FILINGS

**OTHER CIVIL RIGHTS (00's) vs. ALL PRIVATE (000's)**

![Graph showing the growth in civil rights filings compared with all private filings between 1975 and 1983.](image)
### TABLE B2 (to accompany Figure 3)

**Litigation Rates Before and After the 1976 Fees Act:**

**Nonprisoner "Other Civil Rights" Terminations vs. Non-civil Rights Terminations**

Source: Administrative Office computer tapes

<table>
<thead>
<tr>
<th>Year</th>
<th>Non-Civil-Rts.</th>
<th>Other Civil Rts. (code 440)</th>
<th>Difference</th>
<th>Change in Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>8.2%</td>
<td>11.2%</td>
<td>3.0%</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>8.1%</td>
<td>11.1%</td>
<td>3.0%</td>
<td>0.2%</td>
</tr>
<tr>
<td>1977</td>
<td>7.5%</td>
<td>10.2%</td>
<td>2.7%</td>
<td>-9.1%</td>
</tr>
<tr>
<td>1978</td>
<td>7.6%</td>
<td>10.1%</td>
<td>2.5%</td>
<td>-7.2%</td>
</tr>
<tr>
<td>1979</td>
<td>7.1%</td>
<td>10.0%</td>
<td>2.9%</td>
<td>14.1%</td>
</tr>
<tr>
<td>1980</td>
<td>7.6%</td>
<td>10.2%</td>
<td>2.6%</td>
<td>-7.5%</td>
</tr>
<tr>
<td>1981</td>
<td>6.4%</td>
<td>10.3%</td>
<td>3.9%</td>
<td>47.5%</td>
</tr>
<tr>
<td>1982</td>
<td>6.2%</td>
<td>10.0%</td>
<td>3.8%</td>
<td>-3.2%</td>
</tr>
<tr>
<td>1983</td>
<td>5.3%</td>
<td>9.3%</td>
<td>4.0%</td>
<td>6.9%</td>
</tr>
<tr>
<td>1984</td>
<td>4.7%</td>
<td>9.3%</td>
<td>4.5%</td>
<td>12.9%</td>
</tr>
</tbody>
</table>

Figures in Table are % of terminations that are completed trials.

### TABLE B3 (to accompany Figure 4)

**Comparison of Success Rates of "Other Civil Rights" Filings with All Private Filings**

Source: Administrative Office national data on cases reporting judgment for plaintiff or defendant

<table>
<thead>
<tr>
<th>Year</th>
<th>Civil Rights Actions</th>
<th>Private Actions</th>
<th>Diff. in P-D Spread</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prevailing Party</td>
<td>Prevailing Party</td>
<td></td>
</tr>
<tr>
<td></td>
<td>in Actions</td>
<td>in Actions</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Plaintiff</td>
<td>Defendant</td>
<td>P-D Spread</td>
</tr>
<tr>
<td>1975</td>
<td>17</td>
<td>22</td>
<td>-5</td>
</tr>
<tr>
<td>1976</td>
<td>13</td>
<td>25</td>
<td>-12</td>
</tr>
<tr>
<td>1977</td>
<td>11</td>
<td>28</td>
<td>-17</td>
</tr>
<tr>
<td>1978</td>
<td>9</td>
<td>31</td>
<td>-22</td>
</tr>
<tr>
<td>1979</td>
<td>9</td>
<td>29</td>
<td>-20</td>
</tr>
<tr>
<td>1980</td>
<td>9</td>
<td>26</td>
<td>-17</td>
</tr>
<tr>
<td>1981</td>
<td>8</td>
<td>27</td>
<td>-19</td>
</tr>
<tr>
<td>1982</td>
<td>7</td>
<td>25</td>
<td>-18</td>
</tr>
<tr>
<td>1983</td>
<td>6</td>
<td>25</td>
<td>-19</td>
</tr>
</tbody>
</table>

N 3,960 12,980 105,700 92,400