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Elena Kagan Law Review 9 [4]

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constitutional provisions conventionally highlighted in theories of judicial review. Rather, nonlegislative cases focus on criminal procedure, the Fourth Amendment, the prohibition on cruel and unusual punishment, and the protections afforded by substantive due process against physical abuse. n96 These are not, in large measure, areas in which the Court deduces results from broad and controversial political premises or historical debates; they are topics in which, starting from consensus ideals of minimal physical dignity and fairness, the Supreme Court delegates to lower courts the applications of standards of "legitimate expectations," "deliberate indifference," "reasonable suspicion," and "fundamental fairness." The rights invoked are not the stuff of sophisticated doctrinal elaboration, but they are crucial to our image of a decent order of government. High policy and social transformation are not dictated by the Supreme Court in these cases. Rather, the Court empowers the lower federal judiciary to act as field agents dispensing minimal federal justice.

- - - - -Footnotes- - - - -

n96 One hundred nonlegislative cases, 58% of all nonlegislative cases, presented those claims.

- - - - -End Footnotes- - - - -

The Supreme Court's review of legislative actions usually is framed as a legal resolution of claims for prospective relief. In the nonlegislative arena, by contrast, relief is predominantly retrospective. n97 The cohort of [*464] nonlegislative damage cases tended to focus on claims that individual government functionaries abused the person or freedom of individual citizens. n98 The relevant constitutional norms directly engage the moral sensibility of the trier of fact, but because the trier was intensely dependent on the resolution of disputed factual accounts and contextual judgments, the cases were unlikely to be resolved on appeal. n99

[SEE TABLE IN ORIGINAL]

- - - - -Footnotes- - - - -

n97 In 38 of the 45 challenges to actions by administrative agencies, the plaintiffs sought injunctive relief or reversal of regulatory actions, a pattern similar to legislative challenges. Claims against individual officials, by contrast, were primarily retrospective. Eighteen of 30 sought damages, and eight sought habeas or reversal of a conviction. Against police, the breakdown was similar: 13 of the 24 involved habeas or reversal, and 6 sought damages.

n98 See infra Table 8. Of the 29 nonlegislative damage cases before the Supreme Court, 23 involved challenges to actions by individual officials or police officers.

n99 In the nonlegislative damage cases, defendants prevailed in the Supreme Court in 11 of the 29 cases; the Court remanded the remaining 18.

- - - - -End Footnotes- - - - -

[*465] [*466]

B. Dark Matter in the Trial Courts

At the Supreme Court level, the challenged decisionmaker is most often a legislature and less often an individual executive official. Legislative actions are at issue in two of five cases decided by the Supreme Court; decisions by individual bureaucrats appear only half as often. The frequency of cases roughly mirrors the breadth of effect and dramatic import of the challenged decision: the legislative decision is the most deserving of the Supreme Court's limited resources and is the least likely to be controlled by sub-constitutional decision rules.

In the trial courts, the order is reversed: challenges to legislative actions are by far the least common type of constitutional review, while challenges to actions by street-level bureaucrats n100 generate almost half of the constitutional claims. In the district court sample, only thirty-three cases (7.6%) involve challenges to legislative action. In contrast, decisions by individual officials and police officers, which accounted for barely one-fifth of the Supreme Court's cases (18%), spawned forty-five percent of the cases before the trial courts. Individual civilian officials' actions were challenged in 121 cases (28%), and police officers', in seventy-five (17.5%). n101 This reversal is not solely an application of the proposition that applying the law is a far more frequent activity than legislating. Although both judges and administrative agencies apply law, decisions account for the same proportion of cases in the Supreme Court and the district courts. Judges made the decisions challenged in about one-third of the cases, n102 and challenges to administrative agency action comprise about one case in six. n103

- - - - -Footnotes- - - - -

n100 The term "street-level bureaucrat" is Professor Lipsky's. Michael Lipsky, Street-Level Bureaucracy: Dilemmas of the Individual in Public Services 1 (1980) ("Most citizens encounter government . . . not through letters to Congressmen or attendance at school board meetings, but through their teachers, and their parents' teachers, and through the policeman on the corner or in the patrol car.").

n101 This is partly attributable to the prevalence in district courts of claims involving prisoners. Even among the nonprisoner cases, however, the combination of police and other individual official action accounts for 36% (98/265) of the cases.

n102 Challenges to judicial decisions accounted for 28% of the Supreme Court's docket and 33% of the trial courts' dockets.

n103 Challenges to administrative agency action accounted for 15% of the Supreme Courts' docket and 16.7% of the trial courts' dockets.

- - - - -End Footnotes- - - - -

Among all cases adjudicated by the Supreme Court, the Justices tended to enforce the Constitution prospectively; claimants were three times as likely to raise constitutional claims in requests for injunctive or declaratory relief as in claims for damages. n104 At the trial court level, the relationship [*467] was reversed: the typical case involved an effort to remedy prior constitutional violations. Claims for damages predominated by a two-to-one

ratio. n105 In part, this reflects the fact that claims challenging legislative action, which are less common at the trial court level, are also more likely to involve injunctive relief. Even among nonlegislative claims, however, damages were more likely to be sought at the trial court level. n106 As at the Supreme Court level, damage claims disproportionately represent interactions with official deployments of force. n107 Interactions with prison officials or police generated sixty percent of the cases in which damages were sought, and another sixteen percent of damage cases involved alleged denials of procedural due process. n108

[SEE TABLES IN ORIGINAL]

- - - - -Footnotes- - - - -

n104 Parties in 36 (12.3%) of the Supreme Court cases sought damages, 90 (30%) sought injunctive relief, and 15 (55%) sought reversal of regulatory actions.

n105 There were 349 claims for damages (61% rejected, 4.58% sustained) and 158 claims for equitable relief (56% rejected, 16.46% sustained) (but of the 51 claims that sought equitable but not damages relief, 37.25% were rejected, and 21.57% were sustained).

n106 Percentage of Cases Which Raised Damage Claims

[SEE CHART IN ORIGINAL]

n107 Among Eighth Amendment claims, 87% (62/71) involved damage claims. Among Fourth Amendment force claims (arrest, seizure, and excessive force) the ratio was 61/83 (73%), and among claims of official physical abuse under Rochin v. California, 342 U.S. 165 (1952), 12 of the 15 were raised in damage actions (80%). This is to be expected. It is difficult to anticipate being subjected to many deployments of physical force, and the standards by which force is constrained are not amenable to clear and enforceable statements ex ante; injunctive relief is therefore difficult to obtain. Moreover, because force is often deployed at a limited point in time, injunctive relief is unlikely to benefit the plaintiff in the future. Additionally, after force is deployed, the effects are rarely reversible but are instead merely compensable.

These categories account for 40% of the 341 damage claims in the sample. See infra Table 10. Claims under the Fourth Amendment's constraints on search and seizure appeared in 33 cases, of which only 16 (48%) involved claims for damages. The claimants in 82% (14/17) of the nondamage Fourth Amendment cases were unsuccessful; the claims were dismissed in only 44% (7/16) of the damage cases.

n108 Of the 210 out of 431 cases that sought damages in trial courts, 54 involved claims against police officials and 76 more involved claims by prisoners. Prisoner (28) and police (34) cases accounted for 65% of the 95 potentially successful damage cases. Thirty-five other cases involved claims of administrative denial of procedural due process, but only 11 (33%) were potentially successful. At the Supreme Court level, damages were sought in 36 cases, of which eight were prisoner cases and six were police cases.

The other major sources of damage actions at the trial court level were public employees, whose 34 damage cases (50% of which were potentially successful) accounted for almost half of the damage cases outside of the prisoner/police cluster, and the 25 cases brought by business, landowner, or taxpayer plaintiffs, which were potentially successful in 40% of the cases.

-----End Footnotes-----
[*468] [*469] [*470]

1. The Constitutional Claims

a. Minimal Decency

The constitutional universe at the trial court level comprises more of the "dark matter" and less of the "classical core" of constitutional adjudication than does the sample at the Supreme Court. Even more than the Supreme Court, federal trial courts administer not the high constitutional law of governmental structure or contested social norms but the constitutional law of what a number of commentators describe as "moral minimalism": the basic guarantees against abusive force and arbitrary government action. n109

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n109 See infra Part III.B (discussing moral minimalism).

Trial courts dealt with the Commerce Clause in only six of their 667 claims. The category of "other" claims includes four Supremacy Clause claims, four right to travel claims, two separation of powers claims, and one Tenth Amendment claim.

-----End Footnotes-----

Two-thirds of the claims refer to abuses by street-level bureaucrats in their imposition of force or criminal penalties or failure to provide minimal due process. n110 Indeed, claims of administrative due process violations, which appeared in only three percent of the nonlegislative cases before the Supreme Court, constituted the largest category of claims at the trial court level.

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n110 Cases involving administrative due process, cruel and unusual punishment, criminal procedure, arrest, search, effective counsel, criminal trial, excessive force, self-incrimination, Rochin, double jeopardy, and fair trial comprise 64% (393/606) of the total cases heard by federal trial courts. See infra Table 11. These categories account for 57% of the nonlegislative claims before the Supreme Court. See supra Table 7.

-----End Footnotes-----

Plaintiffs invoking constitutional claims in the trial courts are frequently at the rough end of the government's monopoly on coercive violence. Of the 398 nonlegislative cases in the sample raising constitutional claims, more than one-third, and half of the damage or injunctive cases, were brought either by prisoners challenging their treatment while in custody or by alleged victims

of police abuse, and almost half of these cases survived an initial decision by a trial court. n111 Another quarter of the reported nonlegislative constitutional opinions involve claims by criminal defendants, but these challenges were more likely to be dismissed by trial courts than by [*471] the Supreme Court. n112

[SEE TABLE IN ORIGINAL]

-Footnotes-

n111 Of the 166 cases brought by prisoners, 93 sought injunctions or damages, and 67 sought either relief from criminal convictions or suppression of evidence. Of the 93 cases seeking affirmative relief, 33 remained viable.

Seventy-five cases involved claims of constitutional violations by police officers; 54 sought injunctive relief or damages, of which, 34 were actual or potential claimant victories..Of the 13 police damage cases were brought by prisoners, nine failed and four survived.

n112 The district court sample includes 67 habeas cases. In ten (15%), the claimant did or could prevail. The sample also includes 42 cases in which criminal defendants sought dismissal or reversal of their prosecutions. In 12 (28%), the claimant could or did prevail.

-End Footnotes-

b. Civil Rights and Liberties on the Ground

Even in areas in which values clash at a high level of generality and political conflict in the Supreme Court, the trial courts face a more concrete and less controversial set of applications. The trial courts' decisions focus on discrete interactions with lower-level government entities rather than on matters of broad policy.

i. First Amendment

First Amendment claims retain a hold on the constitutional attention of the trial courts, although they represent a lower proportion of cases among the nonlegislative caseload than at the Supreme Court level. n113 The trial courts' First Amendment caseload outside of the legislative arena is not characterized by the great confrontations between government and the media. Almost half of the cases involve claims by public employees alleging retaliatory job actions for criticism of their employers, and another twenty percent were brought by inmates challenging administrative decisions. n114

-Footnotes-

n113 In the trial courts, 6% (40/606) of the nonlegislative claims involve the freedoms of speech, press, or association. Forty-two percent (17) were, or could be, sustained. These claims comprised 12% (25/207) of the Supreme Court's nonlegislative docket, of which 64% (16) were, or could be, sustained.

n114 Public employees brought 17 of the 40 First Amendment claims, of which eight were possible victories. Prisoners brought seven claims, two of which

succeeded. The remaining potentially successful cases include one claim of a retaliatory arrest, one successful challenge to a rule of judicial conduct, one challenge of a denial of access to a criminal trial, and one successful claim of a reporter's privilege asserted in response to a discovery order.

- - - - -End Footnotes- - - - -

The trial courts are called upon to resolve contested facts regarding either the motivation for adverse administrative actions or the balance between administrative interests and First Amendment rights in particular situations. This is not to say that such determinations are unimportant; the capacity to enforce constitutional rights is what makes them real. Nevertheless, in announcing the resolution of these claims, the trial courts are unlikely to elaborate on contested norms so as to guide future decisionmakers. [*473]

ii. Equal Protection

Equal protection cases represent identical proportions of nonlegislative claims before the trial courts and the Supreme Court. The trial court claims are substantially less successful, however, n115 and the focus of the claims differs from that in the cases which preoccupy the Supreme Court.

- - - - -Footnotes- - - - -

n115 Fifteen of the 207 nonlegislative claims (6.7%) heard by the Supreme Court involve equal protection, and it rejected 33%. Forty-one of the 606 nonlegislative claims (6.7%) heard by the federal trial courts implicate equal protection, and the courts rejected 70%.

- - - - -End Footnotes- - - - -

Almost three-quarters of the nonlegislative equal protection cases before the Supreme Court involved efforts to institute a norm of racial neutrality in the use of peremptory challenges, and in all but one of these cases, the plaintiff succeeded. n116 Jury selection cases were largely absent from trial court reports of constitutional decisions; only two of the forty-one equal protection claims involved peremptory challenges, and neither of these claims were successful.

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n116 See supra note 94.

- - - - -End Footnotes- - - - -

Nonlegislative equal protection claims before the trial courts focused on claims of unequal application of law by administrative officials. Three-quarters of these cases turned on contested facts about settled norms of nondiscrimination, and in eighty-seven percent of these, the plaintiffs failed. n117

- - - - -Footnotes- - - - -

n117 Of the 41 claims, 11 involve minority plaintiffs claiming disparate administrative treatment because of their race. Only two of these claims, a

challenge to an allegedly racially motivated arrest for shoplifting and a claim of racially motivated employment sanctions, survived the trial courts' scrutiny.

Seventeen more claims involved administrative treatment of individual plaintiffs that allegedly lacked minimum rationality. Only one of these claims, a successful attack on a police policy of entertaining only the first filed of two conflicting claims of assault, survived in the trial courts.

Three claims challenged alleged disparate treatment or harassment by employers on the basis of sex; one survived trial court scrutiny.

- - - - -End Footnotes- - - - -

Five of the forty equal protection cases in the nonlegislative sample brought the trial court into confrontation with administrative decisionmakers about contested issues of social policy. Two cases involved school desegregation decrees; in one, the court approved a consent decree, and in the other, the court withdrew supervision from a school district it declared to be unitary. In two more cases, the trial courts invalidated local affirmative action programs. In the final case, the trial court entertained an equal protection challenge to a police department's lax enforcement of criminal prohibitions on domestic violence. [*474]

iii. Property Rights

Trial court activism on behalf of civil rights and liberties beyond moral minimalism in the nonlegislative arena is limited; extrapolating from my sample, less than 150 published First Amendment cases and less than 100 published equal protection cases involving personal rights survived initial scrutiny in 1994.

In comparison with this record, my data suggests that a total of sixty published "property rights" cases survived initial judicial scrutiny in 1994. Four of the equal protection claims in the trial court sample involved allegations that the administration of local business or property regulations was so wanting in public justification as to violate the demands of minimum rationality imposed by equal protection. Unlike cases involving legislative enactments, where such challenges were predominantly unsuccessful, three of the four equal protection challenges by business plaintiffs survived trial court scrutiny. In addition, four of the seven challenges by businesses or property owners to administrative determinations based on substantive due process or takings allegations survived initial trial court scrutiny. Combining equal protection and substantive property protection, six cases challenging police power regulations survived initial scrutiny by the trial courts. n118 Thus, well-represented economic claimants are apparently able to invoke "minimum rationality" at least to press their claims in federal court with sufficient force to tie up the resources of enforcement agencies almost as often as individuals can raise potentially successful personal equal protection claims.

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n118 One of the potentially successful cases raised both equal protection and substantive due process property claims.

- - - - -End Footnotes- - - - -

The result should not be overstated. Challenges to administrative implementation of police power regulations survived in six cases, and one could imagine that judges are more apt to publish cases involving business plaintiffs than individual claimants. It does suggest, however, that economic claimants invoke "minimum rationality" with more prospects of success than a review of Supreme Court practice would predict.

2. Who Wins?

The profile of cases in the nonlegislative area overall is similar in the trial courts and in the Supreme Court; neither reveals a distinctive activism on behalf of property holders. In both venues, cases brought by individual rights claimants were several times as common as cases raising claims by [*475] businesses, landowners, and taxpayers. n119 In both, there was no substantial difference between the rates of rejection of business/landowner/taxpayer claims and the rate of rejection of claims brought by nonprisoners outside of those classes.

- - - - -Footnotes- - - - -

n119 Success Rates in the 172 Nonlegislative Cases Before the Supreme Court
[SEE CHART IN ORIGINAL]

Success Rates in the 398 Nonlegislative Cases Before the District Courts
[SEE CHART IN ORIGINAL]

- - - - -End Footnotes- - - - -

Among nonlegislative claims, however, property claimants were less likely than individuals to prevail before the Supreme Court and more likely than individuals to succeed before the district courts. Overall, property claimants were proportionately more frequent in the nonlegislative docket at the trial court than they were in the Supreme Court. This excess, however, is accounted for by the fact that twenty-nine of the sixty-nine business cases before the trial courts raised due process challenges to jurisdiction based on an absence of minimum contacts--claims that were not found among cases before the Supreme Court.

Prisoners in both venues were substantially more likely to have their claims rejected than other claimants. Women in both venues represented only a fraction of the nonprisoner individual cases, although the fraction was higher in the trial courts than in the Supreme Court. Claimants at the Supreme Court were eight times more likely to be male, and at the trial court level, four times more likely. n120 In both venues, women's claims were rejected substantially less often than men's, and at the trial court women were [*476] more likely to prevail.

- - - - -Footnotes- - - - -

n120 Nonprisoner Cases in Which Parties Are Identifiable by Sex
[SEE CHART IN ORIGINAL]

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3. Nonlegislative Decisionmakers in the Trial Courts

a. The Parallels: Administrative and Judicial Decisions

At the trial court level, the proportion of challenged nonlegislative decisions was nearly double the proportion at the Supreme Court level. The difference, however, came almost exclusively from the prevalence of cases challenging the decisions of officials and police. The trial court sample and the Supreme Court cases contained virtually identical percentages of judicial and administrative decisions.

The subject matter of the trial court and Supreme Court cases also resembled each other where the cases challenged judicial and administrative actions. Differences arose in only two areas. First, the trial court challenges to administrative action showed a far greater incidence of administrative due process challenges and damage actions. Second, the most successful challenges in the judicial category at the trial court level claimed a lack of minimum contacts, a contention entirely absent before the Supreme Court.

i. Administrative Agencies

In large measure, the substance of the district court claims in the sample challenging administrative agency decisions tracked the distribution at the Supreme Court, with one major exception. n121 Claims of failure of administrative due process, which appeared in three of the fifty-one cases before the Supreme Court, generated almost half of the challenges to the administrative actions before the trial courts. n122 From the evidence in this sample, the [*477] most prevalent role of judicial review of administrative agencies is to confine the range of procedurally arbitrary exercises of authority.

- - - - -Footnotes- - - - -

n121 As at the Supreme Court level, assertion of the rights of free speech and equal protection account for a substantial proportion of claims. Before the trial courts, however, the incidence of free speech claims is much lower, and both claimant classes were somewhat less likely to succeed.

Challenges to administrative actions under the Takings Clause and other constitutional property protections accounted for four of the 51 administrative legislative claims before the Supreme Court and nine (9%) of the 101 claims before the trial courts.

Federal agencies were more likely than state or local agencies to prevail at both the trial court and Supreme Court levels, but all agencies were more likely to prevail in the trial courts than the Supreme Court:

{SEE CHART IN ORIGINAL}

n122 At the Supreme Court level, 5.8% (3/51) of the claims against administrative bodies raised due process challenges. At the trial court level, 44% (44/101) of the cases claimed a lack of procedural due process. The proportion of due process challenges was consistent across levels of

government: federal agencies, 40% (11/27); state agencies, 45% (20/44); nonprisoner state agency, 42% (14/33); and local agency, 40% (14/35).

- - - - -End Footnotes- - - - -

District court cases differed from Supreme Court cases in the relatively greater prevalence of damage actions. Cases precipitated by administrative decisions sought damages at the trial court level more than four times as often as cases before the Supreme Court. n123

[SEE TABLES IN ORIGINAL]

- - - - -Footnotes- - - - -

n123 In the district courts, 56% (41/72) of the claimants sought damages; in the Supreme Court, the ratio was 6/45 (13%).

- - - - -End Footnotes- - - - -

[*478] [*479] [*480] [*481] [*482]

ii. Judicial Determinations

In both samples, challenges rooted in criminal procedure accounted for more than half of the claims challenging judicial determinations, although the trial courts rejected a far higher percentage of these challenges than did the Supreme Court. At the Supreme Court level, Eighth Amendment challenges to the imposition of the death penalty accounted for fifteen percent of the claims, while such cases were rare in the trial courts. By contrast, the most successful class of claims in the trial court sample--accounting for twelve of the thirty successful assertions of constitutional rights--was challenges to an assertion of personal jurisdiction based on the "minimum contacts" requirement of due process. This class was virtually absent at the Supreme Court level.

b. The Divergence: Street-Level Bureaucrats, Prisoners, and the Police

As noted above, claims challenging the actions of street-level bureaucrats under the Constitution were far more prevalent in the trial court sample than at the Supreme Court level. n124 Most of these cases were brought against police officers and prison officials. This fact highlights a distinctive and dominant role of constitutional adjudication in the federal trial courts, a role somewhat obscured from view when Supreme Court decisions are the principal unit of analysis: federal trial courts predominately deploy constitutional norms of decent treatment against street-level bureaucrats authorized to use coercive violence.

- - - - -Footnotes- - - - -

n124 See supra note 101 and accompanying text.

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i. Individual Officials and Prisoners

Eighteen percent of the Supreme Court's cases challenged actions by individual officials other than police. More than half of these cases focused on fact-intensive challenges to alleged abuses in the deployment of coercive force or criminal justice. n125 The plurality of claims were not resolved as a matter of law on appeal but remained open for resolution on remand. n126

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n125 Three of the equal protection claims also focused on challenges to racially biased peremptory challenges.

n126 In the 13 of the 30 cases, the Court left open the possibility that the claimant could prevail.

-----End Footnotes-----

In the trial court sample, the incidence of individual official claims was substantially higher, accounting for forty-five percent of the trial court cases. The focus of constitutional inquiry, however, was similar. As at the Supreme Court, approximately half of the 185 trial court claims challenging actions by individual officials involved physical coercion or criminal justice issues, but a higher proportion of the claims (30%) challenged alleged cruel [*483] [*484] [*485] and unusual punishment. n127 Issues of administrative due process, which accounted for less than ten percent of the individual cases in the Supreme Court (3/33), were somewhat more common at the trial court level, accounting for sixteen percent (30/185) of their cases. Additionally, 166 of the 185 trial court claimants sought damages.

[SEE TABLES IN ORIGINAL]

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n127 Only 13% of the Supreme Court cases raised Eighth Amendment conditions-ofconfinement challenges. A much higher proportion of the individual claims were rejected outright by the trial courts (64% rejected by the trial courts; 24% by the Supreme Court).

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The most substantial difference between the Supreme Court and the trial court was the identity of the claimants. At the trial court level, a preponderant role of federal judicial review is to provide prisoners a forum in which they may assert their right to minimally decent physical treatment. Twothirds (77/121) of the cases alleging individual official misconduct in the trial courts were brought by prisoners, compared with one-third (10/33) at the Supreme Court level. n128

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n128 Constitutional claims of prisoners were most likely to assert misconduct by individual officials (77 cases), police (18 cases), or administrative agencies (12 cases), or challenge judicial determinations (67 cases). The prevalence of prisoner claims was particularly pronounced (89/106, or 83%) in cases involving individual state defendants. Local individual official

violations had an incidence more comparable to that at the Supreme Court (17/54, or 31%). Nonprisoner cases, like prisoner cases, clustered around norms regarding fair procedure (11/73, with 72% rejected), the use of violence (16/73, with 31% rejected) and the First Amendment (14/73, with 46% rejected).

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This preponderance of prisoner litigation in the trial sample corresponds with other observations of the federal court system. Prisoner litigation has constituted a growing part of the federal trial court docket over the last decade. Between 1984 and 1994, prisoner civil rights cases and habeas petitions increased from one-tenth to almost one-fifth of the federal civil docket. n129 During the same period, the number of prisoner civil rights cases increased from 18,375 (7.07%) to 33,933 (14.36%) at a time when the total number of federal civil cases declined slightly. n130 This growth in prisoner litigation is largely attributable to the growth in the American prison population. Despite a varying rate of litigation per prisoner from district to district, the overall rate of civil rights litigation per prisoner has remained roughly constant over the last two decades. n131

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n129 Theodore Eisenberg, Civil Rights Legislation 534 (4th ed. 1996).

n130 See Robert G. Doumar, Prisoner Cases: Feeding the Monster in the Judicial Closet, 14 St. Louis U. Pub. L. Rev. 21, 23 (1994).

n131 Professor Eisenberg observes that the rate of prisoner filings in the federal courts has remained stable nationally, with between six and seven thousand filings per hundred thousand prisoners over the last twenty years. Eisenberg, supra note 129, at 535; see also Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, Challenging the Condition of Prisons & Jails: A Report on Section 1983 Litigation 2-3 (1995) (noting a constant annual rate of 1 lawsuit for every 30 inmates).

This stability masks substantial temporal variation from district to district. See Note, Resolving Prisoners' Grievances Out of Court: 42 U.S.C. <sect> 1997e,104 Harv. L.Rev. 1309, 1315, 1329 (1991) (reviewing trends in civil rights filings per prisoner in nine states from 1978 to 1990: Virginia rates began at 17.6/100 and ended at 7.1/100; Iowa rates began at 4.6/100 and ended at 12.4/100; North Carolina rates began at 3.0/100 and ended at 3.1/100). In contrast, statewide rankings of the rates of prisoner lawsuits have remained relatively constant. Hanson & Daley, supra, at 2.

My calculations, based on statistics from the Administrative Office, put the rate in the same range as that reported by Hanson and Daley, slightly lower than that reported by Eisenberg, but still constant: in 1980, 13,495 prisoner claims/493,815 prisoners (.026); in 1987, 23,297 claims/880,957 prisoners (.026); in 1993, 33,018 claims/ 1,408,685 prisoners (.023). See Doumar, supra note 130, at 23 (prisoner cases); National Center on Institutionalization and Alternatives, The Real War on Crime 34 (Steven Donziger ed., 1996) (prison populations).

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Although there is no shortage of articles by frustrated judges and judicial administrators remarking on these trends, n132 few national accounts systematically address the nature of prisoner civil rights litigation. n133 What we do know is embodied in studies of litigation in particular districts. In one early study of prisoner litigation in five districts, the most frequent claims alleged a failure to provide adequate medical care, denials of access to courts, property loss, disciplinary procedures, and guard harassment or brutality. n134 More recent studies of district court filings in particular districts continue to show a plurality of medical treatment cases, followed by disciplinary complaints and assertions of failure to protect from fellow inmates or guard brutality. n135 A study of a large sample of cases disposed of in [*487] 1992 in sixteen districts found that more than half of the prisoner civil rights cases concerned medical treatment, physical security, or due process. n136 In each of the district studies, the percentage of prisoner cases that were dismissed or rejected by the courts was quite high, and almost always greater than two-thirds. Moreover, the proportion in which relief was obtained by the prisoner was quite low, never exceeding twenty percent. n137 [*488] None of the studies disaggregated the rates of success by the nature of the prisoners' claims.

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n132 E.g. Doumar, *supra* note 130, at 21; Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Court* (1980); Carl B. Rubin, *Section 1983: A Limited Access Highway*, 52 U. Cin. L. Rev. 977 (1983).

n133 The most systematic survey of constitutional tort litigation, which was conducted by Eisenberg and Schwab (surveying filings in three districts representing 8% of the federal civil filings for the year 1981), noted the large proportion of constitutional tort cases represented by prisoner plaintiffs (626 prisoners; 509 nonprisoners) as well as the relatively low success rate for prisoners (82% rejected by courts as opposed to 50% for nonprisoners). Eisenberg & Schwab, *Explaining Constitutional Tort Litigation*, *supra* note 63, at 733 (1988). Eisenberg and Schwab do not, however, report the nature of the claims raised by the prisoners.

n134 William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 661 (1979). Claims for denial of medical care accounted for a fifth or more of the total claims filed in four of five districts. Cf. William Wayne Justice, *The Origins of Ruiz v. Estelle*, 43 Stan. L. Rev. 1, 3-5 (1990) (noting that prisoner complaints fall into four main areas: brutality, medical care, overcrowding, and summary discipline).

n135 Howard B. Eisenberg, *Rethinking Prison Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 457 (1993) (finding that in 937 cases drawn from court records in three districts in 1991, medical complaints represented 14% of the cases in the federal court for the Eastern District of Montana, 21% in the Southern District of Illinois, and 16% in the Eastern District of Arkansas; discipline complaints represented 19% of the cases in the Montana district court, 21% in the Illinois court, and 9% in the Arkansas court; and failure to protect/excessive force complaints represented 12% in the

Montana district court, 15% in the Illinois court, and 23% in the Arkansas court); Kim Mueller, Comment, Inmates' Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California, 28 Creighton L. Rev. 1255 (1995) (sampling 42 cases drawn from those filed in 1991 in the federal court for the Eastern District of California and noting that ten of these cases involve medical care, six involve discipline, and 11 involve guard brutality or a failure to protect).

n136 Hanson & Daley, supra note 131, at 17. Of the 4481 claims made in 2700 cases, 17% concerned medical treatment, 21% concerned physical security, and 13% concerned due process.

n137 Id. at 19. A case sample of 4481 cases showed that 94% of prisoner civil rights cases were dismissed by the courts, 4% resolved by stipulated dismissal, and less than half of the 2% of cases tried resulted in plaintiffs' verdicts. Id. at 36.

Eisenberg found that in a sample of 937 cases from 1991, 5% of the prisoner cases in the federal court for the Eastern District of Montana were settled, and 8% were voluntarily dismissed, with 65% being dismissed before trial. Eisenberg, supra note 135, at 458. In the federal court for the Southern District of Illinois, 1% of the prisoner cases were settled, 3% were voluntarily dismissed, and 76% were dismissed by the courts before trial. Id. In the federal court for the Eastern District of Arkansas, 6% were settled, 16% were voluntarily dismissed, and 52% were dismissed by the courts before trial. Id.

In their three district study of 626 prisoner cases from 1980 to 1981, Eisenberg and Schwab found that 18% of the prisoner cases were potentially successful (with 1% of these succeeding at trial), and 82% were dismissed by the courts at or before trial. Theodore Eisenberg & Stewart J. Schwab, What Shapes Perceptions of the Federal Court System?, 56 U Chi. L. Rev. 501, 525 (1989); Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 63, at 729.

In a 42 case sample of prisoner litigation filed in the Eastern District of California during 1992, Mueller reported that six (14%) obtained monetary relief by trial or settlement, and seven others (17%) survived pretrial dismissals. Mueller, supra note 135, at 1284. Turner, in his sample of 664 cases, found only 15 instances of equitable relief and two successful damage actions, but did not report the incidence of settlements. Turner, supra note 134, at 624.

Most recently, Judge Robert Doumar of the Eastern District of Virginia, Norfolk Division, reported that in his court, of the 442 prisoner civil rights cases closed in the 1993-1994 term, only two cases recorded monetary settlements, and one case received a nominal damage verdict. Three other cases went to trial unsuccessfully. Judge Doumar did not report voluntary dismissals. Doumar, supra note 130, at 36.

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In my 1994 trial court sample, prisoners who sued over allegedly unconstitutional conduct by individual officials most often (in 71 out of 77 cases) tendered claims for damages. n138 In fourteen cases, plaintiffs sought injunctive relief as well; in two cases, injunctive relief alone was at issue. Among the damage actions, more than two-thirds (53/77) involved claims of

cruel and unusual punishment. As one might expect from anecdotal reports of prisoner litigation and prior local studies, the bulk of such claims were rejected. n139

-Footnotes-

n138 Such cases represented the bulk of the 102 non-habeas cases brought by prisoners in the district court sample.

n139 In 32 of the damage cases (61%), the courts rejected the plaintiffs' claims of cruel and unusual punishment; they also rejected eight injunction claims (80%). Among prisoner damage actions as a group, in 64% (57/89) of the cases, the courts rejected all of the plaintiffs' claims, and among injunctive actions, 75% (16/20) of the decisions were for the defendants.

-End Footnotes-

The rate of rejection, however, varied among the types of claims. Archetypally frivolous claims were represented in the sample of claims of cruel and unusual punishment, n140 and such claims were uniformly dismissed by the courts. More than half of the Eighth Amendment cases, however, involved allegations of serious physical impositions on prisoners--either denials of medical treatment (21 cases) or physical assaults by guards (9) or other prisoners (5). Among these cases, the prisoner rate of rejection was comparable to the rates in other civil rights areas.

-Footnotes-

n140 One plaintiff, for example, claimed that prison officials had engaged in telepathic mind control; another viewed the loss of his chess set as cruel and unusual punishment.

-End Footnotes-

Among claims of denial of medical treatment, the five cases involving serious injury or threat to health all survived initial judicial scrutiny, n141 and the sixteen rejected cases involved arguably minor physical ailments. n142 Similarly, of the fourteen cases in the sample alleging stabbing, beating, and [*489] other serious physical abuse by guards and fellow prisoners, ten survived initial or intermediate judicial evaluation, and two were tried, with findings for the prisoner plaintiffs. n143 An additional nineteen prisoner cases filed against individual officials sought relief from alleged violations of procedural due process. Again, almost half of these claims (42%) survived.

-Footnotes-

n141 Those cases involved an untreated abscess, denial of back surgery, failure to order a biopsy for a breast lump, denial of care resulting in a fatal heart attack, and refusal to treat "numbing pain."

n142 The complaints included a sprained ankle, a badly capped tooth, scabies, back pain, an earache, delay in setting a broken finger, and hemorrhoids. Although most of these ailments can be excruciating, it is difficult for courts to determine whether the alleged pain is being feigned.

As a practical matter, therefore, the pattern of results in this sample is not far from the proposition advanced by Justice Thomas in *Hudson v. McMillian*, 503 U.S. 1, 17-29 (1992) (Thomas, J. dissenting), that the Cruel and Unusual Punishment Clause does not protect against pain unaccompanied by lasting physical injury. It suggests as well that the provision of the 1996 Prison Litigation Reform Act barring actions "for mental or emotional injury . . . without a prior showing of physical injury," 42 U.S.C. 1997e(e), is unlikely to have substantial effect in the area of Eighth Amendment suits.

n143 In *Devon v. Keane*, 1994 U.S. Dist. Lexis 13692 (S.D.N.Y. Sept. 28, 1994), the jury awarded a total of \$ 32,550 where prisoners alleged being beaten in restraints and made to run a gauntlet of guards, but the trial court ordered a new trial. In *Davis v. Moss*, 841 F. Supp. 1193 (M.D. Ga. 1994) the jury awarded \$ 35,000 because a guard threw a handcuffed prisoner down a fire escape.

My data is consistent with the observation by Daley and Hanson that among their sample of 1992 cases, 45% of the cases that settled (where the terms of the settlement are reflected in the files) involved the physical security of inmates, as did the three plaintiffs' verdicts with specified awards. Hanson & Daley, *supra* note 131, at 36-37. Daley and Hanson report that the plaintiffs' verdicts ranged from \$ 10,000 to \$ 40,000. *Id.*

- - - - -End Footnotes- - - - -

What does this tell us about the role that lower federal courts play in prison administration? Aside from the potential therapeutic effects of access to courts, even where cases are dismissed before litigation on the merits, n144 federal courts seem most likely to address the claims of prisoners alleging a disregard of minimum standards of physical decency resulting in palpable physical injury. Whether plaintiffs ultimately prevail, at least in published cases, it is prisoners claiming damages for substantial physical abuse who seem able to invoke the attention of federal courts. n145 Federal courts stood relatively ready, as well, to consider claims of failures to abide by the minimal requirements of due process in prison discipline and maintenance. n146

- - - - -Footnotes- - - - -

n144 See, e.g., Eisenberg, *supra* note 135, at 439-41 (arguing that unsuccessful suits may have beneficial effects both in bringing grievances to the attention of officials and allowing inmates to retain an opportunity for interactions in which they are treated with respect); Eisenberg & Schwab, *Reality of Constitutional Tort Litigation*, *supra* note 63, at 676 (suggesting that the fact that an officer is sued, albeit unsuccessfully, may provide some specific deterrence).

n145 See Hanson & Daley, *supra* note 131, at 28-29, 36-37 (finding that cases involving physical security of inmates are most likely the prisoner cases that involve longer and more extensive judicial proceedings and are those most likely to result in judicial relief).

My sample contained 93 prisoner civil rights cases seeking damages or injunctive relief. Of these, twenty-one were medical claims, of which five were serious. This is consistent with other district court studies suggesting that 20% of prisoner claims involve alleged denials of medical treatment. Also in my sample, 14 of the 93 cases involved serious physical abuse. This is comparable

to the Hanson and Daley rate of 21% for "physical security." Hanson & Daley, supra note 131, at 17.

n146 The recently adopted amendments to 42 U.S.C. <sect> 1997e(e) which preclude prisoner actions for "mental or emotional injury . . . without a showing of physical injury", if held to apply to due process claims, combined with the narrowing of the scope of due process requirements for prisoners in Sandin v. Conner, 115 S.Ct 2293 (1995), may well portend the constriction of due process actions.

-----End Footnotes-----
[*490]

When compared with a prison population of 1.5 million in 1994, n147 rough calculations suggest that the proportion of the prison population whose efforts to obtain individual relief from federal courts are seriously considered is probably between four and seven prisoners out of every thousand. n148

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n147 See Real War on Crime, supra note 131, at 34 (noting that 1.54 million prisoners were incarcerated in state and federal prisons and local jails in 1994).

n148 The "four" figure was calculated using Eisenberg and Schwab's 18% possible success rate (.18 x 33,000 prisoner cases = 5940 / 1.5 million prisoners = .004). The "seven" figure was calculated using the higher 33% rate in my sample. See Eisenberg & Schwab, supra note 137, at 525.

-----End Footnotes-----

The courts' role in these cases is almost wholly retrospective and hortatory; damages are sought but substantial sums are rarely awarded. The most optimistic interpretation of this outcome is to hope that the prospect of ultimate review in a damage action by a judge outside of the closed institutional culture of corrections provides a mediating influence on the decision to apply or sanction brutality or physical abuse. The pessimistic version is that the largely symbolic availability of a toothless remedy allows judges to legitimate brutal prison regimes.

Entertaining individual cases is not necessarily the most important federal judicial intervention in America's correctional system, though it is clearly the most frequent. Although the incidence of class action civil rights cases in the federal trial courts has declined to only one-tenth of what it was in the late 1970s, n149 in 1993, almost one-third of local jails, forty states, the District of Columbia, Puerto Rico, and the Virgin Islands were under court orders to eliminate unconstitutional prison conditions. n150 These cases do not make up a large fraction of reported opinions. In the six years of Supreme Court decisions surveyed, only two cases involved a prisoner class action. n151 In the 1994 sample, only two cases of the 431 trial court cases involved class action challenges by prisoners, and a more intensive search of [*491] all 1994 Lexis cases unearthed the incidence rate predicted by my one-in-ten sample: twenty-one opinions involving class litigation by prisoners.

-Footnotes-

n149 See David Luban, Settlements and the Erosion of the Public Realm, 83 Geo. L.J. 2619, 2630 (1995) (tracking the decline of class actions reported filed in federal courts as "civil rights class actions" from 1837 actions in 1977 to 169 in 1990).

Within the search parameters I used to identify constitutional claims in 1994, I identified 110 class actions in Lexis-reported federal district court cases: 21 prisoner class actions, 19 class actions on behalf of social entitlement recipients, 13 employment class actions, 9 police abuse class actions, 8 election class actions, 7 school class actions, 6 custodial institution class actions, and 27 others.

n150 Susan P. Sturm, The Legacy and Future of Corrections Litigation, 142 U. Pa. L. Rev. 639, 641 (1993).

n151 Lewis v. Casey, 116 S. Ct. 2174 (1996) (holding, inter alia, that alleged inadequacies in a prison law library did not act to deny an inmate's access to the courts); Rufo v. Inmates of Suffolk Jail, 502 U.S. 367 (1992) (remanding a case involving a sheriff's request to modify a consent decree which required the construction of a new jail).

-End Footnotes-

Yet if each of the twenty-one reported class actions affected two thousand inmates, n152 the number of prisoners affected by the relief at issue in class actions far outweighs the number of published individual prisoner cases in the federal district courts in 1994 and equals or exceeds the total number of cases filed by all prisoners in the federal trial courts. n153 Moreover, the impact of such cases greatly exceeds the number of successful individual claims. Individual prisoner claims involving damage actions were rejected in more than two-thirds of the cases in the sample, and claims seeking injunctive relief failed in more than three-quarters of the cases. By contrast, only three of the twenty-one reported 1994 class action cases involved outright rejections of constitutional claims. n154

-Footnotes-

n152 Few of the cases explicitly report the number of inmates at issue, although Small v. Hunt, 858 F. Supp. 510 (N.C. 1994), aff'd, 98 F.3d 789 (4th Cir. 1996), refers to 30,000 inmates subject to the decree and Coleman v. Wilson, No.CV-S-90-0520, 1994 U.S. Dist. LEXIS 20786 (E.D. Cal. June 6, 1994), aff'd, 912 F. Supp. 1282 (E.D. Cal. 1995), appeal dismissed, 101 F.3d 705 (9th Cir. 1996), granted relief covering the provision of mental health services to inmates in all of California's prisons.

n153 Prisoners filed 73 damage and injunctive actions in the trial court sample, which suggests less than a thousand cases generating published opinions in 1994. According to the Administrative Office, prisoners filed a total of 33,933 civil rights actions in 1994. Mecham, supra note 63, at 142 tbl. C-2A.

n154 Whether this rate of success survives the Prison Litigation Reform Act of 1996 depends in large measure on how the courts interpret the statutory mandate that "prospective relief in any civil action with respect to prison

conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff plaintiffs," and the mandate that relief be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary." 18 U.S.C. <sect> 3636(a)(1)(A) (1994).

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Class litigation is thus clearly a more efficient means of bringing judicial scrutiny to bear on potentially oppressive prison conditions. What it lacks, however, is the potential for individual vindication; the existence of a pending class action, or the threat that some representative action may occur in the future, does not necessarily give the individual prisoner a sense that someone outside of the institution will listen to his (and it usually is "his" n155) complaint. As Dean Eisenberg comments,

- - - - -Footnotes- - - - -

n155 Women constitute roughly 6.6% of the incarcerated population in the United States (100,000/1.5 million including jails and 64,403/1.05 million excluding jails). Real War on Crime, supra note 131, at 147. From my sample, it appears that women are also less likely than men to seek relief in the federal courts. Women were plaintiffs in 4 of the 166 cases (2.4%) in the trial court sample. This result accords with conventual wisdom. See, e.g., Ellen M. Barry, Jail Litigation Concerning Women Prisoners, 71 Prison J. 44 (1991).

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[*492]

Sometimes the real "relief" sought by the prisoner is neither money damages, an injunction, nor a declaration of rights by a federal court but simply being treated in a more humane and less cavalier manner. In a number of cases the prisoner actually obtains substantially the relief he seeks, not through the order of the court, but simply because some responsive person has seen the complaint after litigation was filed. n156

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n156 Eisenberg, supra note 135, at 439 (footnote omitted).

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Class litigation, as currently practiced, does not give inmates an opportunity to be heard as individuals. n157

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n157 The Supreme Court's increasing skepticism regarding prisoner class actions in Lewis v. Casey, 116 S. Ct. 2174 (1996), combined with the Prison Litigation Reform Act of 1996, 18 U.S.C. <sect> 3626 (1996 Supp.), which effectively eliminates consent decrees as binding resolutions of prison condition cases, suggests that class litigation may further recede as a means of potential relief.

- - - - -End Footnotes- - - - -

ii. Police Litigation

For most citizens, the most common interaction with visible government authority comes in the form of contact with the police. Certainly, when compiling a list of officials who are in a position to violate minimal claims of constitutional duty, police rank high. Yet, at the Supreme Court level, challenges to police conduct appear in only twenty-four cases (8.2%) claiming constitutional violations, and of these, seventeen arise from the criminal justice system. Two were habeas challenges and fifteen were efforts to reverse criminal convictions.

At the trial court level, the picture is quite different. Claims of constitutional violations in published opinions involve police almost twice as often. Seventy-five cases, or 17.5% of the sample, alleged constitutional violations by police. Moreover, although the bulk of the Supreme Court's consideration of police actions arise in the context of criminal proceedings, fifty-four of those seventy-five cases (72%) at the federal trial level involve damage [*493] [*494] [*495] actions arising out of police activity.
n158

[SEE TABLES IN ORIGINAL]

- - - - -Footnotes- - - - -

n158 This is consistent with the findings of Eisenberg and Schwab that "cases brought against the police are the largest and most successful class" of constitutional tort cases. Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 63, at 734. Eisenberg and Schwab found that 156 of the 513 cases (30.4%) in a sample of 1981 nonprisoner constitutional tort litigation in three federal districts were brought against police. This represented 13.6% of the total constitutional tort cases. Id. at tbl. V. The parallel proportions of damage cases in this study is 41 of the 121 nonprisoner damage cases (34%) and 54 of the total 210 damage cases (25.7%).

A rough measure of the stability of the proportion of claims involving police actions over the last quarter century is suggested by the following LEXIS searches:

[SEE CHART IN ORIGINAL]

This is not to say that issues of police action are absent from the federal criminal trial system; applications of the exclusionary rule occur in the course of federal criminal trials. They do not, however, often result in published opinions at the trial court level. By contrast, when I reviewed a comparable one-in-ten sample of federal appellate cases in 1994, I found that more than half of the cases, 55 of 92, involving police arose in the course of criminal proceedings. These accounted for 10.6% of all cases raising constitutional claims (31 were damage actions).

A 1/20 sample of 1994 state appellate court constitutional cases from intermediate courts generated a starker contrast: 47 of the 50 constitutional claims involving police were raised in criminal proceedings; these actions

accounted for 16% of all cases raising constitutional issues.

- - - - -End Footnotes- - - - -

The challenged actions in the trial court sample are predominantly (47/75) those of local police officers. Among the potentially successful claims, the proportion of local police defendants is even more pronounced. Damage actions arising out of state or federal police actions are rejected in seven cases out of ten; actions against local police are rejected in less than one-third of the cases. n159

- - - - -Footnotes- - - - -

n159 Two-thirds of the damage cases claiming violations by federal police officials resulted in defendant victories, as did 5/7 of the damage cases claiming violations by state officers. By contrast, courts dismissed only 14 of the 45 cases claiming a constitutional violation by a local police officer. This too is consistent with Eisenberg and Schwab, whose 1981 data suggests a 40% failure rate for constitutional claims against police. Eisenberg & Schwab, Explaining Constitutional Tort Litigation, supra note 63, at 734-35. It is also consistent with the results reported in Victor E. Kappeler et al., A Content Analysis of Police Civil Liability Cases: Decisions of the Federal District Courts, 1978-1990, 21 J. Crim. Just. 325, 332-34 (1993), which found that in a national sample of opinions in reported Section 1983 cases involving police officers, the officers prevailed in 40% to 60% of the cases, depending on the year.

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[*496]

Before the Supreme Court, claims involving police officers most often concerned allegedly unlawful searches. At the trial court level, however, allegations of misuse of official prerogatives of force and arrest came to the fore. n160 Allegations of unlawful searches declined in importance and were more often rejected. Among damage claims against police, allegations of excessive force were most likely to survive preliminary determinations. n161

- - - - -Footnotes- - - - -

n160 Claims Against Police

[SEE CHART IN ORIGINAL]

This distribution roughly matches the findings in the 1970 to 1977 Connecticut sample in Project, Suing the Police in Federal Court, 88 Yale L.J. 781, 793 (1979) (noting that 52% of the cases involved allegations of excessive force, 46% involved allegations of false arrest, and 17% involved allegedly illegal searches) and the 1985 to 1986 New Jersey survey in Fisher et al., Civil Liability of New Jersey Police Officers: An Overview, 10 Crim. Just. Q. 45, 56 (1989) (noting that 56% of damage cases involved "assault & battery"; 54%, false arrest; 41%, false imprisonment; 29%, malicious prosecution; and 24%, search/seizure). Cf. id. at 76 (noting that 57% of all cases, state and federal, were settled); see also Kappeler, supra note 159, at 325 (reporting that in a national sample of opinions in reported Section 1983 cases involving police

officers, 55.7% claimed false arrest, 44% claimed excessive force or assault, and 16% claimed unlawful search and seizure).

n161 See infra Table 20.

- - - - -End Footnotes- - - - -

In each of these categories, the bulk of the claims not dismissed remained pending as "possible" claims; published pronouncements of the federal trial courts did not so much announce final dispositions as set the stage for future settlements or trials. Particularly striking was the profile of excessive force claims, where 25% were dismissed but only 6.25% were sustained. n162

- - - - -Footnotes- - - - -

n162 See id. The sense that excessive force constitutes the most important area of police abuse litigation is reinforced by my examination of the 1994 verdicts involving police officers reported in Lexis's "Verdicts" library.

[SEE CHART IN ORIGINAL]

- - - - -End Footnotes- - - - -

The picture that emerges places the federal court in the role of forum of [*497] last resort for those claiming physical abuse by the police. A substantial portion of the work of lower federal courts in this arena again involves an effort to implement not abstract and contestable notions of social justice but concrete and common senses that law enforcement officials may not abuse the person of the citizenry by disproportionate force or arbitrary arrest. n163

- - - - -Footnotes- - - - -

n163 The cases retrieved from the 1994 Lexis "Verdicts" library tell a similar story: 16 federal verdicts involved uses of potentially lethal force, 31 involved minor uses of force, 20 involved arrests, and 14 involved searches. Based on that library, the same can be said of state court actions against the police.

Claims involving unlawful searches of property unaccompanied by violence or arrest, however, accounted for 17% of the federal police verdicts and only 7% of the state verdicts. Cases involving searches unaccompanied by physical abuse resulted in three federal verdicts for more than \$ 67,000 (the overall median verdict), but there were no state verdicts in that range.

- - - - -End Footnotes- - - - -

How effective this work proves to be is a different question. The bulk of the cases in which federal trial courts published opinions were damage actions.

[SEE TABLE IN ORIGINAL]

[*498] [*499] At a minimum, from my sample it appears that more than five hundred federal damage actions based on police conduct around the country reached the stage of active consideration by federal courts in published opinions in 1994, and more than three hundred survived initial consideration.

Depending on what inflation factor seems most reasonable, this could represent 3000 to 6000 cases filed in federal court, of which 2000 to 3500 are potentially successful. n164 Unlike prisoner cases, these successes were not entirely symbolic. From a computerized search of a sample of verdicts in 1994, I was able to identify at least seventy-six police abuse cases that went to trial in federal courts, resulting in thirty-one plaintiff verdicts totalling \$ 22.4 million. n165 A 1991 survey by the Police Foundation identified \$ 48.9 million paid in settlements and verdicts in 128 excessive force cases in 1991. n166

-Footnotes-

n164 Two calculations point to this range. First, in 1980, Eisenberg and Schwab found that 30% of the constitutional nonprisoner tort complaints in their three surveyed federal districts involved claims against police, with a 60% success rate. Eisenberg & Schwab, supra note 137, at 525. They found that roughly 80% of the Administrative Office category "Other Civil Rights Claims" were constitutional tort claims. Id. The total "other civil rights cases" commenced in 1993 were 13,776. Mecham, supra note 63, at 143 tbl. C-2A. This suggests that a total of 3300 police civil rights cases filed in federal courts in 1993 (.8 x .3 x 13776), with a 60% (2000) survival rate.

Second, for 1994, Lexis collected 20,338 federal district court opinions, and for 1993, 229,850 cases were filed in district courts. Id. at 141 tbl. C-2A. If the distribution of collected cases matches the overall distribution of cases filed, the 54 cases in my sample represent 540 Lexis cases and 6200 (540 x 229,850/20,338) cases, of which 62% (3800) survived.

A 1991 survey of a large sample of police departments identified 2558 pending cases against police officers involving allegations of excessive force. 1 Antony M. Pate & Lorie Fridell, Police Use of Force: Official Reports, Citizen Complaints and Legal Consequences, 148 (1993); 2 Pate & Fridell, supra, at tbl. B37. Cf. Mary M. Cheh, Are Law Suits an Answer to Police Brutality?, in And Justice For All: Understanding and Controlling Police Abuse of Force 233, 250 (William A. Geller & Hans Toch eds., 1995) (estimating 1700 to 2600 federal civil rights police misconduct cases per year).

n165 I searched the Lexis "Verdicts" library for cases mentioning "police." After culling for duplicates, I found 81 police abuse cases, of which 75 reached trial. The 31 plaintiffs' verdicts averaged \$ 636,000, with a median of \$ 67,000. Sixty-six state court cases were reported, of which 61 reached trial. Recoveries totalled \$ 87 million, of which \$ 45 million was accounted for by one New York case in which a high speed chase left the minor plaintiff an invalid with an IQ of 35. The 43 plaintiff verdicts and settlements averaged \$ 2.02 million, with a median of \$ 200,000.

n166 See 2 Pate & Fridell, supra note 164, at tbls. B-39 and B-40.1.

A recent report by a special counsel to the Los Angeles Police Department reports that Los Angeles paid \$ 13.6 million in settlements and verdicts for police abuse litigation in 1995, and \$ 67.5 million over the period 1991 to 1995. Merrick Bobb, Five Years Later 55 (1996).

Cheh estimates that payments in police misconduct suits in Los Angeles totaled \$ 11 million in 1990, \$ 13 million in 1991, and \$ 14 million in 1992; in New York City, \$ 44 million from 1987 to 1991; in Detroit, \$ 20 million in

1990; and in Miami Beach, \$ 3.5 million from 1986 to 1992. Cheh, supra note 164, at 250 n. 37.

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[*500]

At one level, compared to the 2000 to 3000 annual complaints entertained by the Civil Rights division of the U.S. Justice Department--complaints which resulted in fifty grand jury presentments n167 --private actions in the federal courts seem relatively promising as a mode of police control. n168 On the other hand, this level of involvement compares to a 1993 estimate of 373,550 police officers on duty around the country, with reported complaints of excessive force averaging between 20 and 50 per 1000 officers and with total police budgets that exceeded \$ 24 billion. n169

- - - - -Footnotes- - - - -

n167 Jerome H. Skolnick & James J. Fyfe, Above the Law 209 (1993); Cheh, supra note 164, at 233, 241 n.19, 248.

n168 Thus, unlike the impression left on Professor Powell by his examination of Supreme Court precedent that "stripped of the channeling that the constitutional tradition's moral inquiries provided, the American polity's employment of violence is increasingly wayward, increasingly brutal," H. Jefferson Powell, The Moral Tradition of American Constitutionalism 262 (1993), it appears that lower Federal courts remain available to at least act as a medium of constitutional critique.

n169 See Brian Reaves, Local Police Departments, 1993 (Bureau of Justice Statistics 1996) (reporting that 230,000 uniformed officers responded to service calls and that total budgets were \$ 24.3 billion in 1993).

Pate and Fridell report that the city police departments they surveyed in 1991 received 47.5 complaints of excessive force per 1000 officers, while sheriff's departments received an average of 20.7 complaints per 1000. 1 Pate & Fridell, supra note 164, at 107. The rate of civil actions alleging excessive force in city police departments was 23.7 per 1000 officers, and in sheriff's departments, 14.5 per 1000. 2 id. at tbl. B-38.1. The total complaints identified in the sample were 15,608. 2 id. at tbl. B-11.1.

In the city of Los Angeles, during the past five years, the 8700 police officers averaged 2377 "uses of force" per year and 640 complaints of misconduct. Bobb, supra note 166, at 7, 37.

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Based on the national average, a police officer has one chance in one hundred of being sued in federal court in a given year for abuses of civil rights; the chances that any particular encounter with a citizen will eventuate in judicial review is probably lower. n170 Most suits are not brought, many of those brought are dismissed, and many of those which survive are settled. Evidence suggests that in New York and Los Angeles, for example, the [*501] police departments treated excessive force suits costing an average of \$ 4 million to \$ 10 million annually as a cost of doing business. n171

-Footnotes-

n170 In the Police Foundation sample, roughly 25,000 incidents of police uses of force were reported in 1991, which resulted in 2558 lawsuits. 2 Pate & Fridell, supra note 164, at tbl. B-3.1. The sample of incidents clearly underreports use of "bodily force," however, because only 198 police departments reported statistics for that category, while 557 reported statistics for the "civilians shot and killed" category. See id. Moreover, if one includes searches and arrests as deployments of potential force that may give rise to constitutional actions, the percentage of encounters that reach judicial review drops still further. Cf. Bobb, supra note 166, at 38 (noting that in Los Angeles, there is less than one "force related encounter" per 100 arrests).

n171 Bobb, supra note 166, at 55, 62, 77 (citing \$ 13 million as the annual cost of police litigation verdicts and settlements in the Los Angeles Police Department in an annual budget of more than \$ 1 billion and noting that efforts to minimize risk were "still in their infancy"); Paul Chevigny, Edge of the Knife: Police Violence in the Americas 100-02 (1995) (noting the average payments in Los Angeles in 1990 of \$ 1300 per officer and the average payments in New York during the period 1987 to 1992 of \$ 400 per officer).

The Los Angeles County Sheriff testified in 1995 that recoveries for the 28 to 30 annual fatal shootings by his officers come out of a \$ 20 million litigation fund annually budgeted for his department. Aiding Police Who Are Sued: Hearings on H.R. 1446 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 1995 WL 668727 (Nov. 8, 1995) (statement of Los Angeles Sheriff Sherman Block). Because excess funds are returned to the county, the financial incentive to minimize recoveries is diluted.

-End Footnotes-

The result could differ in particular situations. Where a street-level bureaucrat views simply being sued as a significant cost, where the suit provides information and leverage to supervisors within the bureaucracy or polity who themselves are attuned to the constitutional value, or where the information revealed or dramatized in the lawsuit itself generates popular reaction, civil rights actions may have a practical and immediate impact. But the real effect of such litigation, if an effect exists at all, will usually be heuristic rather than deterrent. The hope must be that the shadow of episodic intervention will provide a normative beacon for officials who have some fidelity to constitutional ideals. n172

-Footnotes-

n172 In theory, just as a small number of prison injunctive class actions are probably of more practical import than the much larger number of damage actions, one might think that a small number of police injunctions could serve a similar purpose.

Unfortunately, since Rizzo v. Goode, 423 U.S. 362 (1976), and Los Angeles v. Lyons, 461 U.S. 95 (1983), the obstacle of finding a plaintiff who is currently subject to the challenged practice has proved an almost insurmountable barrier to prospective relief in most police cases. See, e.g., Paul Hoffman, The Feds,

Lies and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. Cal. L. Rev. 1453 (1993); Alison L. Patton, Note, The Endless Cycle of Abuse: Why 42 USC Section 1983 Is Ineffective in Deterring Police Brutality, 44 Hastings L.J. 753 (1993).

Police abuse is generally sporadic rather than predictable, so most claimants at best seek retrospective relief. If the federal government chooses to use it, Congress has in 1994 provided authorization for pattern or practice suits by the Attorney General against police departments that regularly violate civil rights. See 42 U.S.C. <sect> 14141 (1994). To the best of my knowledge, the only case brought pursuant to this statute is an action against the police department of Pittsburgh, Pennsylvania, which resulted in a consent decree establishing structural mechanisms for controlling police brutality. See Jon Schmitz, A Blueprint for Change, Pittsburgh Post-Gazette, Feb. 27, 1997, at A-14.

After searching all reported constitutional claims in the 1994 Lexis federal district court database, I identified nine opinions involving class actions against police. Two involved successful efforts to obtain injunctive relief, though they were not efforts to enjoin street-level police abuse. Loper v. New York City Police Dep't, 853 F.Supp. 716 (S.D.N.Y. 1994) (enjoining the enforcement of an ordinance prohibiting begging); Alliance to End Repression v. City of Chicago, 1994 U.S. Dist. LEXIS 3070 (N.D. Ill. 1994) (involving the administration of a 1981 consent decree involving political surveillance), rev'd and vacated, 119 F. 3d 472 (7th Cir. 1997).

Two others involved successful damage actions. Hvorcik v. Sheahan, 847 F. Supp. 1414 (N.D. Ill. 1994) (granting summary judgment on liability to a class of citizens arrested on the basis of invalid warrants which had already been quashed); Jones v. Cochran, 1994 U.S. Dist. LEXIS 20625 (S.D. Fla. 1994) (granting summary judgment on liability to a class of defendants detained by police after being acquitted at trial). One class action, Johns v. Deleonardis, 1994 U.S. Dist. LEXIS 8916 (N.D. Ill. 1994), sought damages for a police raid on a meeting of the Chicago Gypsy Counsel, but it was not a challenge to any systematic practices.

Two cases denied class treatment for damage claims. Douglas v. Sheahan, 1994 U.S. Dist. LEXIS 12098 (N.D. Ill. 1994) (alleging a practice of issuing inaccurate warrants); Davis v. City of Philadelphia, 1994 U.S. Dist. LEXIS 3640 (E.D. Pa. 1994) (alleging illegal confiscation of personal property). One denied standing to plaintiffs seeking to bring an injunctive class action suit challenging allegedly racially motivated traffic stops. Washington v. Vogel, 156 F.R.D. 676 (M.D. Fla. 1994).

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Is this hope plausible? With respect to fine grained judgments under the Fourth Amendment, there is reason to be dubious. Police officers often appear to have neither detailed knowledge of their precise legal obligations nor the incentive to obtain it. One recent study reports that in a survey of more than five hundred police officers in three cities, the officers identified their legal obligations in borderline situations under the Fourth Amendment barely more often than random chance would dictate. n173 Furthermore, if damages are

sought from individual officers, the officer will be protected from personal liability in close calls unless no reasonable officer could have believed that her actions were lawful. n174

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n173 William C. Heffernan & Richard W. Lovely, Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law, 24 U. Mich J. L. Reform 311, 332 (1991). This finding is notably less prevalent with respect to the "bright line" rules of Miranda and the Fifth Amendment. Id. at 338-39.

n174 See, e.g., Hunter v. Bryant, 502 U.S. 224 (1991) (establishing the standard for qualified immunity for arrest); Anderson v. Creighton, 483 U.S. 635 (1987) (holding that in determining whether an officer was entitled to qualified immunity, the relevant inquiry is whether a reasonable officer could have believed that a warrantless search was lawful).

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Episodic judicial interventions could serve to establish in the consciousness of officers and their superiors the simple fact that there are some limits--that even in the midst of the war on drugs, for example, not everything goes. n175 A study of New York City police officers concluded that many [*503] officers are Holmesian positivists: in the absence of the concrete sanctions imposed by the exclusionary rule, "most police officers interpret the Wolf case as not having imposed any legal obligation on the police since, under that decision, the evidence would still be admissible no matter how it was obtained." n176 Yet two recent investigators were struck by the "consistent unwillingness of [more than half of the surveyed] officers . . . to depart from the Constitution's requirements" n177 regarding searches even in situations in which direct employment sanctions or liability were unlikely. The investigators hypothesize that "exclusion provides officers with a day-today reminder of the importance of adherence to the law." n178 The hope must be that the lower federal courts' episodic intervention can likewise serve as a "still small voice" stimulating the willingness of officers to acknowledge constitutional commands. n179

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n175 In Wolf v. Colorado, 338 U.S. 25 (1949), overruled by Mapp v. Ohio, 367 U.S. 643 (1961), Justice Frankfurter opined that the core concern of the Fourth Amendment is "the security of one's privacy against arbitrary intrusion by the police," but he refused to impose the exclusionary rule. Id. at 27. Mapp reversed that decision on the grounds that constitutional exhortations without sanction are entirely ineffective.

Mapp has not been overruled, though Professor Kamisar points out that the recent evolution of Fourth Amendment doctrine has left the exclusionary rule in a state in which "if the criminal goes free, it is because the constable has flouted the Fourth Amendment, not because he has made an honest blunder". Yale Kamisar, Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano, 23 U. Mich. J. L. Reform 537, 554 (1990). Moreover, the constitutionally mandatory provision of counsel in criminal cases under Gideon v. Wainwright, 372 U.S. 335 (1963), means that the exclusionary remedy will be wielded with at

least some modicum of expertise.

n176 Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 *UMKC L. Rev.* 24, 29 (1980).

n177 Heffernan & Lovely, *supra* note 173, at 351.

n178 *Id.*

n179 See Carol S. Steiker, *Second Thoughts About First Principles*, 107 *Harv. L. Rev.* 820, 852 (1994) (arguing that constitutional enforcement provides an "alternative vision" for "good cops" to follow); cf. Lawrence Lessig, *Social Meaning and Social Norms*, 144 *U. Pa. L. Rev.* 2181 (1996); Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. Pa. L. Rev.* 2021 (1996).

In some ways, the depressingly prevalent findings of police willingness to engage in perjury to escape the exclusionary rule, see, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 *U. Colo. L. Rev.* 75 (1992); Kevin R. Reitz, *Testifying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 *U. Colo. L. Rev.* 1061 (1996); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 *U. Colo. L. Rev.* 1037 (1996), can be read as confirming the existence of this function, for, like any hypocrisy, "testifying" is the homage of vice to virtue. Officers must know the rules in order to claim they have followed them, and the officer who is attracted to either honesty or constitutional norms will seek to obey the rules.

The sporadic nature of current judicial intervention, even in the area of physical abuse, however, suggests that claims that a damage remedy will adequately substitute for the elimination of the exclusionary rule, e.g., *Bivens v. Six Unknown Named Agents*, 403 *U.S.* 388, 411 (1971) (Burger, C.J., dissenting) (suggesting an administrative damage tribunal as a substitution for the exclusionary rule); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 785 (1994); Slobogin, *supra*, leave a certain plausibility behind. This is not a new lesson, see, e.g., Caleb Foote, *Tort Remedies of Police Violations of Individual Rights*, 39 *Minn. L. Rev.* 493 (1955), but one which periodically seems to need reiteration. See Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 *N.C. L. Rev.* 1559 (1996); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 *S. Cal. L. Rev.* 1, 60 (1994); Steiker, *supra*, at 849-51.

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The alternative interpretation is that in both the area of prisons and police, the availability of federal court remedies is simply a fig leaf placed on the brutality our society sanctions. This is the interpretation of other constitutional criminal procedure landmarks suggested by some more pessimistic scholars. n180 I must confess that on many days this account of the role of police abuse litigation seems plausible to me. If only these abuses were not hidden behind a veil of alleged constitutional rights, a real movement to exert control over them might emerge.

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n180 Louis Michael Seidman, Brown and Miranda, 80 Calif L. Rev. 673 (1992) (suggesting that Miranda was essentially a way of bleeding off objections to the criminal justice system); Louis Michael Seidman, Criminal Procedure as the Servant of Politics, 12 Const. Commentary 207 (1995) (asserting that constitutional protections make prosecutors' jobs easier); Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harv. L. Rev. 355 (1995) (arguing that the Supreme Court's death penalty jurisprudence has served to entrench capital punishment by providing a patina of decency); see also Lipsky, supra note 100, at 42-43, 134-35 (asserting that due process and illusory rights to appeal legitimize the continuation of abusive practices).

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Ultimately, however, this hope is even less compelling than the optimistic vision of constitutional litigation; the history of political efforts to control abuse in law enforcement has hardly been a model of efficacy, and there is certainly no indication that it has been more effective in the absence of purported constitutional safeguards. At the end of the day, even the illusion of rights has two values.

First, as long as the courts continue to articulate the claim that official violence has its limits, some officials will believe it. Sometimes the threat of being taken to court will tap into a disinclination to the adverse publicity which accompanies a solemn allegation of impropriety. Like the news of acquittals, the news of the dismissal of a suit often has less impact than the news of its inception. Sometimes the information discovered and disclosed in court will galvanize a torpid bureaucracy into action, n181 and sometimes [*505] the courts' statements will be a call to the official's better self. As long as courts articulate a norm that officials have an obligation to act "reasonably" even when enforcing drug laws, the official inclined to act with basic decency has a basis to claim that that inclination does not cause her to abandon her duty but rather to fulfill it.

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n181 Thus, in one recent case, NAACP v. City of Philadelphia, Civ. No. 96-6015 (E.D. Pa. Sept. 4, 1996), the City of Philadelphia responded to a police abuse scandal, damage actions, federal prosecutions, and the prospect of an injunctive class action by committing itself to institute a comprehensive restructuring of its systems for controlling police abuse and appointing both internal and external monitors. See Shannon Duffy, City Settles Cop Reform Lawsuits; Plaintiffs' Lawyers to Monitor Progress, Legal Intelligencier, Sept. 5, 1996; Joseph Slobodzian, City Tries To Contain Cop Scandal Damage, N.Y. Law J., Feb. 5, 1996, at A10. In the interests of full disclosure, I should note that I worked with plaintiffs' counsel in that case.

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Second, and equally important, the citizens subject to government authority may believe the myth. As long as claims are sometimes vindicated, the belief that one has rights is a basis for organization, self-respect, and autonomy. To be without rights is to be a slave, and the result is all too often

resignation. To be defrauded of one's rights is to be abused, and the result--as we saw in the reaction to the acquittal of Rodney King's assailants in Los Angeles--is often rage.

III. Implications

Having surveyed constitutional practice in the 1990s, I now draw some conclusions. The results of my survey in many ways confirm conventional constitutional theories. In both the Supreme Court and the trial court samples, litigation involving legislative judgments was likely to fall within the relatively uncontroversial categories described by most constitutional theorists. The activism with respect to federal governmental structure which permeates much of the Supreme Court's docket is rare at the trial court level, and the beneficiaries of trial court determinations are less likely to be business and property claimants. Nevertheless, in general, legislative review by the trial courts mirrors determinations at the Supreme Court level.

Such legislative confrontations, however, represent only a minority of the situations in which the Constitution is actually invoked before the Supreme Court, and at the trial court level that portion shrinks still further. The most frequent constitutional claims in trial litigation concern the use of force or discretion by individual officials. The claims are brought not by businesses but by individuals--often those who are dispossessed--and usually the claims are for damages. In the following pages, I examine what these observations suggest about the role of courts and constitutional adjudication.

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A. The Countermajoritarian Difficulty Confined

1. Comparative Institutional Competence and Democracy

First, we should remember that a great deal of what federal courts actually do with the Constitution does not raise the "countermajoritarian difficulty" directly. The power of the "countermajoritarian difficulty" is in part a function of the degree of majoritarianism that characterizes the decisions being reviewed. A decision by a cop on the beat has a different democratic pedigree than an act of Congress. To say we should prefer decisions of judges to those of police officers does not necessarily fly in the face of popular self-rule.

If we move beyond the fact that neither most police officers nor most judges are directly accountable to the electorate, the issue of judicial review becomes a comparative one. Whether one is attempting to achieve morally correct results, accurate accounts of constitutional norms--however judged--, or efficiency, the question of which institution is most likely to achieve "correct" results becomes crucial. If the manifest defects of the courts are less than their competitors', then courts should make the constitutional determinations. n182

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n182 For efficiency arguments, see, for example, Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 204 (1994) ("In the complex world of institutional choice, foxes might be assigned to guard the chicken coop where the alternatives (bears, weasels, and so forth) are worse."); Neil K. Komesar, Slow Learning in Constitutional Analysis, 88

Nw. U. L. Rev. 212 (1993); cf. Einar R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L. J. 31 (1991) (arguing that probable failings of courts' decisionmaking processes are even greater than those of legislatures).

For arguments regarding the relative moral capacity of courts and legislatures, see, for example, Perry, supra note 7, at 21, 95-104; Frederick Schauer, Constitutional Positivism, 25 Conn. L. Rev. 797 (1993); for arguments regarding the relative capacity of courts and administrative officials, see Frederick Schauer, The Occasions of Constitutional Interpretation, 72 B.U. L. Rev. 729, 735-38 (1992). Professor Schauer observes that the desire, as a matter of ideal political theory, to allow important matters to be decided by popular determination might be an independent reason for courts to defer in constitutional cases, id. at 734, but, by hypothesis, the competition in most of the nonlegislative cases has a relatively diluted democratic pedigree.

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In all bureaucracies, the bureaucracy's mission tends to dwarf competing values. To believe that HHS is good at devising welfare proposals does not mean that it has a comparative advantage at judging the appropriate scope of rights against searches and seizures. The FDA is interested in drug safety, not international trade or free speech; the state welfare department focuses on efficient delivery of services, not rights of migration.

Experience suggests still less that individual case workers have a comparative advantage. Many of the situations in which the constitution is deployed in the federal courts--indeed in a vast majority of the cases in the trial courts--involve confrontations with street-level bureaucrats who can neither be tightly bound by rules nor be required to give reasons for their actions. The office water cooler is not likely to be the locus of transformative constitutional dialogue.

Michael Perry suggests the protection of human rights by courts is necessarily countermajoritarian: "If there really were consensual values of a determinate helpful sort, there would probably be little need for the Court frequently to enforce them against electorally accountable officials" n183 The problem, of course, is that the "electorally accountable officials" against whom the courts most frequently enforce constitutional norms include police, prison guards, and prosecutors whose accountability hardly equates with a popular mandate. Indeed, a primary characteristic of these street-level bureaucrats is the difficulty in prospectively constraining their discretion. n184

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n183 Michael J. Perry, The Constitution, The Courts, and Human Rights 94 (1982). The point echoes Justice Frankfurter's argument in Wolf v. Colorado, 338 U.S. 25, 31 (suggesting that suspects whose constitutional rights have been violated should be remitted "to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford") and Monroe v. Pape, 365 U.S. 167, 242-44 (1961) (Frankfurter, J., dissenting).

n184 Lipsky, supra note 100, at 15, 159. The danger is that if the constraints of minimal decency are regularly violated by street-level bureaucrats with impunity, such violations will no longer be viewed as repugnant, and a deadened public opinion will allow them to be enacted into law.

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Both of these concerns--the single-mindedness of the focus on bureaucratic missions and the relative unreliability of street-level bureaucrats as constitutional decisionmakers--are particularly salient in the areas of corrections and law enforcement which account for such large portions of the trial courts' constitutional review. n185 In each setting, a bureaucratically monochromatic view of the world is exacerbated in total institutions where officials confront potentially hostile "clients" (with associated cognitive dissonance), where danger imposes the need for mutual loyalty among an insular corps of officials, and where individual "clients" are disenfranchised or powerless.

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n185 As Professor Schauer points out, these types of concerns prompted the imposition of the warrant requirement in the Fourth Amendment. Schauer, supra note 182, at 734.

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The costs of violations in such contexts, moreover, are concentrated on isolated individuals, while the benefits accrue to the polity at large. However much the polity may adhere to beliefs in the importance of search warrants, due process, or limits on physical force in the abstract, when the interests of a particular (often) low-status individual are balanced against an organizational mission, the incentive of the bureaucrat is to slight rights. n186

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n186 Should we not rely on the political process more generally to discipline such organizational overreaching in the long run? In part, the story is the old one of "prejudice against discrete and insular minorities," United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938), amplified by the fact that victims are not predictable: for most individuals, the prospect of abuse is unlikely enough and sufficiently unpredictable that they will rarely take political action. Organizational costs are high, and unlike statutes or public rules, the practices of ingrown bureaucracies are difficult subjects for political debate and control. The combination of the difficulty of obtaining information about organizational practices, the difficulty of identifying effective interventions, and the "organizational stasis" identified by my colleague Susan Sturm combine to make judicial intervention particularly useful in such areas. See Susan Sturm, Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons, 138 U. Pa. L. Rev. 805, 810 (1990).

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2. Reversibility and the Trial Courts

This does not mean that the "countermajoritarian difficulty" is entirely illusory in the cases which comprise the bulk of judicial review. When Alexander Bickel coined the phrase, his claim was that democracy "means that a representative majority has the power to accomplish a reversal" of a contested policy. n187 When a federal court strikes down an action by a bureaucrat or another court in the name of the Constitution, that action cannot be rehabilitated by the direct representative processes. When the police are enjoined from interfering with a controversial anti-abortion (or gay rights) demonstration, a subsequent local ordinance or state or federal statute permitting such interference may not withstand judicial scrutiny, no matter how great the popular enthusiasm for the legislation. n188

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n187 Alexander M. Bickel, The Least Dangerous Branch 17 (1962).

n188 On the other hand, given the structure of constitutional doctrine, it may. For example, in the "limited public forum" area, which has generated a large number of cases in recent First Amendment adjudication, a municipality which seeks to eliminate controversial speech can tailor access to the forum by appropriately general rules to exclude speech as long as those rules are "viewpoint neutral" and "reasonable." See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 115 S. Ct. 2510 (1995) (applying "limited public forum" test in the context of denying funds to a religious student publication); United States v. Kokinda, 497 U.S. 720 (1990) (applying "limited public forum" test to uphold a regulation prohibiting solicitation on post office premises); Frisby v. Schultz, 487 U.S. 474 (1988) (upholding the portion of a municipal ordinance which banned picketing in front of a particular residence); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) (holding that the government may exclude charities from a charity drive aimed at federal employees if the exclusion was not aimed at suppressing particular viewpoints).

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Three factors, however, temper these concerns. First, the initial judgment regarding the actions of a local bureaucrat often simply initiates a dialogue. A determination that a particular bureaucrat's action is unreasonable or is invidiously motivated may do little more than send the majoritarian branch [*509] back to the drawing boards. An effort to bar a specific demonstration under the terms of a disorderly conduct statute may be unavailing, while a regulation by a representative body prohibiting all demonstrations near medical facilities may be upheld. The tendency of recent doctrine to focus either on balancing and reasonableness or on the presence or absence of constitutionally impermissible administrative intent by officials means that a trial court's decision--or even a Supreme Court mandate--invalidating one administrative determination has limited applicability to a similar decision by a different government entity or a subsequent decision by the same one. The countermajoritarian difficulty is diluted to the extent that the court's legal theory leaves representative institutions with the authority to effectively pursue their goals despite a constitutional determination. As we have seen, much of the trial court's constitutional caseload is of precisely this variety.

In many cases, the trial courts do not purport to invalidate the value choices of responsible branches of government. Unlike the challenges in Brown, Roe, and Romer, in which the Court declared majoritarian value choices to be constitutionally impermissible, the challenges before the trial courts are often leveled at the methods by which social choices are carried out. The legal sources of these claims often bear the seeds of their own qualification.

The First Amendment prohibits all viewpoint-based prohibitions on protected speech, but the Fourth Amendment prohibits only "unreasonable" searches and seizures. The Fourteenth Amendment prohibits all denials of equal protection, but deprivations of life, liberty, and property must merely be accompanied by procedures that provide "due" process. Constitutional limitations in the classical core purport to be apodictic: they often bar with one degree of absoluteness or another even the effort to achieve a proscribed goal. The limitations which protect most basic decencies are conditional; they call for a particularistic reconciliation of conceded public concerns with human dignity. Courts often review means rather than ends or values, n189 and under current doctrine, even in the classical core of judicial review, the Court in recent years has forged doctrinal devices that limit the degree to which courts resolving particular disputes bind popular value choices. n190

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n189 Thus, despite his skepticism of open-ended "value based" judicial review, Professor Ely felt no qualms about approving noninterpretive review under the Cruel and Unusual Punishment Clause because "the subject is punishments, not the entire range of government action." John Hart Ely, Democracy and Distrust 14 (1980). He similarly accepted procedural review under the Due Process Clause because "the questions that are relevant here--how seriously the complainant is being hurt and how much it will cost to give him a more effective hearing--are importantly different from . . . how desirable or important the substantive policy the legislature has decided to follow is." Id. at 21; see id. at 95-97.

n190 The Fourth Amendment, of course, has for many years been a home for "allthings-considered reasonableness," and Eighth Amendment cases forbid deliberate indifference or malicious desire to cause harm. See, e.g., Farmer v. Brennan, 511 U.S. 825 (1994). The emerging focus on motive and viewpoint neutrality in First Amendment cases both in public forum and employment situations, cf. Elena Kagan, Private Speech, Public Purpose: the Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413 (1996), and in equal protection, see, e.g., Shaw v. Hunt, 116 S. Ct. 1894 (1996); Hernandez v. New York, 500 U.S. 352 (1991); Washington v. Davis, 426 U.S. 229 (1976), provide similar limitations on the generalizability of the constraints imposed by particular decisions. See generally T. Alexander Aleinkoff, Constitutional Law in the Age of Balancing, 96 Yale L. J. 943 (1987); Sullivan, supra note 62.

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Second, most of the review of street-level decisionmaking, and hence most constitutional review in trial courts outside of review of judicial determinations, occurs in damage actions. n191 This means that the official

action has already taken place and, with respect to whatever underlying policy is at issue, official decisions have been determinative. The issue before the courts is whether the polity should be required to pay damages. If the courts find a constitutional violation, the determination is "reversible" by a popular majority willing to pay for the privilege. Indeed, in most cases it is not the courts alone who impose this obligation but the courts in concert with juries, which are themselves popularly responsive bodies. The one thing that cannot be reversed is the polity's obligation to pay for the constitutional damage it causes.

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n191 Among trial court claims involving administrative agencies, 60% (60/101) involved damage claims; among claims arising out of actions by police, 78% (103/131); and among claims against individual officials, 90% (166/131). Nor was this solely a function of prisoners' tendency to bring damage actions: among prisoners challenging bureaucratic determinations, 86% (86/101) cases involved damage claims; among nonprisoners, 69% (109/157).

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Third, most cases in which constitutional norms are vindicated in the lower courts are not resolved by authoritative judicial statement; if a plaintiff prevails, it is usually through settlement. A case which survives initial judicial screening obliges the government's representatives to defend their actions. But in settlements, where the popular representatives have entered into an agreement in the shadow of the law, the result is less a coup d'etat than a result of a dialogue between the government and those whom it seeks to govern.

B. The Courts As Ordinary Moral Observers: Moral Consensus Renewed

Some of the constitutional work of the federal courts is concerned with realizing controversial aspirational ideals or preserving integrated systems of democratic governance. In a great bulk of cases, however, the common values courts bring to bear involve the moral minimalism which Sissela Bok identifies as basic and common across cultures: the necessity to limit the government's exercise of its power to harm or confine the person of its citizens and the requirement of fair procedures. n192 These values constitute the "dark matter" that holds our constitutional universe together. Adjudication of cases involving those values calls particularly upon the comparative advantages of trial courts as constitutional expositors.

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n192 See Sissela Bok, Common Values 15-16, 18-19, 30, 57 (1995) (citing duties to refrain from coercion and violence and rudimentary fairness in procedural justice); cf. Stuart Hampshire, Innocence and Experience 90 (1989) ("The great evils of human experience, reaffirmed in every age . . . are murder and the destruction of life, imprisonment, enslavement[,] . . . physical pain, and torture."); Michael Walzer, Thick and Thin: Moral Argument at Home and Abroad 2-3 (1994) (arguing for recognition of a "minimal" or "thin" political morality that is embedded in, and can be recognized by, a large variety of cultures involving "the end to arbitrary arrests, equal and impartial law enforcement, the abolition special privileges"); id. at 9-10 (identifying "injuries and wrongs no person should have to endure," such as "murder,

deceit, torture, oppression, and tyranny").

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1. The Nature of the Claims

Americans believe that the government should be constrained in its ability to inflict bodily harm on its citizens. The sources of this consensus are three-fold. First, there is wide agreement that the imposition of physical harm is an evil. As Professor Shklar notes, "The liberalism of fear, which makes cruelty the first vice, quite rightly recognizes that fear reduces us to mere reactive units of sensation, and that does impose a public ethos on us. One begins with what is to be avoided" n193

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n193 Judith N. Shklar, Ordinary Vices 5 (1984); cf. Sullivan, supra note 60, at 93 ("The bedrock concept of coercion is force. If you can find force in the picture, a violation of a constitutional right is at hand."); Avishai Margalit, The Decent Society 85 (1996) ("Cruelty is the ultimate evil; preventing cruelty is the supreme moral commandment"). Margalit, however, extends the proposition from physical to mental cruelty. See generally id.

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The very definition of the state as the legitimate monopolist of coercive violence makes clear that within an effective legal order, the government is a most potent source of fear. The need to constrain the exercise of official violence lies at the heart of the first ten amendments. n194 As Shklar observes,

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n194 Cf. H. Jefferson Powell, The Moral Tradition of American Constitutionalism: A Theological Interpretation 264 (1993) ("Constitutionalism is the most fundamental mode by which the American republic attempts to channel and mitigate the violence of the state and (since the state attempts to enforce a monopoly on violence by violence) the society.").

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The first right is to be protected against the fear of cruelty. People have rights as a shield against this greatest of public [*512] vices Justice itself is only a web of legal arrangements required to keep cruelty in check, especially by those who have most of the instruments of intimidation closest at hand Laws . . . have one primary objective: to relieve each one of us of the burden of fear so that we can feel free because the government does not, indeed cannot, terrorize us. n195

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n195 Shklar, supra note 193, at 237-38; id. at 244 ("Throughout history, war and punishment have been the primary functions of government Weber chose to put it in a nutshell by defining the state as the holder of a monopoly on legitimate use of force [The definition] encourages demands for limited government, for justice as the sole public virtue, and underlines the

political significance of putting cruelty first."); cf. Komesar, supra note 182, at 202 ("The single greatest threat to the rules and indeed to the game comes from the monopoly of force that characterizes the government. The military and the police are central functionaries in any constitutional government. But they are also its major threats.").

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The threat of physical abuse is more than cause for apprehension in its own right--it is potentially toxic to the independence of the citizenry that American democracy presupposes. Thus, Justice Frankfurter periodically expressed the proposition that "modern totalitarianisms have been a stark reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for human integrity." n196

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n196 Monroe v. Pape, 365 U.S. 167, 209 (1961) (citing, at 208, the "conception expressed in Wolf v. Colorado, 338 U.S. 25, 27 [(1948)], that 'The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society.'").

Professor Klarman plausibly suggests that part of the impetus for the evolution of criminal justice constraints during the second half of the twentieth century arose from reaction to the experiences of repressive Nazi "justice." Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 64-66 (1996); cf. Richard Primus, Note, A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought, 106 Yale L.J. 389 (1996).

As a subsidiary matter, a willingness to perpetrate violence is often a function of social distance. See, e.g, Stanley Milgram, Obedience to Authority (1974); Arne Johan Vetlesen, Perception, Empathy and Judgement 202-03, 273-77 (1994). If we worry that constitutional limits should bind the treatment of those who are distant from the majority, cf. Ely, supra note 189, at 158-64 (asserting that dangers of "wethey" thinking trigger constitutional review), then control of official violence is a good place to start.

Professor Sunstein argues, "The commitment to citizenship requires that people have a large degree of security and independence from the state . . . as a precondition for the independence that is necessary for the role of the citizen." Cass R. Sunstein, The Partial Constitution 136 (1993). Sunstein would push the point much farther than broken doors and broken bones, however, incorporating a right to property, freedom from desperate conditions, and a "sphere of autonomy into which the state may not enter." Id. at 136-39. In his hands, the argument seems to evolve from a bill of particulars indicting the precursors to tyranny into a shopping list.

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When my teenage daughter recently pressed me for a set of truths that could serve as anchors in a world of diverse moral perceptions, I began my efforts to respond by asserting that cruelty is evil and love is good. The federal courts in recent years have come close to abandoning the aspiration that the Constitution, unaided, can further the labors of love (or its cognates, equality and affirmative claims to dignity), but they retain a constitutional role in the prevention of cruelty. At a basic level, the proposition that government officers cannot abuse citizens' bodies in pursuit of public good represents a minimal commitment to decency to which even the most antiactivist of judges gives allegiance.

In many areas where this commitment asserts itself, constitutional review is "extratextual"; it is difficult to ground a judicial warrant firmly in textual or narrowly originalist claims. n197 Yet there is relatively little controversy that some judicial intervention is appropriate. n198 The only forceful debate revolves around the appropriate degree of intervention.

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n197 Thus, the right to bodily integrity, rooted in the "canons of decency and fairness which express the notions of justice of English-speaking peoples," Rochin v. California, 342 U.S. 165, 169 (1952), has transmigrated to the Fourth Amendment for those subjected to physical abuse by police, see Graham v. Connor, 490 U.S. 386 (1989); Brower v. County of Inyo, 489 U.S. 593 (1989); Tennessee v. Garner, 471 U.S. 1 (1985), and to the Eighth Amendment for prisoners, see Farmer v. Brennan, 511 U.S. 825 (1994); Hudson v. McMillan, 503 U.S. 1 (1992). It remains textually ungrounded for mental patients, see Youngberg v. Romeo, 457 U.S. 307 (1982), and civilians, c.f. U.S. v. Lanier, 73 F.3d 1380 (6th Cir.) (en banc) (holding that a constitutional right not to be sexually assaulted by a judge is not "clearly established"), vacated, 117 S. Ct. 1219 (1997). The right to minimally decent medical care for prisoners has been discovered in the Eighth Amendment, see Estelle v. Gamble, 429 U.S. 97 (1976), and the right to avoid baseless prosecutions has been shoe-horned into the Fourth Amendment, see Albright v. Oliver, 510 U.S. 266 (1994). Cf. Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 353 (1974) (asserting that such issues are "too large, too ungoverned by a commanding text or clear institutional dictates, to be laid solidly to rest").

n198 Justice Thomas may be an exception. See, e.g., Hudson v. McMillian, 503 U.S. 1, 17-29 (1992) (Thomas, J., dissenting) (suggesting that the Eighth Amendment should not be interpreted to protect prisoners from harsh treatment).

-End Footnotes-

In part this consensus follows from the nature of the norms courts invoke. The rights to avoid arbitrary and demeaning incarceration for mental illness, physical abuse or denial of medical care while in custody, sexual assault under color of the law, like the rights against official impairment of bodily integrity, baseless arrests or searches, and the emerging Fourth Amendment right against groundless prosecution are all linked to unremarkable normative claims. Although courts in these areas implement value choices that may be only loosely grounded in the text of the Constitution, [*514] there seems to be no call to invoke fancy constitutional methodology; there is recognition on all sides that the courts are appropriate moral arbiters of some side constraints under which the government operates.

Dissenting from the judicial activism of Lochner v. New York, n199 Justice Holmes maintained that a court should not invalidate the "natural outcome of dominant opinion" unless the challenged act "would infringe fundamental principles as they have been understood by the traditions of our people and our law." n200 Holmes's intellectual heir, Richard Posner, has written approvingly of Holmes's "rule of thumb" that a law is constitutional "unless it made him want to 'puke.'" n201 Such definitions limit judicial review, but they do not eliminate it.

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n199 196 U.S. 45 (1905).

n200 Id. at 76 (Holmes, J., dissenting).

n201 Richard Posner, Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights, 59 U. Chi. L. Rev. 433, 447 (1992).

-End Footnotes-

Thus, even as the current Court has renounced open-ended evaluation of public justifications of run of the mill traffic stops in Whren v. United States, n202 it reaffirmed the propriety of balancing intrusiveness against public necessity in "searches and seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or . . . physical interests." n203 The constitutional claims invoked in these cases are keyed to irreducibly contextual moral insights regarding physical harm and individual dignity.

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n202 116 S. Ct. 1769 (1996).

n203 Id. at 1776 (citing Wilson v. Arkansas, 514 U.S. 927 (1995) (unannounced entry into a home); Tennessee v. Garner, 471 U.S. 1 (1985) (seizure by means of deadly force); Winston v. Lee, 470 U.S. 753 (1985) (use of a surgical incision to obtain evidence); Welsh v. Wisconsin, 466 U.S. 740 (1984) (entry into a home without a warrant)).

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Although Michael Perry has announced, in terms common to many commentators, that "consensual values would probably be of little help to the main body of persons who press human rights claims in the Court," n204 the most prevalent, though not the most visible, constitutional claims before the Court in the 1990-1995 Terms involve issues in which consensus on values in fact obtains. n205 These cases swell to a clear majority of the lower [*515] court docket. n206

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n204 Perry, supra note 183, at 94.

n205 Professor Perry takes the position that substantive due process is "by consensus the most controversial" category in the corpus of constitutional

law. Perry, supra note 183, at 5. This is true, however, only in the areas of reproduction, sexuality, and family rights, where the Court seeks to aid in the transformation of national values.

Where the Court and the trial courts are engaged in realizing basic immunities against physical abuse, the doubts as to whether the Court should be involved at all are substantially less intense. Indeed, in some ways the effort to transform the abortion debate into a debate about "bodily integrity" sought to capitalize on precisely that uncontroversial point. See, e.g., Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (interpreting the abortion right as linked to bodily integrity); id. at 2287 (Souter, J., concurring); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 849, 857 (1992) (plurality opinion) (linking the abortion right to bodily integrity); id. at 915 (Stevens, J., concurring); id. at 926 (Blackmun, J., concurring).

Thus, Professor Perry's reductio that "moral skepticism is a terribly difficult position to take seriously in this post-Holocaustal age," Perry, supra note 183, at 105, founders on the fact that freedom from physical abuse is what stands in the way of government-sanctioned torture, slavery, and genocide and that this freedom is grounded precisely in the moral consensus that abortion cases have not yet achieved. The efforts to restrain police abuse and torture are not fundamental political-moral problems; rather, they are gritty issues of holding functionaries to the terms of a basic moral consensus.

n206 Professor Perry's critique of the courts as guardians of consensus values therefore is at odds with the bulk of what the lower courts do. Perry suggests that "if there really were consensual values of a determinate, helpful sort, there would probably be little need for the Court frequently to enforce them against electorally accountable officials." See Perry, supra note 183, at 94. But much of the enforcement in the lower courts is directed against officials who, while they may be electorally accountable in some indirect sense, do not stand for election themselves. Moreover, the defendants' and whose low-level discretion is not subject to effective supervision. See generally Lipsky, supra note 100.

The demands of minimal physical decency are not, in fact, widely debated in the United States so much as dwarfed by the demands of professional roles. Professor Perry acknowledges as much in his discussion of institutional reform litigation but fails to recognize how much of the constitutional caseload falls into this paradigm. See Perry, supra note 183, at 153. Professor Perry also suggests that "consensual values would probably be of little help to the main body of persons who press human rights claims in the Court--persons whose skin is not white or whose politics or lifestyle is heterodox." Id. at 94. Again, particularly in view of the lower courts' caseloads, it is precisely these individuals who lay claim to the assistance of federal courts in vindicating the minimal rights that the consensus of society acknowledges.

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Because a large element of the Court's adjudication, and the vast bulk of the lower courts' adjudication, is keyed to striking violations of minimal moral norms, it follows that it would be a mistake to rely on courts as a screen for the overall morality or legitimacy of government action. n207 The failure to intervene does not mean that government actions are just, but simply that they are no more unjust than the run of the mill oppressions we live with in an

imperfect world. The norms of basic decency are not often violated by overt legislative mandate; only rarely does a legislature affirmatively seek to abuse the persons of its citizens. n208

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n207 E.g., Randy E. Barnett, Getting Normative: The Role of Natural Rights in Constitutional Adjudication, 12 Const. Commentary 93 (1995); cf. Dahl, supra note 36, at 295.

n208 The sole contemporary exception is capital punishment.

-End Footnotes-

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2. The Trial Court's Judicial Role Elaborated

The major role of the federal trial courts in constitutional litigation thus differs importantly from that of the seekers of neutral principles, the strivers for social aspiration and prophecy, or the archaeologists of historical intention that appear in most constitutional theory.

The challenge for trial court judges is not so much to identify political or moral norms as to disentangle competing factual narratives and map constitutional boundaries by established moral polestars. In this endeavor, sophisticated doctrinal or philosophical reasoning is not likely to be crucial. Indeed, in most cases, doctrine is at best indicative of the elements of the competing accounts presented to the courts.

The Supreme Court has adopted broad standards that embody basic social judgments; prohibitions against "deliberate indifference" or "unreasonable" use of force are examples. n209 The judge in such situations seeks to engage her moral sense (and/or that of the jury) with the immediate situation before her, rather than bring her analytic or policy resources to bear on larger questions. These are norms of decency and proportionality, not maximization and aspiration. n210

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n209 See, e.g., Farmer v. Brennan, 511 U.S. 825 (1994) (holding that the Eighth Amendment bars subjecting prisoners to "deliberate indifference" to the risk of serious physical harm); Helling v. McKinney, 509 U.S. 25 (1993) (same); Estelle v. Gamble, 429 U.S. 97 (1976) (same); see also Graham v. Connor, 490 U.S. 386 (1989) (holding that the Fourth Amendment bars "objectively unreasonable" uses of force by police); Tennessee v. Garner, 471 U.S. 1 (1985) (holding that the Fourth Amendment bars the use of deadly force against fleeing felons).

n210 The same is true in the 31 cases in which due process challenges to personal jurisdiction were resolved under the "minimum contacts" doctrine (38% (12) successful) and in many of the 50 nonprisoner cases in which the presence or absence of administrative due process is at issue (32% (16) possible or successful).

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Trial courts are not well-adapted to formulate, and speak to the public on behalf of, a national vision of good. n211 Unlike the Supreme Court, the trial court judge is unitary--she does not encompass within her psyche a range of political orientations, she need not accommodate her views to obtain a majority, and she need not justify herself except as necessary to persuade an appellate court to affirm her. She also is unlikely to be able to develop a coherent vision of the law over time for she cannot set her own [*517] agenda and has no access to the vast majority of cases. Lower court judges visit issues episodically rather than synoptically. By the time an issue appears again, it is likely that other decisionmakers of equal or greater authority will have addressed the question.

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n211 Thus, theorists who rely on the role of the Supreme Court as a national educator to anchor judicial review, e.g., Phillip Bobbitt, Constitutional Fate 184-87, 20919 (1982); Christopher L. Eisgruber, Is the Supreme Court an Educative Institution?, 67 N.Y.U.L. Rev. 961, 962 (1992); Richard H. Pildes & Elizabeth S. Anderson, Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2154-57 (1990); Cass Sunstein, Leaving Things Undecided, 110 Harv. L. Rev. 6, 69 (1996), offer scant basis for the implementation of that function at the trial level.

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Unlike Supreme Court opinions, which may enshrine striking phrases in the legal and public consciousness, lower courts are unlikely to catch the national eye, even if they issue determinative opinions. This is still more true in the case of a settlement or blank jury verdict, and, as we have seen, it is the rare case in which a constitutional claim actually goes successfully to trial. n212 If the trial courts are to have pedagogic impact, they must do so by actions rather than words.

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n212 See supra Table 6 (showing that at the trial level, 14.75% of legislative claims were sustained, and 37% were "possible"); Table 11 (showing that at the trial level, 9.74% of nonlegislative claims were sustained, and 21.62% of nonlegislative cases were "possible").

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Trial courts are, however, differentially well-suited to give substance to the ideals of protection against abuses by street-level bureaucrats. A student of the Supreme Court's decisions regarding certiorari reported, "Time and again my informants--justices and clerks--stated that the Supreme Court was not there to insure justice." n213 By contrast, doing justice is precisely the job description of the trial judges. n214

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n213 Perry, supra note 183, at 36; see id. at 266 (quoting a Supreme Court justice as saying, "This is not a court to simply assure that justice is done

. . . .Basically we see it not as a court of justice.").

n214 In one striking example, Judge Raymond Broderick commented in an address to the Third Circuit Historical Society (May 4, 1995) that, while considering the repellant practices of the Pennhurst State School and Hospital, he was confronted by his law clerk with the proposition that under Hagans v. Lavine, 415 U.S. 528 (1974), a court should not resolve constitutional questions if other means of approaching the result are available. Judge Broderick responded, "Yes, I've read the caseNow here are a couple of other ways in which Pennhurst violates the constitution." Telephone Interview with Judge Raymond Broderick (Sept. 9, 1997). See Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977) (Broderick, J.) (upholding the constitutional right to deinstitutionalization), aff'd in part and rev'd in part, 612 F.2d 84 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981). The Pennhurst institution was ultimately closed pursuant to a consent decree. See Halderman v. Pennhurst State Sch. & Hosp., 610 F. Supp. 1221 (E.D. Pa. 1985).

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This realm is dominated by what Bruce Ackerman once characterized as the "ordinary observer"; n215 the terms of evaluation are often ones which, as Professor Feldman puts the matter, "tend to be world-guided by social facts, such as conventional mores, shared cultural ideas, community values, and customs." n216 Because the courts seek to affect the actions of low-level officials, we can expect them to gravitate toward rules and standards that are phrased or justified not in terms of high theory but in terms of social judgments that can guide these actors. n217

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n215 Bruce Ackerman, Private Property and the Constitution 15-20 (1977).

n216 Heidi Li Feldman, Objectivity in Legal Judgment, 92 Mich. L. Rev. 1187, 1212 (1994). Feldman refers to concepts like negligence, but issues of deliberate indifference, unreasonable force, probable cause, legitimate expectations, and adequate process have much the same character.

n217 Cf. id. at 1233 (asserting that legal concepts of negligence are constrained by the fact that it is a "legal concept applied by lay people sic (jurors) and according to which the lay people are supposed to act, must be intelligible to and resonate with laypeople").

To the extent that the Supreme Court has resolved the debate in bright-line prophylactic rules (e.g., Miranda) the role of the lower court is in most cases "simply" to find the facts. But even in these situations, resolution of conflicting factual accounts gives room for the play of the trial court's faculty of judgment. See, e.g., George C. Thomas III, Book Review, An Assault on the Temple of Miranda, 85 J. Crim. L. & Criminology 807, 824 (1995) (reviewing Joseph D. Grano, Confessions, Truth, and the Law (1993)) (asserting that the "vast jurisprudence" of "close cases" under Miranda allows judges to "decide them based on whether they believe the suspect was coerced or otherwise treated unfairly").

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I am suggesting a distinction between "high" constitutional law and "low" constitutional law. The former seeks to resolve basic moral questions or structure the basis on which we govern ourselves as a matter of moral or political theory and is applicable by the lower courts in a relatively mechanical fashion. Mundane or "low" constitutional law takes commonly accepted moral or political commitments as its basis and applies those commitments to particular facts in a way that calls upon courts to make moral judgments by confronting the personal narratives before them. n218 Particularly where control of government cruelty is at issue, the relevant principles tend to be "low" ones, which "know only two figures and one place: victimizers and victims here and now." n219

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n218 Cf. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1752 (1995) (arguing for "low-level" rules that can obtain broad agreement rather than "high-level" comprehensive theories). Sunstein waffles on whether "higher level" principles might be appropriate in constitutional interpretation; in the business of the federal trial courts, they are rarely deployed explicitly.

n219 Shklar, *supra* note 193, at 241.

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The strength of the trial courts in deploying such principles is precisely in that they see the victims. Professor Sager has commented that "whenever I learn of great abuses of citizens at the hands of their state, I find myself wishing that a courageous and independent judiciary, . . . were in place, and I think our national experience justifies the optimism in the judicial process implicit in that wish." n220 But where Professor Sager bases his faith in the common law process's ability to foster a "reflective equilibrium," I suspect that the more relevant capacity of the trial courts is the willingness to give [*519] substance to a visceral revulsion for government cruelty when confronted with particular victims. n221 This function, particularly in administering consent decrees (and presumably in facilitating settlements in damage actions), is informed less by interpretive theory than by a concrete sense of injustice.

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n220 Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893, 956 (1990).

n221 Thus, unlike Professor Levinson, see generally Levinson, *supra* note 7, I believe that the role of the trial courts is not to woodenly parrot the "doctrine" handed down by the Supreme Court but rather to give that "doctrine" the reality of justice through repeated application. Likewise, even if one does not take issue with Professor Schauer's claim that "if one looks at the federal and state appellate courts, instead of looking at the Supreme Court, . . . claims are either upheld or denied on the basis of little more than mechanical application of existing rules with little anguish on the part of the courts," Schauer, *supra* note 9, at 410, the same could not be said of the trial courts' task, a point Schauer acknowledges. See *id.* at 411.

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The key move in this drama is getting the case into federal court. Once the trial judge has plausible jurisdiction, the state must justify its actions or spend time and energy to get the trial judge reversed. In many areas of contemporary American law, this does not require constitutional intervention. Normative claims based on equality have access to federal court under an array of civil rights statutes. n222 The Constitution proves to be a crucial ticket of admission to federal courts primarily in the areas of extratextual claims to physical integrity and First Amendment assertions of free expression rights. n223

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n222 E.g., Americans with Disabilities Act, 42 U.S.C. <sect><sect> 12101-12213 (Supp. V 1993); Fair Housing Act, 42 U.S.C. <sect><sect> 3601-3619 (1988 & Supp. IV 1993); Voting Rights Act, 42 U.S.C. <sect><sect> 1971, 1973-1973p (1988 & Supp. IV 1993).

n223 My findings regarding the six reported trial court cases in which challenges to the rationality of regulatory actions survived initial scrutiny suggest that the function may be invoked by property owners as well, though not as frequently.

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C. How Does It Work?

Trial courts make several thousand judgments each year regarding whether particular assaults on a citizen's person and liberty are "unreasonable." Is it plausible to believe that judges will generate a coherent code of police conduct? Obviously it is not. No judge is in a position to synoptically account for all of the judgments made by her peers around the country. The probability of inconsistency is simply too high. Moreover, we cannot expect the "reasonable" decisions made by the police in New York City, for example, to be identical to those of their peers in Grand Junction, Iowa if the likelihood of violent assault on police differs in the two cities.

Is the judge to act, at least, as a proxy for the Supreme Court (or perhaps the local circuit), comparing the situation before her to the array of cases in which the relevant precedents have been judged reasonable or unreasonable? This might be the implication of the Court's recent decision in [*520] Ornelas v. United States, n224 which deputized the federal courts of appeal to undertake de novo review of the "common sense, nontechnical" findings of "reasonable suspicion and probable cause" as a way of avoiding definitions of legal rights which differ from judge to judge. n225 The Court also rejected a proposal that a pretextual traffic stop should be deemed "reasonable" only if a reasonable officer would have made the stop, maintaining that the demands of the Fourth Amendment are objective and should not "vary from place to place and time to time." n226

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n224 116 S. Ct. 1657 (1996).

n225 Id. at 1662.

n226 Whren v. United States, 116 S. Ct. 1769 (1996).

-End Footnotes-

The pattern of precedent is likely to be too thin for national uniformity. If judgments of "reasonableness" were matters of principle, we might expect trial judges to extrapolate from a limited class of Supreme Court judgments a line of demarcation between the permissible and the impermissible, and we might expect appellate review to police that line. But the judgments of principle are not contested; it is the application that is at issue, and here the difference between too much force and acceptable force, or between probable cause and its absence, is likely to turn on contextual judgments which spin out of precedential control. The most the Supreme Court or the federal appellate courts do is lay down a description of the factors relevant to the inquiry.

Thus, even as it announced a de novo review policy in Ornelas, n227 the Court admonished appellate courts to give "due weight" to the inferences drawn by resident judges and police officials. n228 If, as Professor Stuntz suggested, the Fourth Amendment is in essence a tort law for the police, n229 we are likely to find, as the Court did in the days when it administered a national law of railroad torts, that clearly defined rules of Fourth Amendment engagement are beyond the capabilities of appellate judges. n230

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n227 Ornelas, 116 S. Ct. at 1662.

n228 Id. at 1663.

n229 William Stuntz, Warrants and the Fourth Amendment, 77 Va. L Rev. 881, 899 (1991).

n230 Compare Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927) (establishing as a matter of law requirements for drivers of vehicles at grade crossings to avoid contributory negligence), with Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934) (abandoning the effort to impose such requirements on the ground that judgments of negligence must be "taken over from the facts of life").

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These concerns are exacerbated when we realize that most lower court opinions on police practices are damage cases. The ultimate determination is likely to be made by a jury rather than a judge on the basis of credibility determinations. Whatever their other virtues, we do not expect the decisions of different juries across the nation to be mutually consistent.

In many of these situations, exact control on the ground may be neither [*521] feasible nor desirable. In a street confrontation, Fyfe and Skolnick argue, the actual ability of higher level officials to constrain the exercise of police discretion is distinctly limited, and efforts to micromanage may reduce the effectiveness of leadership. n231 The challenge is to inculcate a sense of fidelity to relevant norms. In part, this can be done by clear and forceful action, whether by courts or administrators. n232

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n231 Skolnick & Fyfe, supra note 167, at 120 ("Hard and fast rules are viable in mechanical work situations, but they are of little assistance in dealing with the fluid discretionary situations that are the core of police work"); id. at 137 ("When administrations are weak or too far out of touch with the reality of the streets--as when police chiefs pretend that hard and fast rules govern officers' behavior--they are rejected by officers.").

This perception is an instance of a broader point: for many street-level bureaucrats, the combination of complexity of task, resource constraints, and necessity of individualized responsiveness leave it "difficult if not impossible to severely reduce discretion." Lipsky, supra note 100, at 15.

n232 Thus when police hierarchies introduced deadly force policies in earnest, police shootings dropped dramatically. See, e.g., Chevigny, supra note 171, at 66-67, 134-36 (asserting that deadly force guidelines and administrative review reduced shootings in New York City and elsewhere); James Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J. Crim. Just. 309 (1979); James J. Fyfe & Jeffrey T. Walker, Garner Plus Five Years: An Examination of Supreme Court Intervention into Police Discretion and Legislative Prerogatives, 14 Am. J. Crim. Just. 167 (1990); Skolnick & Fyfe, supra note 167, at 141-42 (noting that clear use of force policies reduced police shootings). Control of street-level discretion in less dramatic violence, however, often must rely on more subtle cultural pressures.

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How, then, should a court approach the question of "reasonableness"? The guiding virtues here are common law virtues: impartiality and practical wisdom combined with a willingness to address the facts of the case, to listen with an open mind, and to empathize with the litigants. The courts and juries provide a perspective outside of the parochial confines of a profession authorized to deal in violence and serve as a reminder that the bearers of gun and badge must ultimately account to civilian society.

The difficulty, of course, is that the trial judge's moral perceptions may have a tendency to bend to the prevailing winds no less than the street-level bureaucrat's. When the well-scrubbed police officer and the disheveled homeless man stand before the court, the moral balance is likely to be affected by enthusiasm for law enforcement.

Such intervention is not fundamentally antidemocratic, but it may replicate the disadvantages of the political process, for the claims of low-status individuals are more likely to be rejected by a jury. Still, by facing the reality of the harm that has been inflicted, the jury may be able to move away from initial rejection. The damage action gives victims a voice. Unlike the demonized "mugger" of public debate, the plaintiff in a damage action comes before the decisionmaker in his civilian persona to tell his story and [*522] appeal to the decisionmaker's humanity. The plaintiff is not an abstract threat but a concrete individual who has suffered harm. The damage action ultimately requires the plaintiff to exercise his voice in a democratic context. The jury--a random sample of the polity--is the interlocutor. n233

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n233 Why not rely on state law? Practically, in addition to the parity debate, many states have adopted immunity statutes. But doesn't that provide exactly the response to the claim that these are shared values? One answer is the interest group argument: loss is suffered stochastically and diffusely, and gain is attained directly by the bureaucracy. Additionally, the jury is itself a measure of value consensuses.

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In the context of damage actions, contextual judgments of decency and reasonableness are ultimately the appealing alternative. Bright-line rules might persuade the court to allow a case go to the jury, but the jury is likely to award damages based on precisely the community perceptions such rules seek to efface. Furthermore, to the extent that the court is limited to applying bright-line rules, the temptation is to draw the rules with ever more ample room for authorities to maneuver. It is thus better, perhaps, to enunciate a rule sufficiently responsive to factual nuance and allow claimants into court where they can engage the factfinder's empathy. n234

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n234 Cf. Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1441, 1496 (1990) ("A skillful narrative may bring one to comprehend another's experience or perspective, perhaps effectuating a normative 'gestalt switch' or perhaps just changing one's appreciation of the stakes.").

Matters stand differently where the relevant constitutional rule engages not concrete consensus values but political norms. It is not the moral sense of the court that is to be engaged with respect to the harm suffered by the individual before it but the court's sensitivity to the danger the challenged action poses to social structure. In the First Amendment context, very little of the story a Klansman tells is likely to add weight to his claim. If it engages the court, it will be at the level of abstract commitment; abstract rules are entirely appropriate as a means of guarding against being blinded by particulars.

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When all is said, the opportunity to vindicate constitutional rights is worthwhile beyond any concrete impact it may have as a deterrent. What would we say about a society that empowered its officials to search citizens on whim, to physically abuse them without redress, or to deprive them of livelihood and liberty without appeal or recourse? It is the definition of tyranny. n235

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n235 See Shklar, supra note 193, at 28 ("This is what it means to be a slave: to be abused and bear it, compelled by violence to suffer wrong.") (quoting Euripides). It is no coincidence that the procedural form in which Dred Scott sought his freedom was a suit for trespass vi et armis against his alleged master. See Scott v. Sanford, 60 U.S. 393, 469 (1857).

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The suit for redress of constitutional violations is a means of allowing society to restore dignity to victims of governmental abuse. Professor Fletcher argues that the "minimal task of the criminal trial is to stand by the victims, to restore their dignity, to find a way for them to think of themselves once again as men and women equal to all others." n236 The ability to call officials to account in a civil trial can similarly be a step toward restoring lost dignity; at the very least, it leaves the plaintiffs a means of announcing their equality with the officials who abused them.

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n236 George P. Fletcher, *With Justice For Some: Victims' Rights in Criminal Trials* 6, 201-03 (1995) (asserting that punishment counteracts domination by reducing the criminal to the position of the victim--when the criminal suffers as the victim suffered, equality between the two is reestablished).

-End Footnotes-

Equally important, it is an expression that the powers of the state are not without limits. Hannah Arendt claims that "the first step on the road to total domination is to kill the juridical person in man." n237 Conversely, the ability of an individual to call the state to a constitutional accounting is a step on the road to freedom. In this, the idea that the courts may act only in the presence of systemic malfunction n238 seems profoundly misdirected. It is precisely the unique sense of each individual's individual liberty that should be the ward of the courts.

-Footnotes-

n237 Hannah Arendt, *Origins of Totalitarianism* 447 (1974). Lawrence Wechsler, *A Miracle, A Universe: Settling Accounts with Torturers* 242-43 (1990), uses Arendt's aphorism to argue that to expose torturers and to hold them accountable is an essential step toward the reemergence of a free society.

n238 See, e.g., *Zinermon v. Burch*, 494 U.S. 113, 139-52 (1990) (O'Connor, J., dissenting) (dissenting from Court's allowance of a patient's civil rights action against state mental hospital employees who admitted him to a hospital without ensuring that he was competent to sign voluntary admission forms); *Parratt v. Taylor*, 451 U.S. 527 (1981) (denying a prisoner's claim that prison officials had violated his due process rights because it was a "random and unauthorized" violation); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 Ga. L. Rev. 343, 367 (1993) ("The Constitution requires an adequate system of remedies to keep the government, in general and on average, tolerably within the bounds of law. One person's interest in remediation can be sacrificed . . ."); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, NonRetroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1787-88 (1991) (asserting that denial of individual remedies is tolerable if systematic incentives to obey the law are appropriate).

-End Footnotes-

IV. Conclusion

In considering the adoption of the Bill of Rights, James Madison voiced skepticism as to the efficacy of those "parchment barriers" entrusted to the courts. "The restrictions however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases, they will lose even their ordinary efficacy." n239 Nonetheless, Madison believed that written guarantees in fundamental law had two potential uses: as security against anti-democratic [*524] abuses and as an educational device. n240 In the first dimension, he recognized that in some circumstances, "the danger of oppression" would arise from "usurped acts of the Government" rather than "the interested majorities of the people". n241 In the second, he hoped that "the political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of a free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion." n242

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n239 The Papers of James Madison 299 (Charles F. Hobson & Robert A. Rutland eds., 1979).

n240 Id. at 297-300.

n241 Id. at 298-99.

n242 Id.

-End Footnotes-

As the twentieth century closes, our constitutional practice remains Madisonian in the first dimension. It is only the minority of Supreme Court cases and the barest fraction of trial court cases in which the constitutional rights of individuals confront the "decided sense of the public" articulated through their elected representatives. Rather, the work of constitutional review is predominantly to confront the "usurpations" by individual government officials.

In these confrontations, the citizen is only sporadically successful--a fact which initially casts doubt on the second Madisonian claim. The education the public can gain in constitutional norms from even the denial of a motion to dismiss in a police abuse damage action is limited; the guidance from the grant of such a motion is still less. Yet the fact that courts must consider the motion keeps alive the concepts that citizens have rights that constrain government officials and that the United States is a country where those rights may be asserted in court.

This sporadic success is not surprising. A generation ago, when the Warren Court laid the foundations for the constitutional damage action, Justice Harlan recognized that "for a variety of reasons, the remedy may not often be sought" and that judicially constructed immunities were likely often to preclude recovery. n243 Still, he maintained,

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n243 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

-----End Footnotes-----

at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances. n244

-----Footnotes-----

n244 Id.

-----End Footnotes-----

The importance does not lie in a belief that every violation will be avoided, or that most violators will be punished, but rather the simple affirmation that [*525] we are, or seek to be, a civilized society.

Appendix

The 1990-1996 Supreme Court Sample

The cases in the Supreme Court sample were taken from the Supreme Court's 1990, 1991, 1992, 1993, 1994, and 1995 Terms, using the Lexis search, "Constitutional right or unconstitutional or constitutional violation or violate constitution or First Amendment or Fourth Amendment or Fifth Amendment or Eighth Amendment or due process or cruel unusual or equal protection or Commerce Clause or Takings Clause or obligation of contract and syllabus (held)." I then excluded cases which did not in fact raise constitutional claims, which left 292 cases. The search yielded all of the Supreme Court cases raising constitutional claims of which I am aware during the six year period.

The 1994 Trial Court Sample

The cases in the trial court sample began with a search of the Lexis United States District Court (Library: Genfed, File: Dist) database during the summer of 1995 using the same search used in the Supreme Court database without the syllabus "held" limitation and using the term, "Date=1994". This generated a universe of 5058 opinions. From this universe, my research assistant examined and coded every tenth case, and I checked the coding. After excluding cases which fell within the search but did not in fact raise constitutional claims, a sample of 431 cases remained, suggesting that of the 20,253 Lexis-published district court opinions, about 20% deal with constitutional issues. In each coding, some cases raised more than one constitutional claim. Data is often reported, therefore, by both claim and case.

This trial court sample, although representative of the cases reported on Lexis, still represents only a fraction of the cases entertained by the federal district courts during 1994. Overall, less than one in ten cases filed in federal district courts results in an opinion reported on Lexis. In 1993, according to the Administrative Office, parties filed 275,753 cases in the federal district courts. n245 Lexis reports 20,253 opinions, both civil and criminal, for 1994, the year in which most of the cases filed in 1993 would have been resolved.

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n245 See Mecham, supra note 63, at 141 tbl. C-2A (229,850 civil cases), 207 tbl. D-2 (45,903 criminal cases).

-End Footnotes-

The proportion is even smaller for some groups. In 1993, prisoners filed 13,054 habeas corpus petitions; n246 my sample contained only sixty-seven [*526] habeas opinions, representing 670 cases, or approximately one case in twenty. Also in 1993, prisoners filed 33,933 civil rights cases; n247 my sample contains 166 opinions in prisoner cases, representing 1660 cases (4.8%).

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n246 Id. at 142 tbl. C-2A.

n247 Id.

-End Footnotes-

Among nonprisoner civil rights cases, the percentage in the sample is higher. In 1993, the Administrative Office recorded 13,776 "other civil rights cases" and 12,962 "employment civil rights cases," n248 of which 10.8% were probably constitutional claims. n249 My sample includes 171 nonprisoner cases seeking affirmative relief, representing 1710 cases (12.3%). n250

-Footnotes-

n248 Id.

n249 See John J. Donohue III & Peter Siegelman, Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle, 66 S. Cal. L. Rev. 709, 715 (1993) (reporting that among 1247 "employment civil rights cases," 10.8% raised constitutional claims).

n250 Cf. Susan M. Olson, Studying Federal District Courts through Published Cases: A Research Note, 15 Just. Sys. J. 782, 790 (1992) (noting that 12% of the civil rights cases decided from 1982 to 1984 by the federal district courts for Minnesota were reported on Lexis); Peter Siegelman & John J. Donohue III, Studying the Iceberg from Its Tip : A Comparison of Published and Unpublished Employment Discrimination Cases, 24 Law & Soc. Rev. 1133 (1990) (asserting that 80-90% of the employment discrimination cases were not published on Lexis, and an average of 8.1% of the civil cases in seven selected districts were published).

-End Footnotes-

The potential for selection bias in this sample is manifest, and there is virtually no data on which way the bias might cut. n251 Nonetheless, life is short, and the possibilities of a reasonably easily available nationwide sample seems to outweigh methodological difficulties. Whenever possible, I have compared my results with other writers' partial results for particular issues.

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n251 Eisenberg & Schwab, supra note 137, at 508, suggest that trial judges are more likely to publish opinions granting summary judgment for defendants than opinions denying such judgments; Siegelman & Donohue, supra note 250, at 1150, find that among employment discrimination cases, published cases tend to be more complex, and unpublished cases have a greater tendency to be settled.

-End Footnotes-

A list of the cases in each sample is on file with the William & Mary Bill of Rights Journal.

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ARTICLE: ASSOCIATION, ADVOCACY, AND THE FIRST AMENDMENT

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-----Footnotes-----

* Weld Professor of Law, Emeritus, Harvard Law School. I have benefitted from the insightful counsel and advice of James J. Brudney, Richard H. Fallon, and Pamela S. Karlan--including that which I did not follow, alas.

-----End Footnotes-----

SUMMARY:

... They are not equally amenable, in principle or in doctrine, to government-imposed restrictions in their affairs, particularly in their advocacy speech or activities. ... If the compelling need is understood to be not only to protect the "compelled" individual member but also to limit the power of enterprises that the state specially authorizes to collect funds and membership for particular purposes, the narrowest feasible restriction to meet that need appropriately could encompass confinement of the group to those functions for which it has been empowered, thereby wholly precluding its advocacy speech. ... Severing corporate advocacy speech from other corporate activities frees investors from the need to yield to the corporation some of their advocacy voice as part of the price of investing, and such severance does not prevent investors from spending their own funds to advocate public policies in their own economic interest either individually or through advocacy groups. ... Potential members may be moved by the non-speech benefits offered, but would not join or support the enterprise if not for its advocacy activity. ...

TEXT:
[*2]

I. Introduction

Elective associations n1 come in many sizes and shapes and serve widely varied functions for their members and for society generally. They are not equally amenable, in principle or in doctrine, to government-imposed restrictions in their affairs, particularly in their advocacy speech or activities. n2 For some associations the government may be (and [*3] should be) virtually as indifferent to the exercise of the advocacy voice or activities as it is (or normally should be) to the exercise of such activities or voice by individuals. For others, the government may select the collective advocacy activities or voice of the group for special restriction

or limitation. n3 At first blush, the notion of government interference with the advocacy activities or speech of organizations seems as objectionable, both in principle and under the First Amendment, as government efforts to restrict the speech of individuals. However, the problems generated by intervention in an association's speech are both significantly different in policy and considerably more complicated in practice than those generated by restriction of an individual's speech. n4 This Article addresses the policy and constitutional propriety (or impropriety) of governmentally-mandated restrictions or limitations on the collective advocacy activities and voices of a variety of associations.

- - - - -Footnotes- - - - -

n1 Significantly different problems concerning the relationships between individuals and groups and between the group and the larger society arise with respect to groups that fairly can be called non-elective groups--i.e., groups to which people "belong," but do not join, and that are defined essentially by reference to immutable, or at least involuntary, characteristics such as race, gender, age, physical or mental handicaps, ethnicity, and associated cultural history and identity. While the membership characteristics of some of these groups are not necessarily immutable, all, including religious and sexual preference, may be treated for our purposes as non-elective. Members of non-elective groups often form elective associations to develop and advance their perceived interests as members of the non-elective source group (e.g., a religious society or a gay rights association) or otherwise (e.g., golf clubs, swimming groups, etc.). The rights, obligations, and privileges of members of those associations and the entitlements of (and limitations which may be imposed on) those associations differ from the comparable aspects of the non-elective source group. Indeed, the efforts of members of the latter to form exclusive elective associations, like the efforts of other elective associations to exclude on grounds of ethnicity, gender, or religion, can present special problems. See Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878, 1887-94 (1984); William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. Rev. 68, 75-91 (1986); Jose A. Bracamonte, *Minority Critiques of the Critical Legal Studies Movement*, 22 Harv. C.R.-C.L. L. Rev. 297, 297-447 (1987).

n2 In this Article, "advocacy activities" refers to contributions, expenditures, or other conduct in support of or in opposition to: (1) any candidate for any political office; (2) any pending or proposed referendum; or (3) any pending or proposed legislation. "Advocacy speech" refers to public (i.e., not addressed only to association members) expression in support of or in opposition to any candidates, referenda, or legislation. More precise delineation of those concepts is a subject for legislation and rules. The difficulties that a regulatory regime might encounter in separating advocacy speech or activities from other kinds of speech or activities do not preclude easy recognition of the relevant behavior in most cases. Nor do those same difficulties make administration of the limits constitutionally impermissible for vagueness, at least under prevailing Supreme Court opinions, possibly because speech or activity that is precluded or curtailed for the association is thereby protected for the individual who can provide it alone or in an association formed for the purpose. See, e.g., *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 514-19 (1991); *Keller v. State Bar*, 496 U.S. 1, 15-16 (1990); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657-61 (1990); *Chicago*

Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 294 (1986); Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 85, 435, 445-48 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236-37 (1977). Indeed, the cases cited above suggest that the broader concept of "ideological" speech or activity may describe the content of speech or activity that is constitutionally regulable in the context that this Article addresses. But cf. Buckley v. Valeo, 424 U.S. 1, 40-44 (1976). Compare United States South-West Afr./Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 768-74 (D.C. Cir. 1983) with Lebron v. National R.R. Passenger Corp., 811 F. Supp. 993, 1001-05 (S.D.N.Y. 1993), rev'd on other grounds, 12 F.3d 388 (2d Cir. 1993), cert. granted, 114 S. Ct. 2098 (1994).

n3 See supra note 2 (citing union shop and integrated bar cases).

n4 For analyses of tensions among rights of members and associations in various categories of associations, see generally Meir Dan-Cohen, Rights, Persons and Organizations: A Legal Theory For a Bureaucratic Society (1986) [hereinafter DanCohen, Rights]; Meir Dan-Cohen, Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State, 79 Cal. L. Rev. 1229 (1991) [hereinafter Dan-Cohen, Freedoms]; Ronald R. Garet, Communality and Existence: The Rights of Groups, 56 S. Cal. L. Rev. 1001 (1983); Richard B. Stewart, Organizational Jurisprudence, 101 Harv. L. Rev. 371 (1987) [hereinafter Stewart, Organizational Jurisprudence]; Richard B. Stewart, Regulation in a Liberal State: The Role of Non-Commodity Values, 92 Yale L.J. 1537 (1983).

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II. Categories of Association and Membership

Associations have been described, analyzed, classified, and evaluated from different angles by sociologists, social psychologists, organization theorists, political scientists, and practitioners of other disciplines--on the basis of size, structure, social function, class and other characteristics of members, intimacy of contact among members, sources of support, and a variety of other factors. n5 Examination of possible categories of associations will situate the kinds of organizations with which this Article is concerned.

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n5 For a useful collection of references, see Constance Smith & Anne Freedman, Voluntary Association: Perspectives on the Literature (1972). For a comprehensive, if not exhaustive, listing of minority associations, see Minority Organizations: A National Directory (4th ed. 1992). In theory, at least, the concept of association extends to such varied relationships as ordinary commercial contracts between two or more persons (whether of the one shot buy-sell variety or of the long term "relational contract" variety) and classes of litigants.

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Measured by reference to numbers, dispersion, and impersonality of members, n6 elective associations may be said to range from the "intimate," like the nuclear family, to the non-intimate but more or less "private," like a local

poetry reading society or bocce club, to the "public," like business corporations, professional associations, unions, or chambers of commerce. n7 The Supreme Court has indicated that association all [*5] along the intimate--private--public spectrum thus conceived is entitled to constitutional protection as "liberty" protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment; but although the matter is subject to substantial debate, n8 association located at the intimate end of the spectrum is entitled to considerably more rigorous protection against government restriction or intrusion than is association of the more public kind, n9 and possibly of the private kind. n10 It is not necessary for the purposes of this Article to explore the rationale of the distinctions thus made, or the justification for the difference in levels of constitutional protection. n11 The associations with which this Article is concerned are located well at the public end of the spectrum. n12

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n6 For example, affinity of personal relationships and relevance of personal characteristics of the members in conducting the group's activities.

n7 For purposes of determining the constitutionality of government intervention in organizations' affairs, the difference between the contours of the "intimate" association and the others is, at least at the extremes, reasonably clear, even though Supreme Court opinions do not offer much help in deciphering differences at the margin. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Compare *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) with *Moore v. City of E. Cleveland*, 431 U.S. 494, 504-06 (1977) and *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973). Although the line between "private" and "public" associations so characterized is more a band with rough edges than a bright line, the distinction is generally visible. The public-private distinction among non-intimate associations often is made explicitly to define the limits on the scope of legislative prohibitions of racial or gender discrimination by associations. Legislative proscriptions often allude to criteria like numbers of members or provision of service and openness of facilities to non-members. Courts have often adverted to characteristics like size, selectivity, or transience of membership and degree of control over internal governance by members. See Joshua A. Bloom, Comment, *The Use of Local Ordinances to Combat Private Club Discrimination*, 23 U.S.F. L. Rev. 473, 478-79, 485 (1989); Margaret E. Koppen, *The Private Club Exemption from Civil Rights Legislation--Sanctioned Discrimination or Justified Protection of Right to Associate?*, 20 Pepp. L. Rev. 643, 654-77 (1993); Kimberly S. McGovern, Comment, *Board of Directors of Rotary International v. Rotary Club of Duarte: Prying Open the Doors of the All-Male Club*, 11 Harv. Women's L.J. 117, 134-35 (1988).

n8 Compare, e.g., Cass Sunstein, *The Partial Constitution* 197-231 (1993) and Ronald Dworkin, *A Matter of Principle* 33-35, 237-89 (1985) with John Hart Ely, *Democracy and Distrust* (1980).

n9 See, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984); Laurence H. Tribe, *American Constitutional Law* sections 15-1 to 15-21 (2d ed. 1988).

n10 See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting); *Bell v. Maryland*, 378 U.S. 226, 313 (1968) (Goldberg, J.,

concurring).

n11 This is not to say that varying degrees of constitutional protection of association--or refusal to associate--may (or should) not be accorded varying strictness of judicial scrutiny for claims of infringed rights based on gender, racial, or ethnic selectivity.

n12 The state rarely seeks to intrude upon the advocacy speech of members of "intimate" or "private" associations individually or collectively.

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The vast bulk of such large elective associations are not formed to engage primarily (or indeed more than peripherally) in advocacy, or ideological activities or speech that is protected by the speech provisions of the First Amendment, even though significant numbers of such associations expend portions of their energies to do so. Many of the most powerful elective associations, like large business corporations, unions, and trade and professional associations, focus principally on providing and offering more or less impersonal monetary returns, n13 goods or services, n14 and facilities n15 to members and possibly to the public generally. Others are engaged solely, or almost entirely, in activities that are grist [*6] for the First Amendment mill--such as the print and electronic media, political parties, or ideologically organized groups that are engaged almost exclusively in advocacy activities. n16 Still others, like fraternal organizations, veterans associations, automobile associations, associations of the elderly or of ethnic groups, or clubs like the Lions or Rotary Club, occupy marginal territory that houses both non-advocacy benefits (e.g., community service, network opportunities, or collateral economic benefits) and substantial advocacy speech and activities, at least if measured as a proportion of their agenda.

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n13 For example, business corporations or producer cooperatives that offer economic returns to stockholders or members.

n14 For example, services offered by consumer cooperatives or associations like unions, health maintenance organizations, or universities.

n15 Associations like hospitals and medical societies also offer access to facilities and other advantages like professional comity; bar associations offer educational and professional facilities to members; and enterprises like the Junior Chamber of Commerce or Rotary Club offer commercial contacts and networking.

n16 The distinction between such expressive associations and non-expressive or multiple-purpose associations is plain enough at the extremes. Business corporations engaged almost entirely in manufacturing, mercantile operations, or finance (or any combination of them) can be categorized as non-expressive groups--notwithstanding that they often engage in ideological or advocacy speech to help fulfill their non-expressive functions and aspirations. The print and electronic media (whether or not engaged in activities for profit), political parties, or ideological groups (like the American Civil Liberties Union, the National Association for the Advancement of Colored People, or political

action committees (PACs)) can be categorized as expressive groups. However, large numbers of significant enterprises engage substantially in both advocacy speech and non-expressive activities--e.g., many unions, occupational and professional associations, trade associations, and enterprises like the Jaycees or the American Association of Retired Persons (AARP). Some of them attract members and offer them substantially more by reason of their non-expressive activities (services or facilities) than because of their advocacy programs. Others may attract members more to support their advocacy programs than to enjoy the benefits of their non-expressive activities.

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Attempts to restrict the advocacy speech and activities of associations that offer benefits in addition to advocacy activities and voice (hereinafter "multi-purpose" groups or associations) reflect and generate problems for their members and society generally that differ significantly from those generated by attempts to regulate the advocacy speech of expressive or advocacy associations. To the extent that the multi-purpose association's function for members is predicated considerably more on the monetary returns or goods, services, and facilities it offers than on its speech or advocacy activities, the question arises whether it is necessary or appropriate from the individual member's viewpoint to sever the member's obligation to contribute to the latter activity in order to obtain the benefits of the former. In addition, because multi-purpose associations obtain their funds and advocacy power by reason of the benefits their contributors expect from the association's offer of returns, goods, services, and facilities, there are the further questions whether such group's resources and incentives fuel a speech or advocacy role that differs from that of expressive, ideological, or advocacy associations (hereafter sometimes simply "expressive" associations), whether that difference can justify restriction by government in the former case that is not [*7] permitted in the latter, n17 and if so, to what extent. n18

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n17 For multi-purpose groups, as for others, problems generated by bureaucracy also may invite government intervention. Protecting the preferences of individual members with respect to advocacy speech may be justified even if the leadership of the group is in some sense adequately responsive to the members' preferences (and the mechanism by which membership exercises its choice is otherwise acceptable) with respect to the group's non-advocacy activities. It does not necessarily or systematically follow that leadership will be equally adequately responsive with respect to decisions about the group's advocacy role.

n18 Interventions that affect or curb the collective ideological voice of the multi-purpose group may take a variety of shapes--a requirement to fracture individual members' contributions so as to rebate (ex ante or ex post) a proportion of dues equal to the proportion of the group's expenditures, or a requirement of super-majority consent to advocacy speech or activities, or even a prohibition of such activities or speech. Intervention may be effected by judicial action, or by legislative or administrative action. The legislative or administrative process offers significant advantages over judicial intervention by way of flexibility, detail, monitoring, and adaptability to particular institutional configurations and changing circumstances. However, judicial intervention may be the only remedy available to protect discrete and insular minorities for whom legislation is more likely to be the problem than the

solution.

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For expressive associations, as the Supreme Court has suggested, entirely different considerations determine whether it is necessary, appropriate, or permissible for the government to intervene in internal decision-making processes or their advocacy activities or voices. n19 If the association's sole or essential function is to aggregate the advocacy voices of its members or to provide communication or expression, the command of the First Amendment engages directly the association's raison d'etre. As we shall see, for such groups both (a) conflicts between the expressive or advocacy preferences of a group and its individual members, and (b) issues involving the distortion in the quality or impact of a group's speech pose radically different questions than do similar conflicts and issues in the case of multi-purpose groups. Even so, expressive or advocacy groups are not immune from government-imposed restrictions on their activities. n20

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n19 See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657-61 (1990); City of Dallas v. Stanglin, 490 U.S. 19, 24-28 (1989); New York State Club Ass'n v. City of N.Y., 487 U.S. 1, 13-14 (1988); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 548 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 617-18, 622-23 (1984).

n20 The extensive government regulation of political parties, see infra notes 203-06, illustrates both the responses to perceived bureaucratic distortion and corruption by leadership, and the tension generated by the conflict between government intervention in the party's internal processes and the import of the mandate of the First Amendment to protect the members' freedoms of association and speech. The considerations that justify the balance struck with respect to political parties may not, however, justify a similar balance for other advocacy groups or ideological associations, like political action committees or religious associations. Still other considerations determine the appropriate level of government intrusion into the expressive activities of for-profit communications enterprises like newspapers or broadcast media, or of other kinds of enterprises like universities, whose activities normally engage the First Amendment.

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Several variables in the composition or role of a multi-purpose association are relevant to assessing the validity of government interventions in the association's advocacy activities and of its claim to be free from those interventions. One concern is the extent to which the individual member's support of the association, and pro tanto of its advocacy activity, is compelled rather than voluntary. The most obvious form of compulsion is that imposed by a government mandate to join or contribute funds to the group, such as the integrated bar. n21 Less obvious, but often no less effective a form of compulsion, is the economic necessity to obtain the "goods" that an association offers. n22 On still another level are the contributions induced to obtain the kinds of non-speech economic benefits offered by enterprises like business

corporations, some professional and trade associations, and other organizations like the Elks or the Junior Chamber of Commerce. Such benefits do not rise to the level of "practical necessities," and their pursuit does not rise to the level of compelled support. Yet a member's support for the group's advocacy voice is not as voluntarily given as if it were not induced in fair part by the pursuit of those other benefits or were induced solely by the association's advocacy voice.

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n21 The integrated bar is an arrangement prescribed in many states, sometimes by statute, often by court pursuant to statute, and occasionally by the state supreme court by rule acting under its "inherent" powers. Under the arrangement, a person's admission to practice law or continued permission so to practice is conditioned upon joining and paying dues to the state bar association. The existence of that association is directed by statute or judicial action, and the association is given certain privileges and powers in addition to its entitlement to acquire as members all persons licensed to practice law.

n22 Even in the absence of any government mandate, or imputed government mandate for an individual to join a group, an individual fairly may be said to be compelled to join or support the group if doing so is a condition precedent to gaining access to the services, facilities, or credentials of the group, and those benefits are a practical necessity for earning a living in the individual's chosen occupation, trade, or profession that only the group affords. Such conditions have historically characterized access to local medical associations, and may well be true of access to associations of medical specialists or other kinds of occupational or professional associations. See infra text accompanying notes 100-08.

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Other relevant variables include the extent to which the group is effectively a delegee of government power, or one whose structure and operation are dependent upon a pattern of special government authorization and support or subsidy, and have public import. n23 Some groups, [*9] like investor-owned business corporations, certain farm organizations, many professional associations and hospitals, veterans organizations, and, in some circumstances, trade unions, could not offer the non-speech benefits that attract participants without special government assistance. If organized only by private contract among the participants, such groups could not function because special government empowerment through protective rules and tailored arrangements or subsidies is necessary for the creation and operation of the enterprises. Other groups (like the Jaycees, the Rotary Club, possibly voluntary bar associations, many business and social clubs, trade associations, and, in some circumstances, trade unions) that offer benefits other than advocacy activities to induce participation are not supported by such an array of special government arrangements.

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n23 The public import of the group's activities (i.e., is it "affected with a public interest"?) has been urged as a significant predicate to justify government efforts to regulate the internal affairs and external activities of some groups. See, e.g., Matthew O. Tobriner & Joseph R. Grodin, The

Individual and the Public Service Enterprise in the New Industrial State, 55 Cal. L. Rev. 1247, 1253-54, 1256-63 (1967). That concept is somewhat amorphous, but is less ambiguously delineated when it is tied to the notion of special government empowerment of the group.

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At the margin it may be difficult to separate an association whose members are compelled to join by government mandate or by the need for the practical necessities that it (and often it alone) offers from associations that offer less essential benefits. n24 Among the latter, distinctions may be drawn to turn the color of legal litmus paper based on the extent of government support of the enterprise or on the relative weight in the enterprise's agenda (and in its attraction for members) of the non-advocacy benefits it offers as compared to its advocacy activities. The difficulties in drawing lines at the margin among such activities n25 as well as in degrees of government support n26 may make the distinctions unfeasible as predicates for government intervention. Before so concluding, it is appropriate to inquire whether, in the polar cases, some sort of mandated disconnection of a multi-purpose association's advocacy voice and activities from its other activities is justifiable in policy and acceptable constitutionally.

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n24 See, e.g., *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 287-92 (4th Cir. 1991), cert. denied, 112 S. Ct. 1760 (1992); *Washington Legal Found. v. Massachusetts Bar Found.*, 795 F. Supp. 50, 54-55 (D. Mass. 1992). The fact that "coercion" can fairly be said extensively to dominate many relationships in society and that no one enjoys quite the free choice pictured in the libertarian model does not preclude recognition of different degrees of freedom and volition in behavior by each individual in response to stimuli from others. There is wide room to argue about the different consequences that should attend behavior produced by debatably different levels of coercion or volition, but recognition of differences in the levels or kinds of inducements producing behavior is inescapable in the process of urging or assessing norms for any society.

n25 For example, in order to distinguish a multi-purpose enterprise with an expressive role that so permeates its affairs as to justify according it the same First Amendment protection as an expressive association from one whose expressive role is so slight as fairly to preclude treating the enterprise as equivalent to an expressive association.

n26 Compare, e.g., the extent of government "enmeshment" in voluntary state bar associations with its role in the integrated bar. Consider also publicly-built and operated housing projects, government-subsidized housing projects, and private housing projects that do (or do not) receive special tax encouragement.

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III. Intervention in Advocacy Activities of Multi-Purpose Associations

A. Preliminary Considerations

Intervention in the advocacy speech of multi-purpose associations rests essentially on either or both of two justifications--first, protecting individual members' preferences, or enhancing their freedom of choice, to refrain from supporting the group's advocacy voice (a kind of "negative speech interest"), n27 and second, protecting society from a collective advocacy voice that is powered by compelled member contributions or by voluntary contributions offered for functions other than advocacy

[*11] speech and for which the group's advocacy speech is peripheral. Justification of government intervention designed to protect individuals' negative advocacy speech interest requires, preliminarily, examination of the nature of that interest. Justification of government intervention on behalf of society's interest in the group's advocacy speech requires, preliminarily, examination of multi-purpose groups' claims to freedom of choice and of finance in matters of such speech.

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n27 As a formal matter, a distinction may be drawn between the act of a person in using assets to pay others to express (or amplify) what the person wishes expressed and that person's own act of expressing. There is debate over whether the former may be treated as the equivalent of the latter and thus be subject to the same protection against government restriction under the First Amendment. See Sunstein, *supra* note 8, at 197231. Compare J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 *Colum. L. Rev.* 609, 631-42 (1982) [hereinafter Wright, *Money*] and J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 *Yale L.J.* 1001, 1005-13 (1976) [hereinafter Wright, *Politics*] with Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 *Cal. L. Rev.* 1045, 1052-65 (1985). See also *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 787-95 (1988); *Meyer v. Grant*, 486 U.S. 414, 420-25 (1988); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-32 (1980). That debate becomes more complex if the individual pays or contributes dues to an organization which pays others to express (or amplify) what the organization wishes expressed. In that case, questions arise as to (a) whether the group's use of funds to pay others to express is equivalent to expression by the group, and (b) whether the individual may be deemed to be engaged in expression by reason of his or her dues contribution to the group. Constitutional doctrine appears to answer the former question in the affirmative. The latter question implicates the meaning of the concept "negative speech interest" and its constitutional value if the government legislates to protect it. See Andrew Stark, *Strange Bedfellows: Two Paradoxes in Constitutional Discourse over Corporate and Individual Political Activity*, 14 *Cardozo L. Rev.* 1343, 1358-70 (1993).

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1. The "Negative" Speech Rights or Interests of Individuals

Individuals may be said to have a negative speech interest--i.e., an interest in remaining silent and not being forced or "improperly" pressured to speak. That interest may become involved when the individual joins or contributes to the support of an association. The collective voice of the

association is, to be sure, not the same as the speech of the individual. But there is a connection that implicates the latter in the former, sometimes strongly and sometimes weakly; a connection that fruitfully may be examined by beginning with the situation in which individual support of a group is commanded by government.

The bulk of First Amendment case law on free speech is concerned with the limits on government actions that impede or curtail expression, i.e., interfere with a person's positive interest in uttering or receiving communication. n28 Both jurisprudence and political philosophy generally address those limits in terms of the consequences to society and to individuals (both speakers and listeners) of forbidding the communication. n29

[*12] As has been pointed out, not all the limits on government power to suppress speech nor all the justifications for those limits are equally applicable to government power to compel speech. n30 Indeed, there may be good reason to treat such government compulsion as an intrusion on "liberty" if not on the speech protected by the First Amendment. n31 In any case, in parsing a claim to resist such an infringement of "liberty," the closeness of the interests involved to interests protected by the First Amendment Speech Clause suggests significant protection by that Amendment. Government compulsion of individual speech intrudes on the right to freedom of speech to the extent that freedom of speech imports the speaker's freedom of thought, belief, and conscience, and the audience's (both the individual listener's and society's) interest in the integrity of the communications that it receives. The intrusion on these rights by government-compelled speech requires justification under the jurisprudence of the First Amendment as well as under the Due Process and Equal Protection Clauses.

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n28 There is great force to the view that the values of freedom of speech cannot be optimally, or even adequately, realized unless "private" power (at least that power generated by wealth) over expressive action is curbed or the expressive opportunities of the less wealth-empowered elements of society are subsidized. See, e.g., Sunstein, *supra* note 8, at 197-256; J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *Duke L. Rev.* 375, 410-12; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *Phil. & Pub. Aff.* 204, 223 (1972); Jonathan Weinberg, *Broadcasting and Speech*, 81 *Cal. L. Rev.* 1101, 1138-64 (1993). However, it is not necessary for purposes of this Article to confront the problems that view poses. This Article assumes the narrower premises of conventional free speech concepts and doctrine in a private property economy in a modest welfare state. Cf. *infra* notes 122, 126, 127, 173.

n29 For a sample of the literature explicating values underlying the First Amendment, see C. Edwin Baker, *Human Liberty and Freedom of Speech* (1989); Lee C. Bollinger, *The Tolerant Society* (1986); Thomas I. Emerson, *The System of Free Expression* (1970); Alexander Meiklejohn, *Free Speech and Its Relation To Self Government* (1948); Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* (1994); Martin H. Redish, *Freedom of Expression: A Critical Analysis* (1984); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982); Steven H. Shiffrin, *The First Amendment, Democracy and Romance* (1990); Sunstein, *supra* note 8; Balkin, *supra* note 28; Scanlon, *supra* note 28; T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 *U. Pitt. L. Rev.* 519 (1979) [hereinafter Scanlon, *Freedom*].

n30 For thoughtful, albeit differing, views of the relationship of the compelled contribution to compelled speech and the deference to be paid to what Gaebler describes as "negative rights" under the First Amendment, see David B. Gaebler, First Amendment Protection against Government Compelled Expression and Association, 23 B.C. L. Rev. 995, 996 (1982); Norman L. Cantor, Forced Payments to Service Institutions And Constitutional Interests in Ideological Non-Association, 36 Rutgers L. Rev. 3 (1983); Leora Harpaz, Justice Jackson's Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism, 64 Tex. L. Rev. 817 (1986).

n31 Such compulsion might plausibly be said to intrude on a "fundamental element of personal liberty"--privacy, cf. Watkins v. United States, 354 U.S. 178, 198-99 (1957), or personhood--that claims special constitutional protection and strict judicial scrutiny of the kind that would be accorded under the First Amendment. See supra notes 8-10.

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The considerations that support protection of the speaker's persona against the injury caused by forbidding his or her expression also support, if they do not equally require, protection of the speaker against the injury entailed in government compulsion to speak--whether the compulsion is to carry a particular message or to forbid the person from declining to express any views. n32 The interests of the audience in receiving n33 [*13] and of society in exchanging ideas n34 is also touched by such government compulsion. Less of either the audience interest or the social interest in free speech may be affected by compelling an individual to speak than by forbidding her from speaking. But, there is no doubt that compelled speech tends to distort the total mix of speech to be digested by the audience, whether the audience's interest is defined by reference to the individual listeners or to society as a whole. n35

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n32 E.g., Wooley v. Maynard, 430 U.S. 705, 714-15 (1977); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943); cf. Riley v. National Fed'n of the Blind, 487 U.S. 781, 787-95 (1988); Pacific Gas & Electric v. Public Utils. Comm'n, 475 U.S. 1, 11-14 (1986). The individual's will to communicate with others is equally thwarted, whether his or her speech is suppressed or compelled, and the communicative aspect of the "self" is equally invaded by government coercion. See Tribe, supra note 9, sections 15-5, 15-16. To be sure, the locus of injury is more the individual's belief, thought, or conscience than expression. However, the individual's beliefs, and therefore expression in the future, are not less likely to be affected in that case than in the case of suppression of speech. See Harpaz, supra note 30, at 902. Arguably, the individual's speech may be curtailed because he will refrain from some expression if faced with the possibility of government mandate to utter other expression to offset what he has said. See Mitchell C. Tilner, Government Compulsion of Speech: Legitimate Regulation or First Amendment Violation? A Critique of PG & E v. Public Utilities Commission, 27 Santa Clara L. Rev. 485 (1987).

Moreover, in the case of compelled speech, the individual's ability to define his or her public identity, see Gaebler, supra note 30, at 1004-05; Tribe, supra note 9, section 15-5, is impaired, and indeed that identity is

apt to be no less substantially distorted by compelled speech than by suppressed speech. The individual may thus be required to endure the fact, and the knowledge, that the public has a false impression of him, or that the public has an accurate view of beliefs about which she may prefer to remain silent. In the former case, he may be under some pressure to explain his views--a task which may present costs and difficulties in effectuation or risks by way of public exposure of attitudes.

n33 That audience interest embodies, in part, respect for the listener as an autonomous individual who is able to hear and enabled to make reasoned choices. See Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 756-57 (1976); Stanley v. Georgia, 394 U.S. 557, 564-68 (1969); Scanlon, Freedom, supra note 29.

n34 Society's interest in the exchange of ideas embodies the enriching social or communal (including political) values of the free exchange of ideas in a society, particularly a democratic society. See First Nat'l Bank v. Bellotti, 435 U.S. 765, 776-83 (1978); Scanlon, Freedom, supra note 29, at 520-28; cf. Emerson, supra note 29, at 6-9 (discussing speech as a safety valve for violent discontent); Redish, supra note 29, at 1419; Balkin, supra note 28, at 387-94; Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521, 544-67.

n35 Quite apart from the possibility of government "drown-out" resulting from compelled speech, if the government can compel individuals to utter particular ideas, it has power to influence social choices with a potency that it is a function of the First Amendment to deny. The cost of meeting the social interest in the subject matter of the views thus expressed is increased by the need to offset them, even if only to dilute their psychologically conditioning effect.

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The problems associated with government-compelled speech become complicated when the power to speak exists in an association that is privately organized, whether or not specially empowered by government, and the government "compels" the individual to join and/or support the
[*14] organization by dues or similar payments. In such circumstances, the utterance about which individuals complain is not "made" by them, but is "made" by the organization they are forced to support. Insofar as the injury to the individual comes from the act of associating with or contributing funds to the group (rather than "participating" in its speech), the issue is more one of protection of "liberty" than of a First Amendment violation. n36 Insofar as the injury to the individual comes from association with the group's advocacy speech or ideological activities, questions are raised under the First Amendment. To the extent that the group's advocacy activities are enabled by the claimant's contribution, can the group's use of dues or "in lieu" payments which the member is compelled to pay be transformed into individual expression "compelled" by the government, such that the propriety of forced financial support for the group's expression can be said to entail intrusion on individual members' First Amendment negative speech rights? n37

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n36 See supra note 27. It may be argued that individuals' forced "formal" association with the group that speaks, even if none of their funds is used to support the group's advocacy speech, so identify them with that speech as to invoke the considerations that implicate their negative First Amendment rights against a government command to speak. Cf. Keller v. State Bar, 496 U.S. 1, 17 (1990). If this is so, questions arise (a) whether a claim to "speech" under the First Amendment rather than a claim to "liberty" tests the propriety of the command to join the group, and (b) whether the group's claims under the First Amendment should trump the individual's claim.

n37 One argument against such transformation rests on the premise that the existence of, and the necessity for, a process by which a group reaches the decision to speak disconnects its members from its speech and justifies treating its utterance as emanating from "it" rather than from any of its members or any aggregation of them. See Dan-Cohen, Freedoms, supra note 4, at 1234-44. Group action affecting public choice in a democracy may indeed implicate transformation of individual preferences of members and integration of those preferences to produce a collective voice that not all, or even most, members desire. Yet the democratic process does not require all groups to be authorized to invoke that transformative voice in affecting public choice.

Groups lack the autonomy conventionally claimed for individuals. Some groups are said to have a solidity that requires respect for them as something more than merely an instrumental aggregation of individuals; yet they are entitled to less than the respect to be accorded to an individual human being. See Morris Raphael Cohen, Reason and Nature 386 (2d ed. 1953). The role thus envisioned for groups as institutions operating in some space not occupied by individuals or government, and functioning as essential to individual self-realization and definition and to pluralist democracy, contemplates some indeterminate sort of status for the collective. Cf. Liberalism and Its Critics (Michael Sandel ed., 1984). The indeterminacy is mirrored in uncertainty about how the legal system can accord adequate respect for the group without scanting the "rights" of individuals and the claims of the rest of the society. See, e.g., Tribe, supra note 9, section 12-26, at 1010-15, sections 15-1 to 15-3, at 1302-12, section 15-17, at 1400-09; Balkin, supra note 28, at 384-87; Dan-Cohen, Freedoms, supra note 4, at 1241-44; Jane Rutherford, Beyond Individual Privacy: A New Theory of Family Rights, 39 U. Fla. L. Rev. 627, 63840 (1987); Stewart, Organizational Jurisprudence, supra note 4, at 383-84.

However that uncertainty may be resolved, to the extent that individual members do, or are forced to, contribute to the support of the group, they enable the group voice and can fairly be said to bear, and can reasonably expect that they bear, some responsibility for that voice. Hence an individual's unwillingness to contribute or bear responsibility for the advocacy voice is plausibly entitled to protection analogous to the protection given to the individual against being mandated to speak. The function of an expressive or advocacy group requires limits on the protection that may be given to individual members in this regard. See infra text accompanying notes 198-202. However, as we shall see, such limits are not required for multi-purpose groups.

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Viewed solely in terms of the impact on a complaining member who is compelled to contribute to support the group, an affirmative answer may be

urged persuasively. To be sure, there is no government effort to compel any particular communication, belief, or line of thought. Yet the thwarting of the individual's will and the intrusion on the individual's conscience by the group's expression that the individual is forced to enable is as present in the case of restricting individual speech as in the case of "compelling" speech. The frustration of conscience may be less intense if one is made to pay for a joint product that includes group speech rather than being forced to speak personally, but the intrusion on the individual's will to speak is real, n38 and the jurisprudence of the First Amendment is properly invocable. n39

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n38 Less apposite is the claimed distortion of the individual's public identity. See supra note 32. However, that too may be affected by one's forced participation in the group. In the clearest case--that of the integrated bar--one's public identification with the content of the group's speech is more remote than it would be with the content of personally uttered views. The distortion may be less remote in the case of enterprises that the individual is compelled to join or support by institutional considerations--as with a local professional or trade association or the union shop. Whether the reason for not wanting to facilitate the group's speech is a desire to be silent on the matter under discussion or opposition to the views expressed, there is enough of a public connection between one's known participation and the speech to require one either to endure the public's uncertain inferences about him or her or to make his or her own statement. To make one's own statement involves either losing desired silence or incurring the cost of making the statement and revealing one's views.

There is likely to be a closer connection in the public mind between the group's speech and the individual compelled to join the group than there is between, for instance, a public utility corporation and the consumer's message that the utility was unconstitutionally "forced" to carry. See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 9-12, 20-21 (1986).

n39 If the government-created or sponsored association is organized, albeit "privately," for the principal purpose of communicating, and individuals are directed by government to contribute to the organization, the claim of intrusion on the individual's First Amendment speech rights is considerably stronger than it is for members of a multi-purpose association. It may be possible to justify such an intrusion if, for example, only commercial speech is involved. See United States v. Frame, 885 F.2d 1119, 1130-39 (3rd Cir. 1989), cert. denied, 493 U.S. 1094 (1990). Even so, more is required by way of justification than in the case of forced membership in a multi-purpose association. The problems involved, and an unsatisfactory rationale for upholding such a mandate, are discussed in Frame, 885 F.2d at 1119.

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The fact that the target of governmental compulsion is the individual's pocket rather than his or her voice does not make persuasive the analogy to taxation in assessing the propriety of the coercion on the individual contributor, or in disconnecting the coercion from the claim of violation of

the claimant's speech protection. n40 The homogenization of tax money in the government's till serves to disconnect the taxpayer from particular government expenditures that may be necessary to enable the nation, of which all must (in some sense) be members, to function. If every government expenditure were required to mesh with every preference of every individual taxpayer for use of his or her tax money, collective action for the common good would be difficult, if not impossible. n41 But the reasons which require persons to yield to collective decisionmaking by government do not require them to yield to all collective decisions in special organizations which they join or are forced to join for special purposes. n42 The analogy to government, which people are compelled to support, is inapposite because other organizations that people are compelled to join are not formed in order to, and do not, represent the whole society and deal with all its problems. n43 More importantly, other groups are not subject to the restrictions on their power to act, including their power to speak, that restrain government. n44

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n40 See Cantor, *supra* note 30, at 29-35; Steven Shiffrin, *Government Speech*, 27 UCLA L. Rev. 565, 590-95 (1980); cf. *Wooley v. Maynard*, 430 U.S. 705, 721 (1977) (Rehnquist, J., dissenting). But see *Lathrop v. Donohue*, 367 U.S. 820, 864-65 (1961) (Harlan, J., concurring).

n41 While problems exist about limits on government speech, see Mark Yudoff, *When Government Speaks: Politics, Law, and Government Expression in America* (1983); Shiffrin, *supra* note 40, at 588-95, they do not sensibly arise from the claim of the protestant as contributor to the fisc.

n42 It does not detract from this conclusion that an obligation to yield to many of the group's decisions should exist for members of "voluntary" groups. In order for the group to perform its essential functions, it is necessary to permit the group to spend collective assets on its functional operations without requiring it to satisfy each member's preferences about the expenditure. However, such deference to a majority with respect to collective conduct that is not essential to the group's function (e.g., much of advocacy speech of many multi-purpose associations) is unnecessary.

n43 Cf. *Keller v. State Bar*, 496 U.S. 1, 11-14 (1990); *Frame*, 885 F.2d at 1129-37.

n44 The government is constitutionally and politically more confined in its ability to spend funds than it is in the range of activities it can authorize for groups that it compels citizens to join and fund. Government is also more confined by procedural rules for making decisions. The person forced to join and contribute to an integrated bar is thus subject to looser procedural safeguards and a wider range of decisions made by fellowmembers than is the citizen compelled to pay taxes or to subject herself to the discipline of a government organization. To be sure, there may be some constitutional limitations on the conduct of an association thus created that would not restrict the conduct of an otherwise "private" group performing a comparable function such as a voluntary bar association. See Larry W. Yakle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. Rev. 791, 796-811 (1993). The powers vested in the integrated bar association, including its power to determine the subject matter of its speech, are considerably less restrained by constitutional

considerations than are the powers of a government organization. But compare Richard D. Silberman, *The Compelled Contribution in the Integrated Bar and the All Union Shop*, 1962 Wis. L. Rev. 138, 142 with authorities cited infra note 79.

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Concern for audience interests and for society's interest in the exchange of ideas expressed by the group implicates considerations that are comparable to, but far from identical with, those affecting assessment of compelled speech by an individual. If the government dictated the content of the group's speech, n45 the objections from the audience's viewpoint would be the same in the one case as in the other--if not to drown-out, at least to systematic government-ordered distortion of the mix that the audience is offered as the basis for social choice. The fact that government leaves the organization free to make its own speech alters the import of the distortion because the content of the message is not government-dictated. n46 However, the group's utterance of a communication which the individual member was forced to help the group to utter exposes the public to a louder voice and to an impression of larger, and possibly more diversified, support than exists for positions which the individual does not wish accepted. Although the government's compulsion in this circumstance does not address the content expressed, the likelihood of public acceptance of that content is affected and probably enhanced thereby; and the dissident is forced by the government to contribute to that enhancement.

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n45 Cf. *Wooley*, 430 U.S. at 714-17; *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795-802 (1988).

n46 Compare *Wooley*, 430 U.S. at 714-17 (1977) with *Pacific Gas*, 475 U.S. at 21-26 and *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980).

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The decisions of the Supreme Court are not entirely consistent, and the Court's rationale is not clear in cases involving government "compelled" personal speech through association. n47 The same may be said of [*18] decisions interpreting the Constitution to require that A (an association) not be compelled by government to distribute B's speech through A's facilities. n48 But even if the decisions were consistent and their rationales offered clearer support for the proposition that to compel an individual to speak is likely to entail as much a violation of the First Amendment as to suppress his or her speech, the analogy in the claim to First Amendment protection between compelled personal speech or compelled formal association and compelled contribution to support a multi-purpose [*19] group's speech is not perfect. The likelihood of the individual being as intimately affected in belief, in persona, in repute, or in compensatory behavior (i.e., in the perceived need to engage in counter-speech) is plainly not as great in the one case as in the other. n49

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n47 The bulk of the cases involving speech claims in connection with association originate in the "right to remain silent" about association membership. E.g., *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 540-58 (1963); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *Talley v. California*, 362 U.S. 60, 66 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-66 (1958). But cf. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-98 (1982); *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976).

The cases dealing with compelled personal speech like *Wooley*, 430 U.S. at 714-17, and *Barnette*, 319 U.S. at 642, and those dealing with pressures on persons' political attachments or views like *Rutan v. Republican Party*, 497 U.S. 62, 68-79 (1990), *Branti v. Finkel*, 445 U.S. 507, 513-17 (1980), *Wooley*, 430 U.S. at 714-17, and *Elrod v. Burns*, 427 U.S. 347, 355-73 (1976), rest uneasily alongside cases dealing with loyalty oaths (involving the right to remain silent), e.g., *Cole v. Richardson*, 405 U.S. 676, 678-87 (1972); *Elfbrandt v. Russell*, 384 U.S. 11, 15-17 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 373-74 (1964), and the non-communist oath cases, e.g., *Law Students Research Council v. Wadmond*, 401 U.S. 154, 164-66 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589, 593-95, 597-604 (1967); *Nelson v. County of L.A.*, 362 U.S. 1, 4-9 (1960); *Lerner v. Casey*, 357 U.S. 468, 470-79 (1958). Principles to reconcile them all are hard to find, if indeed they exist. But see Harpaz, *supra* note 30.

n48 Most decisions involve the problems raised by compelling an institution to carry the speech of another, rather than compelling an individual to utter another's prescription. Compare, e.g., *Riley*, 487 U.S. at 787-95, *Pacific Gas*, 475 U.S. at 9-18, and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249-58 (1974) with decisions dealing with broadcast media like *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456-58 (1994), *CBS v. FCC*, 453 U.S. 367, 394-97 (1981), and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-401 (1969), and compare those decisions with that in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 101-14 (1973). To be sure, the amenability of the broadcast media to government regulation may differ from that of the print media or other modes of communication, and the problem is the subject of much debate in the industry and in the academy. See T. Barton Carter et al., *The First Amendment and the Fourth Estate* 495-666 (1988); Lucas A. Powe, *American Broadcasting and the First Amendment* 11-45, 197-215 (1987); Charles D. Ferris & Terrence J. Leahy, *Red Lions, Tigers and Bears: Broadcast Content Regulation and the First Amendment*, 38 *Cath. U. L. Rev.* 299, 304-07 (1989); Weinberg, *supra* note 28, at 1138-64; see also *City of L.A. v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986); *United States v. National Soc'y of Professional Eng'rs*, 555 F.2d 978, 984 (D.C. Cir. 1977), *aff'd* on other grounds, 435 U.S. 679, 696-99 (1978). See generally Tilner, *supra* note 32, at 494-513 (critiquing the Court's conceptual presupposition that corporations enjoy "freedom of mind"). But the cases do not reconcile easily, if at all.

Pruneyard, 447 U.S. at 85-88, touches the problem but is slightly off center because in *Pruneyard*, the government was not compelling transmission or utterance by the coerced person of any message or expression, or subscription by that person to any belief, or even appearance (except possibly to some in the audience) of such subscription or utterance. See also *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888, 904-06 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989).

n49 By the same token, even if it is valid to treat use of funds as the equivalent of speech when the issue is the propriety of government effort to

prohibit or limit a person's contribution to a political candidate or cause, see Buckley, 424 U.S. at 39-59, it does not follow that a contribution of funds is speech or its equivalent when the issue is the propriety of compelling payment of funds for a service function and allowing use of part of the funds for political communications that are relevant to the service function, see, e.g., Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 514-19, 522-24 (1991); Robinson v. State of N.J., 741 F.2d 598, 610-14 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985), or even for ideological communications that are more remotely relevant to the group's service function, see Shiffrin, supra note 40, at 588-95. But cf. Stark, supra note 27, at 1362-78.

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It has been suggested that even if government-forced contributions or formal association can be metamorphosed into government-compelled speech, the impingement on any particular contributor's speech rights by reason of the meagerness of the individual's contribution to enabling the group's speech is too slight, and the connection between the government mandate (which is neutral as to the fact or content of the group's speech) and that impingement is too remote to permit a finding of a First Amendment violation. n50 When balanced against the social value of (i.e., the compelling state need for) the forced contribution to, for example, a union or the integrated bar in order to fund the benefits that the association confers, the curtailment of the individual's liberty or speech is said [*20] to be not enough to tip the scales against either the propriety or the constitutional validity of the requirement to contribute. Much may be said for that view; n51 but if the Supreme Court's repeated rejection of it n52 prevails, substantial questions arise with respect to the resulting impingement on the group's freedom of speech.

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n50 See Cantor, supra note 30, at 27-28; Gaebler, supra note 30, at 110-14; Shiffrin, supra note 40, at 588-95; see also Galda v. Rutgers, 772 F.2d 1060, 1069-71 (3d Cir. 1985) (Adams, J., dissenting), cert. denied, 475 U.S. 1065 (1986). Relevant in this connection is the possibility that the individual's contribution to the group's speech may be more imperatively commanded and may be assimilated more closely to personal speech (and public perception of personal speech) in some group settings than in others. Thus, for example, the ratepayer's contribution to the utility's speech in Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 543 (1980), or the student's contribution to the group's speech in Galda, 772 F.2d at 1060, Smith v. Regents, 844 P.2d 500, 519-33 (Cal. 1993), and Carroll v. Blinken, 957 F.2d 991, 995-1003 (2d Cir. 1992), cert. denied, 113 S. Ct. 300 (1993), is considerably less assimilable to compelled personal speech in its impact on the persona of the forced contributor or the public's perception of his participation than is the lawyer's contribution in the case of the integrated bar or the dissident employee's contribution to the union in Abood v. Detroit Bd. of Educ., 431 U.S. 209, 332-37 (1977). Hence, the protection of the individual (whether by Constitution or by legislative or judicial action) against being "forced" to make such contributions may be appropriate or "necessary" in some settings of compelled association but not in others when a court is required to balance the cost to the individual and society against the state's "need" for imposing the compulsion to contribute or for relieving the individual of the obligation to contribute.

n51 If the impingement on the protestant's negative speech rights is driven by noncommunicative considerations such as those that underpin the integrated bar and the impact is not viewpoint-based, the impingement's propriety may be tested under adumbrations from United States v. O'Brien, 391 U.S. 367, 375-82 (1968). See Tribe, supra note 9, sections 12-2, 12-3, at 789-804; John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482, 1482-1507 (1975). On that view, the propriety of the impingement is easier to accept.

n52 See, e.g., cases cited supra note 2. The lower courts uphold the even more attenuated claims to First Amendment protection made by students in state universities who resist contribution to student activities funds that implicate political action. See cases cited supra note 50.

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Quite apart from an individual's possible claim to a "right" to First Amendment protection against being compelled by government to support an association, and therefore its advocacy activities, is the "interest" of the individual in being relieved of the obligation to support the advocacy speech of an association that he or she is compelled by circumstances to join, or wishes to join, in order to obtain the other benefits it offers. n53 In such circumstances, the constitutional "right" of individuals (if any) n54 to be protected against government-compelled contribution to a group's speech is not involved; but the individual's negative speech "interest" is involved. Even if the individual's support of the group is not compelled, he or she may find it objectionable to participate in, or contribute to support, the association's advocacy speech as a condition of obtaining the other benefits the association offers. If individuals' negative speech interests are protected by the state by, for example, legislation restricting the funding or subject matter of the group's advocacy speech or activities, n55 the question arises whether such legislation un [*21] constitutionally interferes with the group's speech. Such legislation would seek to resolve the conflict between the negative speech interests of individuals who prefer not to support the group's advocacy activities, and the speech interests (or indeed rights) of the group and those members who wish to support the multi-purpose association and its collective voice. n56

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n53 It does not detract from the importance of that negative "interest" that imputation of the group's view to the individual is more likely if his or her participation in the association is voluntary than if it is compelled.

n54 The connection between contributing and speaking may be deemed to be broken by reason of the pooling of contributions in a general fund to be spent for a range of functions of which advocacy speech is only one, often quite peripheral, function. See Dan-Cohen, Rights, supra note 4, at 102-13.

n55 See, e.g., Communications Workers of America v. Beck, 487 U.S. 735, 742-44 (1988); International Ass'n of Machinists v. Street, 367 U.S. 740, 746-49 (1961); Employes' Dep't v. Hanson, 351 U.S. 225, 233-35 (1956). But cf. Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983).

n56 It may be argued that the individual's interest at issue is not a "speech" interest but merely a "liberty" interest in the transfer and use of funds that he or she is contributing to the association. See supra note 27. If that argument is valid, the claim of the association to use (i.e., transfer) the funds for expression (i.e., to pay someone to express notions that "the association" wishes expressed) would seem to be more a "liberty" interest than a "speech" interest. Except for the difference between the negative and the positive character of the claimed interest, it is problematic to treat the former as not a speech interest and at the same time treat the latter as a speech interest, for purposes of determining whether the First Amendment precludes the government from limiting enjoyment of the interest. See Stark, supra note 27, at 1362-78. To be sure, as DanCohen has argued persuasively, it may not be necessary or appropriate to protect all associational speech identically with individual speech. See Dan-Cohen, Freedoms, supra note 4, at 1241-44.

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2. Freedom of Choice and Uses of Wealth to Affect Advocacy Activity--Restrictions on Individuals and on Associations

a. Freedom of Choice of Individuals in Associations

As an abstract proposition, unbundling a multi-purpose organization's political or ideological activity and related advocacy speech from its other authorized behavior should lower the barriers to individual contributions and membership. In theory, such unbundling should make a rational individual more willing to contribute, join, or continue membership in the enterprise than if the activities of the enterprise were bundled. n57 However, advantages may be offered by a bundled enterprise that are worth more than the opportunity to assemble the equivalent bundle by acting through separate enterprises. If the contribution to the [*22] group is induced by the offer of material benefits, individuals may be more willing to let a portion of their contribution be used for such activities than if they were solicited for funds only for such activities. The logic of collective action suggests that such bundling helps to solve freerider problems. n58 However, depending on the kind of association and the form of intervention, the net benefits to society from mandatory unbundling may exceed its costs to participating individuals.

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n57 Individuals may oppose the use of collective funds to advocate all or some kinds of government action that would further those professional, occupational, or investment aspirations that impelled them to contribute to the organization. Use of the association's funds and energies to urge consumer acceptance of a proposed program by the association may well be acceptable even if one disagrees with the proposed program; but use of those funds to seek enforcement of the program by government coercion may not be. Moreover, to the extent that government power is sought to prescribe regulation or deregulation with respect to externalities (such as environmental protection, taxes, race relations, political processes, or health, military, or foreign policy) that affect members as citizens apart from their interests as members, individuals may well be unwilling to furnish the funds for such proposals, particularly if they disagree with them.

n58 See Mancur Olson, Jr., The Logic of Collective Action: Public Goods and the Theory of Groups 76-91 (1965).

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The cost-benefit question is not answered by generic arguments about freedom of choice, such as the argument that if both bundled and unbundled associations are available to persons who wish to form or join one, the parties and the public are free to join one or the other, and the virtues of unbundling are available, but the limitations of mandatory unbundling are avoided. That theme implicates two kinds of issues. Normatively, even if such private arrangements can be made with sufficient cognition and volition appropriately to reflect the parties' free consent to bind themselves, are there societal reasons to deny such freedom by mandating unbundling? n59 Moreover, as a practical matter, is it possible for sufficient freedom of choice to be available to the parties to such private arrangements to meet the consensual norm embodied in the individual autonomy that entails freedom of contract, let alone freedom to make choices about public matters? n60

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n59 E.g., will the advocacy voice of the collective drown out or obscure the opposing voices of members acting individually, or if there is dissent in the group, will the collective voice distort (i.e., overstate) the power of the message the group sends? Does formation of one group alter the menu available to the public if formation of competing groups is thereby required but costly and often impossible?

n60 For example, are there pressures on individuals to join or support the group (e.g., government mandate) that can be said to deprive them of adequate freedom of choice with respect to supporting the group's advocacy activities? Does the association have an actual or effective monopoly on necessities normally sought by individuals? Does the lure of the material inducements to join the group so far outweigh the cost of yielding to the group's political voice as to obscure the latter or make it de minimis in deciding to join, resulting in a mirror image of the free-rider problem? Will the incentive to form a political action group be so muted by the need to avoid free-rider problems that expressive groups are not likely to be formed as competitors unless multi-purpose groups are forced to unbundle?

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Both the normative and the practical questions have been debated and answers have been offered by free market economists and libertarian philosophers as well as by those devoted to republican virtues or communitarian values. Few would deny that to some extent government intervention is necessary to take care of "externalities" created by wholly volitional private arrangements. Others would raise the question whether, [*23] in principle, the fully volitional private ordering advocated by libertarians is ever possible or always an unrestrictable "good" even from the point of view of its participants. n61 Still others, perhaps most, also would be concerned with whether there should be limits on private ordering, if only to vindicate the volitional and cognitive premises underlying the free choice ascribed to the participants. n62