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Towards a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended

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COMMENTS

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I. INTRODUCTION

Motive and intent play a prominent role in the Supreme Court's most recent definitions of responsibility. In a variety of doctrinal areas, the Court requires plaintiffs to prove the defendant's motive or intent, imputing responsibility only when the defendant's will and conscious choice played a part in the harm.¹ Victims of police brutality must show that their aggressors acted with "deliberate indifference".² Market participants injured by the manipulations of insider traders must show an intent to defraud.³ Employees challenging the constitutionality of racially discriminatory policies in the workplace must establish discriminatory purpose on the part of their employers.⁴ This Comment examines the role of motive and intent⁵ in cases involving allegations of police brutality, employment discrimination, and insider trading. It suggests that the centrality of motive and intent stems from the Court's rights-based, liberal vision,⁶ that it

1. See generally *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating a provision of the Alabama Constitution that disfranchised persons convicted of crimes involving moral turpitude on the ground that the enactment of the provision was motivated by a desire to discriminate); *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (holding that liability under 42 U.S.C. § 1981 must be premised on proof of intentional discrimination); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that zoning board's denial of rezoning petition to allow for multiple family dwelling did not violate the equal protection clause because there was no evidence of discriminatory motive on the part of the zoning board); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that proof of discriminatory purpose is necessary to establish a claim of racial discrimination under the fifth amendment); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (requiring plaintiffs bringing a Rule 10b-5 complaint to show that the defendant acted with intent to deceive, manipulate, or defraud); *Wright v. Rockefeller*, 376 U.S. 52 (1964) (holding that challengers to New York apportionment statute failed to prove that the New York legislature was motivated by racial considerations).

2. *City of Canton v. Harris*, 409 U.S. 378, 388 (1989).

3. *Ernst & Ernst*, 425 U.S. at 199.

4. *Washington*, 426 U.S. at 247-48.

5. For a discussion of the conceptual differences between the terms "motive" and "intent," see *infra* note 9.

6. There is a conceptual tension in political philosophy between rights-oriented, individualist liberals and critics of liberalism who emphasize common purposes and ends, reminiscent of Aristotle's focus on human telos. Liberalism is a deontological ethic, which emphasizes individual rights and duties that override public concerns and collective ends. On the other hand, communitarianism and civic republicanism are teleological ethics, which emphasize affirmative community goals, human virtue, and a search for the common good. See generally J. RAWLS, *A THEORY OF JUSTICE* (1971) (formulating a comprehensive analysis of the liberal model based on the priority of the individual); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (criticizing liberalism's individualist tendencies by proposing a competing theory based on notions of mutuality and community); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (criticizing liberalism's rights-based approach, and proposing a theory centered on political participation and dialogue as means to the achievement of civic virtue and freedom). This Comment explores the tension between liberalism and its counterparts: communitarianism and civic republicanism. The Court's emphasis on motive

reflects a fundamental misunderstanding of institutional behavior, which results in a narrow and impoverished definition of responsibility.

A. *Liberalism's Narrow Vision of Interdependence, Institutions, and Responsibility*

Liberalism emphasizes individual rights and autonomy, viewing humanity as a collection of autonomous beings free from government interference.⁷ Because liberalism defines interdependence narrowly, by limiting the importance of common connections, it also defines responsibility narrowly, by limiting our obligations to one another. Liberalism's emphasis on individualism limits our sense of duty to one another: We are at once alone, independent, and disinterested. This Comment examines the impact of this individualist vision on the Court's analysis of various forms of institutional malfunctions: discrimination in the institution of the workplace, brutality in the institution of the police department, and fraud in the institution of the market.

This Comment argues that this individualist model has led the Court to neglect structural elements of institutional behavior. Heavily influenced by a vision of autonomy, the Court rejects the importance of the ties that bind us—ties that find expression in community values and faults, such as collective expressions of good will or corruption. The Court perceives institutions as the sum of their individual parts, as collections of autonomous beings, who, according to the liberal ethic, are mutually disinterested and owe very little to one another.⁸ Assumptions of limited responsibility and mutual disinterest lead the Court to adjudicate as if its only role were to protect individuals in institutions from the rights and choices of others. Liberalism places the individual ahead of the whole, so that the protec-

and intent reflects a rights-oriented, liberal approach, because it emphasizes the defendant's *right* to a neutral framework in which she is held liable only for her individually chosen ends. For a discussion of liberalism's emphasis on rights, neutrality, and choice as reflected in caselaw, see *infra* Section III.

7. For example, Rawls suggests that

[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.

J. RAWLS, *supra* note 6, at 3-4. Rawls's explanation of justice denies the legitimacy of government interference for the sake of a collective conception of the good when that interference would violate the individuality of an autonomous being.

8. *Id.* at 13.

tion of separateness is paramount to the cultivation of social or communal ties. By following this model, the Court ignores the connections among individuals in a group, causing institutional imperfections to go unaddressed. For that reason, the Court protects individualist values, like motive and intent,⁹ at the expense of institutional values. These judicial preferences reflect the failure of the language of liberalism to speak to the institutional aspects of discrimination in the workplace, of abusive behavior in our police departments, and of manipulations in the market. When the Court insists on a showing of motive, it protects the defendant from responsibility for anything she has not chosen and meant to do as an individual. The Court denies that an individual, as part of a Community of the workplace, police department, or market, owes a duty to that Community that stems from something other than motive, and rejects duties arising from a Community's needs and values. By emphasizing motive, the Court liberates individuals from responsibility for structural problems they did not mean to cause, and negates an affirmative responsibility for attitudes and behavior that hurt other individuals in the institution.

The Court's liberal conception of justice is not surprising, since notions of rights and individualism have deep roots in American political culture.¹⁰ Liberalism's emphasis on individual rights,¹¹ and

9. Though the terms "motive" and "intent" are related, they are not synonymous. For a discussion of the conceptual and legal differences between motive and intent, see Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733 (1987). "Intent is prospective while motive is retrospective. Motive addresses the factors that lead into a decision: the reasons upon which a decision is based, the realities that motivate a decisionmaker. Intent is synonymous with purpose." *Id.* at 736. The Court, however, has not always distinguished the terms: "Some of the Court's opinions employ the terms in a way that seem to suggest their interchangeability." *Id.* at 763. "Intent" and "motive" are both used by the Court in ways that suggest identical visions of justice and of individualism. Whether the Court uses motive to refer to the impetus for an *individual's* actions or intent to refer to an *individual's* ends, it still emphasizes individual elements over structural effects. Therefore, this Comment treats intent and motive as elements driven by an identical vision.

10. See, e.g., The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable *Rights* That to secure these *rights*, Governments are instituted among Men") (emphasis added); Dahl, *On Resolving Certain Impediments to Democracy in the United States*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 230, 231 (R. Horwitz 3d ed. 1986) ("The first commitment was the one this country made to a liberal political and constitutional order that gave primacy to the protection of certain political and civil rights among its citizens.").

11. See, e.g., M. SANDEL, *supra* note 6, at 1 ("The liberalism with which I am concerned is a version of liberalism prominent in the moral and legal and political philosophy of the day: a liberalism in which the notions of justice, fairness, and *individual rights* play a central role") (emphasis added).

on government that is neutral toward competing conceptions of the good,¹² are relied upon to protect against a majoritarian impulse.¹³ Yet, as many critics of liberalism have noted,¹⁴ the Court's approach is impoverished because it ignores important aspects of our social lives. By emphasizing individualism, liberalism ignores interdependence and community.¹⁵ The centrality of individual motive in the Court's jurisprudence is a reflection of an emphasis on the private, on individualism, and on autonomy. A liberal vision presumes that individuals are responsible primarily for themselves and their intentions, not for the systemic problems of their institutions.

This Comment relies on competing visions that reject liberalism's underlying assumptions of individualism and autonomy. Building on communitarian notions of mutuality, it proposes a more expansive notion of responsibility, a broader range of enforceable duties to and from our institutions. This Comment does not argue that the individual is unimportant, nor that individual motive is insignificant. Rather, in the context of institutions, like the workplace, the municipality, and the market, an emphasis on individualism is at best incomplete, because institutions exhibit structural problems unattributable to individual motive, problems to which the Court's narrow vision of responsibility does not speak. Narrow definitions of responsibility reject the possibility of imputing a duty to others that stems from something outside of their intentions. The Court's liberalism does not address how or why we, as a society and as a community, have obligations to those around us—obligations that stem from our mutuality, from the fact that we all benefit from and contribute to our commonality. As a result, the Court's recent jurisprudence over-emphasizes motive at the expense of effects, thereby protecting individuals at the expense of their commonality. For example, when the Court forces an employee to show an employer's intentional discrimination regardless of discriminatory impact, the Court confirms the notion that the

12. See, e.g., J. RAWLS, *supra* note 6, at 3-4.

13. See, e.g., Fallon, *What is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1724 (1989) ("[F]ew if any republican revivalists are ultimately willing to eschew reliance on judicially protected individual rights against local communities—and this reliance threatens republicanism's claimed distinctiveness.") (footnote omitted); Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 319 (1985) ("The enforcement of liberal rights, not the absence of settled community, stands between the Moral Majority and the contemporary equivalent of witch hunting.").

14. For a discussion of the tension between liberals and their communitarian and civic republican critics, see *infra* Section III.

15. See generally M. SANDEL, *supra* note 6 (arguing that liberalism misconceives the primacy of justice because it relies on a vision of individuals as autonomous beings independent of communal ties, history, and friendship).

defendant employer's right to be responsible only for her chosen ends overrides the responsibility to her institution. The Court thus denies, or at least neglects, an affirmative duty to combat structural discrimination.

B. *Is There Institutional Intent?*

The Court's insistence on a showing of "institutional intent" reveals a fundamental misunderstanding of the nature of discrimination and corruption in many of our institutions. In its analysis of discrimination and corruption, the Court treats institutions as if they were human beings.¹⁶ In police brutality and employment discrimination cases, it often personifies institutional defendants in search of a source of collective evil motivation.¹⁷ In insider trading cases, the Court often regards the institution of the market as an aggregate of individuals, so that only those who actually participate in the operation of the organization, those *individuals* who buy or sell securities, have a right to make a claim.¹⁸ The Court's perception of organizations as persons or aggregates of persons is deficient, however, because it misunderstands the nature of organizations, whose operations are seldom attributable to the will or intent of one or several individuals.¹⁹ Organizations are "both opaque and impermeable,"²⁰ such that their function can not be linked with any accuracy to individual motive.²¹

Corporations and municipalities cannot think, feel, and intend like people. However, because the Court adjudicates in a language of individualism, it distorts institutional behavior, imputing both motive

16. For a comprehensive discussion of the law's treatment of organizations, see M. DAN-COHEN, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR A BUREAUCRATIC SOCIETY* (1986) (criticizing legal theory's conception of organizations as persons or clusters of persons, and proposing a legal theory of organizations that takes into account the complexity of institutional parties).

17. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) (holding that a showing of racial imbalance is insufficient to make out a disparate impact claim; plaintiffs must point to specific or particular employment practices which caused the disparate impact) (note that the Court examines the specific practices of *individuals* to evaluate the behavior of an organization); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (dictum) (requiring plaintiffs to show that policymakers *consciously chose* a police officer training program that would violate constitutional rights of their constituents).

18. *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975) (holding that only purchasers and sellers of securities have standing to bring a Rule 10b-5 claim).

19. Professor Dan-Cohen argues that organizations can act with intent; however, he suggests that organizational intent is separate from individual will, and he criticizes legal theory's equating of individual and organizational motive. M. DAN-COHEN, *supra* note 16, at 38-39.

20. *Id.* at 38.

21. *Id.*

and intent to institutions like police departments and corporations.²² The same type of analysis shapes the Court's insider trading jurisprudence. Here, the defendant is often an individual accused of an intent to defraud,²³ so that to speak in terms of motive is not illogical, as it is in cases where the defendant is a municipality or a corporation. Nevertheless, the Court's insistence on motive reflects a misunderstanding of the way in which the flow of information in the market can cause injury to participants. As in the municipality and the workplace, injury can stem from corruption and inertia, independent of motive.²⁴ Negligence on the part of market participants and carelessness in the use and distribution of information can distort the institution of the market. The Court's language of liberalism denies a duty to the market, much like it denies a duty to the workplace and to the municipality.

The selection of police brutality, employment discrimination, and insider trading cases is not arbitrary. Precisely because they are substantively unrelated, while still requiring proof of motive, the three areas epitomize a trend in the Court's reasoning process. Because they are so different, they suggest that the Court's analysis is independent of any substantive legal doctrine, and that its reasoning is instead a function of a particular conception of justice. These three doctrinal areas exhibit different faces of responsibility and irresponsibility to the Court. Duties to financial markets, municipal police departments, and workplaces present different types of obligations to and from different institutions. Yet, because the Court always begins its analysis from the standpoint of individual motive, it tends to treat these very different institutions in remarkably similar ways, looking for intent and conscious choices and ignoring the structural nuances of the players involved. Thus the Court arrives at very narrow definitions of responsibility, imputing liability only when an injury was consciously chosen by a personified or individualized defendant. A more

22. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986) (arguing that individualism as a method of analysis presents an inadequate foundation for evaluating institutional misconduct). Professor Whitman focuses on constitutional tort cases brought under 42 U.S.C. § 1983. For a discussion of many of these cases, see *infra* text accompanying notes 48-88.

23. See *Dirks v. SEC*, 463 U.S. 646 (1983) (action brought against a broker-dealer who provided investment information to investors). But see *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (action filed against a corporation and some of its directors); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (action filed against an accounting firm).

24. See Phillips, *An Essay: Six Competing Currents of Rule 10b-5 Jurisprudence*, 21 IND. L. REV. 625, 642 n.95 (1988) ("[E]ither where misleading statements have been made or material facts omitted, the investing public has been injured whether the party who produced the facts or omitted them acted intentionally, recklessly, or negligently.").

sensitive jurisprudence would analyze the workings of the particular institutions involved, taking into account the benefits and burdens borne by the players in the dispute, and arriving at a conclusion more consistent with communitarian values.

C. *The Public/Private Problem*

The motive requirement in insider trading, police brutality, and employment discrimination cases conforms with many of liberalism's basic tenets. Liberalism emphasizes the protection of private interests, resulting in a tacit hostility to public-rights needs.²⁵ Recent scholarship has brought out the conceptual inconsistencies in the notion of separate public and private realms.²⁶ These commentators argue that no judicial dispute is truly private. Whenever a court protects or redistributes rights and entitlements, very public things happen, so that even our definitions of private rights are derived, at least in part, from public priorities.²⁷ Perhaps not every lawsuit implicates the characteristics we often associate with public-rights issues,²⁸ such as the vindication of public policy objectives through affirmative government action;²⁹ remedies that regulate municipal, institutional, and

25. Many scholars have noted the Court's reluctance to grant relief to public-rights plaintiffs. See generally Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 56 (1982) ("I began this essay by posing the question whether public law litigation, seemingly an expression of a liberal and reformist ideology in the legal system, would be able to withstand prolonged confrontation with a Supreme Court whose dominant tenor was neither liberal nor reformist."); Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 346 (1989) ("[M]any courts have enforced a number of Rules in ways that adversely affect public interest litigants. . . . [F]ederal judges can and should apply the Rules with considerably more solicitude for public interest litigants"); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1454 (1988) (analyzing the demise of the public-rights model as a consequence of our emphasis on individualism: "[T]he rise of liberalism in the nineteenth century led to the primacy of the private rights model and to modern standing law").

26. For a discussion of the controversies inherent in the public/private distinction, and of the conceptual difficulties in separating public from private realms, see generally Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1357 (1982) (arguing that the public/private distinction cannot be taken seriously "as a description, as an explanation, or as a justification of anything"); Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1445-49 (1982) (arguing that corporate conduct is shaped by a hybrid of public and private influences that cannot be distinguished).

27. Paul, Book Review, 7 CARDOZO L. REV. 743, 746 (1986) ("[V]irtually every judicial decision affecting private conduct has an impact on matters arguably of public concern.").

28. For a comprehensive analysis of the elements and characteristics of public law litigation, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

29. *Id.* at 1284, 1302 (asserting that relief in a public-rights suit is "forward looking,"

social behavior;³⁰ and legislative fact-inquiries that implicate public policy issues.³¹ Nevertheless, every time a court adjudicates, it intervenes, abstains, or interprets in ways that draw on value-laden, normative principles that implicate public values.³² The Court, however, has repeatedly ignored its own public role, adjudicating with a deference to the choices of private actors and to existing distributive entitlements.³³ This deference suggests an insensitivity to the actors who are not beneficiaries of the status quo. The Court's philosophy, based on the priority of existing private interests, protects only private elements, such as motive and intent, and neglects institutional concerns and issues of public policy.³⁴ Driven by a liberal vision, the Court imputes responsibility only when private actors, as individuals, intentionally choose to cause harm. The Court has been unable to define responsibility in broader terms. Therefore, it has been unable to deal with the public, structural problems of our institutions. The challenge is to find a way to impute liability justly without relying exclusively on individualist values.

The Court's blind spot to public-rights issues stems at least in part from a liberal impulse, which focuses so strongly on individual autonomy: on rights, motives, choices, ends, and privacy.³⁵ The

shaped along "broadly remedial lines," and has "important consequences for many persons including absentees," and thus must often be implemented by affirmative government action).

30. See *id.* at 1297.

31. *Id.*

32. See Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 411 (1989) (arguing that because statutes do not have pre-interpretive meanings, courts inevitably rely on normative principles in the course of statutory interpretation).

33. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (tracing the Court's protection of private interests and existing entitlement to the *Lochner* era).

34. The Court's recent caselaw exemplifies a reluctance to grant relief to plaintiffs attempting to vindicate public rights. In the three doctrinal areas analyzed in this Comment, for example, the Court has dramatically restricted the scope of legitimate actions. As a result, many plaintiffs with police brutality claims are turning to state courts. See Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOKLYN L. REV. 1057, 1058 (1989) ("federal court refugees" bring their federal claims to state court). The Supreme Court has also drastically narrowed the scope of legitimate claims for employment discrimination plaintiffs. See 58 U.S.L.W. 3065 (Aug. 8, 1989) ("A series of civil rights decisions by a conservative majority of the U.S. Supreme Court making it easier to challenge affirmative action programs and more difficult to establish claims of employment discrimination highlighted the 1988-1989 term's labor and employment cases."). Insider trading cases show a similar trend, where standing limitations and narrow definitions of statutory duties have made it more difficult for plaintiffs to invoke the anti-fraud provisions of the Securities and Exchange Act of 1934, 15 U.S.C. § 77a-77aa (1990). See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731 (1975) (standing limitations); *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980) (narrow definitions of duties).

35. See West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 6 (1988) ("Because of the dominance of liberalism in this culture, we might think of autonomy as the 'official' liberal value entailed by the physical, material condition of inevitable separation from the other:

Court draws on its own individualist vision which neglects that which is beyond the individual, ignoring the institution, the community, or "the whole."³⁶ Simply stated, the Court is hostile to public aspects of litigation because it is not accustomed to thinking in terms any larger than the individual. Liberalism speaks to problems of separateness and autonomy, driving the Court to protect those private individualist interests, while ignoring, or rejecting, public needs. In the Court's hostility to the public and in its embrace of the individual, we find one of the roots of the centrality of motive. Just as liberalism denies the significance of the whole, the Court denies the importance of structure, and emphasizes individual ends, volition, and motive at the expense of community.³⁷ Note that the centrality of motive is in a sense a distortion, resulting from the Court's inability to acknowledge a relevant, experiential aspect of our lives. The Court speaks in terms of motive when issues call for institutional restructuring, largely because it is blind to the public aspect of problems we face. "Distortions occur when [public rights] cases are treated in terms of the schemata of the private rights model—much like forcing a square peg into a round hole."³⁸

D. *Statutory Interpretation*

Motive also stems from the Court's narrow interpretations of congressional intent. In each of the areas discussed in this Comment, plaintiffs usually bring actions under federal statutes with broad public policy objectives.³⁹ However, both the legislative text and history

separation from the other entails my freedom from him, and that in turn entails my political right to autonomy.").

36. See ARISTOTLE, *THE POLITICS* Book 1, at 37 (C. Lord trans. 1984) ("The city is thus prior by nature to the household and to each of us. For the whole must of necessity be prior to the part . . .").

37. Winter, *supra* note 25, at 1393 ("When we persist in seeing only the individual as a cognizable social unit, we limit also the recognizable interests that are available for our consideration either in adjudication or legislation.").

38. *Id.* at 1460. See also Chayes, *supra* note 25, at 8 ("[T]he Court has tried to construct a metaphor or effigy of the traditional lawsuit. The doctrinal output of this approach is incoherent or inappropriate, or both, and diverts attention from the considerations that ought to be taken into account.").

39. In the context of insider trading, plaintiffs invoke Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990), promulgated under the Securities and Exchange Act of 1934, 15 U.S.C. § 77a-77aa (1990), to combat fraud and deception in the use of public information, and to encourage full disclosure. See generally Comment, *The Basics of Disclosure: The Market for Information in the Market for Corporate Control*, 43 U. MIAMI L. REV. 1021 (1989) (analyzing different models of disclosure in preliminary merger negotiations in terms of congressional objectives of disclosure and fairness). Victims of police brutality combat municipal abuses of power through 42 U.S.C. § 1983 (1982), enacted to provide a remedy for constitutional violations committed under color of state law. See generally Blackmun, *Section 1983 and Federal*

shed little light on whether or not Congress meant for motive to be an essential element of plaintiffs' cases.⁴⁰ Gaps in the text and history of

Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. REV. 1 (1985) (analyzing the role of section 1983 in the protection of individual rights, and urging that its viability not be restricted for the sake of efficiency). Finally, employees challenging allegedly discriminatory practices in the workplace can use a variety of statutory provisions, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1988), which was enacted "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). Employees can also challenge certain discriminatory practices by invoking 42 U.S.C. § 1981 (1982), which provides that "[a]ll persons . . . shall have the same rights in every State and Territory to make and enforce contracts" See generally Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541 (1989) (arguing that the statute was intended to reach private discrimination).

40. For a discussion of Congress's vision of motive in the Title VII context, see Sunstein, *supra* note 32, at 422 (Title VII's "basic prohibition of 'discrimination' provides no guidance on the role of discriminatory effects, the appropriate burdens of proof and production, and the mechanisms for filtering out discriminatory treatment"). But see Gold, *Griggs' Folly: An Essay of the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985) (arguing that Title VII was directed exclusively at purposeful discrimination). For a discussion of gaps in congressional vision in section 10(b) of the Securities Exchange Act of 1934 and in Rule 10b-5, see Kaler, *Scienter After Hochfelder: Recklessness as a Standard in Rule 10b-5 Private Damage Actions*, 6 J. CORP. L. 337, 337 (1981) ("Much of the confusion in this area is a consequence of the development of the 10b-5 remedy in the courts. When Congress passed the Securities Exchange Act of 1934, Section 10(b) was added as a 'catch-all' provision . . .") (footnote omitted); Note, *Recklessness and the Rule 10b-5 Scienter Standard After Hochfelder*, 48 FORDHAM L. REV. 817, 819 n.9 (1980) ("[T]he legislative history of § 10(b) does little to clarify the elements of a private cause of action, because the federal courts implied the action from § 10(b) and Rule 10b-5 using a statutory tort theory."). These commentators suggest that Congress was not concerned with the elements of a cause of action under Rule 10b-5. Motive, or scienter, is such an element.

For a discussion of Congressional purpose and legislative history of 42 U.S.C. § 1983, see Mead, 42 U.S.C. § 1983 *Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C.L. REV. 517 (1987) (arguing that the Court mistakenly rejected respondeat superior municipal liability under section 1983). Under a respondeat superior theory, municipal employers (such as police departments) would be responsible for the constitutional violations of their employees acting under color of state law. Motive would play no part. Professor Mead argues that "the Court unjustifiably relied on statutory silence to support its rejection of respondeat superior." *Id.* at 538. Thus, gaps, or silence in congressional history, resulted in the imposition of an artificial motive requirement in section 1983 jurisprudence. This result is not necessarily consistent with Congress's purposes in 1871, when it enacted 42 U.S.C. § 1983 to "extend its broad remedies to all persons deprived of federally protected rights under color of state law." *Id.* at 518-19 (42d Cong., 1st Sess. 68 app. (1871), quoting CONG. GLOBE).

The text and history of 42 U.S.C. § 1981 is also ambiguous. In *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), the Supreme Court held that section 1981 can be violated only by purposeful discrimination. Justice Rehnquist's opinion was based on a narrow reading of legislative history. He argued that because the statute did not refer to intent or purpose, and because it had been enacted in response to "blatant" instances of discrimination, Congress must have meant for it to cover only intentional acts. *Id.* at 388-89. Despite Justice Brennan's vigorous dissent, which attacked Rehnquist's reading of legislative history, *General Building Contractors* has not been forcefully challenged by commentators.

the statutes have given the Court a great deal of leeway in creating a federal common law based on motive. This jurisprudence, in its illumination of judicial visions of justice, also illustrates the difficulty of drawing from congressional silence an understanding of congressional vision.

Congressional visions of justice are difficult to pinpoint precisely because Congress itself is an institution, whose members are driven by unidentifiable structural biases and institutional problems, many of which are conspicuously absent from statutory text.⁴¹ It is only to the extent that congressional statutes like Title VII, sections 1981 and 1983, and Rule 10b-5 have explicit regulatory objectives that it is possible to determine congressional purpose. On one level, such enactments reveal certain anti-liberal tendencies in the Congress. As an institution, it responds to communities and constituencies as well as to individual problems. Congress may be less drawn to the individualist model, largely because its function is to consider broad social remedies. By comparison, adjudication is a different phenomenon, designed to resolve more specific questions. Nevertheless, there may be room for communitarian concerns in their resolution.

Given the gaps in statutory language, judicial determinations of congressional intent must also incorporate the Court's vision of justice. Recent case law exhibits very narrow interpretations of statutory language and purpose, a type of literalism that limits the potential effect of regulatory measures in an effort to protect private ordering and established entitlements.⁴² In one sense, this type of judicial approach is consistent with the liberal model, which, in its most basic form, rejects the legitimacy of any public policy goals that intrude on the inviolability of individual ends and preferences.⁴³ The Court's

Whether Congress meant for motive to be an element in section 1981 actions is by no means clear; however, the doctrine seems well settled.

41. Sunstein, *supra* note 32, at 433 ("[L]egislative intent, like legislative purpose, is largely a fiction in hard cases—a problem aggravated by the extraordinary difficulties of aggregating the 'intentions' of a multimember body.").

42. *Id.* at 484 (arguing that recent cases suggest a trend away from the protection of disadvantaged groups, a trend "perhaps rooted in a competing norm of private autonomy").

43. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 661 (1990) [hereinafter West, *Taking Preferences*] (criticizing a conservative, libertarian tendency to "take preferences as inviolable in the two spheres in which they are most clearly revealed—private contracting and public lawmaking"). Professor West does not equate conservative legalism with liberalism, although she does base a conservative deference to contractual preferences on libertarian principles. *Id.* at 660. This is not to suggest that the present Court exhibits judicial restraint, since in fact many recent cases reveal a conservative activism geared at the protection of existing entitlements. See West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 651-52 (1990) [hereinafter West, *Constitutionalism*] (arguing that libertarian judicial thought has been replaced by a conservative constitutionalism, which "is grounded in and united by an aversion to the redistributive normative authority of the political state and a

narrow reading of statutes reveals an attempt to achieve neutrality by allowing for the expression of individual rights and norms, but rejecting the imposition of collective values in the form of broad remedial readings of legislation.⁴⁴ Neutrality is an illusory goal, however, because in filling the gaps of statutory language, the Court inevitably draws on normative, contextual principles⁴⁵ to distribute public entitlements.⁴⁶ In their evaluations of Congressional motive, purpose, and history, courts make normative choices, which in recent years have favored the liberal values of individualism and autonomy. Judicial emphasis on intent is an example of that type of normative choice, born of gaps in Congressional direction and driven by a liberal voice.

E. Towards a Communitarian Definition of Responsibility: Bearing the Burden for the Unintended

Liberalism creates two bases of intent jurisprudence: (1) the Court's protection of the private realm, and (2) its narrow reading of remedial statutes. Both are continuing themes throughout this Comment. The first base justifies the centrality of motive. The Court can understand holding an individual liable for private, intentional acts, while it cannot understand holding an individual or an organization liable for the public problems of institutions. The second base explains the Court's methodology. By interpreting statutes narrowly, to impute liability only when the defendant intended to cause injury, the Court protects the status quo and limits notions of responsibility.

commitment to the preservation, or conservation, of existing social, economic, and legal entitlements and structures"). In rejecting judicial implementation of broad remedial statutes, the Court may not be deferring to preferences as expressed in federal statutes. Congress may have intended for the implementation of social reconstruction. In rejecting these goals, the Court succumbs to some, but not all, of liberalism's basic tenets. Consistent with the libertarian view, the Court rejects normative conceptions of the good imposed by the state. However, by neglecting, or detaching itself from legislative preferences, the Court contradicts a libertarian mandate through a conservative version of judicial activism.

44. For a discussion of liberalism's emphasis on neutrality, see M. SANDEL, *supra* note 6, at 1 (Sandel's definition of the thesis of liberalism shows the importance of neutrality: "[S]ociety, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not themselves presuppose any particular conception of the good . . ."); Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 255 (1989) ("The rule of law exists so long as such legal institutions and their associated practices (variously specified) are conducted in a reasonable way in accordance with the political values that apply to them: impartiality and consistency . . .").

45. See Sunstein, *supra* note 32, at 411.

46. See Sunstein, *supra* note 33, at 918-19 (arguing that the Court imposes its own requirement of neutrality that preserves the status quo and takes existing entitlement and distributions of wealth as inviolate and natural). Professor Sunstein warns that this definition of neutrality perpetuates a status quo that is artificial and therefore not deserving of such fervent protection. *Id.*

Section II analyzes the emergence of motive in police brutality, employment discrimination, and insider trading cases, all of which evince the lack of, and the need for, an effects-oriented judiciary. The police brutality and employment discrimination cases show how the Court uses motive to define breach of duty by an institution. The insider trading cases show how the Court uses motive to define duties to an institution. In each of these doctrinal areas, the Court's definition of responsibility is impoverished, because it overemphasizes motive, protecting individualist values and private ordering, with a reluctance to implement broad public policy prerogatives. In police brutality and employment discrimination cases, the Court personifies institutional defendants like workplaces and municipal police departments. Conversely, in insider trading cases, the Court treats the institution of the market as if it were merely an aggregate of individuals,⁴⁷ to be held liable only for their intentional acts against one another. This personification is a prerequisite to attributing motive, and it is consistent with liberalism's limited vision of responsibility. Section II shows how the Court's emphasis on the private, and its narrow statutory analysis, have resulted in the emergence of motive as a central principle that overrides the call for institutional restructuring. Section III analyzes the theoretical underpinnings of motive, suggesting that the Court's vision is conceptually flawed in its limiting and constraining embrace of liberalism. This Section attacks the underlying individualist assumptions that drive the intent standard, arguing that these assumptions distort our jurisprudence by emphasizing motive, choice, and purpose. Finally, Section IV suggests a model of jurisprudence that emphasizes an effects-oriented approach and a departure from the Court's rights-based vision, constructing an alternate definition of responsibility grounded in a critique of liberalism.

II. THE STANDARD OF INTENT IN PRACTICE

A. 42 U.S.C. § 1983 and *Negligent Training of Police Officers*

In recent years, plaintiffs have often invoked 42 U.S.C. § 1983's broad scope in attempts to curb instances of police brutality and other municipal abuses of power.⁴⁸ Congress enacted section 1983 to pro-

47. See M. DAN-COHEN, *supra* note 16, at 15 (criticizing legal theory's treatment of organizations as individual human beings, either through personification or through aggregation).

48. See generally *City of Canton v. Harris*, 489 U.S. 378 (1989) (action against a municipality for failing to provide necessary medical attention to a suspect in police custody); *City of Springfield v. Kibbe*, 480 U.S. 257 (1987) (action against a municipality, alleging negligent training of its police officers); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (action against a county, alleging that it had violated plaintiff's fourth and fourteenth

vide a federal remedy against violations of civil and constitutional rights by "persons" acting under color of state law.⁴⁹ This section examines how the Supreme Court's interpretation of section 1983 has stripped it of much of its usefulness in the context of police brutality cases. In its analysis of breach of duty under section 1983, the Court has developed a federal common law that emphasizes a narrow vision of responsibility, imputing liability only when police departments can be shown to have consciously and intentionally violated the constitutional rights of constituents. The Court's seminal interpretation of section 1983 in *Monell v. Department of Social Services*,⁵⁰ which set the stage for the personification of municipal defendants and for the imposition of a standard of intent, provides a perspective for analyzing recent case law involving allegations of negligent training of police officers.

1. *MONELL V. DEPARTMENT OF SOCIAL SERVICES: WHEN IS A CITY A PERSON?*

In *Monell*, the Supreme Court held that a municipality is a "person" who can be sued under section 1983 when the allegedly unconstitutional action implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.⁵¹ A municipality also may be liable if a constitutional violation occurs as a result of a municipal custom.⁵² The Court relied on the legislative debates surrounding the passage of section 1983 to conclude that Congress meant the terms "any person" to include both natural and legal persons.⁵³ Because only persons can have intent, the Court's reasoning set the stage for the personification

amendment rights); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (action against police officer and municipality, alleging deprivation of constitutional rights); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (action against a municipality that compelled pregnant women to take unpaid leaves of absences before they were medically required); *Rizzo v. Goode*, 423 U.S. 362 (1976) (action against Mayor of Philadelphia, its Police Commissioner, and others, alleging a pattern of police mistreatment of minority citizens).

49. Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

42 U.S.C. § 1983 (1988).

50. 436 U.S. 658 (1978).

51. *Id.* at 690.

52. *Id.*

53. *Id.* at 683. "Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690.

of a municipal defendant with the requisite state of mind essential to motivation: "In *Monell* the Court seemed to be looking for something parallel to an individual's decision to act, some indication of will or intent."⁵⁴

The contours of *Monell*'s policy or custom requirement have been the source of much of the Court's analysis since 1978. The facts of *Monell* did not call for a specific definition of policy or custom: A class of female employees sued the City of New York alleging that an official city policy compelled unpaid maternity leaves before they were medically required.⁵⁵ Because the policy in *Monell* was facially unconstitutional, the Court did not have to consider the parameters of other policies or customs that would give rise to section 1983 liability.⁵⁶ In cases of police brutality, however, the challenged policy or custom is rarely unconstitutional on its face. Usually, plaintiffs allege that a municipal policy of negligent training violated their rights⁵⁷—that a municipality applied a constitutional policy in an unconstitutional manner. The question invariably involves an analysis of whether a training, hiring, or operating procedure falls within the *Monell* parameters for municipal liability. Courts routinely apply *Monell*'s framework of a personified municipal entity to allegations of negligent training. Consequently, victims of police brutality must show that a person-like bureaucracy intended to do harm.⁵⁸

2. SECTION 1983 SINCE *MONELL*: WHEN DOES A CITY, AS A PERSON, MEAN TO DO HARM?

Monell demonstrates the conceptual problems that arise when courts attribute human, individualist characteristics to a bureaucratic

54. Whitman, *supra* note 22, at 238.

55. 436 U.S. at 661.

56. *Id.* at 695 ("[W]e have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be. . . . [W]e expressly leave further development of this action to another day.").

57. See generally *City of Springfield v. Kibbe*, 480 U.S. 257, 262 (1987) (respondent argued that the City of Springfield should be found liable under 42 U.S.C. § 1983 because it had a policy or custom of inadequately training its police officers); *City of Oklahoma City v. Tuttle*, 471 U.S. 811, 820 (1985) (respondent claimed that Oklahoma City's policy of police training and supervision resulted in inadequate training leading to constitutional violations).

58. Since *Monell*, the Court has addressed the issue of whether a state or territory can also be a "person" for purposes of section 1983. See *Ngiraingas v. Sanchez*, 110 S. Ct. 1737 (1990) (holding that neither the territory of Guam, nor one of its officers acting in an official capacity, is a person for purposes of section 1983); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (finding that neither state nor state officials acting in their official capacities are "persons" within the meaning of section 1983). This Comment is limited to section 1983 as it pertains to municipal abuses of power, only because state and territorial abuses of power have not engendered as developed a jurisprudence.

municipal entity. The effect is to emphasize motivation, a human characteristic, at the expense of structural problems that also may cause injury of constitutional dimensions.⁵⁹ Since *Monell*, the Court has exacerbated this incongruity in a series of decisions that have transformed municipal defendants into personified, thinking and feeling entities.

In *City of Oklahoma City v. Tuttle*,⁶⁰ the Court redrew the contours of municipal liability under section 1983. The plaintiff in *Tuttle* was the widow of a man shot by a police officer.⁶¹ The complaint alleged that the training curriculum of the Oklahoma City police force was grossly inadequate. The Supreme Court reversed the district court judgment because the jury instructions "allowed the jury to impose liability on the basis of such a single incident without the benefit of the additional evidence."⁶² The Court found it improper that the jury could establish liability without "proof of a single action taken by a municipal policymaker."⁶³

Had the Supreme Court simply reversed on the basis of the jury instructions, *Tuttle* would be of little significance. The opinion, however, is rich with language analyzing and defining the contours of municipal liability under section 1983. In discussing the facts of *Tuttle*, Justice Rehnquist's opinion noted that the link between the alleged negligent training and the violation of the plaintiffs' constitutional rights was tenuous.⁶⁴ According to Rehnquist, inadequate training creates liability only if it was the result of a "conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate."⁶⁵ Rehnquist's narrow interpretation of the contours of the word "policy" is dicta

59. See Whitman, *supra* note 22, at 226.

[T]he perspective adopted from tort encourages the Justices to convert the problem of institutional morality into one of individual morality; tort language leads them to look for individual choices or motives, for an actor or a "mind" that can be evaluated. . . . [T]he possibility of looking at an institution as a unit distinct from the separate individuals who compose it is not considered. For example, the Justices fail to see that injuries can be brought about quite inadvertently through the workings of institutional structures—through the massing or fragmentation of authority, or by the creation of a culture in which responses and a sense of responsibility are distorted.

Id.

60. 471 U.S. 808 (1985).

61. *Id.* at 811.

62. *Id.* at 821.

63. *Id.*

64. *Id.* at 823.

65. *Id.*

because the issue of jury instructions was dispositive.⁶⁶ However, *Tuttle* took *Monell*'s implicit personification of the defendant one step further by suggesting not just that a city can be a "person" for purposes of section 1983, but also that it must be capable of making "conscious choices."

Tuttle requires the categorization of a defendant municipality as a conscious, thinking human being.⁶⁷ The conscious choice requirement makes it very difficult to combat many institutional imperfections, like inertia, corruption, or mistake, even though they are often the driving force behind constitutional violations, and even though they are often bases for individual liability.⁶⁸ In addition, *Monell* and *Tuttle* both suggest a particular vision of the municipal defendant. Both cases assume that an institutional defendant cannot be culpable without intent, ignoring injury that stems from inertia, racism, and corruption.

The Court again addressed section 1983 and allegations of police misconduct in *Pembaur v. City of Cincinnati*,⁶⁹ which held that a decision by a municipal policymaker on a single occasion may give rise to liability.⁷⁰ The plaintiff in *Pembaur* was a physician who had been under investigation for fraudulently accepting checks from welfare agencies.⁷¹ He alleged that deputy sheriffs and police officers, pursuant to a prosecutor's instructions, violated his rights under the fourth and fifteenth amendments by forcibly searching his clinic without a search warrant.⁷² In its analysis, the Court emphasized that section 1983 liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."⁷³ The Court found that the prosecu-

66. See Whitman, *supra* note 22, at 239 ("The holding in *Tuttle* is not unremarkable given *Monell*'s rejection of vicarious liability. . . . The more interesting, and more troubling, aspects of the *Tuttle* opinions lie in the various remarks about what *would* be evidence of institutional error.").

67. *Id.* at 241 (Justice Rehnquist's plurality opinion assumed that liability could only be based on a municipal defendant's "state of mind."). See generally M. DAN-COHEN, *supra* note 16 (criticizing the law's personification of organizations).

68. See Whitman, *supra* note 22, at 242-43 ("No Justice in *Tuttle* welcomed the possibility of looking with some flexibility into the effects of institutional structures."); Note, *Municipal Liability for Police Misconduct: Must Victims Now Prove Intent?*, 97 YALE L.J. 448, 458 (1988) (arguing that a judicially imposed intent requirement reveals a fundamental misunderstanding of how municipalities cause constitutional violations).

69. 475 U.S. 469.

70. *Id.* at 480.

71. *Id.* at 471.

72. *Id.* at 474.

73. *Id.* at 483-84.

tor was such a policymaker, and that his order to forcibly enter Pembaur's clinic could give rise to section 1983 liability.⁷⁴ *Pembaur* shows that the Court is not always hostile to section 1983 claims, and that it is more willing to attach liability when wrongdoing can be attributed to an individual decision maker acting on conscious choices. This is what made *Pembaur* an easy case. After *Pembaur*, however, section 1983 jurisprudence was still unable to account for institutional violations as distinguished from those of individuals.

In *City of Canton v. Harris*,⁷⁵ the Court recognized that section 1983 liability did not have to be based on an unconstitutional policy.⁷⁶ Inadequate police training could trigger the policy or custom requirement, but only where "failure to train amounts to deliberate indifference."⁷⁷ In *Harris*, the plaintiff alleged a violation of her right to adequate medical care while in police custody.⁷⁸ The Court conceded that a policy that is not facially unconstitutional can give rise to section 1983 liability. However, the plaintiff must prove *intent* in the form of "deliberate indifference."⁷⁹ In explaining the "deliberate indifference" standard, the majority noted that it may be illogical to assume that a city would consciously and deliberately institute a policy of not training its officers.⁸⁰ The Court then conceded that structural imperfections may, in some circumstances, satisfy the "deliberate indifference" standard:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.⁸¹

Like its predecessors, *Harris* is logically, linguistically, and conceptually inconsistent with the notion of an institutional defendant.⁸² The section 1983 cases perceive municipal defendants through a private-rights lens. The defendant is a personified bureaucracy capable of making "conscious choices" with "deliberate indifference." For the Court, section 1983 does not impose a sense of responsibility on

74. *Id.* at 486.

75. 498 U.S. 378 (1989).

76. *Id.* at 387.

77. *Id.* at 388.

78. *Id.* at 381.

79. *Id.* at 388.

80. *Id.* at 390.

81. *Id.*

82. See generally Whitman, *supra* note 22 (criticizing the Court's section 1983 doctrine for its emphasis on motivational requirements and for its blindness to the nature of institutional defendants).

the participants of these institutions. As long as police officers act with good or even indifferent intentions, they and their institution are not held accountable for the structural imperfections of the collective. By personifying the institution of the police department, the Court misses the nonpersonal ways in which such an institution can bring harm to its constituents.⁸³ The Court's inability to distinguish between individual behavior and the interaction of individuals in a community or institution illustrates its blindness to the public dimensions of litigation. The Court can understand a private individual's intent, but not the public structural characteristics of the problem. The Court could punish a policymaker in *Pembaur* because it could easily link the plaintiff's injury to an individual's conscious, intentional decision. By contrast, in cases like *Tuttle* and *Harris*, where there was no individual motive, the Court adjudicated as if the relevant institutions were individuals. The Court's individualist, private-rights lens refuses to recognize a legal responsibility when the institution of a police department breaches its responsibility through negligent training and corruption. A narrow vision of responsibility based on intent imputes liability only in cases like *Pembaur*. If injury stems from the failure of the organization as a collective to fulfill its obligations, the Court offers no redress, since it finds no individual to blame.

The history and text of section 1983 leaves a lot of leeway for judicial interpretation and implementation of federal common law.⁸⁴ In its recent interpretations of section 1983, the Court has used its leeway to create a jurisprudence that protects a particular set of values, such as individualism, autonomy, and intent. Many commentators argue that these stringent, motive-centered requirements are inconsistent with legislative history and purpose.⁸⁵ Section 1983 was

83. *Id.* at 259.

The government, like other institutions, operates through structures that direct and dispose of power. These can injure grievously when deliberately used by individual human beings to do harm. And they can injure just as seriously through inertia, direction of energy to narrow goals, and oversight in the design of institutional structures. It is in this sense that focus on institutional structures may expand our sensitivity to previously disregarded harms.

Id.

84. Sunstein, *supra* note 32, at 421-22 ("[S]ection 1983 is silent on many important questions, including available defenses, burdens of pleading and persuasion, and exhaustion requirements. Because of the textual silence, judges must fill the gaps. To this extent, the statute delegates power to make common law.") (citations omitted).

85. For example, Professor Mead argues that the Court's rejection of *respondeat superior* liability under section 1983 is inconsistent with both the language and history of the statute). Mead, *supra* note 40, at 532. If *respondeat superior* liability were acceptable under section 1983, intent or motive would play no part because the defendant police department would be liable for the acts of an officer, by virtue of the employer-employee relationship, regardless of motive or intent. Another commentator notes:

passed in 1871 to combat the racially discriminatory acts of many southern states and in reaction to their failure to control violence perpetrated by the Ku Klux Klan.⁸⁶ Part of the problem is that Congress was not very clear. The drafters did not explain to what extent we are responsible today for the legacy of slavery, centuries of state promulgated discrimination, and the racial acts of the Ku Klux Klan. Liberal notions of motive recognize no duty to compensate for the effects of centuries of discrimination because they are not intentional acts of the present, even though they are born of intentional acts of the past. A communitarian perspective, however, would recognize a duty to combat the effects of past intentional discrimination, because the community still feels its effects.

It is much easier, however, to criticize a limited, motive-centered vision of responsibility than it is to define the contours of a broader notion of responsibility without motive. It is unlikely that we would impute responsibility for all acts of discrimination, corruption, and fraud. That would make every police department liable for the acts of any bad officer; every community responsible for the imperfections of its members; every one of us responsible for the failure of our societies. Collective responsibility is a greedy concept because it threatens to become global by holding each of us liable for the improper behavior of individuals whom we cannot influence or control.⁸⁷ However, liberalism's impoverished version of responsibility—of rights without a sense of civic duty—threatens our freedom as well.⁸⁸ The remainder of Section II analyzes two other doctrinal areas that grapple with the tension between narrow notions of responsibility based on motive, on the one hand, and the call for institutional restructuring, on the other. The discourse suggests a just and novel conception of responsibility.

[S]ection 1983 was created to give citizens a remedy where their local government failed to protect their rights. . . .

The legislative debates offer no hint that the authors of the provision wished to reach only the actions—as opposed to the omissions—of local authorities. . . .

Nor is there any indication that the statute was meant to cover only intentional deprivations of rights.

Note, *supra* note 68, at 460.

86. Mead, *supra* note 40, at 517-19.

87. See Fain, *Some Moral Infirmities of Justice*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY: THE MASSACRE AT MY LAI* 17, 21 (P. French ed. 1972).

88. See West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990). Professor West compares America's sense of freedom through individualism with Czechoslovak President Vaclav Havel's theory of freedom through a combination of individualism and civic responsibility. *Id.* at 63. She notes that "[t]he emergence of a vital liberal and individualistic tradition in Eastern Europe, firmly grounded not only in the rights tradition but also in an ideal of citizen responsibility, gives us at least the opportunity to reflect on such a needed change in focus." *Id.* at 102.

The challenge is to know how and when to impute liability in a manner which makes us accountable to one another, without instilling a very real fear that every one of our actions could make us liable for a breach of responsibility.

B. *Employment Discrimination*

1. THE PARAMETERS OF THE STANDARD OF INTENT: FROM *GRIGGS TO WARDS COVE*

A plaintiff alleging employment discrimination under Title VII can recover by showing either that discrimination occurred as a result of an improper motive or by showing that an employer's practices resulted in discriminatory effects.⁸⁹ This Section examines how recent case law has blurred the distinction between disparate impact and disparate treatment by introducing elements of intent into the disparate impact arena.⁹⁰ The introduction of motive has increased the burden for plaintiffs, who must attribute human characteristics, like motive

89. The Court acknowledges a disparate impact/disparate treatment dichotomy in Title VII jurisprudence. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 668 (1989) (Stevens, J., dissenting) ("Decisions of this Court and other federal courts repeatedly have recognized that while the employer's burden in a disparate treatment case is simply one of coming forward with evidence of legitimate business purpose, its burden in a disparate impact case is proof of an affirmative defense of business necessity."). This dichotomy is blurred through the imposition of a motivational requirement in disparate impact cases where motive ought not be an element of the plaintiff's claim. The Court is more willing to recognize the legitimacy of a claim alleging discriminatory purpose. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that where a plaintiff shows that her employer's actions were largely motivated by gender, the defendant must show by a preponderance of the evidence that it would have made the same decision without taking gender into account). Not all victims of discriminatory effects can bring disparate impact actions. The Court has refused to extend disparate impact jurisprudence far beyond the realm of Title VII. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (holding that liability under 42 U.S.C. § 1981 must be grounded on proof of intentional discrimination); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that discriminatory motive is a necessary element of constitutional employment discrimination actions challenging government employers).

90. Many scholars have noted and criticized the Court's imposition of motivational requirements in disparate impact employment discrimination cases. *See, e.g., Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (criticizing the Court's imposition of a motive requirement in employment discrimination cases brought under the fifth or fourteenth amendments); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987) (arguing that the Court's current notions of improper motive do not confront deeply ingrained racism, and that courts must speak to "the unconscious racism that underlies much of the racially disproportionate impact of governmental policy"); Fischl, *Job Bias Barrage*, LEGAL TIMES, Aug. 7, 1989, at S12 (arguing that the Supreme Court's employment decisions of the 1988-1989 term suggest an insensitivity to and misunderstanding of the nature of discrimination in employment, and criticizing the Court's view of discrimination as a series of discrete, intentional acts rather than as a structural, deeply ingrained social illness).

and good faith, to inanimate entities like corporate and institutional defendants.

Both employment discrimination and police brutality cases illustrate the Court's inability to understand and analyze institutional wrongdoing.⁹¹ In both contexts, the defendant described by the Court is not reflective of any experiential reality. It is an institution personified by human characteristics; an entity incapable of showing true motive. By emphasizing the defendant's intent rather than the impact of the defendant's actions, the Court ignores the practical realities of deeply imbedded structural racism and sexism,⁹² perpetuating a flawed vision of institutional behavior. Moreover, the Court's cultivation of the liberal emphasis on autonomy and individualism limits our notions of responsibility and discourages institutional restructuring.

In the early 1970's, the Supreme Court was more sensitive to the need to vindicate social wrongs inflicted on large minority interests. In *Griggs v. Duke Power Co.*,⁹³ the Court confronted a standardized test that effectively excluded minorities from certain employment positions. The Court held that the Civil Rights Act of 1964 prohibited the use of employment practices that are discriminatory in effect, regardless of the intent of the employer: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."⁹⁴

The Court emphasized the underlying purposes of Title VII⁹⁵ and the need to attack centuries of discrimination.⁹⁶ Its reasoning stressed the importance of ameliorating the status of the victim of discrimination, not to neutralize the behavior of the employer.⁹⁷ The *Griggs* Court attempted to do more than put a bandage on the prob-

91. See Whitman, *supra* note 22, at 276. See generally M. DAN-COHEN, *supra* note 16.

92. See Lawrence, *supra* note 90, at 322; Fischl, *supra* note 90, at 513.

93. 401 U.S. 424 (1971).

94. *Id.* at 431.

95. *Id.* at 429-30. The Court concluded that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.*

96. *Id.* at 430 (criticizing the use of standardized tests because they fail to account for the historical reality of segregation).

97. See Freeman, *supra* note 90, at 1052-57 (distinguishing between the Court's "victim" and "perpetrator" approaches to racial discrimination). The *Griggs* Court adopted a "victim" perspective, which suggests that the resolution of the problem of discrimination requires the removal of its associated structural conditions. See *id.* at 1093-99. After *Griggs*, the Court emphasized a "perpetrator" perspective that ignores the status of the victim and only attempts to neutralize specific violations. See *id.* at 1118.

lem of discrimination. It looked beyond the intent of the offending party in an attempt to restructure social attitudes by proscribing practices that contradict Title VII's mandate. *Griggs* is significant in its exposition of a type of reasoning that the Court has abandoned. Instead of focusing on the defendant's motive, the Court was decidedly teleological. It embraced a particular value (eliminating discrimination), and de-emphasized the autonomy of the defendant. Additionally, *Griggs* introduced a broad notion of responsibility to employment law. Employers would breach a legal duty if their policies resulted in a racial imbalance, regardless of their intent. The idea that employers are responsible for the racial make-up of their enterprises suggests that individuals might, in some circumstances, owe more than just good intentions to one another.

Since *Griggs*, the Court has gradually abandoned the victim perspective and its emphasis on structural discrimination. *McDonnell Douglas Corp. v. Green*⁹⁸ and *Washington v. Davis*⁹⁹ signaled the beginning of the Court's detachment from the broad reconstructive position it adopted in *Griggs*. Both *McDonnell Douglas* and *Washington* exhibit a disregard for institutional problems of race not attributable to motive or intent.¹⁰⁰ This methodology came full circle in *Wards Cove Packing Co. v. Atonio*,¹⁰¹ which established the parameters for the Court's intent jurisprudence in Title VII actions.

In *McDonnell Douglas*, the Court crystallized the burdens of proof for private, non-class action Title VII suits involving purposeful racial discrimination. Plaintiffs alleging racial discrimination must first establish a prima facie case by showing that they belong to a racial minority, that they were rejected in spite of their qualifications, and that their employer continued to seek applicants with the same qualifications. The burden then shifts to the employer who must show a non-discriminatory reason for the employee's rejection. If the employer meets that burden, the plaintiff can then attempt to show that the employer's excuse was pretextual.¹⁰² In *McDonnell Douglas*, an employee alleged that his discharge was racially motivated.¹⁰³ The framework of burdens of proof above was designed to determine

98. 411 U.S. 792 (1973).

99. 426 U.S. 229 (1976).

100. For a discussion of *Washington's* disregard for institutional racism independent of motive, see *infra* text accompanying notes 112-17. For a discussion of *McDonnell Douglas's* disregard for institutional racism independent of motive, see *infra* notes 105-07 and accompanying text.

101. 490 U.S. 642 (1989).

102. *McDonnell Douglas*, 411 U.S. at 802.

103. *Id.* at 792.

whether the plaintiff can show improper motive through its consequences. Recent cases, however, have transferred the *McDonnell Douglas* test to the disparate impact arena, so that plaintiffs who used to prevail through a *Griggs* showing of disparate impact are now forced to satisfy the elements of *McDonnell Douglas*'s motive-centered framework of shifting burdens.¹⁰⁴ *McDonnell Douglas* illustrates the Court's departure from *Griggs*'s effects-oriented approach to questions of discrimination. More importantly, however, *McDonnell Douglas*'s conceptual framework, originally designed for the disparate treatment plaintiff, has been transferred to the disparate impact arena.

McDonnell Douglas took the first step away from the effects-oriented approach of *Griggs* through a subtle shift in emphasis. Instead of focusing on the effects of the employer's practices, the Court looked at the intent and actions of the individual employer. The Court justified its deviation by distinguishing *McDonnell Douglas*: "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."¹⁰⁵ The Court distinguished the plaintiff in *McDonnell Douglas*, reasoning that he represented an individual claim against the discriminatory behavior of his employer and thus did not implicate broader social interests.¹⁰⁶ The Court's distinction is perplexing because the plaintiff in *McDonnell Douglas* was as much a representative of minority interests as were the plaintiffs in *Griggs*.¹⁰⁷ Moreover, *McDonnell Douglas* focused on motive not because the plaintiff represented individual interests, but because improper motive was the primary allegation of the complaint. The Court's unwillingness to see the plaintiff in *McDonnell Douglas* as a representative of legitimate collective interests uncovers its own latent hostility to issues of public, collective concern—a hostility that perpetuated the emergence of motive and intent standards. The Court's vision of the defendant suggests a partiality to autonomous interests over collective goals and, correspondingly, to individual choices over community efforts.

104. See *infra* notes 126-38 and accompanying text.

105. *McDonnell Douglas*, 411 U.S. at 806 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

106. *Id.*

107. The plaintiff-employee in *McDonnell Douglas* was a civil rights activist who participated in different types of demonstrations against his employer. *Id.* at 794. Plaintiffs in *Griggs* were a power company's employees alleging that certain standardized tests effectively excluded minorities from certain employment opportunities. *Griggs*, 401 U.S. at 426-28. The plaintiffs in both cases asserted and represented the concerns of large minority interests.

In *Washington v. Davis*,¹⁰⁸ the Court struck a much stronger blow to *Griggs* through a narrow reading of the equal protection clause of the fifth amendment. The issue in *Washington* resembled the one in *Griggs*. Plaintiffs, who were minority applicants for the Washington, D.C. police department, alleged that a standardized test used for employment purposes excluded a disproportionately high number of minority applicants.¹⁰⁹ *Washington*, however, was brought under the equal protection clause of the fifth amendment and not under Title VII.¹¹⁰ Although the parties did not raise the issue, the Court actively chose to consider the standards applicable in a constitutional claim as compared to those governing Title VII. The Court held that Title VII and the equal protection clause are driven by different standards, and that disproportionate impact alone is insufficient to establish liability in a constitutional action; proof of discriminatory racial purpose is necessary.¹¹¹

Washington greatly narrowed the scope of *Griggs*. Even though the case did not raise a Title VII question, the Court chose to consider the validity of the test under standards similar to those of Title VII.¹¹² The Court held that the employment test was valid under statutory standards because it was a good indicator of success in the police training program.¹¹³ *Griggs*, however, invalidated exclusionary testing procedures if they were unrelated to job performance, regardless of their impact on training programs.¹¹⁴ In *Washington*, there was no proven link between the test and job performance; nevertheless, the Court validated the test without relying on Title VII standards.¹¹⁵ Though *Washington* was not a Title VII case, the Court's analysis of the testing standards threatened the continued viability of Title VII in monitoring testing procedures.¹¹⁶ In its analysis, the Court ignored important aspects of structural discrimination. Under the Court's standard, tests can be invidiously discriminatory and still remain beyond statutory reach. They can, for example, test the same verbal skills in the entrance examination and in the training program, even if

108. 426 U.S. 229 (1976).

109. *Id.* at 235-36.

110. The plaintiffs in *Washington* could not bring their claim under Title VII because the statute was not applicable to federal employees at the time they filed the complaint. *See id.* at 238 n.10.

111. *Id.* at 245.

112. *Id.* at 249.

113. *Id.* at 251-52.

114. *Washington*, 426 U.S. at 266 (Brennan, J., dissenting); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

115. *Washington*, 426 U.S. at 249-50.

116. *See id.* at 270 (Brennan, J., dissenting).

high scores on these exams bear no relation to actual job requirements.¹¹⁷ By broadening the scope of permissible testing procedures with a discriminatory racial impact, and by eliminating the requirement of correspondence between testing procedures and job performance, the Court ignored structural biases and prejudices that allow discrimination to grow.

Washington exemplifies a focus on both motive and intent, and a shift from *Griggs*'s effects-oriented reasoning. The majority's vision of discrimination as stemming from conscious, purposeful sources is particularly significant because it has been recently transposed into the Title VII arena through *Wards Cove Packing Co. v. Atonio*.¹¹⁸ *Washington* not only limited the extra-Title VII implications of *Griggs*, but it also introduced a type of reasoning that would soon infiltrate and alter Title VII jurisprudence. In *Wards Cove*, the Supreme Court applied the *McDonnell Douglas* framework and the reasoning of *Washington* to mold the standard of intent in the context of disparate impact Title VII cases. Although *McDonnell Douglas* presumed intent as an element of the suit, and although *Washington* did not propose to set the standard for non-constitutional cases, the two set the stage for the Court's search for the defendant's motive in *Wards Cove*.

Wards Cove involved a disparate impact Title VII claim by non-white Alaskan cannery workers, alleging that their employer's hiring and promotion practices resulted in a racial stratification that denied them noncannery positions as skilled workers.¹¹⁹ The Court began its analysis by noting that Title VII proscribes facially neutral employment practices regardless of intent, and that this claim fell under the disparate impact paradigm.¹²⁰ The Court, however, then proceeded to undermine the disparate impact jurisprudence established by *Griggs*. First, the Court held that a showing of racial imbalance is insufficient to support a claim of disparate impact, and that a plaintiff must point to the specific employment practices that created the imbalance.¹²¹ *Wards Cove* thus makes it more difficult than ever to attack deeply imbedded discriminatory practices, even where they are numerous and pervasive, because they may be difficult to identify as specific incidents.¹²² Moreover, a plaintiff who must point out specific incidents may be forced to delve into the employer's cognitive process

117. *Id.*

118. 490 U.S. 642 (1989).

119. *Id.* at 647-48.

120. *Id.* at 645-46.

121. *Id.* at 657.

122. See Fischl, *supra* note 90, at S12.

in order to isolate the incidents in question. Evidence of racial disparity, or impact, is no longer sufficient as it was under *Griggs*.

Justice White's opinion in *Wards Cove* recognized the severity of the specific causation requirement. To justify the added burden, the majority noted that liberal discovery rules render employers' records easily accessible, and that federal regulations require some employers to maintain and disclose records regarding selection procedures and discrimination.¹²³ The Court's reasoning reflects a flawed assumption that all discriminatory practices are consciously undertaken in a way that can be recorded or determined, and specific enough to be identified. The assumption is flawed because our feelings about race are unconsciously shaped by a multitude of cultural factors.¹²⁴ If Title VII is to be used efficiently to combat racial discrimination, it must be directed at behavior that stems both from our cultural, structural biases, and from our specific conscious choices. By insisting on proof of specific instances of discrimination, the Court ignores the most deeply imbedded patterns of structural racism. The Court's reasoning also reflects its vision of the defendant as an individual who should be liable for conscious, identifiable choices, rather than as a bureaucratic, imperfect entity. The defendant becomes a reconstructed fiction that conceals bureaucratic realities and possesses a sense of motivation that may be unattributable to large corporate entities.¹²⁵

Wards Cove also altered the evidentiary burdens for employers and employees in disparate impact cases. First, if a plaintiff can satisfy the stiff causation requirement described above, the employer may counter with a business justification for the alleged practices,¹²⁶ instead of the previous standard, which required a showing of business necessity.¹²⁷ Second, the Court shifted previous burdens of proof by holding that the burden of persuasion on the business justification issue remains with the employee; the employer only has a burden of

123. *Wards Cove*, 490 U.S. at 657-58. The majority refers to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1-18 (1988). It is ironic that the regulatory obligations and liberal discovery rules that the majority uses to justify its stringent causation requirement do not even apply to the plaintiffs in this case since the employers did not preserve records of this type. *Id.* at 673 n.20.

124. Lawrence, *supra* note 90, at 322.

125. Professor Whitman notes:

Our struggle with the consequences of racism and sexism has made us aware that injuries do not flow solely from the acts of evil or careless persons. . . . [A] law that addresses only the isolated behavior of individuals, whether private or official, sees only some of the ways in which power can be abused, and the abuse of power is a subject with which the law is properly concerned.

Whitman, *supra* note 22, at 276.

126. *Wards Cove*, 490 U.S. at 658-59.

127. *See supra* note 89.

production.¹²⁸

Allowing the defendant employer to counter allegations of discriminatory impact with a business justification rather than a business necessity has dramatic consequences. The business justification rationale, borrowed from *McDonnell Douglas*, outlined the means for determining intent in cases alleging disparate treatment, as opposed to disparate impact.¹²⁹ When a plaintiff challenges an employer's motives, it is logical to allow that employer to respond with an alternative, permissible motivation to justify the alleged wrongdoing. In a disparate impact case, however, the plaintiff establishes a *prima facie* case simply by showing the effects of certain employment practices. Before *Wards Cove*, an employer had to respond by showing that the practices were necessary.¹³⁰ A mere business justification, however, allows an employer to propose a multitude of otherwise permissible reasons justifying the imbalance. By transferring *McDonnell Douglas*'s business justification framework into the disparate impact arena, the Court blurred the distinction between the two paradigms,¹³¹ permitting an employer to counter evidence of discrimination with a business justification instead of a business necessity. The natural consequence of *Griggs* would have been to treat *Wards Cove* as part of the disparate impact chain of cases, which dictate that employment practices with discriminatory effects can only be justified by business necessity.¹³²

Wards Cove further blurred the distinction between disparate impact and treatment by imposing the burden of persuasion on the business justification issue on the plaintiff. Again, the Court injected *McDonnell Douglas*'s disparate treatment analysis into the disparate impact paradigm. To determine intent in a disparate treatment case, *McDonnell Douglas* requires a *prima facie* showing of discrimination, after which the burden shifts to the employer to articulate a legitimate reason for the practice.¹³³ Because *McDonnell Douglas* was a disparate treatment case, the plaintiff retained the burden of showing an

128. *Wards Cove*, 490 U.S. at 659.

129. *Id.* at 667-68 (Stevens, J., dissenting). *McDonnell Douglas* held that once an employee established minority status, applied and qualified for a certain position, was rejected, and after the rejection, her employer continued to seek similarly qualified applicants, the burden shifts to her employer to show a "legitimate, nondiscriminatory reason" for her rejection. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

130. *Wards Cove*, 490 U.S. at 671-72 (Stevens, J., dissenting) ("This causal—almost summary—rejection of the statutory construction that developed in the wake of *Griggs* is most disturbing.").

131. *Id.* at 668-69.

132. *Id.* at 668.

133. *McDonnell Douglas*, 411 U.S. at 802.

improper motive, the primary allegation of the complaint.¹³⁴ In cases where the employee alleges discriminatory impact, however, it is illogical for the plaintiff to bear the burden of showing a lack of suitable justification for the employer's behavior. Thus the Court inappropriately applied the *McDonnell Douglas* rationale in *Wards Cove* by requiring the plaintiffs to work within the framework of burdens of proof designed to establish motive.¹³⁵ Once the employee establishes a prima facie case of disparate impact, the employer's response is in the nature of an affirmative defense for which the employer should bear the burden.¹³⁶ After *Wards Cove*, structural problems of racism and sexism are very difficult to attack under Title VII. Although there is not an explicit motive requirement, this showing seems necessary to win a Title VII case: Plaintiffs must point to specific practices that caused incidents of discrimination, and plaintiffs bear the burden of showing that the employer's proffered justifications are illegitimate.¹³⁷

Wards Cove illustrates how drastically the Court's vision of responsibility has changed. The contrast between *Wards Cove* and *Griggs* in terms of an employer's legally enforceable obligations is remarkable. *Griggs* made an employer a participant in a social call to end all forms of discrimination, imputing an affirmative responsibility to shape the racial stratification of the workplace and to rectify even unintended imbalances. *Wards Cove* all but eliminated the concept of responsibility established by *Griggs*. *Wards Cove* made an employer responsible only for chosen actions. No longer are employers responsible for the racial balance of the workplace; they are beyond reproach as long as their choices do not cause the harm. The evidence of discriminatory impact in *Wards Cove* was striking, eliciting comparisons to a plantation economy: housing and dining facilities, as well as jobs,

134. See *Wards Cove*, 490 U.S. at 670 (Stevens, J., dissenting) (explaining that in a disparate treatment case, there is no statutory violation unless the employer's purpose was illegitimate; "the employee retains the burden of proving the existence of intent at all times").

135. If intent has to be established by inference in a disparate treatment case, the *McDonnell Douglas* burdens of proof are used. *Id.* at 670. In a disparate impact case, however, the relevant inquiry centers on the effects of an employer's practices, not on his motivations. *Id.* Therefore, when an employee presents a prima facie case of disparate impact, an employer's only recourse is to justify the practice as a business necessity. *Id.* Such a justification, however, is an affirmative defense, for which the employer bears the burden of proof. *Id.*

136. *Id.*

137. See Fischl, *supra* note 90, at S13 ("The Reagan Court thus seems to conceive of disparate-impact theory as a device for uncovering hidden discriminatory motives—not one for eliminating the discriminatory consequences of unexamined institutional practices, as the Court had emphasized in *Griggs* and its progeny.").

were divided along racial and ethnic lines.¹³⁸ Nevertheless, the Court refused to impute responsibility. Instead, the Court focused on whether the plaintiffs could point to specific instances of discrimination and a lack of justification for them.

2. BEYOND MOTIVE: STATUTORY INTERPRETATION AND THE LIMITS OF ACTIONABLE DISCRIMINATION

Much of the Court's recent statutory interpretation related to employment discrimination reflects the use of private rights norms to interpret statutory text narrowly.¹³⁹ Recent cases exemplify two related trends: (1) narrow readings of statutory text with little regard for public policy; and (2) a vision of discrimination as a series of single, individually perpetrated intentional acts rather than as a structural, institutional problem.

In *Patterson v. McLean Credit Union*,¹⁴⁰ the Supreme Court narrowly interpreted 42 U.S.C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts." In *Patterson*, the Court held that section 1981 does not proscribe racial discrimination in all aspects of contractual relations, and that the scope of the statute is limited to discrimination at the time of contract formation.¹⁴¹ The Court refused to expand the scope of section 1981 to any employment practices after the formation of the contract. Furthermore, it confirmed previous doctrine by requiring a showing of intent: "[T]he question under § 1981 remains whether the employer, at the time of the formation of the contract, in fact intentionally refused to enter into a contract with the employee on racially neutral terms."¹⁴²

In *Patterson*, a black former employee of a credit union sued her former employer when she was discharged after working there for ten years. She alleged that her former employer had violated 42 U.S.C. § 1981 by harassing her, failing to promote her, and discharging her because of her race.¹⁴³ The Court held that the right to make contracts does not extend to conduct, discriminatory or not, after contract formation.¹⁴⁴

138. *Wards Cove*, 490 U.S. at 663-64 n.4 (Stevens, J., dissenting).

139. See, e.g., Sunstein, *supra* note 32, at 484.

140. 109 S. Ct. 2363 (1989).

141. *Id.* at 2372.

142. *Id.* at 2376-77. In *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), the Court held that section 1981 claims require proof of intentional discrimination. *Patterson* merely followed a well-settled doctrine in confirming an intent requirement.

143. *Patterson*, 109 S. Ct. at 2368-69.

144. *Id.* at 2372-73.

Patterson uncovers a misconception in the Court's vision of discrimination. By limiting the plaintiff's claim to circumstances surrounding contract formation, the Court implies that discrimination can always be discerned as one or more distinctive episodes, linked to an identifiable time frame. The inference is that discriminatory conduct that occurs after contract formation is separate, and does not stem from invidious discrimination that existed when the contract was formed.

The Court's reasoning can lead to ludicrous results. Recently, in *Perry v. Command Performance*,¹⁴⁵ the Third Circuit applied the reasoning of *Patterson* in a non-employment context, holding that a white beautician would not be liable under section 1981 for refusing to serve a black client unless the black customer could prove that the contract for services was formed when she arrived for the appointment, since that is when the discernible instance of discrimination took place.¹⁴⁶ If the contract was formed over the telephone, the plaintiff would have no action, since discrimination would not have occurred at the time of contract formation.¹⁴⁷ What the Court's reasoning in *Patterson* failed to grasp is that discrimination that occurs during contract formation often has a resonant effect, causing injury long after the contract is formed—injury that stems from invidious discrimination. *Perry* illustrates the limited reach of section 1981 after *Patterson*: seemingly non-discriminatory conduct at time of contract formation can be a veil for insidious discrimination that very much affects the execution, if not the formation, of the contract.

Like *Washington v. Davis*, *Patterson* demonstrates the Court's reluctance to expand protection against discrimination beyond Title VII. The Court is cautious in its quest for equal opportunity. It attaches liability only in those settings where conscious discriminatory practices are readily apparent and easily classified under specific statutes. The result is unfortunate because section 1981 covers many employment scenarios that are not protected by Title VII.¹⁴⁸ The

145. 913 F.2d 99 (3d Cir. 1990).

146. *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990).

147. *Id.* at 101. The court conceded that even if the contract was formed at the time the appointment was made by telephone, the court could find that the contract was grounded on discriminatory terms. *Id.* at 102. For example, the contract may have been conditioned on the availability of a hairdresser who would treat black customers. *Id.* Such a condition would presumably violate section 1981. *Id.* The court emphasized nonetheless that discrimination would have to be linked to *contract formation*, irrespective of blatant discriminatory behavior after the contract was formed. *Id.*

148. See Fischl, *supra* note 90, at S13 (noting that section 1981 can reach beyond Title VII to encompass (1) businesses with fewer than fifteen employees, (2) awards of damages beyond back pay, and (3) non-employment contractual relations like education).

majority's selection of "the most pinched reading of the phrase 'same right to make contract' "¹⁴⁹ exemplifies the type of narrow statutory interpretation that protects existing entitlements, limiting the scope of the statute's potential beneficiaries.¹⁵⁰

The Court demonstrated a similar type of formalism in *Lorance v. AT&T Technologies*,¹⁵¹ which held that the limitations period in a lawsuit arising out of a facially neutral seniority system begins to run when the allegedly discriminatory practices are adopted, not when their effects are felt.¹⁵² The plaintiffs in *Lorance* were women employed by AT&T Technologies.¹⁵³ Until 1979, the company calculated seniority on the basis of years spent in the plant.¹⁵⁴ A collective-bargaining agreement signed in 1979, altered the system by determining seniority not on the basis of plantwide service, but on the basis of time spent as a tester.¹⁵⁵ The plaintiffs in this lawsuit became testers between 1978 and 1980; they were demoted in 1982 based on their low seniority, although they would not have been selected for demotion under the previous seniority system.¹⁵⁶ They alleged that tester positions had traditionally been held by men, but that many women became testers in the 1970's, and that the 1979 alteration was an attempt to protect incumbent male testers.¹⁵⁷

The Court classified plaintiffs' claims as alleging an intentional discriminatory alteration of contractual rights that occurred in 1979, when the defendant company eliminated those rights.¹⁵⁸ According to the Court, the plaintiffs' actions accrued at that time.¹⁵⁹ The majority's reasoning ignored the reality that employees may not know whether they will be adversely affected until the effects of the discriminatory act are felt.

Lorance illustrates the Court's reluctance to recognize the very nature of discrimination in employment.¹⁶⁰ By asking employees to anticipate and speculate on future discrimination, the Court ignored

149. *Patterson*, 109 S. Ct. at 2379 (Brennan, J., dissenting).

150. Commentators have criticized the Court's attempts to limit the scope of statutes designed to benefit disadvantaged groups. See Sunstein, *supra* note 32, at 483 (arguing that courts should interpret legislative gaps in favor of disadvantaged groups).

151. 490 U.S. 900 (1989).

152. *Id.* at 911.

153. *Id.* at 901.

154. *Id.* at 901-02.

155. *Id.* at 902.

156. *Id.*

157. *Id.* at 903.

158. *Id.* at 905.

159. *Id.* at 911.

160. The claim in *Lorance* alleged gender and not racial discrimination in employment. *Id.* at 903. Title VII covers both types of discrimination:

the sexism embedded in the defendant company's seniority system. Furthermore, it reinforced the notion of discrimination as a phenomenon characterized by single incidents among individuals. According to the Court, discrimination occurred when the alteration to the seniority policy took place, and not when the plaintiffs were demoted. As in *Patterson*, the Court identified discrimination as the single event rather than as a continuing wrong reflective of a structural bias. *Patterson* and *Lorance* exhibit remarkably similar visions of discrimination as a non-structural, incident-specific phenomenon that occurs in discrete moments, like contract formation (*Patterson*) and alterations of seniority rights (*Lorance*). In both cases, discrimination is intentional, so that the search for motive continues. In both cases, the Court neglects the resonance of discriminatory effects.

The employment discrimination cases are factually and doctrinally complex. The factual complexity stems from the wide variety of situations that can arise in the workplace. The doctrinal confusion, however, stems at least in part from the Court's inability to understand the structural characteristics of discrimination in employment.¹⁶¹ By insisting on a showing of motive, the Court personifies and distorts institutional defendants accused of discrimination.¹⁶² Liberal visions of justice may be driving the Court's search for someone whose motive is to blame, since liberal principles refuse to impute

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988).

Gender and race discrimination present different sociological and economic problems. However, for purposes of this Comment, gender and race discrimination reveal the same type of misunderstandings on the part of the Court. In both *Patterson* and *Lorance*, the Court viewed discrimination as a series of distinct incidents, contract formation or alteration of seniority rights, rather than as an institutional problem. See *Patterson*, 109 S. Ct. at 2372-73; *Lorance*, 490 U.S. at 911.

161. Congress responded swiftly to the Court's 1989 employment discrimination decisions. The Civil Rights Act of 1990, H.R. CONF. REP. NO. 101-856, 101st Cong., 2d Sess. (1990), was designed to overrule many of these decisions. On October 24, 1990, the Senate was one vote short of the two-thirds necessary to override a Presidential veto of the Civil Rights Act. See Barrett, *Bush Veto of Job-Bias Bill is Sustained; Action is Called a 'Temporary Setback,'* Wall St. J., Oct. 25, 1990, at A22, col. 1.

162. For a discussion of the law's misunderstanding of organizational behavior and malfunctioning, see M. DAN-COHEN, *supra* note 16.

responsibility for structural, communal problems. A collective notion of responsibility would resemble the Court's holding in *Griggs*.¹⁶³ Just as in the police brutality cases, however, there must be some limit to such an alternative vision of responsibility. It is equally unsatisfying to blame employers for every racist attitude in the workplace, including those which they may have done nothing to promote.

Liberalism's incident-specific vision of discrimination may suggest a method for arriving at a new definition of responsibility. Because the Court sees institutions as nothing more than the sum of their individual parts, it also sees discrimination as nothing more than the sum of individual instances of wrongdoing, characterized by discernible events like contract formation (*Patterson*), alterations of seniority rights (*Lorance*), or specific incidents that can explain a discriminatory impact (*Wards Cove*). Perceptions of motivated, incident-specific discrimination are consistent with liberalism's autonomy driven basis. They suggest why the Court's vision is at best blurred and at worst blind to issues of structure and public concern, which may have little to do with either motive or with individual instances of discrimination. In order to shape a more complete concept of responsibility, it is necessary to first reconstruct judicial perceptions of institutions. If courts can shift from a personified and individualized vision of institutions to one that incorporates their opaqueness,¹⁶⁴ and the structural characteristics of institutional behavior, they may arrive at a more accurate definition of institutional problems like discrimination in the workplace and corruption in the police department. A more complete picture of institutional malfunctioning may lead to a more complete vision of responsibility, one that holds us accountable for more than our evil motives. If, for example, the Court can see discrimination as more than a series of specific, intentional acts, and if it can incorporate history, structure, inertia, and indifference into its definition of discrimination, then it may begin to require more from individuals than simply good intentions. Through this understanding, a new definition of responsibility emerges, one that begins by looking not at the individual, but at the institution—at the community—and

163. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that Title VII prohibits the use of employment practices that are discriminatory in effect). *Griggs* typifies a broader, collective notion of responsibility, since it imputes an obligation on the employer to create a workplace community free of discriminatory consequences of employment practices. *Id.* at 432. The Court was less concerned about the employer's motivation than it was about the institutional make-up of the workplace.

164. See M. DAN-COHEN, *supra* note 16, at 38 ("Because of their complexity and formality, organizations are both opaque and impermeable: their acts and decisions are not the straightforward product or expression of any particular individual will . . .").

by inferring from the realities of institutional behavior the components of individual and collective accountability.

C. *Insider Trading*

Insider trading case law reveals how the Court uses motive to define duties to the market in a manner consistent with liberalism's narrow vision of responsibility. This Section focuses on cases brought under Rule 10b-5¹⁶⁵ which was promulgated under section 10(b) of the Securities and Exchange Act of 1934.¹⁶⁶ The contours for civil and criminal liability under Rule 10b-5 have been the source of a complex body of case law since the Rule was enacted in 1942. The past fifteen years exhibit a trend that is somewhat analogous to the patterns explored in the police brutality and employment discrimination contexts. Since 1975, a series of Supreme Court decisions has limited the scope of relief to 10b-5 plaintiffs by strictly interpreting the elements of the Rule.¹⁶⁷ The defendant, in most of these cases, is ordinarily not a corporate or municipal institution. Nevertheless, Rule 10b-5 jurisprudence contains many familiar themes, including an explicit imposition of a standard of intent, and a vision of the market as an aggregate of individual participants, whose responsibility to one another is defined by a narrow range of duties.¹⁶⁸

165. 17 C.F.R. § 240.10b-5 (1989). Rule 10b-5 provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

166. 15 U.S.C. §§ 78a-11 (1988).

167. See *Dirks v. SEC*, 463 U.S. 646 (1983) (holding that liability under Rule 10b-5 is based on the breach of specific fiduciary duties); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (holding that liability under Rule 10b-5 must be based on a showing of the defendant's scienter—an intent to defraud); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (holding that only purchasers and sellers of securities have standing to bring a Rule 10b-5 action).

168. Most of the jurisprudence generated by Rule 10b-5 presumes that insider trading has detrimental effects on the market and on investors. Courts emphasize an unfairness to shareholders and harm to the corporation due to a loss of confidence and consequential loss of value. Other cases emphasize that insider trading may hinder market efficiency. See *Blue Chip Stamps*, 421 U.S. at 765-67 ("Manipulators who have in the past had a comparatively free hand to befuddle and fool the public . . . are to be curbed . . .") (quoting 78 CONG. REC. 2,271 (1934)); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 851-52 (2d Cir. 1968) ("The core of

1. SCIENTER AND OTHER LIMITATIONS

In *Ernst & Ernst v. Hochfelder*,¹⁶⁹ the Court held that a plaintiff must show scienter, defined as an "intent to deceive, manipulate, or defraud,"¹⁷⁰ in order to prevail on a Rule 10b-5 action. The Court emphasized the statutory language of section 10(b), which prohibits the use of "any manipulative or deceptive device or contrivance."¹⁷¹ Noting that the word "manipulative" connotes willful conduct, the Court justified its decision by narrowly interpreting the statute, in an opinion void of any policy analysis.¹⁷²

In *Ernst & Ernst*, plaintiffs were customers of First Securities Company, a small brokerage firm that retained the defendant, Ernst & Ernst, as an accounting firm.¹⁷³ The president of First Securities initiated an allegedly fraudulent security scheme, in which the plaintiffs invested.¹⁷⁴ When the fraud became evident, the plaintiffs sued Ernst & Ernst under a theory of negligent nonfeasance, alleging that they aided and abetted First Securities in violating the securities laws.¹⁷⁵ While rejecting the plaintiffs' claim, the Court ignored any policy implications of its analysis. For example, the Court might have analyzed the need to promote the use of professional financial experts in the market. Instead, the opinion was based exclusively on a formalistic statutory construction argument.¹⁷⁶

Ernst & Ernst is instructive for several reasons. Most importantly, it establishes the standard of intent more explicitly in the insider trading arena than in any other. Secondly, the opinion's strict construction of the statute reflects a disregard for public policy and for the effects of the decision. Much like the Court's decision in *Patterson v. McLean Credit Union*,¹⁷⁷ *Ernst & Ernst* illustrates an emphasis on narrow statutory interpretations that disregard the broad

Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities transactions."), *cert. denied*, 394 U.S. 976 (1969). There are commentators who maintain, however, that insider trading has positive consequences. See generally H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966).

169. 425 U.S. 185 (1976).

170. *Id.* at 193.

171. *Id.* at 195 (citing 15 U.S.C. § 78j (1970)).

172. See *id.* at 197; see also R. CLARKE, *CORPORATE LAW* 327 (1986) ("In a sense, the opinion's narrowness is odd, because a reasonable argument could have been made that a scienter requirement was a good filter for straining out vexatious litigation.").

173. *Ernst & Ernst*, 425 U.S. at 188-89.

174. *Id.*

175. *Id.* at 190.

176. See R. CLARKE, *supra* note 172, at 327.

177. 491 U.S. 164 (1989). See *supra* notes 140-50 and accompanying text.

remedial purposes of the relevant statute.¹⁷⁸ The dissents in both cases condemned the Court's blindness to the consequences of such narrow visions. In *Patterson*, Justice Brennan decried the Court's confinement of 42 U.S.C. § 1981 to "the narrowest possible scope" which is "antithetical to Congress' vision of a society in which contractual opportunities are equal."¹⁷⁹ Similarly, the dissent in *Ernst & Ernst* complained that the majority confined Rule 10b-5 and frustrated the victim's recovery through a narrow and restrictive reading of the statute:

The Court's opinion, to be sure, has a certain technical consistency about it. It seems to me, however, that an investor can be victimized just as much by negligent conduct as by positive deception, and that it is not logical to drive a wedge between the two, saying that Congress clearly intended the one but certainly not the other.¹⁸⁰

Ernst & Ernst illustrates the Court's preference for literalism over policy analysis. The Court emphasized the language of section 10(b), arguing that Congress meant to combat only intentional misconduct by use of words like "manipulative," "deceptive," "device" and "contrivance."¹⁸¹ The Court recognized that the legislative history of the 1934 Act is "bereft of any explicit explanation of Congress' intent";¹⁸² nevertheless, the Court rested its decision on the language of the statute and a reconstructed version of congressional intent, refusing to speak to the broad policy objectives of the Act.¹⁸³ Given the legislative silence, and the gaps in the text of the statute, the Court's decision to narrow, rather than broaden, the scope of section 10(b) indicates particular value judgments.¹⁸⁴ The Court's choice reveals: (1) a liberal emphasis on individual ends and intentions over structural problems created by misinformation, (2) a limited vision of responsibility to the institution of the market, and (3) a conservative political swing favoring existing power structures in the market who regularly benefit from inside information.¹⁸⁵

178. *Ernst & Ernst*, 425 U.S. at 218 (Blackmun, J., dissenting) (asking whether "investor victims, such as these, are ever to have relief under the federal securities laws that I thought had been enacted for their *broad, needed, and deserving benefit*") (emphasis added).

179. *Patterson*, 109 S. Ct. at 2379 (Brennan, J., dissenting).

180. *Ernst & Ernst*, 425 U.S. at 216 (Blackmun, J., dissenting).

181. *Id.* at 197.

182. *Id.* at 201.

183. *Id.* at 206 ("There is no indication that Congress intended anyone to be made liable for such practices unless he acted other than in good faith. The catchall provision of § 10(b) should be interpreted no more broadly.").

184. See, e.g., Sunstein, *supra* note 32, at 422 ("When the language of a statute does not specify its implementing rules, textualism is incomplete: courts must look elsewhere.").

185. See generally Sunstein, *supra* note 33, at 918-19 (analyzing the Court's tendency to

The contours of insider trading liability have been defined by other restrictions on plaintiffs attempting to vindicate the anti-fraud provisions of the 1934 Act. In *Blue Chip Stamps v. Manor Drug Stores*,¹⁸⁶ the Court held that only purchasers and sellers of securities in an allegedly fraudulent transaction or scheme have standing to seek judicial protection under Rule 10b-5.¹⁸⁷ On one level, *Blue Chip Stamps* illustrates the Court's disregard for public-rights concerns.¹⁸⁸ The Court used standing to ensure that only actual, private participants in the market got relief, ignoring the general market effects of insider trading and the statutory objective of parity of information. The Court's holding is illogical as a matter of public policy because plaintiffs who buy or sell stock based on false statements are not necessarily injured more seriously than those who are similarly tricked into not buying by the same information.¹⁸⁹ Together with *Ernst & Ernst*'s scienter requirement, the standing limitation ensures that only plaintiffs who suffer an identifiable, private rights type of injury get relief from defendants who actually intended to cause injury. Again, the Court favors that which separates us—our individual choice and our individual injury—from that which connects us—a need to promote parity of information and fairness in the market. Additionally, *Blue Chip Stamps* suggests that the Court views the institution of the

justify the preservation of market entitlements under the guise of neutrality). Although Professor Sunstein does not analyze Rule 10b-5 jurisprudence, he argues that courts tend to view neutrality as a constitutional requirement, and that courts define neutrality as the protection of existing social and economic entitlements. *Id.*

186. 421 U.S. 723 (1975).

187. *Id.* at 754-55. The Court's dramatic limitation of the potential class of plaintiffs was surprising in light of the unique fact scenario of *Blue Chip Stamps*. The defendant was a stamp company that, pursuant to a consent decree, offered a favorable price for its own stock to the victims of its prior anticompetitive practices. *Id.* at 725-26. Two years later, one of the victims who had not bought the stock brought suit under 10b-5, alleging that the company had given a pessimistic prospectus of the stock in order to discourage trading at the artificially low price set by the consent decree. *Id.* at 726-27. The facts were sufficiently atypical to warrant a narrow holding. However, the Court instead used *Blue Chip Stamps* to make a radical statement about the legitimacy of many plaintiffs' claims. See R. CLARKE, *supra* note 172, at 319-20 ("[T]he *Blue Chip* plaintiffs had a plausible claim only because of a fairly peculiar fact situation. . . . *Blue Chip* is as significant for its effort to adopt a flat, objective, tough rule as it is for a holding about the purchaser-seller limitation."); Brooks, *Rule 10-b5 in the Balance: An Analysis of the Supreme Court's Policy Perspective*, 32 HASTINGS L.J. 403, 419 (1980) (stating that *Blue Chip Stamps* revealed the Supreme Court's attitude towards Rule 10b-5 private damage actions: "[U]nless a plaintiff can support the maintenance of an action on policy grounds favored by the Court—the absence of vexatious litigation, overall fairness to the defendant, and the promotion of efficient judicial administration—the merits of the action will not be adjudicated").

188. See Brooks, *supra* note 187, at 423 (suggesting that commentators had foreseen an ascendancy of public advocacy, which was rejected by the Court in Rule 10b-5 litigation).

189. R. CLARKE, *supra* note 172, at 320.

market as an aggregate of individuals,¹⁹⁰ recognizing only those who actually buy and sell. The market, however, is a more complicated organization, affecting and injuring all sorts of individuals, those who buy and sell, as well as those who rely on information to refrain from buying and selling. The Court's limited individualist vision prevents it from penetrating the opaqueness¹⁹¹ of the market.

2. SPECIFIC FIDUCIARY DUTIES AND THE DISLOCATION OF THE DEFENDANT

The Supreme Court has further emphasized the private rights aspects of insider trading actions by requiring proof of the breach of specific duties to specific individuals, thus rejecting liability based on the breach of duty to the market as a whole.¹⁹² These cases are significant not because they define the standard of intent, since that was explicitly imposed by *Ernst & Ernst*, but because, by emphasizing the individualism and autonomy of the defendant, they define the individual's obligations to the institution of the market narrowly.

The Court's search for specific duties was not predicated on widespread lower court case law. In fact, the Second Circuit explicitly endorsed a broader responsibility to the trading community in *SEC v. Texas Gulf Sulfur Co.*,¹⁹³ which held that anyone possessing material inside information must either disclose it or abstain from trading.¹⁹⁴ The court emphasized that Rule 10b-5 "is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information."¹⁹⁵

Thus, because *Texas Gulf Sulphur* recognizes a duty to the market as a whole, a defendant can be held liable upon a mere finding of trading on material, nonpublic information, regardless of the defendant's status as an insider or outsider. *Texas Gulf Sulphur's* equal access approach is consistent with a public-rights model of communi-

190. See M. DAN-COHEN, *supra* note 16, at 15-16 (analyzing a view of organizations as aggregates of persons, and suggesting that such a view leads to a perception of all institutions as individuals, denying the complexity of many of our organizations).

191. See *id.* at 38 (describing organizations as "opaque").

192. See generally *Dirks v. SEC*, 463 U.S. 646, 660 (1983) (holding that the tippee's fiduciary duty to the shareholders of a corporation not to trade on inside information arises only when the insider breached a fiduciary duty in disclosing the inside information to the tippee); *Chiarella v. United States*, 445 U.S. 222, 230 (1980) (holding that liability for nondisclosure "is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction").

193. 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

194. *Id.* at 848.

195. *Id.*

tarian duties as opposed to individual, private-rights obligations. As such, *Texas Gulf Sulphur* is antithetical to subsequent Supreme Court reasoning. Compare the similar perspectives of *Griggs v. Duke Power Co.*¹⁹⁶ and *Texas Gulf Sulphur*. In both, courts emphasized the broad brush of congressional intent, the need to remove certain social inequities, and a communal prerogative of equality of access and opportunity.¹⁹⁷ Like *Griggs*, *Texas Gulf Sulphur* focuses on an attempt to restructure and achieve a social objective—in this case, parity of information. Both decisions are teleological; they explicitly embrace and promote certain values. Both are daring in their conception of responsibility, suggesting that any participant in an institution is accountable for the fairness of its operation. Today's Supreme Court, in contrast, is much more concerned with breaches of individual obligations than with a collective vision.¹⁹⁸

The Supreme Court has repeatedly rejected the equal access theory and the notion of a broader fiduciary duty. In *Chiarella v. United States*,¹⁹⁹ the Court held that liability for nondisclosure of material nonpublic market information "is premised upon a duty to disclose arising from a relationship of trust and confidence,"²⁰⁰ and that absent an insider or fiduciary relationship with sellers of stock, the purchaser had no duty to disclose nonpublic market information.²⁰¹ In *Chiarella* the defendant was an employee of a large printing company, who identified the targets of potential corporate takeovers from documents he handled as a "markup man."²⁰² Without disclosing his knowledge, Chiarella purchased stock in the target companies and sold for a profit after a takeover began.²⁰³

Emphasizing that Chiarella had no duty to the sellers of the target companies' stock, the Court explicitly rejected the notion of a broader duty to the market.²⁰⁴ *Chiarella* is significant primarily

196. 401 U.S. 424 (1971). See *supra* notes 93-97 and accompanying text.

197. In *Griggs*, the Court emphasized that Title VII was designed to "achieve equality of employment opportunities and remove barriers." *Griggs*, 401 U.S. at 429-30. Similarly the Second Circuit in *Texas Gulf Sulphur* argued that Rule 10b-5 is designed to promote another type of equality, parity of information: "[A]ll investors should have equal access to the rewards of participation in securities transactions." *Texas Gulf Sulphur*, 401 F.2d. at 851-52.

198. See Phillips, *An Essay: Six Competing Currents of Rule 10b-5 Jurisprudence*, 21 IND. L. REV. 625, 629-631 (1988) (describing *Texas Gulf Sulphur* as a decision driven by an idealist vision and noting that changes in the Court's personnel have curtailed the trend toward the ideal of equal information among market participants).

199. 445 U.S. 222 (1980).

200. *Id.* at 230.

201. *Id.* at 232-33.

202. *Id.* at 224.

203. *Id.*

204. Justice Powell stated:

because of its explicit rejection of *Texas Gulf Sulphur's* equal access theory. The Court drew the defendant's actions not in terms of a broad remedial statutory purpose like parity of information, but rather through a narrow framework of specific duties, viewing the defendant as an employee of *X* with a duty to *Y*, rather than as a market participant inextricably tied to millions of other participants. This approach is extremely private rights-based: Rather than focusing on a common social objective, the Court disposed of the case on an individual obligation rationale.²⁰⁵ Moreover, the Court rejected any kind of responsibility beyond an intentional breach of a fiduciary duty.

*Dirks v. SEC*²⁰⁶ reinforced *Chiarella's* emphasis on specific duties owed by autonomous and disinterested market participants. In *Dirks*, the Supreme Court held that

a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.²⁰⁷

Dirks, an officer of a brokerage firm, had received information from a former officer of an insurance company, alleging that the assets of the

The Court of Appeals said that its 'regular access to market information' test would create a workable rule embracing 'those who occupy . . . strategic places in the market mechanism.' These considerations are insufficient to support a duty to disclose. A duty arises from a relationship between the parties . . . and not merely from one's ability to acquire information because of his position in the market.

Id. at 231 n.14 (citations omitted).

205. Two concurring and two dissenting opinions were filed in *Chiarella*. Only Justice Blackmun's dissent (in which Justice Marshall joined) adopted the notion of a general fiduciary duty to the market in order to promulgate the parity of information objective implicit in Rule 10b-5. "I would hold that persons having access to confidential material information that is not legally available to others generally are prohibited by Rule 10b-5 from engaging in schemes to exploit their structural informational advantage through trading in affected securities." *Id.* at 251. Chief Justice Burger reconciled the tension between limited duties and statutory objectives with a misappropriation theory:

As a general rule, neither party to an arm's-length business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relation. . . . [T]he rule should give way when an informational advantage is obtained, not by superior experience, foresight, or industry, but by some unlawful means.

Id. at 239-40. See Note, *Outsider Trading—Morality and the Law of Securities Fraud*, 77 GEO. L.J. 181, 193 (1988) ("The misappropriation theory bridges a gap left by *Chiarella*, extending liability to outsiders who use nonpublic information in violation of a duty owed to someone other than the shareholders of the corporation whose shares are traded.").

206. 463 U.S. 646 (1983).

207. *Id.* at 660.

insurance company were vastly overstated as a result of fraudulent practices.²⁰⁸ Dirks discussed the information with a number of clients and investors, many of whom sold their holdings in the insurance company.²⁰⁹ Dirks was therefore both a tippee and a tipper. The Supreme Court expanded the notion of specific duties, enunciated in *Chiarella*, to find derivative liability for tippees. The Court explained that a tippee is under an obligation to disclose or abstain from trading only if the insider breached a fiduciary duty in tipping.²¹⁰ That fiduciary duty, in turn, is determined by the purpose of the tip. If the insider benefits personally from a disclosure, the insider breaches a fiduciary duty; but absent some personal gain on the part of the insider, there is not a derivative breach.²¹¹

Dirks adds an additional dimension to the jurisprudence of motive and intent in insider trading cases. There is an added element of motivation in determining whether the insider initially breached a fiduciary duty, since the court must determine whether or not he gained a personal benefit.²¹² "The device employed in this case engrafts a special motivational requirement on the fiduciary duty doctrine. This innovation excuses a knowing and intentional violation of an insider's duty to shareholders if the insider does not act from a motive of personal gain."²¹³ Scrutiny into the insider's purpose in giving information to the tippee is a secondary intent requirement that further divorces the defendant's duty from the remedial purposes of Rule 10b-5. Combined with *Ernst & Ernst*'s scienter requirement, the Court's search for motive in the insider's initial tip in *Dirks* creates dual hoops of premeditation through which the plaintiff is forced to jump.

208. *Id.* at 649.

209. *Id.*

210. *Id.* at 662.

211. *Id.* at 662-64.

212. *Id.* at 663. The Court distinguished the scienter requirement in *Ernst & Ernst* from the "objective criteria" used to define the insider's fiduciary duty through a personal benefit test that is independent of intent:

[T]he initial inquiry is whether there has been a breach of duty by the insider. This requires courts to focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings.

Id. However, to determine whether the insider breached the initial fiduciary duty, the Court had to explore his "deceptive or fraudulent conduct." *Id.* at 663 n.23. The words "deceptive or fraudulent conduct" carry similar connotations to the words "manipulative or deceptive device," which the Court in *Ernst & Ernst* found to imply intent. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). *Dirks* thus implicates a secondary intent requirement for derivative tippee liability.

213. *Dirks*, 463 U.S. at 668 (Blackmun, J., dissenting).

Dirks is also instructive because it reflects a complete departure from the public-rights orientation of the Second Circuit in *Texas Gulf Sulphur*.²¹⁴ The reasoning of *Texas Gulf Sulphur* would have invoked a broader fiduciary duty to promote parity of information and to prevent shareholder injuries. Instead, the Supreme Court took a step further away from the public element of insider trading by focusing on motivational elements rather than the resulting injury and deterrence of future malfeasance and nonfeasance. Like *Chiarella*, *Dirks* limits the duties owed by market participants to one another, consistent with liberalism's tendency to maintain a distance between individuals, protecting their separateness and forsaking the ends of the institution of the market.

3. ATTEMPTS AT EFFECTS-ORIENTED REASONING

The Court implicitly endorsed a more effects-oriented approach through its tacit approval of the misappropriation theory used by the Second Circuit in *United States v. Carpenter*.²¹⁵ Carpenter, a news clerk for the *Wall Street Journal*, served as a messenger for a conspiracy between an employee of the newspaper, who tipped information that was to appear in the financial column, and stockbrokers who traded securities accordingly.²¹⁶ The newspaper's policy deemed confidential the news that was to be printed in the column.²¹⁷ The Second Circuit convicted Carpenter under the theory that Rule 10b-5 proscribes an employee's misappropriation of material nonpublic information from his employer.²¹⁸

The Second Circuit endorsed a broad, remedial role for the misappropriation theory, inconsistent with the Supreme Court's previous disregard for public policy prerogatives: "[T]he misappropriation theory more broadly proscribes the conversion by 'insiders' or others of material non-public information in connection with the purchase or sale of securities."²¹⁹ The court explicitly rejected the specificity of duties enunciated in *Chiarella* and *Dirks*:

214. The dissent suggests a more effects-oriented approach: "The fact that the insider himself does not benefit from the breach does not eradicate the shareholder's injury. . . . The duty is addressed not to the insider's motives, but to his actions and their consequences on the shareholder." *Id.* at 673-74.

215. 791 F.2d 1024 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987). The Supreme Court implicitly endorsed the misappropriation theory by confirming Carpenter's conviction on Rule 10b-5 grounds. "The Court is evenly divided with respect to the convictions under the securities laws and for that reason affirms the judgment below on those counts." 484 U.S. at 24.

216. *Carpenter*, 791 F.2d at 1026.

217. *Id.*

218. *Id.*

219. *Id.* at 1029.

Clearly, Congress has understood its predecessors to have delineated illegal conduct along the lines not simply of relationships to corporations and duties arising thereunder, as developed by the line of cases through *Cady*, *Roberts* and *Dirks*. Rather, Congress apparently has sought to proscribe as well trading on material, nonpublic information obtained not through skill but through a variety of 'deceptive' practices, unlawful acts which we termed 'misappropriation.'²²⁰

The misappropriation theory, though more remedial and prospective than the narrow approaches of *Dirks* and *Chiarella*, nevertheless includes a motivational component. The defendant's actions still must be deceptive in terms of intent. In an attempt to exclude the efforts of market analysts and other professionals from the reach of misappropriation liability, the court introduced an element of motivation into its analysis. Defendants who intentionally steal information are liable, while professional financial experts who merely find information are not. The motive behind the gathering of information is dispositive.²²¹ Though the misappropriation theory suggests a broader remedial outlook, it is not based as much on parity of information as it is on gaining information by fraud and breach of confidentiality. After *Carpenter*, the search for intent and specific duties continues, largely because the *Ernst & Ernst* intent requirement and the *Dirks*' fiduciary duty analysis subordinate the misappropriation theory.²²² In *Carpenter*, the court determined liability by looking not at the consequences of the fraud, but rather at the defendant's means of getting the information, to decide whether his intent was to defraud.

In *Basic Inc. v. Levinson*,²²³ the Supreme Court recently exhibited an effects-oriented approach to the question of disclosure under Rule 10b-5. The Court held that preliminary merger negotiations are material and warrant disclosure when "there is a substantial likeli-

220. *Id.* at 1030-31.

221. See *Chiarella v. United States*, 445 U.S. 222, 242-43 (1979) (Burger, C.J., dissenting) (Under the misappropriation theory, "market specialists would not be subject to a disclose-or-refrain requirement in the performance of their everyday market functions. . . . [T]rading is accomplished on the basis of material, nonpublic information, but the information has not been unlawfully converted for personal gain.").

222. One commentator notes:

Chiarella and *Dirks* required the Second Circuit to base its legal holding on the breach of a fiduciary duty and precluded the court from finding a fiduciary duty to the market. Thus, the court's inability to recognize a duty to the market arising out of efficiency concerns has necessitated an awkward and conceptually inconsistent cross-pollination of injuries and duties in order to establish liability.

Note, *supra* note 205, at 208-09 (citations omitted).

223. 485 U.S. 224 (1988).

hood that a reasonable shareholder would consider it important in deciding how to vote."²²⁴ For our purposes, however, *Basic* is more relevant for its second holding.²²⁵ Instead of requiring each plaintiff to show reliance on the defendant's misrepresentations, the Court endorsed a presumption of reliance on the integrity of the market: "Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."²²⁶ First, the Court recognized that reliance is an element of any Rule 10b-5 claim, because it provides the causal connection between the defendant's misrepresentation and the plaintiff's injury.²²⁷ The Court then emphasized that buyers rely on the integrity of the price set by the market, but that integrity is lost by public, material misrepresentations.²²⁸

The Court's endorsement of a presumption of reliance supported by the fraud-on-the-market theory is significant because it recognizes structural consequences of fraud in the context of a duty to the integrity of the market. As such, *Basic* embraces a more effects-oriented type of reasoning to serve the underlying purposes of Rule 10b-5. This distinguishes *Basic* from the narrower approach of *Dirks* and *Chiarella*, which rejected any reasoning directed at the structural consequences of the defendants' actions. *Basic*, however, is still shaped by a notion of the defendant as an autonomous individual whose intent is of paramount importance. Plaintiffs still must show scienter linked to specific fiduciary duties, in accordance with *Ernst & Ernst*, *Dirks*, and *Chiarella*.

The jurisprudence of Rule 10b-5 exemplifies the Court's emphasis on the private. Liability attaches when it can be linked to illicit motives (*Ernst & Ernst*) and when individuals violate individual duties (*Chiarella*, *Dirks*). The class of potential plaintiffs narrows in an attempt to protect existing market structures as if they were natu-

224. *Id.* at 231 (quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

225. *Id.* at 247.

226. *Id.* The defendant, *Basic Inc.*, had agreed to merge with Combustion Engineering, Inc. *Id.* at 227-28. During the two-year course of negotiations, *Basic* made three public statements denying the existence of any merger negotiations. *Id.* at 228. Former stockholders, who had sold their stock during the period between the first denial of pre-merger negotiations and the suspension of trading just prior to the merger, brought suit under Rule 10b-5. *Id.* The Supreme Court was thus faced with two questions: (1) whether the pre-merger negotiations were material, warranting disclosure, and (2) whether a stockholder who traded after the issuance of the materially misleading information may invoke a presumption of reliance on the integrity of the market. *Id.* at 226. For purposes of this discussion, the second issue is most notable because it indicates a vision of duty to the market.

227. *Id.* at 243.

228. *Id.* at 247.

ral and inviolate (*Blue Chip Stamps*).²²⁹ Furthermore, by rejecting broader duties to the market, the Court remains faithful to its liberal, narrow vision of responsibility. It regards the institution of the market as an aggregate of disinterested individuals with limited obligations to one another. *Basic* may have opened the door to a structural, effects-oriented vision of the market for information. Nevertheless, liability under Rule 10b-5 is still defined through liberalism's lens, through a motive-centered, narrow vision of responsibility.

III. AUTONOMY, COMMUNITY, AND THE COURT'S THEORY OF JUSTICE

This Comment has analyzed the manifestation of motive and intent in three doctrinal areas. It has examined the link between motive and the Court's disregard for issues of structure, and has postulated that the Court's protection of the private sphere and of existing entitlements stems from a liberal conception of justice. This section probes the philosophical underpinnings of the Court's vision, exposing some of its conceptual shortcomings as sources of intent jurisprudence. An examination of the tensions within the Court's theoretical spectrum provides the perspective for an analysis of case law manifestations.

A. *Political Theory and Jurisprudence: The Court's Theoretical Framework*

1. RAWLS AND MODERN LIBERALISM

There is a tension in modern political theory between a liberal emphasis on individual rights and a teleological focus on the role of community and cooperation.²³⁰ In 1971, John Rawls promulgated

229. For criticism of this type of judicial reasoning, see Sunstein, *supra* note 33, at 874-75 (arguing that the Court's philosophy mistakenly uses the status quo as the baseline for measuring departures from neutrality).

230. See Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479, 479 (1989) ("It is widely thought that liberalism as a political theory is hostile to, or anyway not sufficiently appreciative of, the value or importance of community, and that liberal tolerance, which insists that it is wrong of government to use its coercive power to enforce ethical homogeneity, undermines community."); Gutmann, *supra* note 13, at 308 ("We are witnessing a revival of communitarian criticisms of liberal political theory. Like the critics of the 1960s, those of the 1980s fault liberalism for being mistakenly and irreparably individualistic."); Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 217, 218 ("[I]n philosophy as in life, the new faith becomes the old orthodoxy before long. . . . [T]he rights-based ethic has recently faced a growing challenge from a different direction, from a view that gives fuller expression to the claims of citizenship and community than the liberal version allows.").

Civic Republicans also criticize liberalism, but they emphasize political dialogue and participation more than communitarian goals. See Fallon, *supra* note 13, at 1697 (arguing that republicanism emphasizes "that human beings are essentially political animals, that they can

the contemporary notion of the primacy of the "right" over the "good" in a book that revolutionized modern liberalism.²³¹ Rawls emphasized a Kantian vision of the importance of individual rights and autonomy, of humanity free from government interference.²³² He argued that each individual is entitled to his or her own conception of the good.²³³ Accordingly, government should be neutral with respect to competing conceptions of the good in order to allow for autonomy:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by the greater good for others. . . . [I]n a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.²³⁴

Rawls's liberalism exhibits a distinguishable, if reluctant, justification for the imposition of certain subjective values and for certain intrusive government activities. Although Rawls's theory is based on government neutrality and individual liberty, he argues that a neutral framework must be defined by some normative considerations:

We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent conception of justice. We can regard these convictions as provisional fixed points which any conception of justice must account for if it is to be reasonable for us.²³⁵

Rawls is also distinguished by his justification of social and eco-

fulfill their natures only by participating in self-government, and that the most important aims of the political community should be to promote virtue among the citizenry and to advance the common good." In contrast, most versions of liberalism "insist that individual human beings are ultimate subjects of moral value.").

231. J. RAWLS, *supra* note 6; see Gutmann, *The Central Role of Rawls's Theory*, *DISSENT*, Summer 1989, at 330, 338-39 ("Among twentieth-century philosophical works Rawls's theory may be our most common possession.").

232. See J. RAWLS, *supra* note 6, at 251-57.

233. *Id.* at 92-93 ("The main idea is that a person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances.").

234. *Id.* at 3-4.

235. Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 228 (1985). Rawls also notes that

[j]ustice as fairness holds that, with regard to the constitutional essentials, and given the existence of a reasonably well-ordered constitutional regime, the family of very great political values expressed by its principles and ideals normally will have sufficient weight to override all other values that may come into conflict with them.

Rawls, *supra* note 44, at 242-43.

conomic reform within the liberal paradigm.²³⁶ Rawls's theory is based on several conceptional tools. The first he calls "the original position,"²³⁷ which is a hypothetical condition where all beings are deprived of all knowledge of the contingencies of their lives, such as race, sex, and economic status. From within this veil of ignorance, one can choose a set of governing principles that is inherently fair because the principles are derived independently of subjective social contexts. "The principles of justice are chosen behind a veil of ignorance. . . . Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain."²³⁸ In the original position, according to Rawls, a principle of distribution would be chosen.²³⁹ This "difference principle"²⁴⁰ would emphasize the notion that "the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society."²⁴¹ The difference principle has characterized Rawls as the author of "a liberalism for the least advantaged, a liberalism that pays a moral tribute to the socialist critique."²⁴² Thus, in spite of his emphasis on autonomy and procedure, Rawls justifies mechanisms for progressive economic distributions.

Rawls's theory is not so individualist that it denies the role of community and cooperation. Community, however, is subordinate to, and derivative of, the individual.²⁴³ Rawls's emphasis on an original position characterized by mutual disinterest²⁴⁴ does not preclude the choice of community as an individual's end. However, his vision of justice never compromises the primacy and autonomy of the individual, and community becomes one value among many that individuals can choose.²⁴⁵ "The question then becomes whether individuals

236. Ryan, *Communitarianism: The Good, the Bad, & the Muddy*, DISSENT, Summer 1989, at 350, 350 ("Academic political theory has for two decades operated under the shadow of John Rawls's wonderful book, *A Theory of Justice*; that book provides a sustained and often moving defense of welfare-state liberalism.").

237. See J. RAWLS, *supra* note 6, at 17.

238. *Id.* at 12.

239. *Id.* at 14-15.

240. *Id.* at 75.

241. *Id.*

242. Gutmann, *supra* note 231, at 339.

243. M. SANDEL, *supra* note 6, at 64 ("On Rawls' view, a sense of community describes a possible aim of antecedently individuated selves, not an ingredient or constituent of their identity as such. This guarantees its subordinate status.").

244. J. RAWLS, *supra* note 6, at 13 ("One feature of justice as fairness is to think of the parties in the initial situation as rational and mutually disinterested.").

245. M. SANDEL, *supra* note 6, at 64 ("[C]ommunity must find its virtue as one contender among others within the framework defined by justice, not as a rival account of the framework itself.").

who happen to espouse communitarian aims can pursue them within a well-ordered society, antecedently defined by the principles of justice, not whether a well-ordered society is *itself* a community (in the constitutive sense)."²⁴⁶

Although Rawls's liberalism emphasizes the primacy of individual rights and autonomy, it also recognizes the need for some basic normative values, the importance of fair distribution of economic resources, and the potential for community.²⁴⁷ Therefore, it may allow for a greater sense of interdependence than does the Court's philosophy, which is driven by a vision of the exclusivity of individualism. While Rawls allows for the potential for community, the Court's emphasis on the private excludes community from judicial concern. The Court's emphasis on autonomy and individualism may not be all that consistent with the liberal paradigm. The Court belies Rawlsian notions of neutrality by protecting existing entitlements, which may not be derived from intrinsically fair procedures like those of Rawls's original position. The argument is that Rawlsian neutrality is, in fact, illusory, and that the Court, by nature a politically charged entity, has advanced a conservative agenda.²⁴⁸ The primacy of the right over the good is transposed to the Court's focus on intent over public policy. Instead of achieving neutrality, the Court has become an instrument of a conservative agenda and an obstacle to social restructuring.

2. THE CRITICS OF LIBERALISM

Although liberalism appeals to conceptions of liberty, equality, and control over our own lives, its critics decry its glorification of autonomy and its blindness to the community ties that constitute and shape us.²⁴⁹ Critics argue that an individual can never make choices like those called for by the original position, because, removed from our ties to those around us, we are completely dislocated.²⁵⁰ "To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth."²⁵¹ Commu-

246. *Id.*

247. *See, e.g.,* Rawls, *supra* note 44, at 244.

248. *See* West, *Constitutionalism*, *supra* note 43, at 641 (arguing that conservative constitutionalism has replaced libertarian principles in the current Supreme Court).

249. *See, e.g.,* Kelman, *A Critique of Conservative Legal Thought*, in *THE POLITICS OF LAW* 436, 438 (D. Kairys rev. ed. 1990) ("[Libertarians] do indeed posit that we can imagine some set of authentic individual desires antedating and independent of the existence of community.").

250. M. SANDEL, *supra* note 6, at 178.

251. *Id.* at 179.

nitarianism attacks the basic assumptions of liberalism; most importantly, it rejects the notion that individual rights are prior to collective ends. Instead, communitarians argue that we are defined by our communal ties, and that together we share common goals. Communitarianism suggests a return to a teleological vision of society that encourages civic virtue through friendship and a cooperative search for the common good. Its appeal for a resurgence of community values is nostalgic: "When politics goes well, we can know a good in common that we cannot know alone."²⁵²

The communitarian critique is itself vulnerable to criticism, primarily because it does not provide a viable, tangible alternative to the liberalism it scrutinizes.²⁵³ Commentators have argued that communitarianism proposes "fraternity rather than justice as the fundamental social value."²⁵⁴ As such, communitarianism is susceptible to parochialism. Community can result in the positive fusion of different conceptions of the good; just as easily, however, it can succumb to petty prejudices and unjust manifestations of the collective will. Moreover, the concept of fraternity seems somewhat utopian.²⁵⁵

Communitarianism, however, has served as a springboard for other critics of liberalism who base their analysis in legal theory. The tension between liberalism and communitarianism, for example, has been roughly transposed to legal theory in the relationship between liberal legalists and critical legal theorists.²⁵⁶ In addition, the recent advent of civic republicanism stems largely from the communitarian

252. *Id.* at 183.

253. *But cf.* Hirshman, *The Virtue of Liberty in American Communal Life*, 88 MICH. L. REV. 983 (1990) (noting that while critics of liberalism have argued for the importance and primacy of community, they have failed to articulate a theory of the common good that explains the ends to which the community should aspire, and suggesting an end, or telos, to which the community should aspire in the virtue of liberty).

254. Ryan, *supra* note 236, at 350.

255. See Reich, *A Question of Geography*, NEW REPUBLIC, May 9, 1988, at 23; *Liberalism and Community*, NEW REPUBLIC, May 9, 1988, at 22, 23.

In real life, most of us don't live in communities at all in the traditional sense (kids running over lawns, corner soda fountains, town meetings, PTAs) . . . the liberal task is not to add legitimacy to the spurious notion of geographic community. It is to seek new ways of defining and fostering community that transcend borders of race, ethnicity, and class.

Id.

256. See West, *supra* note 35, at 5.

Liberal legalists, in short, describe an inner life enlivened by freedom and autonomy from the separate other, and threatened by the danger of annihilation by him. Critical legal theorists, by contrast, tell a story of inner lives dominated by feelings of alienation and isolation from the separate other, and enlivened by the possibility of association and community with him.

Id.

critique of the isolated individual in liberalism.²⁵⁷ Civic republicans propose a dialogue-based society, where political community is promoted through citizen participation in the making of the law.²⁵⁸ Frank Michelman, for example, criticizes a liberalism-based jurisprudence that excludes groups of people and encourages a passive, detached judiciary whose decisions seem predetermined.²⁵⁹ Civic republicans focus on the transformative nature of law, and on the need for individuals to participate in political action and lawmaking.²⁶⁰

The civic republican and communitarian arguments are similar, particularly in comparison to liberalism.²⁶¹ Therefore, they are vulnerable to similar attacks. Some argue that civic republicanism succumbs to anthropomorphism; it supposes that communal life is the life of an outside person, that it has the same shape, encounters the same moral and ethical watersheds and dilemmas, and is subject to the same standards of success and failure, as the several lives of the citizens who make it up.²⁶²

Communitarianism's notion of a constitutive community is susceptible to a similar attack. Like civic republicanism, it integrates communal with individual experiences, claiming that "community must be constitutive of the shared self-understandings of the participants and embodied in their institutional arrangements, not simply an attribute of certain of the participants' plans of life."²⁶³

Other critics of republicanism note the arguments previously examined in the context of communitarianism. Though civic republicanism de-emphasizes a notion of the common good and focuses instead on positive freedom,²⁶⁴ it shares with communitarianism a

257. See Fallon, *supra* note 13, at 1696.

258. See Michelman, *supra* note 6, at 1495 ("[R]econsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities, by inclusion of those who have been excluded, enhances everyone's political freedom.").

259. *Id.* at 1496-97.

260. *Id.* at 1505 ("Republican thought . . . demands some way of understanding how laws and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law.").

261. The line distinguishing civic republicanism from communitarianism is a difficult one to draw. Communitarianism is an "animating source" of republicanism. Fallon, *supra* note 13, at 1696. Civic republicanism draws from other sources as well, most notably a historical challenge to the primacy of natural rights theorists like John Locke. *Id.* There are similarities between civic republicanism and liberalism as well. See, e.g., West, *supra* note 88, at 60-61 ("Modern civic republicanism rests on a synthesis of aspects of the classical republicanism partly embraced but largely rejected by the drafters of the Constitution with some of the pluralistic values and traditions of modern liberalism.").

262. Dworkin, *supra* note 230, at 492.

263. M. SANDEL, *supra* note 6, at 173.

264. Fallon, *supra* note 13, at 1725.

utopian view of a society that can achieve this sort of political transformative dialogue. At some level, both theories may overlook the complexity of today's society. One commentator notes that "[t]oday we live in a radically diverse society, rife with subcultures. . . . Meaningful participation in national politics is no longer open to most of us."²⁶⁵

3. BALANCING THE THEORETICAL TENSION

The canvass of political theory extends from extreme individualism to an equally extreme emphasis on community. Perhaps we reflect and possess the tenets of each theory within the spectrum, so that both liberalism and communitarianism have a place in the reflection of political theory through jurisprudence. A choice between liberalism and communitarianism is unnecessary, and indeed impossible, if we all possess characteristics of each:

The Rule of Law itself values and protects our autonomy and minimizes the dangers that are consequent to our vulnerability. That's its official role. But it also has an unofficial, underground, subterranean potentiality, only occasionally recognized, but nevertheless always *there*. The Rule of Law is a product of our dread of alienation from the other and our longing for connection with him.²⁶⁶

If we simultaneously and paradoxically long for both autonomy and community, then each theory serves a purpose in jurisprudence.²⁶⁷ As the next section shows, the flaw in the Court's philosophy is that in its emphasis on autonomy, it completely disregards communitarian notions—emphasizing the private at the expense of the public. The conceptual leap from individualism to intent is a short one:

From the standpoint of individualism I am what I myself choose to be. I can always, if I wish to, put in question what are taken to be the merely contingent social features of my existence. I may biologically be my father's son; but I cannot be held responsible for what he did *unless I choose implicitly or explicitly to assume such responsibility*.²⁶⁸

The prominence of motive as a source of liability may stem

265. *Id.* at 1734.

266. West, *supra* note 35, at 52 (juxtaposing the legal theories of liberalism and critical legal studies with those of cultural and radical feminists in a study of the inadequacies of male-dominated jurisprudence to women's values).

267. See C. BERRY, *THE IDEA OF A DEMOCRATIC COMMUNITY* 15 (1989) ("[The] democratic community that constitutes an alternative to the excessive individualism of liberal capitalism will preserve and transcend some elements of the liberal order.").

268. A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 220 (1981) (emphasis added).

largely from liberalism's failure to articulate a tangible definition of responsibility. Communitarianism and civic republicanism, on the other hand, are grounded on a much richer definition of responsibility. Both theories suggest that an individual is constituted and shaped by a surrounding community, that individual motive and communitarian motive must at some level converge. This suggests an unduly burdensome definition of responsibility, one that would impute liability on the community as a whole whenever any member of the community acts improperly. It would make every individual somewhat responsible for the effects of our society's past and present racism, corruption, and indifference. The challenge is to define a communitarian theory of responsibility that rests somewhere between the totalitarianism of a world where we are at all times responsible to and for one another; and the world we find ourselves in today, where mutual detachment and separation render us incapable of owing or expecting anything from our neighbors.

B. *The Court's Philosophical Vision as Reflected in Case Law*

1. THE PERSONIFICATION OF THE DEFENDANT: AN EMPHASIS ON
LIBERALISM AND INTENT

The Court's liberal vision reconstructs, personifies, and privatizes defendants by emphasizing individualist characteristics such as motive,²⁶⁹ and dislocating the defendant from structural and contextual realities of racism, sexism, and corruption. The police brutality and employment discrimination cases exemplify the Court's tendency to personify corporate and municipal defendants. In the section 1983 context, this personification of institutional entities began with the Supreme Court's decision in *Monell v. Department of Social Services*,²⁷⁰ which held that a municipality is a person for purposes of section 1983.²⁷¹ *Monell's* progeny reinforced the notion of a city as a person with decisionmaking power and with the capacity to feel deliberate indifference.²⁷² Similarly, the employment discrimination cases illustrated a vision of the corporate defendant as a person. In *Wards Cove Packing Co. v. Atonio*,²⁷³ the Court insisted that a Title VII plaintiff must point to specific instances of discrimination as opposed to general discriminatory impact.²⁷⁴ In justifying that employers'

269. Motive may be an illogical notion in cases of corporate and municipal defendants. See *supra* Section II.

270. 436 U.S. 658 (1978).

271. *Id.* at 690. See *supra* notes 50-59 and accompanying text.

272. *City of Canton v. Harris*, 489 U.S. 378 (1989).

273. 490 U.S. 642 (1989).

274. *Id.* at 657. See *supra* notes 118-38 and accompanying text.

records are often an accessible documentary source of specific incidents,²⁷⁵ the Court envisioned a large corporate entity as an individual capable of making conscious, discernible choices. The personification of institutional defendants facilitated the imposition of the standard of intent, because people can have motivation, while inanimate entities cannot.²⁷⁶

The personification of the defendant is a conceptual flaw that stems from the Court's adoption of liberalism's emphasis on the individual and on autonomy. The individuals' right to choose her own ends is central to liberalism.²⁷⁷ Thus, the Court searches for a defendant's motives, even where the defendant is not a human being. The emphasis on motivation is consistent with liberalism, which holds that individuals are not inherently tied to those around them; that individuals are not constituted by a community. This narrow vision of interdependence drives a correspondingly narrow vision of responsibility; liberalism frowns on holding a defendant liable for anything that is not attributable to chosen ends. The defects that stem from community ties are independent of the individuals who do not choose those ends. Thus, liberalism personifies institutions because of the centrality of individualism, and emphasizes intent because of the notion of the individual as sovereign of one's own ends.

Liberal thought shapes a warped view of institutional behavior by personifying institutional defendants. The Court misunderstands the dynamic of institutional behavior because its liberal vision focuses on individual people, with their individual rights, ends, choices, and motives. When the Court considers institutions, it often perceives them as aggregates of previously individuated beings. Similarly, discrimination becomes no more than the sum of individual instances of intentional conduct. That is why *Patterson* recognizes only discrimination at the time of contract formation;²⁷⁸ *Lorance* recognizes only discrimination at the time seniority rights were altered;²⁷⁹ and *Wards Cove* insists on proof of specific instances of discrimination.²⁸⁰ Other doctrinal areas show the same perspective. Abusive behavior by police officers becomes nothing more than the sum of individual

275. 490 U.S. at 657-58.

276. See Whitman, *supra* note 22, at 248 ("To require the plaintiff to establish the defendant's 'state of mind'—a particular intent, or attitude, or purpose—is to assume, quite literally, that the defendant will have a mind to evaluate.").

277. See J. RAWLS, *supra* note 6.

278. See *supra* notes 140-50 and accompanying text.

279. See *supra* notes 151-60 and accompanying text.

280. See *supra* notes 118-38 and accompanying text.

instances of consciously chosen policies intended to cause injury.²⁸¹ The misuse of the flow of public information becomes nothing more than the sum of individual instances of intentional breaches of fiduciary duties to identifiable victims participating in the market.²⁸² Individualism aggravates judicial near-sightedness. The Court recognizes individual, intentional instances of wrongdoing, but it can neither see nor regulate the connections among us—the ties that go beyond the sum of our individual parts, ties that bind together and tear apart. An emphasis on motive and intent reflects this blindness, since intent preserves the individuated, personified character that the Court attributes to institutional defendants. Furthermore, intent disregards the characteristics of our connections, those unconscious and intangible factors that give a group character by making it something more than the sum of its parts. In this way the centrality of motive both personifies the institutional defendant, by imputing cognitive powers, and reconstructs the defendant as a mere aggregate. Consequently, liberalism infers a very limited view of responsibility that corresponds to its limited view of interdependence. Since institutions are mere aggregates, its members are only responsible for their individual intentional acts. Liberalism does not allow for a version of responsibility that incorporates the ties that bind us together.

As a consequence of liberalism, our emphasis on intent permeates our jurisprudence. In *City of Oklahoma City v. Tuttle*,²⁸³ the Court searched for “conscious choice” on the part of municipal policymakers whose police training policies lead to an unnecessary death.²⁸⁴ The insistence on conscious choice is consistent with liberal philosophy. The Court could not find the “person” of the police department liable for the structural imperfections it had not chosen. Distorted through the lens of a personified municipal entity, the Court’s liberal philosophy could not find the person of the police department liable for imbedded racism and corruption—structural problems reflective of the community’s faults.

In *Washington v. Davis*,²⁸⁵ the Court held that proof of discriminatory racial purpose is necessary to establish a claim under the equal

281. See, e.g., *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). See *supra* notes 60-68 and accompanying text.

282. For specific examples, see *supra* notes 169-85 and accompanying text (discussing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976)); *supra* notes 186-91 and accompanying text (discussing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975)); *supra* notes 199-205 and accompanying text (discussing *Chiarella v. United States*, 445 U.S. 222 (1980)); and *supra* notes 206-14 and accompanying text (discussing *Dirks v. SEC*, 463 U.S. 646 (1983)).

283. 471 U.S. 808 (1985).

284. See *supra* notes 60-68 and accompanying text.

285. 426 U.S. 229 (1976).

protection clause against an institutional employer.²⁸⁶ Here again, the Court personified an institutional defendant and analyzed its state of mind, perceiving the defendant employer as a person with the capacity to discriminate intentionally. The Court recognized only intentional racism because of liberalism's emphasis on the primacy of the individual, and of individual choice. At the same time, the Court ignored evidence of structural problems. By rejecting the need to show a link between test results and job performance, the Court ignored an essential institutional manifestation of racism.²⁸⁷

Liberalism's focus on separateness de-emphasizes the bonds that connect us. Some of these bonds are the structural manifestations of racism and corruption attacked in *Washington* and *Tuttle*. Because liberalism does not address these aspects of interdependence, it cannot grasp the significance of many structural problems. In both *Washington* and *Tuttle*, the plaintiffs attempted to attack racism and corruption not easily attributed to an intentional act. In *Tuttle* the plaintiff questioned the policy of a police department; in *Washington* the plaintiffs questioned the impact of a standardized test. Although both policies can have discernible discriminatory effects, it is difficult to show how either could stem from discernible discriminatory motives.²⁸⁸ In an increasingly complex and integrated world, however, the racist manifestations of training policies and standardized tests affect us and connect us. It is in liberalism's failure to recognize these connections that we locate the origins of intent and motive standards. Liberalism cannot provide redress for irresponsibility unrelated to individual motive. Therefore, when the problem belongs to the collective, to the police department, corporation, or market, liberalism does not impute liability.

In the insider trading cases, the Court's view of the market as an aggregate embodies the characteristics of the personified police brutality and employment discrimination defendants—autonomy and intent. In *Ernst & Ernst v. Hochfelder*,²⁸⁹ the Court made the standard of intent explicit by holding that a plaintiff alleging a violation of Rule 10b-5 must show scienter.²⁹⁰ *Ernst & Ernst* reflects the same

286. *Id.* at 245. See *supra* notes 108-18 and accompanying text.

287. See, e.g., Freeman, *Antidiscrimination Law: The View from 1989*, in *THE POLITICS OF LAW* 121, 143 (D. Kairys rev. ed. 1990) (stating that standardized tests measure little more than testing ability; more often than not they fail to correlate in any way with job performance).

288. See Lawrence, *supra* note 90, at 322 (arguing that because much racism stems from our unconscious, the Court's emphasis on intent ignores the very nature of the problem).

289. 425 U.S. 185 (1976).

290. *Id.* at 193. See *supra* notes 169-85 and accompanying text.

type of individualism that protects the defendant's rights to motive at the expense of public policy. Much like *Tuttle* rejected a police department's duty to eliminate structural corruption and *Washington* rejected a duty to eliminate structural racial discrimination, *Ernst & Ernst* rejected a duty to eliminate disparity of information in the structure of the market. Furthermore, the Court's vision of the institution of the market is also artificial. The market is somehow reconstructed in a way that recognizes only certain tangible injuries, like those caused by intentional actors breaching specific fiduciary duties. This limiting vision ignores important structural characteristics of the market. It ignores the potential for cooperation among market participants, and, correspondingly, it ignores the existence of structural defects that result because we neither promote nor recognize cooperation.²⁹¹ As a result, negligence, nonfeasance, and corruption go unaddressed because they may be unintended, but they injure nonetheless.

In police brutality, employment discrimination, and insider trading cases, corporate, municipal, and market institutions are in a sense reconstructed and personified. They become either individuals capable of motive, or aggregates whose connections are empty and unimportant. The central theme is that the individual is accountable only for choices and motives. This is consistent with a Rawlsian perception of an unincumbered individual, a free agent responsible only for chosen ends.²⁹² This vision, however, is inconsistent with a communitarian or civic republican ethic which would equate a defendant's interests with those of the community²⁹³ and impose a standard of responsibility when those interests are violated, either by an individual's intent, or by the community's unintentional failure.

2. SPECIFICITY OF DUTY CONSISTENT WITH THE LIBERAL VIEW

Liberalism's glorification of the individual is also evident in cases that define duties owed by defendants to plaintiffs and to others. In

291. Autonomy and disinterest were not always dominant values in the corporate world. See, e.g., Simon, *Contract Versus Politics in Corporation Doctrine*, in *THE POLITICS OF LAW* 387, 394-402 (D. Kairys rev. ed. 1990). Simon argues that in the nineteenth century, corporate actors were concerned with economic democracy, with the effects of their actions on society as a whole, and with notions of citizenship and cooperation. They viewed the market as more than a series of contractual exchanges; it was also a mechanism to encourage meaningful participation and to reinforce community ties.

292. See J. RAWLS, *supra* note 6, at 3 ("Each person possesses an inviolability founded on justice.").

293. See M. SANDEL, *supra* note 6, at 173 (1982) (suggesting that a community constitutes the shared self-understandings of its participants, and that these understandings are embodied in their institutions).

Wards Cove Packing Co. v. Atonio,²⁹⁴ the plaintiff was forced to identify specific instances of discrimination as opposed to showing a general discriminatory impact. The Court implied that a defendant employer has a duty to refrain from initiating specific instances of discrimination. However, an employer is not under an affirmative duty to free the work place from discrimination. There is no general duty to guard against structural racism and sexism; there is only a duty to refrain from individual incidents of wrongdoing.

Similarly, in *Dirks v. SEC*²⁹⁵ and in *Chiarella v. United States*,²⁹⁶ the Court narrowly interpreted the duties owed by a defendant accused of insider trading. *Chiarella* held that Rule 10b-5 liability attaches only when the defendant has a fiduciary relationship with the purchasers or sellers of stock.²⁹⁷ *Dirks* held that a tippee's fiduciary duty derives from the insider's, or tipper's, breach of fiduciary duty.²⁹⁸ Like *Wards Cove*, these two cases recognize only a duty from one individual to another; there is no duty to the workplace community or to the community of the market.²⁹⁹

In a society defined by liberalism's emphasis on pluralism and separateness, liability only attaches when another's space is intentionally violated. Because there is no additional responsibility to one another under the liberal view, structural imperfections and broader community duties are of secondary importance at best. The Court's language in both *Chiarella* and *Wards Cove* emphasizes separateness, disinterest, and a lack of recognition for others. In *Chiarella*, the Court balked at holding a defendant liable when he was nothing but "a complete stranger who dealt with the sellers only through impersonal market transactions."³⁰⁰ Why should *Chiarella*, who had no relationship with the shareholders of the corporations whose shares he traded, care about them, much less be responsible to them? Similarly, in *Wards Cove*, the Court refused to find an employer liable for conduct with a racially discriminatory impact, unless the employee could point to specific practices responsible for racial disparity.³⁰¹ After all, the employer has no duty to remedy the "myriad of innocent causes" which the employer neither initiated nor meant to per-

294. 490 U.S. 642 (1989). See *supra* notes 118-38 and accompanying text.

295. 463 U.S. 646 (1983).

296. 445 U.S. 222 (1980).

297. *Id.* at 230. See notes 199-205 and accompanying text.

298. *Dirks*, 463 U.S. at 660. See notes 206-14 and accompanying text.

299. Structural and political concerns encouraged broader duties to the community of the market in the nineteenth century. Simon, *supra* note 291, at 395. Our individualist tendencies were not always dominant.

300. *Chiarella*, 445 U.S. at 232-33.

301. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989).

petuate.³⁰² Both opinions operate on the same assumptions of mutual disinterest: to the Court, we are fundamentally strangers to one another. Again, liberalism misunderstands the importance of cooperative behavior in institutions, ignoring the possibility that mutual interest might be a natural and worthwhile value to nurture, and rejecting the potential for broader duties to our respective communities—duties that would complement and reinforce our ties to one another.

The Court's narrow interpretation of duty in different doctrinal areas reflects its individualist philosophy. Liberalism emphasizes the separateness of individuals, and the fear of annihilation from others.³⁰³ Therefore, liberal philosophy is reluctant to impose duties on others, since that would intrude on the separateness that is liberalism's very essence. Duty is defined narrowly, from individual to individual, not from individual to community. As the insider trader in *Dirks* is free from a duty to the market, so the employer in *Wards Cove* is free from a duty to keep the work place free of discriminatory practices. Their duties are defined strictly by their relationship to the plaintiffs and by the specific incidents in question, not by any notion of the common social good.

The duty cases exemplify the Court's emphasis on separateness, consistent with liberalism's emphasis on mutual disinterest.³⁰⁴ The Court relies on assumptions of mutual disinterest and alienation to impose duties only in those circumstances where an individual intentionally violates another's space. Neither liberal theory, nor the Court's jurisprudence, however, adequately explains the exclusivity of mutual disinterest as an underlying assumption. If community were an underlying, competitive value, then the Court could logically infer duties arising from mutual interest, duties that would take into account that which connects us, imposing responsibility for the structural imperfections that reflect collective weaknesses.

3. STRICT CONSTRUCTIONISM AND LIBERALISM'S EMPHASIS ON RIGHTS

The liberal ideal protects a framework of fundamental rights, respected within a society where each individual can pursue his or her own ends.³⁰⁵ Rawls' procedural mechanism establishes an ostensibly

302. *Id.* (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988)).

303. *See West, supra* note 35, at 5.

304. J. RAWLS, *supra* note 6, at 13.

305. *See id.*

neutral framework of choice for those fundamental rights.³⁰⁶ The Court's extrapolation of justice from the liberal ideal, however, has resulted in a distorted emphasis on strict constructionism, rights, and neutrality. The distortion stems in part from inconsistencies in the Court's definition of rights. In trying to conform with a notion of government ostensibly neutral with respect to competing conceptions of the good, the Court inevitably exhibits a bias towards some rights over others, thus violating the ideal of neutrality.³⁰⁷ This Section analyzes the Court's emphasis on strict constructionism and rights reflecting an exaggerated emphasis on neutrality. Motive and intent remain relevant throughout, often as the consequences of narrow constructions of statutes and legal concepts such as standing and statutes of limitations.

In *Patterson v. McClean Credit Union*,³⁰⁸ the Court narrowed the scope of 42 U.S.C. § 1981, holding that the statute did not reach employment practices after the formation of the contract.³⁰⁹ *Ernst & Ernst v. Hochfelder*, on the other hand, narrowly interpreted the word "manipulative" in section 10(b) of the 1934 Act to mean that only intentional conduct is actionable under Rule 10b-5.³¹⁰ In both opinions, the majority attempted to remain neutral by emphasizing statutory language rather than the social wrong Congress was trying to correct. As a neutral interpreter, rather than an active participant in the creation of laws, the Court is like a detached and almost disinterested arbiter.³¹¹ In both opinions, the Court arrived at its conclusion by asking how liberal, abstract, individuated parties are likely to manipulate one another. Thus, the Court developed an incident-specific, motive-based definition of responsibility, imputing liability only as a result of an identifiable, intentional act, although Congress may have had a more communitarian vision in mind when it enacted the statutes involved. Moreover, the Court never really remains neutral: Strict constructionism merely reinforces normative notions, protect-

306. See M. SANDEL, *supra* note 6, at 120 ("The priority of procedure in Rawls's account of justification recalls the parallel priorities of the right over the good, and of the self over its ends.").

307. Professor Sunstein argues that since *Lochner*, the Court has defined neutrality to mean a deference to a market ordering and existing distributions that may not be defensible. See Sunstein, *supra* note 33, at 875, 903. As a result, neutrality is both an illusory goal, and a tool to promote value-laden principles. *Id.* at 904.

308. 109 S. Ct. 2363 (1989).

309. *Id.* at 2369. See *supra* notes 140-50 and accompanying text.

310. 425 U.S. 185, 193 (1976). See *supra* notes 169-85 and accompanying text.

311. See Michelman, *supra* note 6, at 1497 (criticizing the Court's detached vision as resulting in the Court's being the "servant, not the author, of a prospective text").

ing existing entitlements and individualist values.³¹² In *Patterson*, for example, the Court endorsed the right of the defendant to ignore structural racism in the work place. Similarly, in *Ernst & Ernst*, the Court endorsed a normative value—the right of the defendant to be negligent in terms of disclosure and material omissions. *Patterson* and *Ernst & Ernst* exemplify the Court's attempt and failure to use literalism to achieve neutrality. Instead of neutrality, the Court's liberalism results in stifling resistance to change.

The Court's methodology uses strict constructionism to achieve a rights-oriented search for neutrality through its narrow interpretations of other legal concepts. In its treatment of the statute of limitations, for example, the Court protects the right of the defendant to be held accountable only for intentional breaches of duty. In *Lorance v. AT&T Technology*,³¹³ the Court held that the statute of limitations for actions arising out of a facially neutral seniority system begins to run when the discriminatory practices are adopted, not when their effects are felt.³¹⁴ The *Lorance* Court used the statute of limitations to reinforce the notion that general structural evidence of discrimination is insufficient. *Lorance* illustrates the reality that statutory construction is inherently normative. Faced with a technical statutory question, the Court had to make a value-laden choice between the interests of plaintiffs, who would have to sue anticipatorily if the statute were narrowly drawn, and the interests of employees, who relied on the seniority system.³¹⁵ By forcing potential plaintiffs to anticipate future contingencies, the Court relieved employers of responsibility for previously instituted intentional discrimination. Again a liberal view of discrimination as acontextual, single incidents of wrongdoing—here, the intentional alteration of contractual rights—prevails over structural concerns.

Similarly, *Blue Chip Stamps v. Manor Drugs Stores*³¹⁶ reinforced the liberal ideal of autonomy and neutrality through a narrow interpretation of the doctrine of standing. In *Blue Chip Stamps*, the Court held that only purchasers and sellers of securities have standing to bring a Rule 10b-5 claim.³¹⁷ The Court's rationale was based on a desire to sift out unnecessary litigation.³¹⁸ By closing the courtroom

312. See Sunstein, *supra* note 32 (arguing that all statutory interpretation draws on normative background principles).

313. 490 U.S. 900 (1989).

314. *Id.* at 911. See *supra* notes 151-60 and accompanying text.

315. 490 U.S. at 912.

316. 421 U.S. 723 (1975).

317. *Id.* at 754-55. See *supra* notes 186-91 and accompanying text.

318. 421 U.S. at 739.

to many potential plaintiffs through a distinction that does not necessarily distinguish meritorious from meritless claims,³¹⁹ the Court reveals the primacy of the liberal model: the values of autonomy and mutual disinterest prevail over the prevention of fraud under Rule 10b-5. the standing limitation addresses a concern of liberalism by ensuring that only those individuals who have been tangibly injured can sue. Individuals who have been injured but cannot show that they participated in the market do not have legitimate claims. This arbitrary distinction illustrates standing's, and liberalism's, emphasis on separateness and autonomy.³²⁰ Furthermore, *Blue Chip Stamps* highlights the Court's understanding of the market as a collection of aggregates, so that only identifiable members of the group, those who actually buy and sell, can expect redress from the law.

Narrow constructions of statutes and legal doctrines invoke an air of neutrality and reinforce the primacy of rights. The Court suggests that it serves neutrality by refusing to extend the protection and impact of legal doctrines. Because the rules were adopted independently of the action, they seem neutral, and facilitate the Court's detachment from policy considerations. Strict constructionism thus reinforces the notion that a right to neutrality is superior to subjective ends. In the cases above, however, strict constructionism promoted several subjective values—employees are not entitled to expect equality of opportunity in contract formation and seniority systems (*Ernst & Ernst, Lorange*), and only discernible market participants can be injured by insider trades committed with scienter (*Patterson, Blue Chip Stamps*).

4. THE PLAINTIFF WHO WINS: CONSISTENCY WITH THE LIBERAL VIEW

Plaintiffs are more likely to prevail in cases that illustrate a breach of duty to an individual in a discernible, intentional act. In *Pembaur v. City of Cincinnati*,³²¹ for example, the Court held that a decision by a municipal policymaker on a single occasion may give rise to liability under section 1983.³²² The Court could conceptually link liability to an individual's choice, an order given by a prosecutor. Therefore, liability could attach, holding the defendant accountable for chosen ends, and not for negligent, structural imperfections.

Similarly, a defendant employer in *Price Waterhouse v. Hop-*

319. See R. CLARKE, *supra* note 172, at 320.

320. See Winter, *supra* note 25, 1387.

321. 475 U.S. 469 (1986).

322. *Id.* at 480. See *supra* notes 69-74 and accompanying text.

kins³²³ faced a very high burden of proof after a plaintiff successfully proved intentional discrimination in employment. Once a female partnership candidate of an accounting firm successfully established intentional discrimination, the Court held that the defendant employer had to prove by a preponderance of the evidence that it would have made the same decision had it not taken the plaintiff's gender into account.³²⁴ This "substantial evidentiary burden on defending employers"³²⁵ may seem inconsistent with the Court's other employment discrimination decisions of the 1988 Term; however, it may just be that the Court is more comfortable with the notion of intentional discrimination than it is with problems of structure.³²⁶ Plaintiffs' victories in *Pembaur* and *Price Waterhouse* suggest that the Court's liberal vision is offended by intentional discrimination, which is perceived as a deliberate intrusion into another individual's inviolate space.

The Court's tacit endorsement of the misappropriation theory in *Carpenter v. United States*³²⁷ is also consistent with liberalism. Misappropriation connotes an individual's conscious intrusion into another's property, something that the Court interprets as inherently offensive to its liberal vision. In *Carpenter* the defendant employee of the newspaper owed absolutely no duty to the purchasers and sellers of stock.³²⁸ Nevertheless, the Court affirmed a finding of liability.³²⁹ Perhaps the Court could justify ignoring the framework of duty established by *Chiarella* and *Dirks* because the employee in *Carpenter* violated liberal notions of autonomy and individual property. Liability in *Carpenter* attached, not because the Court embraced a notion of interdependence and need for collective restructuring of market ethics, but because the defendant intruded on his employer's property. An investment banker could have properly found and used the same information that Carpenter misappropriated.³³⁰ The former would be conducting research; the latter, stealing. The Court is not concerned with effects; it focuses on the motive behind the acquisition of information. Offenses to and by individuals are easier for the Court to understand than violations to and by collective interests, groups, and institutions.

323. 490 U.S. 228 (1989).

324. *Id.* at 244-45.

325. Fischl, *supra* note 90, at S13.

326. *Id.*

327. 484 U.S. 19 (1987).

328. *See* *United States v. Carpenter*, 791 F.2d 1024, 1028-29 (2d Cir. 1986).

329. *Carpenter*, 484 U.S. at 24.

330. *See Carpenter*, 791 F.2d at 1031 ("Obviously, one may gain a competitive advantage in the marketplace through conduct constituting skill, foresight, industry and the like.").

The theoretical string of liberalism that winds through these different doctrinal areas emphasizes separateness over community ties, and focuses on individual choice and motive rather than collective goals. The liberal impulse was not always dominant. The Supreme Court in *Griggs v. Duke Power Co.*³³¹ and the Second Circuit in *SEC v. Texas Gulf Sulphur Co.*³³² both adopted a more effects-oriented type of reasoning, a sensitivity to the intended beneficiaries of legislative enactments, and a recognition of the judiciary's naturally public role. Most recent cases, however, show a marked departure from that type of reasoning. A liberal impulse is creating distorting waves in our case law, removing the law from its communitarian, public call.

IV. CONCLUSION: RESOLVING THE TENSION BETWEEN INDIVIDUALISM AND COMMUNITY THROUGH A SHIFT AWAY FROM INTENT

This Comment has examined the standard of intent as a consequence of the Court's liberal vision, suggesting that basic philosophical misconceptions have perpetuated an excessively individualist jurisprudence. The simultaneous and paradoxical existence of both the private and the public in all that we do parallels our simultaneous and paradoxical yearning for both autonomy and community. The Court's jurisprudence is impoverished because it speaks to only a part of our experience—to our private side, to our yearning for autonomy. The Court's emphasis on the private over the public is consistent with its emphasis on separateness over connectedness, on the individual over the community, and ultimately, on individual choice over collective ends. The standard of intent is both a consequence of our veneration of individualism, and a force that perpetuates a liberal ideology.

The prominence of motive, however, suggests that our notions of responsibility are incomplete. This Comment has discussed doctrinal areas where the standard of intent is judicially imposed, and where the Court interprets statutory gaps to limit responsibility. A judicial tendency to personify an institutional defendant with a sense of motive underscores a judicial discomfort with problems of structure, with issues of communal responsibility that have little or nothing to do with a human being's motive. If the Court's vision of responsibility is unnecessarily narrow because of its emphasis on motive, the challenge remains to find a definition of responsibility that would not become global.

This Comment suggests a shift in focus rather than a tangible

331. 401 U.S. 424 (1971).

332. 401 F.2d 833 (2d Cir. 1965), *cert. denied*, 394 U.S. 976 (1969).

solution. The alternative may be a different conceptual starting point. Instead of initiating its philosophical stance with the individual, the Court might begin with the institution or community. This is not to say that individual rights should be ignored; only that in its initial inquiry, the Court might consider the composition of the organizations at play in order to arrive at a more accurate picture of the problems at issue—be they police brutality, municipal corruption, discrimination, or market failure. A better understanding of the structural problems at play could lead to more logical judicial solutions. Instead of institutional intent, the Court could propose a definition of internal institutional responsibility, basing its imputation of liability against a backdrop of fundamental individual rights. For example, in its examination of racial or sexual discrimination in the workplace, the Court might begin with an analysis of the nature of institutions, the historical forces involved, and the communal ties at stake. At that point, it might define responsibility not as a duty owed by an employer to an employee arising out of a specific incident, but rather as a duty owed by an employer to the community of the workplace, a duty much like that imposed in *Griggs*.

Basing judicial inquiries on principles of communitarianism and interdependence is tempting. However, an exclusively communitarian approach would be as impoverished and as dangerous as the Court's current vision, because collective responsibility threatens to become global and totalitarian.³³³ Individualism is our protection against the potential excesses of the community. By ignoring the private altogether, the Court would also ignore important experiential dimensions of our lives. The answer lies in the recognition that we are at once constituted and driven by individualist and communitarian tendencies. We must find a jurisprudence that satisfies competing

333. A central criticism of the communitarian model is that it fails to suggest a method for developing a theory of the common good without succumbing to authoritarian tendencies. Without a basis in individual rights, how can we ever check a community's majoritarian impulse? Some commentators have attempted to develop theories of the common good, arguing that communitarian scholarship is incomplete without articulated notions of the common good, and dismissing the threat of communitarian authoritarianism in a cursory manner. See generally Hirshman, *supra* note 253 (arguing that communitarian scholarship necessitates the development of a theory of the common good, and suggesting the virtue of liberality as an appropriate end towards which the community should aspire). Hirshman suggests that liberality, in both its ancient Aristotelian roots and its modern manifestations, calls for a sense of moderation and redistribution of property as a solution to the problem of poverty. *Id.* at 988-1011. Hirshman, however, gives but a cursory glance to the libertarian challenge: "If and when philosophy reveals a reliable view of the good, the debate over communal avenues to that life may begin. . . . [E]ven in America, autonomy has not always been trump." *Id.* at 996.

needs for both community and autonomy.³³⁴

A definition of responsibility that adequately balances the needs of the individual and the community would be difficult to determine; this Comment merely points to the need for a more complete vision. The notion of finding or creating a complete jurisprudence, however, suggests the inevitability of normative judicial intervention. As long as the Court is detached, and as long as its decisions are predetermined by a previous individualist vision, it will continue to ignore important collective experiential dimensions of our existence, protecting the status quo under the guise of neutrality.³³⁵ Recognizing that courts make value-laden, political decisions, however, does not answer the more difficult question: How are judges to strike a balance between individualism and community, and how are they to direct the norms? This is particularly difficult where the tension between the two fluctuates as a function of different fact scenarios and the issues that they raise. Yet, if courts must determine when to allow individual rights to prevail, then courts can never be neutral; they enter the political fray by making subjective choices. Most disturbing in the Court's more recent choices is that they exhibit indifference, lack of compassion, and a conservative tendency to preserve the status quo.³³⁶

Politically, then, how are we to determine when the politics of the whole should give way to the politics of the individual? This Comment poses variations of the same question throughout: When does the good supersede the right? When are motive and intent more important than effects? Cases like *Wards Cove Packing Co. v. Atonio*³³⁷ seem to suggest an intractable conflict. A communitarian approach would seek to ameliorate the blatant discriminatory impact of the workplace, while a rights-oriented view protects an employer's right to be held liable only for his intended acts. Yet, the Court's blindness in *Wards Cove* may suggest the potential for a more complete vision. The resolution is not that a communitarian approach alone should prevail, but rather that courts must look at both collec-

334. See, e.g., West, *supra* note 35, at 66. Professor West argues:

We need to show that community, nurturance, responsibility, and the ethic of care are values at least as worthy of protection as autonomy, self-reliance, and individualism. We must do that, in part, by showing how those values have affected and enriched our lives. Similarly, we need to show . . . how the refusal of the legal system to protect those values has weakened this community, as it has impoverished our lives.

Id.

335. See Sunstein, *supra* note 33.

336. *Id.* at 874-75; West, *Constitutionalism*, *supra* note 43, at 642-43.

337. 490 U.S. 642 (1989). See notes 118-38 and accompanying text.

tive and individual interests. Courts must recognize that institutions are more than aggregates, that corruption and discrimination are more than individually perpetrated incidents, and that mutuality is as worthy a value as autonomy. A shift in judicial focus could lead to an understanding that, by redefining responsibility and recognizing interdependence, we are better equipped to protect the individualism and the fundamental individual rights that drive our jurisprudence. With that recognition, courts may arrive at a more comprehensive vision of responsibility and an enriched version of freedom. In other words, intentional discrimination in employment, intentional corruption in police behavior, and intentional fraud in the market are all more severe than unintentional behavior. Deliberateness must be weighed along with communitarian priorities of social reconstruction. The limits of this Comment lie in an inability to structure the exact components of the balancing scale. Motive counts, yet the Court must also consider effects, and weigh the scales of justice accordingly.

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