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Causation in Constitutional Torts

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The issue of causation is fundamental to every constitutional tort action.[1] Money damages are not recoverable unless the defendant is found to have caused the plaintiff to be deprived of a constitutional right and that deprivation is the cause of some harm.[2] In several recent decisions the Supreme Court has seized upon the language of causation as a means of restricting constitutional tort liability.[3] In *Monell v. Department of Social Services*,[4] for example, the Court based its rejection of respondeat superior on the implicit meaning of the term "causes." The concept of causation in a constitutional tort context thus requires a connection between the defendant and the plaintiff's injury more substantial than defendant's employment of the offending actor.

Despite its central place in the law of constitutional torts, the question of causation has attracted little critical analysis.[5] Courts and commentators have tended to focus on the more clearly substantive aspects of the litigation. When the issue of causation is directly addressed, the analysis seldom goes beyond a superficial and sometimes inaccurate recital of common law "rules" of proximate cause. The courts have followed the orthodox common-law cause in fact and proximate cause models in discussing the issue of causation.[6]

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1. A "constitutional tort" action is a private civil suit brought to redress deprivations of constitutional rights. Constitutional tort actions may be brought pursuant to 42 U.S.C. § 1983 (Supp. III 1979) or, in some instances, directly under the Constitution. *See, e.g.*, Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392 (1971). The phrase appears to have originated in Shapo, *Constitutional Tort*: Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U.L. REV. 277 (1965).

2. Martinez v. California, 444 U.S. 277, 285 (1980); Carey v. Piphus, 435 U.S. 247, 255 (1978).

3. Martinez v. California, 444 U.S. 277, 285 (1980); Monell v. Department of Social Servs., 436 U.S. 658, 691-95 (1978); Carey v. Piphus, 435 U.S. 247, 260 (1978); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977); Rizzo v. Goode, 423 U.S. 362, 375-76 (1976).

4. 436 U.S. 658, 692 (1978).

5. Discussion of the causation issue can be found in S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION §§ 3.14-.15 (1979); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 23-25 (1974).

6. Under the common-law model, the issue of causation is divided into two separate inquiries: cause in fact and proximate cause. Conduct is viewed as the cause in fact of

In this Article it is argued that the particular policies[7] underlying constitutional tort actions are different in some respects from those deemed important in a common-law setting. On the one hand, the Court explains that rules governing constitutional tort actions should serve to deter future misconduct, vindicate the plaintiff's constitutional rights, and compensate the plaintiff for the resulting harm.[8] This set of policies closely corresponds to those that influence common-law causation issues.[9] It differs only in that the source of the underlying right is the Constitution. Constitutional torts are thought to be potentially more harmful than their common-law counterparts because they are committed with the imprimatur of state authority. A person "may bar the door against an unwelcome private intruder . . . . [but] [t]he mere invocation of [governmental] power by a . . . law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest."[10] As the Constitution stands as the final barrier between governmental power and individual liberty, deterring constitutional violations is an especially valued goal.

There is, however, a competing set of values that frequently is not openly acknowledged. The Court has exhibited a policy preference to avoid what it perceives to be an excessive burdening of governmental conduct,[11]

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an injury if it is a necessary condition for its occurrence. RESTATEMENT (SECOND) OF TORTS § 432 (1965); *see* W. PROSSER, LAW OF TORTS § 41, at 237 (4th ed. 1971). Judgments concerning factual causation are generally thought to be empirical rather than normative in nature. Proximate cause is the means by which courts select from among numerous causes in fact for purposes of assigning legal responsibility. These issues are openly viewed as normative in nature. 2 F. HARPER & F. JAMES, LAW OF TORTS § 20.4 (1956); W. PROSSER, *supra*, § 42, at 244; Morris, *On the Teaching of Legal Cause*, 39 COLUM. L. REV. 1087, 1088-89 (1939). The essential question is whether the defendant *should* be held responsible for harms that do bear a reasonable factual connection to the defendant's conduct. It is readily acknowledged that perceptions of legal policy often affect the resolution of this question. That is, the determination of whether a defendant's conduct is held to be the proximate cause of a harm depends in large part on the effect that conclusion would have on some social policy.

Alternatives to the traditional common-law approach to causation have been advanced. *See, e.g.*, Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 432-40 (1979); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 166-89 (1973). *See generally* H.L.A. HART & A. HONORÉ, CAUSATION IN THE LAW 171-276 (1959). This Article focuses on the orthodox model as it appears to have provided the framework for judicial discussion of causation in the constitutional tort context.

7. The term "policy," as applied to causation and constitutional torts throughout this Article, denotes the generally desired consequences of a particular rule of law. In this context policy is used interchangeably with the terms "value" and "goal."

8. Gomez v. Toledo, 446 U.S. 635, 638-39 (1980); Carlson v. Green, 446 U.S. 14, 21 (1980); Owen v. City of Independence, 445 U.S. 622, 651-52 (1980); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978).

9. *See* W. PROSSER, *supra* note 6, § 4, at 23.

10. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394 (1971) (citations omitted). *See* United States v. Lee, 106 U.S. 196, 219 (1882).

11. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977); Rizzo v. Goode, 423 U.S. 362, 378 (1976).

both financially[12] and otherwise. The perceived burdens of constitutional tort litigation may reflect the values underlying the concept of federalism.[13] Constitutional torts necessarily affect the interplay between federal power and state prerogatives, and the Court is reluctant to displace traditional prerogatives of state sovereignty. An expansion of constitutional tort liability also poses the danger of imposing rigid uniform standards by which the day-to-day behavior of state and local officials would be measured.[14] The resulting loss of flexibility and increased centralization of power are conditions thought by some to threaten the preservation of individual liberties.[15] Furthermore, there may be contexts in which the Court does not want to subject governments to the same constitutional restrictions protecting individual liberties as when they act as regulators of the general public.[16] The Court may be willing to tolerate governmental conduct directed at a governmental employee that it would not if directed at the public at

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12. The financial burden of constitutional tort liability has been a concern. In his dissent in *Owen v. City of Independence*, Justice Powell argued:

> The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. *E.g.*, Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 958 (1976). By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the level of government least able to bear it. For some municipalities, the result could be a severe limitation on their ability to serve the public.

445 U.S. 622, 670 (1980) (footnotes omitted).

13. Justice Black has defined the general concept of federalism:

> What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971).

The impact of federalism values on constitutional tort law in general has been widely commented upon. A sampling of the literature includes: Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1 (1978); Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723 (1979); McCormack, *Federalism and Section 1983: Limitations of Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1 (1974); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

14. One commentator has noted that the closer a dispute is to the day-to-day functioning of government, the more concerned the Court is likely to be about federalism values. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 749 (1979). *See also* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 38 (1980).

15. R. HUTCHINS, TWO FACES OF FEDERALISM 5-24 (1961); THE FEDERALIST No. 10, at 129-30 (J. Madison) (B. Wright ed. 1961); Durschslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 733 (1979).

16. *See* Wells & Hellerstein, *The Governmental—Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1113-21 (1980).

large. Collectively these concerns reflect policy considerations largely absent from common-law torts.

This Article discusses the interplay between these competing sets of policies and the influence they have on judicial resolution of causation issues. To the extent that these values are irreconcilable, principles of causation developed in the constitutional tort context reflect pragmatic compromises rather than a consistent application of settled principles. Courts have given effect to the policy of not overly burdening governmental conduct while clinging to familiar common-law terminology. By purporting to apply well-settled common-law principles of causation, courts have produced opinions that mask the reasoning behind the result and, in some instances, provide misleading guidance for resolving future cases.

In Part I it is argued that uniform principles of causation are necessary in constitutional tort cases to ensure that the scope of substantive constitutional rights does not vary from state to state.[17] In Part II it is first analyzed how the Supreme Court has developed an approach to cause in fact that deviates from prevailing principles of common law.[18] This variation best can be explained by a policy of avoiding excessive burdening of governmental conduct. This is followed by an analysis of the judicial treatment of proximate cause issues of the liability for unforeseeable consequences and intervening causes.[19] In this section it is illustrated how judicial articulation of constitutional tort causation issues in terms of common-law maxims often disguises the underlying policy considerations. Part III addresses a particular causation issue unique to constitutional torts: when does a government or supervisor cause an employee or subordinate to deprive the plaintiff of constitutional rights?[20] In many instances, this issue can be more appropriately analyzed in terms of duty.

I. THE NEED FOR UNIFORM PRINCIPLES OF CAUSATION

Before analyzing the substantive principles of causation that have developed in the constitutional tort context, it is necessary to address a threshold procedural issue. The question is whether courts should follow state law with regard to issues of causation or whether uniform federal standards should apply. If state law is controlling, courts would merely identify and apply the principles of causation prevailing in the forum state. If a uniform federal approach is necessary, however, courts must give careful consideration to the policies underlying constitutional tort actions in selecting the appropriate standard.

Constitutional tort actions may arise directly under the Constitution[21]

17. *See* text accompanying notes 21-49 *infra*.
18. *See* text accompanying notes 50-90 *infra*.
19. *See* text accompanying notes 91-157 *infra*.
20. *See* text accompanying notes 158-92 *infra*.
21. *E.g.*, Carlson v. Green, 446 U.S. 14, 18-19 (1980); Davis v. Passman, 442 U.S.

or under 42 U.S.C. § 1983.[22] In either instance, the action arises under federal law. It is well settled that federal law governs rights emanating from a federally created cause of action.[23] As the Court has stated:

> [W]hen a federal statute condemns an act as unlawful, *the extent and nature of the legal consequences* of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.[24]

Questions of causation would appear to fall squarely within this maxim.

That causation in constitutional torts is a matter of federal law does not, however, necessarily render state law irrelevant. Nor does it require the adoption of uniform federal rules to govern every aspect of the case. On occasion, federal courts have adopted state law as the federal rule for decision.[25] A number of factors must be considered when determining whether an issue should be governed by state law or a uniform federal rule. Courts must consider, on the one hand, the extent to which uniformity is needed to effectuate federal policies and whether the application of state law would frustrate those objectives.[26] Courts must also be cognizant of the extent to which the application of a uniform federal rule would disrupt relationships predicated on state law and the degree to which a state may have an interest in having its law control.[27]

When the action is inferred directly from the Constitution against

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228, 244 (1979); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392-97 (1971). For a general discussion of this type of constitutional tort action, see Lehmann, Bivens *and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977).

22. Section 1983 provides in pertinent part as follows:

> 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 in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1983 (Supp. III 1979).

23. Burks v. Lasker, 441 U.S. 471, 476 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979); *see* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800-01 (1957). *See also* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 500 (1980); Comment, *Choice of Law under Section 1983*, 37 U. CHI. L. REV. 494, 507 (1970).

24. Burks v. Lasker, 441 U.S. 471, 476 (1979) (quoting Sola Elec. Co. v. Jefferson Co., 317 U.S. 173, 176 (1942)) (emphasis added).

25. *E.g.*, Burks v. Lasker, 441 U.S. 471, 486 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979).

26. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979); Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 361 (1952).

27. United States v. Kimbell Foods, Inc., 440 U.S. 715, 729 (1979); United States v. Yazell, 382 U.S. 341, 352 (1966).

a federal defendant, the potential for disrupting relationships predicated on state law is minimal. In these cases, the state has very little interest in having its law applied. As noted by Justice Harlan:

> [I]t seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, . . . which must in any event control the scope of official defenses to liability. Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs.[28]

In *Bivens*-type cases, the action is created by federal law and generally concerns the liability of federal defendants for the violation of a federal constitutional standard of conduct. It is difficult to see how state interests are implicated by the application of uniform federal rules in these circumstances.

When the action is brought pursuant to section 1983, state interests are more clearly discernible. The defendants in section 1983 actions are, by definition, persons acting under color of state law. It is intuitively more reasonable to take state law into account in determining the extent of liability of persons who acted pursuant to state law.[29] Furthermore, when section 1983 provides the basis for the action, courts must also consider 42 U.S.C. § 1988.[30] Section 1988 appears to direct federal courts to apply state law in civil rights actions when federal law is "deficient" and state law is "not inconsistent" with federal law.[31] It may be argued that section 1988 requires federal courts to apply state proximate cause rules in constitutional tort cases.

Section 1988 has not received consistent treatment by the courts. It has been viewed as requiring federal courts to apply state statutes of

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28. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 409 (1971) (Harlan, J., concurring) (citations omitted).

29. Carlson v. Green, 446 U.S. 14, 24 n.11 (1980).

30. Section 1988 provides in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provision of this Title, . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988 (1976).

31. *See generally* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980); Theis, *Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681 (1976); Comment, *Choice of Law under Section 1983*, 37 U. CHI. L. REV. 494 (1970).

limitation[32] and state survivorship statutes[33] in cases arising under section 1983. In these instances, the need for uniformity was not considered a sufficiently important federal interest to render state law "inconsistent" with federal law. In other cases, section 1988 has been viewed as providing federal courts with a choice of applying state or federal rules, "whichever better serves the policies expressed in the federal statutes."[34] In still other section 1983 cases, the Court has resolved issues without referring to, or by virtually ignoring, section 1988.[35] It has recently been suggested that section 1988 was intended to apply only to cases removed to federal courts pursuant to civil rights removal provisions and therefore should not generally control section 1983 actions.[36]

Regardless of whether section 1988 is thought to compel or merely allow resort to state law, uniform federal rules of causation are appropriate in all constitutional tort cases. The need for uniformity, quite simply, overrides any state interest in having its law applied. This need stems from the role played by proximate cause in defining the scope of protection provided against invasions of rights. In the common law, proximate cause defines the limit of the legal system's protection of rights arising under the common law.[37] In constitutional tort law, proximate cause defines the limit of protection afforded constitutional rights. When a court concludes that the defendant's conduct was not the proximate cause of the dece-

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32. Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980); *cf.* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975) (applying state statute of limitations in an action brought under 42 U.S.C. § 1981).

33. Robertson v. Wegmann, 436 U.S. 584, 594 (1978); *cf.* Gee v. CBS, Inc., 471 F. Supp. 600, 614-17 (E.D. Pa.) (applying state survivorship rules in an action brought under 42 U.S.C. § 1981), *aff'd without opinion*, 612 F.2d 572 (3d Cir. 1979).

34. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969); *cf.* Carey v. Piphus, 435 U.S. 247, 258 n.13 (1978) (characterizing § 1988 as authorizing courts to look to the common law of the states when necessary to furnish "suitable remedies" under § 1983).

35. *See* Martinez v. California, 444 U.S. 277, 284-85 (1980) (without referring to § 1988, the Court held that the defendants' reckless parole decision was not the proximate cause of the deprivation of the decedent's life); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (The Court rejected the application of vicarious liability principles to constitutional tort cases on the basis of causation, *id.* at 690-95, and later observed that § 1988 "cannot be used to create a federal cause of action where § 1983 does not otherwise provide one." *Id.* at 701 n.66.); Carey v. Piphus, 435 U.S. 247 (1978) (The Court noted that § 1988 authorized courts to look to state law when necessary to furnish "suitable remedies" under § 1983, *id.* at 258 n.13, and then held, without referring to § 1988 or state law that a denial of due process is not the cause of harm resulting from a suspension from school if the plaintiff would have been suspended had due process been provided. *Id.* at 260.).

36. Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 525-41 (1980).

37. L. GREEN, RATIONALE OF PROXIMATE CAUSE 11-14 (1927); Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1, 15.

dent's death, it necessarily concludes that the fourteenth amendment provides no protection against that particular deprivation of life.[38]

The need for uniformity is manifest once the question is properly viewed as one affecting substantive constitutional law. Varying the rules of proximate cause according to state law in the context of constitutional torts would alter the scope of protection provided by the particular underlying constitutional provision. Federal policy compels that the extent of rights originating in and secured by the Constitution be the same regardless of the state in which the violation occurred.[39] Indeed, it is this policy of uniformity that underlies the application of the Bill of Rights to the states through the fourteenth amendment.[40] Any state law that significantly alters the scope of individual constitutional rights would necessarily be "inconsistent" with this federal policy, thereby rendering section 1988 facially inapplicable.

In several constitutional tort cases, the Supreme Court resolved causation issues without reference to state law.[41] It may be implied from these decisions that the Court favors a uniform federal approach to causation. The Court's most direct statement on the role of state law is found in its recent decision of *Martinez v. California*.[42] In that case, the plaintiffs sought to hold state parole board officials liable under section 1983 for the death of plaintiffs' fifteen-year-old daughter. The girl was killed by a parolee named Thomas five months after he was released from prison. The plaintiffs alleged defendants' decision to release Thomas was reckless because they were fully aware of "the likelihood that he would commit another violent crime" and "knew, or should have known, that the release of Thomas created a clear and present danger that such an incident would occur."[43] The parole board's decision to release Thomas was alleged to have deprived the decedent of her right to life in violation of the fourteenth amendment.

The Supreme Court held these allegations did not, as a matter of law, state a claim for which relief could be granted under section 1983. More

38. *E.g.*, Martinez v. California, 444 U.S. 277, 284-85 (1980).

39. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) (Justice Story warns of the deplorable "public mischiefs" that would result if the Constitution was not given a uniform construction); *cf.* Note, *Federal Common Law*, 82 HARV. L. REV. 1512, 1529-31 (1969) (discussing need for uniformity in statutory context). *See generally* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 19, 35-36 (1975). The Court has recognized the need for uniformity in administering other federally created tort claims. *See, e.g.*, Norfolk & W. Ry. v. Liepelt, 444 U.S. 490, 493 & n.5 (1980); Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 361-62 (1952).

40. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to state court proceedings to prevent disparity of protection provided by fourth amendment).

41. Monell v. Department of Social Servs., 436 U.S. 658 (1978); Carey v. Piphus, 435 U.S. 247 (1978); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Rizzo v. Goode, 423 U.S. 362 (1976).

42. 444 U.S. 277 (1980).

43. *Id.* at 279-80.

particularly, the Court stated:

> Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.
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> . . . [A]ppellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.[44]

Because there was clearly a deprivation of life and the Court declined to address the issue of due process,[45] the decision must necessarily rest on the question of causation. The parole board's decision, even if reckless, was not, for purposes of constitutional tort law, the proximate cause of the decedent's death.[46] By resolving this proximate cause issue with express indifference to state law, the opinion supports two important propositions. First, the holding clearly indicates that courts are not bound by state law with regard to proximate cause issues arising in constitutional tort cases.[47] Second, the opinion implicitly recognizes that the common-law response to proximate cause issues may reflect values and policies not entirely consistent with those implicated in constitutional tort cases.

Recognizing the need and justification for a uniform approach to

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44. *Id.* at 285 (citations and footnotes omitted).

45. *Id.* at 284 n.9.

46. The *Martinez* decision has been generally recognized as one resolving a proximate cause issue. *See* Owen v. City of Independence, 445 U.S. 622, 664 n.7 (1980) (Powell, J., dissenting); S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 3.14 (Supp. 1980); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 33 n.146 (1980).

47. The facts of *Martinez* illustrate how the application of state rules of proximate cause could produce different levels of constitutional protection. Though the plaintiff could not recover under § 1983, the Court recognized the potential for liability under state tort law. Martinez v. California, 444 U.S. 277, 285 (1980). *But cf.* Thompson v. County of Alameda, 27 Cal. 3d 741, 753, 614 P.2d 728, 734, 167 Cal. Rptr. 70, 76 (1980) (California declined to impose liability under circumstances similar to those presented in *Martinez*). There are several jurisdictions that have held the reckless or negligent release of a dangerous person may be the proximate cause of subsequent injuries. Payton v. United States, 636 F.2d 132, 148 (5th Cir. 1981); Rieser v. District of Columbia, 563 F.2d 462, 477 (D.C. Cir. 1977), *aff'd*, 580 F.2d 647 (D.C. Cir. 1978) (en banc); Hicks v. United States, 511 F.2d 407, 421-22 (D.C. Cir. 1975); Lipari v. Sears, 497 F. Supp. 185, 188 (D. Neb. 1980); Grimm v. Board of Pardons & Paroles, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977). *See generally* Comment, *Victims' Suits Against Government Entities and Officials for Reckless Release*, 29 AM. U.L. REV. 595 (1980); Note, *Holding Governments Strictly Liable for the Release of Dangerous Parolees*, 55 N.Y.U. L. REV. 907 (1980); Comment, *Liability of Mental Hospitals for Acts of Their Patients Under the Open Door Policy*, 57 VA. L. REV. 156 (1971). *See also* Semler v. Psychiatric Institutes, 538 F.2d 121 (4th Cir. 1976); Santangelo v. State, 103 Misc. 2d 578, 426 N.Y.S.2d 931 (Ct. Cl. 1980). Absent the application of a uniform federal rule of proximate cause in such instances, the substantive protection of the fourteenth amendment could depend on the fortuity of geography.

causation in constitutional torts can bring much desired clarity to the burgeoning body of decisional law. It may help avoid ambiguous discussions of causation that provide little direction to lower courts.[48] More important, it should encourage courts to analyze proximate cause issues in terms of policies and values reflecting the constitutional nature of the litigation. Rote recitals of maxims of common law[49] would ideally be replaced by a more accurate articulation of the reasons underlying particular assessments of responsibility.

II. CAUSATION ISSUES IN CONSTITUTIONAL TORT LITIGATION

A. Cause in Fact

The threshold causal inquiry concerns the factual connection between the defendant's conduct and the plaintiff's injury. In common-law tort actions a cause in fact is defined as a necessary antecedent condition. Conduct is considered the cause in fact of an injury if it is a necessary condition for the harm's occurrence. The converse, of course, is that conduct is not the factual cause of harm that would have occurred without the conduct.[50] This standard is commonly called the "but for" or "*sine qua non*" rule of cause in fact.[51] One criticism leveled at the but for test is that it is underinclusive. A strict application of the but for test would deny recovery in cases of joint causation. If either of two forces would have produced the injury independent of the other, neither could be considered a cause of the injury under the but for test.[52] To avoid such results courts developed the somewhat broader "substantial factor" test of factual causation. Under this approach, the defendant's conduct will be considered a cause of the plaintiff's injury if the conduct was a substantial factor in bringing the injury about.[53]

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48. *See, e.g.*, McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980), *discussed at* text accompanying notes 124-32 *infra*.

49. *See, e.g.*, Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972), *discussed at* text accompanying notes 81-84, 138-45 *infra*.

50. Dean Prosser stated: "The failure to install a proper fire escape on a hotel is no cause of the death of a man suffocated in his bed by smoke." W. PROSSER, *supra* note 6, § 41, at 238.

51. 2 F. HARPER & F. JAMES, *supra* note 6, § 20.2, at 1110; W. PROSSER, *supra* note 6, § 41, at 238-39; Strachan, *The Scope and Application of the "But For" Causal Test*, 33 MOD. L. REV. 386, 386 (1970).

52. Assume, for example, one fire negligently set by the defendant merges with a second fire of innocent origin and the combined fire destroys the plaintiff's house. Either fire would have destroyed the house on its own. A literal application of the but for test would lead to the conclusion that the defendant's negligence did not cause the harm because the house would have burned down in its absence. *See, e.g.*, Cook v. Minneapolis, St. P. & S. Ste. M. Ry., 98 Wis. 624, 642, 74 N.W. 561, 566 (1898). Criticism of the application of the but for test in such circumstances can be found in 2 F. HARPER & F. JAMES, *supra* note 6, § 20.3, at 1128-31; W. PROSSER, *supra* note 6, § 41, at 239; Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 948 (1935); Strachan, *The Scope and Application of the "But For" Causal Test*, 33 MOD. L. REV. 386, 391 (1970).

53. W. PROSSER, *supra* note 6, § 41, at 240.

The Supreme Court embraced a variation of the common-law but for test of cause in fact in *Mt. Healthy City School District Board of Education v. Doyle*.[54] A nontenured public school teacher sued for reinstatement and back pay alleging his dismissal resulted from his engaging in conduct protected by the first amendment. The district court found that the plaintiff's first amendment activity played a "substantial part" in the decision not to renew his contract, although independent justification for that decision may have existed.[55] The lower courts held for the plaintiff, reasoning that a decision to terminate public employment based in substantial part on the plaintiff's constitutionally protected conduct infringed upon the plaintiff's first amendment rights.

The Supreme Court reversed and held that unconstitutional considerations do not necessarily "cause" a constitutional injury simply because they were substantial factors in the decision to terminate the plaintiff.[56] The Court adopted what in essence is a two-tier standard of cause in fact. The plaintiff initially must prove his constitutionally protected conduct was a substantial factor in the defendant's decision not to rehire him. The burden then shifts to the defendant to prove the same decision would have been reached even in the absence of the protected conduct.[57]

This second step results in a modified but for standard for cause in fact determinations. The difficulty of plaintiffs prevailing under this standard was graphically illustrated in *Givhan v. Western Line Consolidated School District*.[58] The district court's finding that the plaintiff's first amendment activity was the "primary" reason for her dismissal was deemed an insufficient basis to grant a judgment for the plaintiff. The Supreme Court remanded the case for a determination of whether she would have been rehired "*but for*" her protected conduct.[59] Under this approach a defendant will prevail on the basis of lack of causation when the plaintiff fails to prove the defendant's unconstitutional conduct was a substantial factor in producing the plaintiff's injury,[60] or when the defendant establishes that the same injury would have occurred in the absence of the conduct.[61]

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54. 429 U.S. 274 (1977). This approach also appeared in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

55. 429 U.S. at 284-85. The plaintiff's constitutionally protected conduct consisted of notifying a local radio station of a proposed dress code for teachers. The permissible justification for not renewing the plaintiff's contract was his alleged use of "obscene gestures to correct students in a situation in the cafeteria." *Id.* at 283 n.1.

56. *Id.* at 285.

57. *Id.* at 287.

58. 439 U.S. 410 (1979).

59. *Id.* at 417 (emphasis original). *But cf.* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 3.15, at 87 (1979) (*Mt. Healthy* characterized as employing the "substantial factor" approach to cause in fact).

60. Skehan v. Board of Trustees, 590 F.2d 470, 479-80 (3d Cir. 1978).

61. *E.g.*, Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir. 1980); Ledford v. Delancey, 612 F.2d 883, 886 (4th Cir. 1980); *cf.* Rheuark v. Shaw, 628 F.2d 297, 307 (5th Cir. 1980) (county policy of discouraging the hiring of substitute court reporters is not cause

The plaintiff will prevail only when there is a finding that the defendant's conduct was the but for cause of the plaintiff's constitutional injury.[62] Although the shifting burden of proof[63] distinguishes the *Mt. Healthy* standard from the traditional common-law but for approach to cause in fact, the ultimate standard is quite similar. Under both approaches the plaintiff cannot recover if the same injury would have been suffered even in absence of the defendant's wrongful conduct.

The *Mt. Healthy* modified but for standard of cause in fact is not consistent with prevailing principles of common law. Most jurisdictions view any culpable conduct that is a substantial factor in producing an injury as a factual cause of that injury.[64] If either of two forces would have produced the injury independently of the other, each may be considered a factual cause of the harm. The classic example is the case of the merging fires. If a fire for which *A* is responsible merges with a fire for which *B* is responsible and the combined fire burns *C*'s house, neither *A* nor *B* can escape liability by asserting that the other fire alone would have produced the injury.[65] Each fire is a substantial factor in producing *C*'s injury so that each may be considered a cause of that injury. *A* would also be found to be a cause of the injury if the second fire was of a wholly innocent origin.[66] This common-law rule is predicated on the conviction that wrongdoers should not be permitted to avoid the consequences of their wrongful conduct even if those consequences would have resulted from an independent and nonculpable cause.[67] Holding the wrongdoer respon-

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in fact of the delay in preparation of the plaintiffs' statements of facts when that policy did not influence district judge who had authority to hire such reporters).

62. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979); Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109, 1114 (5th Cir. 1980); Lindsey v. Board of Regents, 607 F.2d 672, 676 (5th Cir. 1979); McGill v. Board of Educ., 602 F.2d 774, 779 (7th Cir. 1979); *see* Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); *cf.* East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977) (if defendant can prove it would not have hired plaintiff because of permissible reasons, then the improper failure to consider plaintiff's application is not the cause of an injury); Marshall v. Commonwealth Aquarium, 611 F.2d 1, 2 (1st Cir. 1979) (*Mt. Healthy* test for causation applied to claim of retaliatory firing following plaintiff's report of an occupational safety and health violation to federal officials).

63. It has been suggested that placing the burden of proof on the defendant nullifies the effect of the but for rule. W. PROSSER, *supra* note 6, § 41, at 239 n.24. *See* Kingston v. Chicago & N.W. Ry., 191 Wis. 610, 616, 211 N.W. 913, 915 (1927).

64. RESTATEMENT (SECOND) OF TORTS § 432 (1965); W. PROSSER, *supra* note 6, § 41, at 240-41.

65. *See* Anderson v. Minneapolis, St. P. & S. Ste. M. Ry., 146 Minn. 430, 440-41, 179 N.W. 45, 49 (1920); RESTATEMENT (SECOND) OF TORTS § 432(2), Comment d, Illustration 3 (1965); Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 943-45 (1935).

66. RESTATEMENT (SECOND) OF TORTS § 432(2), Comment d, Illustration 4 (1965); Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 949-52 (1935).

67. One commentator stated:

> The real policy behind imposing liability in such cases . . . is that wrongdoers should not be permitted to escape the consequences of their wrongful acts. Even a showing that the result would have occurred just the same through other causes

sible in such situations provides greater deterrence of future misconduct, vindicates the plaintiff's rights, and compensates the plaintiff for the injuries.

Application of these common-law principles to the *Mt. Healthy* case could produce a different result. The defendant's consideration of the plaintiff's constitutionally protected activity was culpable conduct that the trier of fact found to be a substantial factor in producing the plaintiff's injury. The independent reasons that could have justified the plaintiff's nonrenewal may be viewed as an innocent cause of his injury. Thus, both a culpable and innocent cause were found, either of which could have independently produced the harm.[68] It is in precisely such circumstances that the common law generally finds sufficient causation to support liability.

It is apparent that a but for rule of causation affords a person less protection against wrongful conduct than does a substantial factor standard. A but for rule allows defendants to engage in wrongful conduct, yet sometimes avoid liability.[69] The approach to causation taken in *Mt. Healthy* thus provides a lesser degree of protection for invasions of constitutional rights than the common law provides for invasions of common-law rights. If causation is established in common law when culpable conduct substantially contributes to an injury that would have occurred in the absence of the conduct, why should a different approach be adopted in constitutional tort actions?

> is not enough to overcome this. This policy of the law refuses to recognize the distinction between the cases where the other cause was innocent and those where it was wrongful.

Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 951-52 (1935).

68. Some may question whether the issue of causation presented by the mixed-motive termination of employment is analogous to that presented when merging fires destroy a house. The former situation concerns the cognitive process of the defendant while the latter involves physical events. However, an analysis of the interests protected reveals that the causal inquiry is the same in each situation.

In the merging fire case, as in many common-law torts, the protected interest of the plaintiff is freedom from a physical invasion of the plaintiff's person or property. The causation issue focuses on a physical event—the connection between the defendant's conduct and the physical invasion. The defendant's motive generally does not affect the connection between the conduct and the invasion of the plaintiff's protected interest.

In the *Mt. Healthy* situation, on the other hand, the protected constitutional interest is inextricably tied to the cognitive process of the defendant. The plaintiff's interest is freedom from damaging governmental personnel decisions predicated upon constitutionally impermissible motives. The causation issue necessarily concerns the connection between the cognitive process of the defendant and the injury. In this context, motive and causation are inseparable.

Once motive is properly viewed as a "cause," any distinction between one's cognitive process and physical events becomes irrelevant. Both may be causes of harm. Because both physical events and motives are "causes" in this context, it is appropriate to compare the manner in which courts treat them.

69. In *Mt. Healthy*, for example, the existence of independent justification not to rehire the plaintiff would allow the defendants to punish him for engaging in constitutionally protected activity without fear of liability.

The Court frequently has said that constitutional tort actions serve to compensate the plaintiff, vindicate constitutional rights, and deter future constitutional misconduct.[70] It is difficult, however, to justify the *Mt. Healthy* rule under any of these purposes. A person is thought to be deterred from engaging in undesirable conduct if held to be legally responsible for the resulting injuries. The conduct sought to be deterred in *Mt. Healthy* is retaliation by government officials against employees who exercise their first amendment rights. This conduct is clearly undesirable yet the modified but for rule of *Mt. Healthy* could allow the officials to escape liability. The *Mt. Healthy* rule hardly can be said to deter future misconduct of this type. Surely a school administrator would be less likely to base a termination decision substantially on unconstitutional considerations if that administrator could not avoid liability by pointing to an alternative justification for the decision.

Nor is the *Mt. Healthy* approach superior to the common-law substantial factor rule as a means of providing compensation or vindicating constitutional rights. The reason a defendant escapes liability under a but for rule of causation is not that the defendant's conduct has not infringed upon the plaintiff's protected interests. Indeed, it is conceded that such an infringement has occurred. Rather, it is the existence of some independently sufficient force that relieves the defendant of legal responsibility. The plaintiff's constitutional rights will be vindicated and the plaintiff will be entitled to compensation under *Mt. Healthy* only in situations in which no independent forces by themselves would have produced the injury. The substantial factor approach, on the other hand, vindicates a person's rights against all invasions that substantially contribute to producing the injury.

The Court advanced two mutually independent lines of reasoning in support of its approach to causation. First, the Court observed that the substantial factor rule "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[71] In other words, the substantial factor rule could produce a windfall to the plaintiff by permitting recovery for an injury that would have occurred without the defendant's wrongful conduct. The same rationale was considered, but rejected, by a majority of common-law jurisdictions.[72] The prevailing common-law view places

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70. *See* note 8 *supra* and accompanying text.

71. 429 U.S. at 285.

72. In Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127 (1934), the author argues that:

> Recovery would make the plaintiff better off than he would have been if the defendant had done no wrong. So long as the innocent cause is in actual, inescapable operation before the wrongful act becomes efficient, it is not apparent how the latter can be considered the cause of the loss.

Id. at 1130; *accord*, Edgerton, *Legal Cause* (pt. 2), 72 U. PA. L. REV. 343, 345-52 (1924). The position of Edgerton and Peaslee clearly represents a minority view and has received little modern support. *See* 2 F. HARPER & F. JAMES, *supra* note 6, § 20.3, at 1123.

greater value on the deterrent function of tort law, preferring to give a plaintiff a theoretical windfall than allow a concededly culpable defendant to escape the consequences of wrongful conduct.[73]

The second justification is more telling. The *Mt. Healthy* Court was concerned that a substantial factor approach to causation would too greatly interfere with the functioning of government. The substantial influence of constitutionally impermissible factors on an important decision should not, in the Court's view, preclude the implementation of that decision if otherwise warranted.[74] In short, the importance to society of effective governmental conduct justifies a slightly more restrictive view of causation than adopted under common law.

Mt. Healthy illustrates the Court's respect for the principles of federalism. By establishing a more restrictive approach to cause in fact than applied in common-law torts, the Court reduces the role of the federal judiciary in the regulation of local government's day-to-day personnel decisions.[75] *Mt. Healthy* may also give effect to the values that underlie the governmental-proprietary distinction in constitutional law.[76] In particular, the Court may be recognizing that government in general should be given more discretion when it acts as an employer than when it acts as a regulator of the general public.[77] These values, reflected elsewhere in constitutional tort law,[78] lie

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73. *See* notes 66-67 *supra* and accompanying text.

74. The *Mt. Healthy* Court stated:

> The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

429 U.S. at 286.

75. The degree of federal intrusion is reduced by the *Mt. Healthy* rule in that it provides a basis to implement state and local decisions notwithstanding the substantial influence of constitutionally impermissible considerations. Reducing the role of the federal judiciary in the day-to-day operations of state and local government is a major precept of federalism values. *See* Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 748-49 (1979).

76. *See generally* Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

77. *Id.* at 1114-21; *cf.* Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980) (Court apparently approved application of *Mt. Healthy* approach to causation in suit involving discharge of assistant public defender for political reasons); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979) (school desegregation). While the *Mt. Healthy* rule may give effect to the values underlying the governmental-proprietary distinction in constitutional law, it has not been limited to such situations. It has been invoked in situations in which the government was clearly acting as the regulator of the general public. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977) (zoning).

78. The desire to avoid unduly burdening governmental conduct is also reflected in the immunity doctrines, the requirement of proof of actual injury in procedural due process cases, and the rejection of vicarious liability. *See* Butz v. Economou, 438 U.S. 478,

in natural tension with the very concept of a constitutional tort action and the vindicatory, compensatory, and deterrent goals of such an action.

It is, perhaps, the notion that the modified but for rule of causation satisfactorily balances these competing values that underlies the Court's conclusion regarding the sufficiency of the rule to vindicate constitutional rights.[79] The rule reduces the burden on government by providing culpable defendants the opportunity to avoid liability on the basis of causation. The vindicatory, compensatory, and deterrent policies are promoted by placing the burden of proof on the defendant on the question of an alleged independently sufficient cause of the harm.[80]

The *Mt. Healthy* approach to cause in fact is less protective of governmental conduct than others invoked in constitutional tort actions. In *Duncan v. Nelson*[81] the defendants were local law enforcement officials who unconstitutionally compelled the plaintiff to confess to a crime. The confession was placed in evidence at trial and the plaintiff was convicted of murder. Nine years later the confession was found to be inadmissible and the conviction was reversed. The plaintiff then brought an action under section 1983 to recover damages for the harm resulting from his conviction and confinement. The court dismissed this aspect of the action holding, as

506-07 (1978) (immunity doctrine); Monell v. Department of Social Servs., 436 U.S. 658, 694 (1978) (rejection of vicarious liability); Carey v. Piphus, 435 U.S. 247, 264 (1978) (actual injury); Scheuer v. Rhodes, 416 U.S. 232, 241-42 (1974) (immunity doctrine). *See generally* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 42-47 (1980).

79. The Court noted that the "constitutional principle at stake is sufficiently vindicated" by the modified but for test of causation. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 285. If the Court is suggesting that there is not a first amendment violation absent but for causation, then it is both defining the substantive constitutional right and establishing the standard for its vindication. In any event, this would not explain why the Court departed from prevailing common-law principles of causation.

80. The practical difference between the *Mt. Healthy* approach to causation and the common-law substantial factor test is the allocation of the risk of error in the factfinding process. It is only the rare case in which the defendant's conduct reasonably could be considered a "substantial" factor in producing a harm that would have occurred in its absence. *See* W. PROSSER, *supra* note 6, § 41, at 240. In cases involving joint causation under the common-law substantial factor test, there exists the risk that the factfinder may render an erroneous finding about the "substantial" nature of the connection between the defendant's conduct and the plaintiff's injury. The Court was clearly concerned about this risk when it noted "that same [marginal] candidate ought not to be able, by engaging in [constitutionally protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. at 286. The danger of an erroneous finding of fact on "substantiality" is reduced under *Mt. Healthy* by specifically addressing the significance of an independently sufficient cause. The primary risk of error in the factfinding process under *Mt. Healthy* is that the judge or jury may erroneously find a "cause" that is merely a subterfuge to be independently sufficient. It would not be surprising if, in future litigation, governmental employers point to numerous constitutionally permissible grounds for terminating employees who have engaged in constitutionally protected activity.

81. 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972).

matter of law, that the defendants' unconstitutional conduct in obtaining the confession was not the proximate cause of the plaintiff's conviction and confinement.[82]

The court observed that even without the constitutionally tainted confession it was entirely possible that the plaintiff would have been convicted. The plaintiff's subsequent acquittal could be explained by stale evidence and missing witnesses. Furthermore, the court could discern no clear correlation between the confession and the sentence imposed. Sentencing is a discretionary matter in which a judge may take many factors into account. Thus, the court concluded, it is sheer speculation that the coerced confession was the proximate cause of the plaintiff's conviction and nine-year confinement.[83] The court's argument, however, is essentially one of cause in fact. Due to the passage of time, the plaintiff as a matter of law cannot prove that he would not have suffered the same injuries in the absence of the coerced confession. This argument cannot withstand closer analysis.

That the admission of the confession required a reversal of the conviction indicates the confession could have been a substantial factor in producing the conviction. Under *Mt. Healthy*, if the plaintiff could establish the involuntary confession was a substantial factor in producing his conviction, the burden would shift to the defendants to prove that even in its absence the plaintiff would have been convicted.[84] Application of the *Mt. Healthy* approach to the question of causation in *Duncan* would likely have led to a different and more proper result. If the question of causation is made difficult by the passage of time, it is surely more appropriate to place the burden of reconstructing the events on the defendants. The plaintiff cannot be deemed responsible for the evidentiary problems created by the length of his incarceration. It was the defendants, after all, who created the risk of this situation by engaging in unconstitutional conduct. The vindicatory, compensatory, and deterrent functions of constitutional torts would be better served in these circumstances by placing the risk of nonpersuasion on the causation issue on the defendants, rather than dismissing the claim on the pleadings.

It is not clear whether the *Mt. Healthy* rule of causation will apply in all constitutional tort cases. It is generally invoked in situations in which the motivation of a single actor is at issue,[85] or when providing procedural due process would not alter the substantive deprivation.[86] The courts have

82. *Id.* at 943.

83. *Id. See also* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 251-52 (1979).

84. *See* text accompanying notes 54-57 *supra*.

85. Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 n.13 (1979); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 n.9 (1977); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

86. Carey v. Piphus, 435 U.S. 247, 260 (1978). In *Carey* the plaintiffs claimed that

not squarely faced the question whether the modified but for rule would be applicable in cases containing multiple actors and multiple culpable causes.[87] Suppose, for example, a mayor issues an order directing local police officers to "shoot to kill" those engaged in unlawful activity. A policeman then shoots a twelve-year-old black child suspected of committing a misdemeanor, depriving the child of his liberty without due process. Either the mayor's order or the child's race would have been a sufficient motivating factor to produce the shooting. Should the mayor's order be considered a cause in fact of the plaintiff's constitutional injury?[88]

Under a strict *Mt. Healthy* approach, the order would probably not be seen as a cause of the injury because the same injury would have occurred in its absence. This result, however, would hardly be satisfying. The mayor's order is the type of affirmative conduct that has led to liability in other contexts.[89] It is an act directed at the public in general. It is culpable in that it creates an unreasonable risk of a foreseeable constitutional deprivation. It is precisely this type of conduct that a constitutional tort action properly serves to deter. The deterrent function would not be advanced by a rule of causation that would allow the mayor to escape liability. Similarly, the vindicatory and compensatory functions would be better served by allowing the plaintiff to proceed against all those whose culpable conduct substantially contributed to the production of the constitutional injury. In situations in which the alleged independently sufficient cause is culpable, the modified but for rule of causation should not control. In these situations federalism concerns and a deference to governmental conduct cannot justify a departure from common-law policy—a wrongdoer

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they had been suspended from school without procedural due process. The procedural error was the absence of a proper hearing. The Court held that if the plaintiffs would have been suspended even if a proper hearing had been conducted, they could recover only for actual injuries attributable to the procedural deficiency. *Id.* at 263; *cf.* McCulloch v. Glasgow, 620 F.2d 47, 50 (5th Cir. 1980) (court implies that plaintiff could not recover for heart attack following denial of procedural due process).

87. *Cf.* Selzer v. Fleisher, 629 F.2d 809, 813-14 (2d Cir. 1980) (*Mt. Healthy* test must apply to each defendant in case concerning an alleged unconstitutional denial of tenure); Mann v. Village of Walden, 482 F. Supp. 154, 157 (S.D.N.Y. 1979) (alleged municipal policy of police harassment was not cause in fact of plaintiff's decedent's death when decedent's undisputed unlawful manner of operating car justified police pursuit).

88. The facts are suggested by Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975). In *Palmer* the officer who shot the child testified unequivocally that the mayor's statements had no effect on his decision to shoot. *Id.* at 709.

89. *E.g.*, Pennsylvania v. Porter, 659 F.2d 306, 321-22 (3d Cir. 1981) (en banc) (per curiam) (liability imposed on mayor and police chief who encouraged offending officer's conduct); Maclin v. Paulson, 627 F.2d 83, 86 (7th Cir. 1980) (police chief who ordered or passively observed beatings may be liable under § 1983); Hampton v. Hanrahan, 600 F.2d 600, 626-27 (7th Cir. 1979) (county attorney and assistant state attorney who personally planned early morning raid on Black Panther Party Headquarters may be liable for all reasonably foreseeable constitutional violations that took place during raid), *modified on other grounds*, 446 U.S. 754 (1980).

should not escape responsibility for wrongful conduct simply because other causes would also have produced the injury.

The Supreme Court's approach to factual causation reflects the tension between compensatory and protective instincts that appears throughout constitutional tort law. *Mt. Healthy* represents a compromise that is more protective of governmental conduct than the common-law substantial factor test. Yet, it is clearly less protective than the conclusory approach reflected in *Duncan*. The compromise reached in *Mt. Healthy* illustrates the use of cause in fact to resolve questions of policy.[90] In this instance the policies of deterrence, vindication, and compensation are slightly overridden by the value of encouraging governmental freedom to act.

B. Proximate Cause

Proximate cause issues concern the defendant's responsibility for the harms the defendant has caused in a *sine qua non* sense. It is often the basis for limiting liability when the fact of causation is clearly established. Proximate cause is essentially a question of whether the policy of law will extend responsibility for the conduct to the particular consequences that have in fact occurred.[91] The policies that underlie judicial conclusions of responsibility are often disguised behind the language of causation.[92] The proximate cause issues of liability for unforeseeable consequences and intervening causes as they relate to the policies and values underlying constitutional tort actions are discussed in this section.

1. Unforeseeable Consequences

a. Direct Consequences and Foreseeability

Of the many issues discussed under the general label of proximate cause, none has provoked more commentary than the extent of a defend-

90. *See* Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 72-84 (1956). In this thoughtful Article, Professor Malone convincingly demonstrates how judicial approaches to cause in fact do reflect policies and value preferences.

91. W. PROSSER, *supra* note 6, § 42, at 244.

92. As has been demonstrated in the work of Leon Green, virtually all of the issues discussed under the label of proximate cause could be more clearly analyzed as the scope of the defendant's duty. *See generally* L. GREEN, JUDGE AND JURY (1930); L. GREEN, RATIONALE OF PROXIMATE CAUSE 11-43 (1927). Such an analysis is thought to more sharply focus the court's attention on the policy considerations underlying its assessment of responsibility. *See generally* Thode, *Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge and Jury*, 1977 UTAH L. REV. 1. This approach may be all the more appropriate in constitutional tort litigation as issues of proximate cause determine the extent of constitutional protections. *See* text accompanying notes 37-40 *supra*. *See also* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 3.14, at 83-84 (1979). This Article, however, utilizes a traditional proximate cause analysis to describe and evaluate judicial decisions in their own terminology.

ant's liability for the unforeseeable consequences of a tortious act.[93] The fundamental question is whether defendants should be held legally responsible for the direct consequences of their conduct,[94] or for only those harms that could have been reasonably anticipated.[95] While this issue is prominent among common-law tort scholars, it has played a relatively insignificant role in the law of constitutional torts. The courts have been able to avoid a direct confrontation of this issue in most instances.[96] It is inevitable, however, that one day a defendant will be found to have deprived the plaintiff of constitutional rights and thereby have produced unforeseeable harm. The courts will then have to decide whether the defendant's responsibility is limited to or extends beyond forseeability. As discussed below, support for both the direct consequences and the foreseeability approaches to proximate cause can be found in the decisional law.

A majority of courts that have commented on the issue have tacitly accepted a foreseeability limitation to proximate cause.[97] These cases typically note their approval of "'the standard 'foreseeability' formulation of proximate cause'"[98] with virtually no discussion of why such a limitation is appropriate. The court in *Johnson v. Greer*[99] came closest to articulating

93. A sampling of the literature would include: L. GREEN, JUDGE AND JURY (1930); L. GREEN, RATIONALE OF PROXIMATE CAUSE (1927); H.L.A. HART & A. HONORE, CAUSATION IN THE LAW (1959); R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

94. Direct consequences may be described as those "which flow in unbroken sequence, without an intervening efficient cause, from the original negligence act . . . and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow." Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 97, 69 N.W. 640, 641 (1896). Other cases illustrating the direct consequences approach to proximate cause include: Petition of Kinsman Transit Co., 338 F.2d 708, 723-25 (2d Cir. 1964); Dellwo v. Pearson, 259 Minn. 452, 455-56, 107 N.W.2d 859, 861-62 (1961); *In re* Polemis & Furness, Withy & Co., [1921] 3 K.B. 560, 577. *See generally* W. PROSSER, *supra* note 6, § 43, at 263-67; Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633 (1920); Carpenter, *Proximate Cause*, 14 S. CAL. L. REV. 1 (1940).

95. *See generally* R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); W. PROSSER, *supra* note 6, § 43; Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939).

96. *See* McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) (ambiguous discussion of potential liability only in the context of state law for heart attack allegedly resulting from denial of procedural due process); Reeves v. City of Jackson, 608 F.2d 644, 650 (5th Cir. 1979) (arresting officers potentially liable to stroke victim allegedly arrested without probable cause); Patzig v. O'Neil, 577 F.2d 841, 845, 850-51 (3d Cir. 1978) (assuming that city may be liable for suicide committed in jail by person arrested without probable cause); Hamilton v. Chaffin, 506 F.2d 904, 911-13 (5th Cir. 1975) (defendants not responsible for suicide committed in local jail following arrest).

97. Arnold v. IMB Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); Beard v. Mitchell, 604 F.2d 485, 495-96 (7th Cir. 1979); Furtado v. Bishop, 604 F.2d 80, 89 (1st Cir. 1979); Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978); Hamilton v. Chaffin, 506 F.2d 904, 913 (5th Cir. 1975).

98. Arnold v. IBM Corp., 637 F.2d 1350, 1355 (9th Cir. 1981).

99. 477 F.2d 101 (5th Cir. 1973).

a justification for the foreseeability limitation. The plaintiff was found to have been deprived of his liberty without due process by the well-meaning administrator of a psychiatric diagnostic clinic.[100] During his unconstitutional detainment the plaintiff suffered a shoulder injury while resisting the efforts of two orderlies to administer medication. An award of damages for the shoulder injury was reversed, in part, because the trial court's instructions did not clearly limit the defendant's liability to those harms reasonably to be anticipated from the imprisonment.[101] The court noted that although

> good intentions do not in themselves create a defense to the action, . . . justice, fairness, and sound policy coalesce to indicate that an officer acting under color of law without malice or bad intent should be liable only for those injuries which an ordinarily prudent man would reasonably foresee would result from his actions.[102]

The *Greer* court perceived it to be unfair and unjust to hold a well-meaning defendant liable to an extent greatly exceeding his moral blameworthiness. Justice and fairness in this instance are apparently viewed from the standpoint of the defendant. Limiting the extent of liability to foreseeable consequences is thought to be fair because it keeps liability proportional to fault.[103] This perception of fairness underlies much of the justification advanced for the foreseeability formulation of proximate cause

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100. *Id.* at 104-05.

101. *Id.* at 105. The court also held that the defendant could not be held liable for the shoulder injury unless the defendant's conduct increased the risk of the injury. The showing of an increased risk was necessary because the defendant acted without malice and the injury was thought to be inflicted by an outside force. *Id.* at 107-08. In reaching this conclusion the court relied on RESTATEMENT OF TORTS § 870, Comment g (1939). The following example, however, given to illustrate the circumstances in which increased risk is needed, reveals the inapplicability of the provision to the facts in *Greer*.

> *A*, intending to wound *B*, pursues *B* down the street. While *B* is running, he is struck by a falling cornice which antecedently gave no indication of danger but which would not have struck *B* had *B* not been forced to run by *A*'s threat. *B* is not entitled to recover from *A* for the damage thus caused.

RESTATEMENT OF TORTS § 870, Comment g, Illustration 9 (1939). The risk of being struck by a falling cornice is entirely distinct from the risk created by *A*'s assault. There was nothing in *A*'s conduct that created the danger of the cornice falling. The falling cornice may therefore properly be considered a force outside *A*. In *Greer*, on the other hand, the defendant's unconstitutional confinement of the plaintiff created the risk of forced medication. It was surely reasonably foreseeable that the orderlies would attempt to provide the plaintiff with medication. Indeed, that was probably the very purpose of the confinement. Moreover, there is no indication that the orderlies acted improperly. Their conduct was a force outside the defendant in only the sheerest fictional sense. *But cf.* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 3.14, at 85 (1979) (approving of the increased risk rationale of *Greer*).

102. 477 F.2d at 107.

103. W. PROSSER, *supra* note 6, § 43, at 257.

in common-law negligence. That is, the same criteria of foreseeability and risk of harm that determine whether the defendant was negligent also determine the extent of liability for that negligence.[104]

It is questionable whether the common-law rationale can be simply transposed into constitutional tort law. Most constitutional tort actions are based on intentional, not negligent, conduct. The common law frequently carries responsibility further for committing an intentional wrongful act than for committing a merely negligent act.[105] If foreseeability is to limit the extent of liability for constitutional torts, it must rest on some basis other than the common-law negligence rationale.

Other cases appear to support extending liability beyond the limits of foreseeability. In *Monroe v. Pape*,[106] the Court stated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[107] Though *Monroe* was not concerned with proximate cause, its characterization of tort law is phrased in terms associated with a rejection of a foreseeability limitation of liability. The phrase "natural consequences" appears in many decisions adopting the direct consequences approach to proximate cause. In *Christianson v. Chicago, St. Paul, Minneapolis & Omaha Railway*,[108] for example, the court ruled that once an act is characterized as negligent, the defendant is "liable for all its natural and proximate consequences, whether he could have foreseen them or not."[109]

The rationale of the foreseeability limitation was recently weakened by *Owen v. City of Independence*.[110] *Owen* directly challenged the fairness policy underlying foreseeability. The municipal defendant was held liable for damages under section 1983 for discharging the plaintiff without providing him with a name-clearing hearing. The right to such a hearing was not firmly established until several months after the plaintiff had been fired. The city argued that it would be unfair to hold it responsible for the plaintiff's injuries because it could not have foreseen that its actions would

104. *Id.* at 251. *See generally* 2 F. HARPER & F. JAMES, *supra* note 6, § 20.5.

105. *See, e.g.*, McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980) (intentional tortfeasor held to greater liability than negligent tortfeasor); RESTATEMENT (SECOND) OF TORTS § 435B, Comment a (1965) ("[R]esponsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault."). Intent does not necessarily involve a desire to do harm. A person acts with intent when the person desires to cause the consequences of the act or believes that the consequences are substantially certain to result from it. RESTATEMENT (SECOND) OF TORTS § 8A (1965); *see, e.g.*, Garratt v. Dailey, 46 Wash. 2d 197, 202, 279 P.2d 1091, 1094 (1955).

106. 365 U.S. 167 (1961).

107. *Id.* at 187.

108. 67 Minn. 94, 69 N.W. 640 (1896).

109. *Id.* at 97, 69 N.W. at 641; *accord*, Turk v. H.C. Prange Co., 18 Wis. 2d 547, 558, 119 N.W.2d 365, 371-72 (1963). *See generally* W. PROSSER, *supra* note 6, § 43, at 263-67.

110. 445 U.S. 622 (1980).

violate the plaintiff's constitutional rights. The Court rejected this argument relying on principles of both corrective and distributive justice. First, the Court reasoned that "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss."[111] It then seized upon the "principle of equitable loss-spreading"[112] to justify imposing liability on a defendant that could not foresee its conduct would violate the Constitution. The Court also emphasized that the increased risk of constitutional tort liability would likely deter future misconduct.[113]

Owen does not, of course, speak directly to the question of proximate cause. Its perceptions of fairness and proper allocation of losses, however, seriously undercut the justifications advanced for the foreseeability formulation of proximate cause. If it is more just to hold a city responsible for harm when it could not foresee that its conduct would violate a constitutional standard of care, it is also more just to hold it, and not the victim, responsible for the unforeseeable harm flowing from that conduct. Indeed, *Owen*'s fairness rationale rejects much of the foundation upon which the common law foreseeability rule of proximate cause was built.[114] Furthermore, it is evident that municipalities enjoy a superior loss distributing capability vis-a-vis the victim for the unforeseeable, as well as the foreseeable, costs of official misconduct.[115]

The perception of fairness to the defendant in *Greer* and the policy

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111. *Id.* at 654. This rationale embodies a principle of corrective justice championed by Professor Epstein. *See generally* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979).

112. 445 U.S. at 657. In explaining why it was appropriate to place the burden of the injury on the city, the Court noted:

> After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Id. at 655.

113. *Id.* at 652.

114. The foreseeability rule of proximate cause was premised on the idea that the same criteria that determined whether the defendant was negligent should also determine the extent of the liability for that negligence. W. PROSSER, *supra* note 6, § 43, at 251. *Owen* has decided that the criterion for municipal liability is not the foreseeability of constitutional deprivation. Thus, if the foreseeability rule of proximate cause is to remain dominant, it must be justified on other grounds.

115. Individual defendants may not be able to distribute the losses caused by unconstitutional conduct any better than individual plaintiffs. In many instances, however, individual defendants are indemnified by their governmental employers. *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 456 (1977). Where indemnity is not available, the fairness rationale of *Owen* would independently justify placing responsibility for unforeseeable consequences on the wrongdoer.

of avoiding excessive burdening of government conduct appear squarely to conflict with the loss-spreading and fairness rationales in *Owen*. Extending liability beyond the foreseeable consequences is appropriate in constitutional tort cases. This follows from the *Owen* Court's premise that "one who causes a loss should bear the loss."[116] This premise is not convincingly rebutted by the various countervailing considerations.

Federalism values do not appear to be seriously implicated. The extent to which federal courts will become involved in state and local affairs will not be reduced by adopting a foreseeability formulation of proximate cause. The primary manner in which governments would be burdened by extending liability is financial. It may be feared that the monetary cost of compensating victims of constitutional torts for unforeseeable injuries could inhibit government conduct in providing essential services.[117]

It is unlikely, however, that serious interference with the functioning of government would result. In the first place, it may be questioned whether people will alter their conduct on the basis of potential liability for unforeseeable harms.[118] Furthermore, cases of this type occur too infrequently to provide the basis for a systematic modification of behavior. If, however, the risk of liability for unforeseeable consequences does alter governmental conduct, this effect may well be warranted. To argue that the potential financial burden would affect the conduct of government is to recognize the deterrent value of constitutional tort actions.[119]

Deterrence is particularly important in the constitutional tort context because of the vast potential for harm residing in the government's reservoir of power. Governments, of course, have an immense capacity to inflict physical harms upon persons and property. More important, however, is the unique position that governments occupy with respect to constitutional rights. Government is both the protector of and principal threat to fragile civil liberties. Monetary incentives reinforce what is other-

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116. 445 U.S. at 654.

117. *Id.* at 670 (Powell, J., dissenting); *see* note 12 *supra*.

118. Calabresi, *Concerning Cause and the Law of Torts: An Essay for Henry Kalvin, Jr.*, 43 U. CHI. L. REV. 69, 81 (1975).

119. This point was forcefully made in *Owen*, in which the Court stated:

> More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'être*."

445 U.S. at 656 (quoting *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1224 (1977)).

wise largely self-restraint in the protection of constitutional rights. Furthermore, many deprivations of constitutional rights are not easily repaired.[120] It is, therefore, more desirable to avoid the constitutional deprivation in the first place than attempt to provide subsequent compensation. If rendering a government liable for the unforeseeable consequences of official misconduct will reduce the danger of future constitutional violations, the rule would advance an important goal of constitutional tort law.

b. The Eggshell Skull Rule

There is one situation in which even its strongest adherents have abandoned the foreseeability formulation of proximate cause. If the defendant could foresee causing the plaintiff some harm, but the extent of the injury actually produced was not foreseeable, common-law courts have held the defendant liable for the entire harm.[121] In such instances the defendant takes the plaintiff as found and is held responsible for the full extent of the injury, even though a latent susceptibility of the plaintiff renders this far more serious than could have been anticipated. This common-law doctrine is commonly referred to as the "eggshell skull rule."[122] The eggshell skull rule is premised upon a respect for personal integrity and a perception that it is fairer to allocate these unforeseeable costs on the wrongdoer than on the innocent victim.[123]

The applicability of the eggshell skull rule to constitutional torts is suggested by the recent case of *McCulloch v. Glasgow*.[124] In this action the plaintiff claimed title to a piece of land upon which the defendants proposed to construct a road. Despite the plaintiff's protest, the defendants proceeded with the construction without conducting a constitutionally mandated hearing to resolve the title dispute. The plaintiff suffered a heart attack allegedly as a consequence of the defendants' actions. He then

120. *E.g.*, Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (victims of denial of procedural due process are not entitled to more than nominal damages absent proof of actual damage); Tatum v. Morton, 562 F.2d 1279, 1281-82 (D.C. Cir. 1977) (district court's award of $100 per plaintiff for damages resulting from first amendment violations held to be inadequate). *See generally* Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979); Comment, *Damage Award for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966 (1980); Note, *Section 1983: An Analysis of Damage Awards*, 58 NEB. L. REV. 580 (1979).

121. A milkman negligently leaves a bottle with a chipped lip which scratches a housewife's hand as she takes it in. This particular housewife has a blood condition so that what would normally be a trivial scratch leads to blood poisoning and death. The negligent milkman is responsible for the full extent of the liability without regard to foreseeability. Kochler v. Waukesha Milk Co., 190 Wis. 52, 59-60, 208 N.W. 901, 904 (1926). *See generally* RESTATEMENT (SECOND) OF TORTS § 460 (1965); 2 F. HARPER & F. JAMES, *supra* note 6, § 20.5, at 1139-40; W. PROSSER, *supra* note 6, § 43, at 261-62.

122. W. PROSSER, *supra* note 6, § 43, at 262.

123. 2 F. HARPER & F. JAMES, *supra* note 6, § 20.5, at 1140.

124. 620 F.2d 47 (5th Cir. 1980).

brought an action under section 1983 and pendent state law to recover damages for his injuries. The defendants argued they could not be held responsible for the heart attack because it was not a reasonably foreseeable consequence of their action. In setting aside a jury verdict for the plaintiff and remanding the case for a new trial, the court stated that the plaintiff could recover for an unforeseeable heart attack if the defendants could have foreseen that their actions would expose the plaintiff to risk of some other injury.[125]

While this result may be proper, the court's opinion only confuses the causation issues presented in the case. The confusion stems primarily from the court's failure to indicate whether its discussion of proximate cause pertains to the federal constitutional tort, the pendent state claim, or both. The ambiguity in this case may be of particular importance. The court's discussion of the role of foreseeability in determining the extent of the defendants' liability is couched exclusively in terms of state law.[126] This discussion follows a ruling that an award of substantial damages could not be sustained under section 1983.[127] Taken together, these passages could be read to hold that no recovery for the heart attack could be made under section 1983. The plaintiff could recover for his heart attack, if at all, only under pendent state law. Such a holding would be in error. It is recognized that a denial of procedural due process creates a risk of causing emotional distress.[128] A heart attack may be only a physical manifestation of distress and thus fall within the zone of risk created by the defendants' unconstitutional conduct.[129] Clearly, recovery of damages for the heart attack resulting from a denial of due process is possible under section 1983.

If the *Glasgow* court intended its discussion of foreseeability to apply to the section 1983 claim, it clouded the issue by failing to distinguish between cause in fact and proximate cause. Before foreseeability becomes an issue, it must be established that the denial of procedural due process was a necessary antecedent condition for producing the injury. Under the rule of *Carey v. Piphus*,[130] the plaintiff first must show that the procedural deficiency was a substantial factor producing the heart attack.[131] If the

125. *Id.* at 51. The jury found that the defendant had acted maliciously in taking the property and under state law, the plaintiff could recover for unforeseeable injuries resulting from intentional wrongdoing. *Id.* It was not clear whether the substantive deprivation was justified. Title to the property in question was a matter to be resolved on remand according to state law. *Id.* at 50.

126. *Id.* at 51.

127. *Id.* at 50.

128. Carey v. Piphus, 435 U.S. at 263-64; Ellis v. Blum, 643 F.2d 68, 83 (2d Cir. 1981).

129. The causal relationship between emotional stress and cardiac disorders is both legally and medically recognized. *See* Klimas v. Trans Caribbean Airways, Inc., 10 N.Y.2d 209, 213, 176 N.E.2d 714, 716, 219 N.Y.S.2d 14, 16 (1961); E. SAGALL & B. REED, THE HEART AND THE LAW 621 (1968); Raab, *Emotional and Sensory Stress Factors in Myocardial Pathology*, 72 AM. HEART J. 538, 552 (1966).

130. 435 U.S. 247, 263 (1978); *see* note 86 *supra*.

131. *Id.*

defendants then cannot prove that the plaintiff would have suffered the heart attack had a hearing been held, factual causation would be established.[132] It is only at this point that foreseeability would become an issue. The guidance to lower courts provided by *McCulloch v. Glasgow* is seriously hampered by the failure to distinguish the proximate cause issue from cause in fact.

If the plaintiff can establish that the defendant's failure to conduct a hearing was the factual cause of his unforeseeable heart attack, a true eggshell skull proximate cause issue would be presented. Convincing arguments can be made in favor of applying the eggshell skull rule in a constitutional tort setting. There is no obvious reason for the constitutional tort victim to be afforded less protection than the common law counterpart in this regard. The conceptual underpinnings of the eggshell skull rule do not depend upon whether the underlying right is of common law or constitutional origin. The deterrent function of constitutional tort law would equally be advanced by the rule's application. A government actor who can foresee little resulting harm may be tempted to take a procedural short cut. The same actor may be less likely to engage in procedural irregularities if remaining potentially responsible for resulting harms that are unforeseen. The fairness and loss-spreading rationales of *Owen* would also support incorporating the eggshell skull rule into constitutional tort law.

The eggshell skull rule would exact no additional costs from the prerogatives of state sovereignty. Again, the effect on governmental defendants would be primarily financial. Although the amount of money at issue in any individual case may be substantial,[133] as a class cases involving eggshell skull issues are rare. Thus, it is not likely that adoption of the eggshell skull rule in constitutional tort litigation would seriously hinder the functioning of government.

2. *Intervening Cause*

One facet of the proximate cause problem that has posed difficulties in constitutional tort cases is intervening cause. In the typical case, the defendant has violated some constitutional right of the plaintiff and this violation is a cause in fact of the plaintiff's injury. The question is whether the defendant should be relieved of responsibility for the resulting harm because it was brought about by some intervening force of independent origin.[134] There is a tendency among courts in these cases to define the

132. *See* text accompanying note 57 *supra*.

133. The plaintiff in McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980), was awarded $20,000 in actual damages resulting from a denial of procedural due process. *Id.* at 49. Most of these damages were attributable to the allegedly unforeseeable heart attack. *Id.* at 51.

134. An intervening force may be defined as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." RESTATEMENT (SECOND) OF TORTS § 441(1) (1965).

defendant's responsibility in terms of the foreseeability of the alleged intervening cause. The defendant is held liable for harms produced by foreseeable intervening causes, but is not responsible for the harms produced by unforeseeable intervening causes.[135]

a. Foreseeability

The foreseeability of the alleged intervening cause properly may explain the results of some cases. In *Anderson v. Nosser*,[136] for example, the plaintiffs sought to hold a local police chief liable for harms suffered at the hands of the superintendent of a state prison. The police chief had violated the plaintiffs' constitutional rights in connection with their arrest, and this violation was clearly a factual cause of their subsequent mistreatment.[137] The court viewed the actions of the prison superintendent as an intervening force for which the police chief could be held responsible only if foreseeable. The causal connection between the unconstitutional arrest and the subsequent mistreatment would be broken if the intervening conduct of the superintendent was found to be unforeseeable.

In other cases, however, the language of foreseeability does not explain adequately the court's assessment of the defendant's responsibility. In *Duncan v. Nelson*[138] the plaintiff sued local law enforcement officials for damages resulting from the plaintiff's conviction for murder and nine-year incarceration. The defendants had forced the plaintiff to confess involuntarily to the crime and the confession was improperly admitted into evidence. The court held, as a matter of law, that the defendants were not responsible for the plaintiff's conviction and confinement because the trial judge's admission of the coerced confession was an unforeseeable "superseding, intervening cause."[139]

The court's reliance on the rationale of unforeseeable intervening cause is troublesome in two respects. First, the court applied principles derived

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135. Furtado v. Bishop, 604 F.2d 80, 89 (1st Cir. 1979); Duncan v. Nelson, 466 F.2d 939, 942 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972); Anderson v. Nosser, 456 F.2d 835, 841 (5th Cir. 1972) (en banc).

136. 456 F.2d 835 (5th Cir. 1972) (en banc).

137. *Id.* at 839. The *Anderson* plaintiffs were civil rights demonstrators arrested in Natchez, Mississippi. As the jails of Natchez were insufficient to accommodate the number of persons arrested, arrangements were made to take them to Parchman State Penitentiary. The plaintiffs were stripped and many were forced to remain naked for periods of up to 36 hours. All the plaintiffs were given laxatives, but toilet paper was in short supply. Four to eight persons were placed in each cell and slept on bare steel beds or on the floor. The court found this treatment to constitute summary punishment which violated the due process clause of the fourteenth amendment. *Id.* at 839-40.

138. 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972).

139. *Id.* at 942. The court reasoned that "[t]o find that these defendants, who knew or should have known this confession was inadmissible, would foresee that the trial judge would erroneously admit this unlawful confession is untenable." *Id.* For a discussion of the alternative holding, see text accompanying notes 81-84 *supra*.

from common-law negligence cases when the defendants' conduct could only be characterized as intentional wrongdoing. As previously observed, under common law the extent of liability of an intentional wrongdoer is frequently greater than that of one who is merely negligent.[140] Furthermore, even if we assume as a matter of policy that police officers who coerce confessions should not be responsible for the unforeseeable acts of judges, the facts of *Duncan* do not fit within this principle.

It is simply untenable to hold as a matter of law that police officers cannot reasonably foresee a trial judge improperly admitting evidence obtained by unconstitutional means and this evidence producing a conviction. This holding presumes the infallibility of trial judges on evidentiary matters. The vast body of law that has developed concerning the admission and exclusion of constitutionally tainted evidence belies its validity.[141] Furthermore, the central reason the use of involuntary confessions is constitutionally proscribed is their perceived unreliability.[142] Judicial doubts regarding the trustworthiness of coerced confessions indicate that the judiciary recognizes the substantial risk that these confessions could cause innocent persons to be convicted of crimes. The possibility of the improper admission of the confession and the resulting conviction in *Duncan* thus falls squarely within the zone of risks that rendered the defendants' conduct unconstitutional. When the actions of the intervening actor lie within the scope of the original risk, the defendant is not relieved of responsibility for the resulting harm.[143]

b. Shifted Responsibility to a Third Party

Perhaps a more persuasive, albeit unarticulated, explanation of *Duncan* lies within the elusive common-law concept of shifted responsibility. It has been recognized in common law that under certain circumstances, the obligation to prevent the harm threatened by the defendant's conduct has shifted to some third party.[144] A defendant, for example, may be negligent in allowing dynamite caps to get into the hands of a child. The defendant will be relieved of responsibility for the subsequent injury if in the meantime the child's parents, aware of the risk, take the caps away and then fail to prevent the child from obtaining possession of them again.[145]

In the *Duncan* case, it could be argued that upon commencement of

140. *See* note 105 *supra*.

141. *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE §§ 2.01-.06 (1980).

142. *See* Ward v. Texas, 316 U.S. 547, 555 (1942). *See generally* White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

143. *E.g.*, Hines v. Garrett, 131 Va. 125, 140, 108 S.E. 690, 695 (1921); *see* RESTATEMENT (SECOND) OF TORTS § 442A (1965).

144. RESTATEMENT (SECOND) OF TORTS § 452(2) (1965).

145. Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 580-81, 113 S.W. 647, 648-49 (1908).

the trial the judge assumed the obligation of protecting the plaintiff from harm threatened by the coerced confession. Judicial independence and the express obligation to control the admission of evidence could be viewed as circumstances justifying shifting responsibility for the conviction from the defendants to the judge. The defendants would escape liability, not because the judge's error was unforeseeable, but because these special circumstances shifted responsibility for the harm to the judge.

The principle of shifted responsibility has appeared by implication in several constitutional tort cases in which the alleged intervening cause was the conduct of a government official. The conduct of persons initiating civil commitment or criminal proceedings has been held not to be the proximate cause of subsequent harm inflicted by the presiding judge.[146] Similarly, providing information and cooperating with police has been held not to be the proximate cause of the resulting illegal arrest when the arresting officers exercised independent judgment.[147] A common thread running throughout these cases is the independent authority of the intervening actor and the separate obligation to prevent the harm that occurred.

It has also been recognized in common law that a defendant's responsibility for the plaintiff's injury may be shifted to a third person by a lapse of time between the defendant's conduct and the plaintiff's injury.[148] Such a limitation is justified by a perceived pragmatic imperative to "forbid an illimitable extension of liability for a train of events proceeding into the indefinite future."[149] The Supreme Court in *Martinez v. California* suggested that such a limitation may have an appropriate role in constitutional tort litigation. The Court in *Martinez* held that under section 1983 parole officials were not responsible for the death of the plaintiffs' decedent at the hands of a parolee. The type of crime committed by the parolee was presumed to be reasonably foreseeable and fell within the zone of risks that rendered the defendants' conduct allegedly reckless. The Court concluded, however, that the death was "too remote a consequence of the parole officers' action to hold them responsible."[150] The Court iden-

146. Hoffman v. Halden, 268 F.2d 280, 296-97 (9th Cir. 1959), *overruled in part on other grounds*, Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); Cuiksa v. City of Mansfield, 250 F.2d 700, 704 (6th Cir. 1957); Whittington v. Johnston, 201 F.2d 810, 811 (5th Cir. 1953).

147. Arnold v. IBM Corp., 637 F.2d 1350, 1358 (9th Cir. 1981). *Cf.* Butler v. Goldblatt Bros., 589 F.2d 323, 327 (7th Cir. 1978) (analyzing liability of private parties involved in police arrests in terms of state action).

148. Goar v. Village of Stephen, 157 Minn. 228, 237, 196 N.W. 171, 174 (1923) (defect in utility pole was not the proximate cause of injury when purchaser failed to inspect the pole for 17 months after the sale). *See* RESTATEMENT (SECOND) OF TORTS § 452(2) (1965).

149. Firman v. Sacia, 7 A.D. 579, 582, 184 N.Y.S.2d 945, 948 (1959). Dean Prosser explained such decisions "merely on the ground that there must be a terminous somewhere, short of eternity, at which the second party becomes responsible in lieu of the first." W. PROSSER, *supra* note 6, § 44, at 289.

150. Martinez v. California, 444 U.S. at 285. *Martinez* also illustrates the use of proximate cause to avoid the resolution of difficult issues. The lower court had ruled that parole officials enjoyed an absolute immunity from the plaintiffs' suit. Martinez v. State, 85

tified three factors in support of its conclusion of remoteness. First, the Court twice noted that five months had passed between the defendants' conduct and the murder. Second, the parolee was not an agent of the parole board. Finally, the decision to release the parolee posed no risk peculiar to the deceased, as distinguished from the public at large.[151]

The Court expressly left open the possibility that a parole officer could be found to have deprived someone of life by deciding to parole a prisoner.[152] This reservation tacitly recognizes that responsibility for a crime committed by a parolee may sometimes lie with the parole officer as well as with the parolee. The emphasis placed on the lapse of time suggests that it is an important factor to be considered in determining who was responsible. Under the particular facts of *Martinez*, responsibility rested entirely on the parolee.[153]

When third party conduct is reasonably foreseeable, the application of principles of shifting responsibility as a limitation on proximate causation is subject to criticism on both a theoretical and practical level. It is difficult to justify relieving a defendant of responsibility for harms that fall within the zone of risks created by the defendant's wrongful conduct simply because someone else has also failed to protect the plaintiff from the same risk.[154] This failure to hold the defendant liable is particularly puzzling in the constitutional tort context when the third person upon

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Cal. App. 3d 430, 437-38, 149 Cal. Rptr. 519, 524 (1978), *aff'd on other grounds*, 444 U.S. 277 (1980). The plaintiffs contended that the defendants were entitled, at most, to a qualified immunity. The Court's conclusory finding of no proximate cause allowed it to sidestep the troublesome immunity issue.

The Court was also able to avoid having to address in detail the plaintiffs' constitutional theory. The plaintiffs alleged that their daughter was deprived of her life without due process by a decision to parole her eventual murderer. This theory assumes that the due process clause of the fourteenth amendment is implicated when a state in some manner makes it possible for a private person to deprive another of life, liberty, or property. Acceptance of such a theory could have a tremendous impact on federalism values. By expanding the circumstances in which the fourteenth amendment would apply, this theory would increase the incidences of federal oversight of state and local governmental conduct. The failure to prevent crime could theoretically provide the basis of a § 1983 claim. *See, e.g.*, Huey v. Barloga, 277 F. Supp. 864, 870 (N.D. Ill. 1967); *cf.* Reedy v. Mullins, 456 F. Supp. 955, 957 (W.D. Va. 1978) (plaintiffs alleged that defendants' failure to provide adequate fire protection caused them to be deprived of their house without due process of law). *See generally* Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981). By resolving *Martinez* with an ambiguous conclusion regarding proximate cause and limiting the decision to the particular facts, the Court postponed its consideration of this theory of constitutional law.

151. 444 U.S. at 285.

152. *Id.*

153. Thus, if the parole board had known that the parolee made specific threats against the decedent and then killed her immediately upon parole, perhaps the proximate cause issue would have been decided differently. *See* S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 3.14 (Supp. 1980).

154. *See* note 143 *supra* and accompanying text.

whom responsibility is placed is frequently immune from suit.[155] The effect of recognizing a shift in responsibility in these cases is to deny a plaintiff money damages for unquestioned injuries of constitutional magnitude.[156]

Because the defendant escapes liability, the shifting of responsibility in this instance is not likely to deter future misconduct. Obviously the plaintiff is not compensated for the injuries. The shifting of responsibility may be justified by vindication of rights because a person's rights are not vindicated simply by allowing recovery. Vindication is achieved only if the person from whom recovery is obtained is responsible for the wrong. If someone other than the defendant is solely responsible for the harm, the defendant should not be held liable.

The pragmatic difficulty is identifying the principles by which sole responsibility can be determined. Identifying the particular circumstances that would justify a shifting of responsibility has proven to be a most perplexing task. In the common law context, the authors of the *Restatement* could do no more than identify some variables and note that "[i]t is apparently impossible to state any comprehensive rule as to when such a decision will be made."[157] There is little reason to believe that clear principles will more easily emerge in constitutional tort cases. Factors such as independent power, separate obligations to the plaintiff, and lapse in time, cannot by themselves resolve many cases. Virtually all human intervening forces have power independent of the defendant, owe the plaintiff a distinct obligation to avoid producing the harm, and act at some point in time subsequent to the defendant's conduct. Yet it is only in the exceptional case that responsibility is shifted.

The discussion of proximate cause issues in constitutional tort cases has been, as in *Martinez*, quite general. It rarely rises above the recital of common law maxims. The common law talisman of foreseeability sometimes takes on a fictional quality, as in *Duncan*. Judicial ambivalence toward the choice of law problem and the distinction between cause in

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155. *See, e.g.*, Duncan v. Nelson, 466 F.2d 939, 943 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972); Hoffman v. Halden, 268 F.2d 280, 296-97, 301, (9th Cir. 1959), *overruled in part on other grounds*, Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); Cuiska v. City of Mansfield, 250 F.2d 700, 704 (6th Cir. 1957). *Cf.* Rheuark v. Shaw, 628 F.2d 297, 304-05 (5th Cir. 1980) (finding that although judge and court reporter were responsible for the unconstitutional delay in preparing plaintiff's statement of facts, both were immune from suit).

156. *E.g.*, Duncan v. Nelson, 466 F.2d 939, 940, 943 (7th Cir.) (plaintiff was uncompensated for nine years of unconstitutional confinement), *cert. denied*, 409 U.S. 894 (1972).

157. RESTATEMENT (SECOND) OF TORTS § 452, Comment f (1965). These variables include:

> [T]he degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations.

Id.

fact and proximate cause produces muddled decisions like *McCulloch v. Glasgow*. The proximate cause issues presented in these cases are important because they define the scope of constitutional protections. Courts should resolve these issues with reference to the policies and values pertinent to constitutional torts rather than by recitation of common law principles.

III. CAUSATION OF CONSTITUTIONAL DEPRIVATIONS BY AN EMPLOYEE

There is one recurring situation in constitutional tort litigation that presents difficult issues of causation. The basic problem is under what circumstances may a local government or supervisor be found to have caused an employee or subordinate to deprive the plaintiff of constitutional rights. For example, can a municipality's failure to adequately train and supervise a police officer cause the plaintiff to be subjected to a constitutional violation at the hands of the officer?[158] This issue is an outgrowth of the Supreme Court decisions in *Rizzo v. Goode*[159] and *Monell v. Department of Social Services*.[160]

In *Rizzo* the Supreme Court reversed a lower court injunction issued against several individuals for their alleged failure to adequately supervise and discipline police officers who engaged in unconstitutional conduct. Among the reasons given for reversing the lower court was the failure of the plaintiffs to establish that the named defendants were directly responsible for the offending officer's conduct.[161] The Court expressly refused to embrace a theory that "without a showing of direct responsibility for the actions of a small percentage of the police force, [defendants'] *failure* to act in the face of a statistical pattern"[162] could support a finding of liability under section 1983.

In *Monell* the Court concluded that the causation clause of section 1983[163] precluded the application of the doctrine of respondeat superior.[164]

158. *E.g.*, Pennsylvania v. Porter, 659 F.2d 306 (3d Cir. 1981) (en banc) (per curiam); Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir. 1980); McClelland v. Facteau, 610 F.2d 693, 696 (10th Cir. 1979); Owens v. Haas, 601 F.2d 1242, 1246-47 (2d Cir. 1979).

159. 423 U.S. 362 (1976).

160. 436 U.S. 658 (1978).

161. 423 U.S. at 377. The Court also expressed serious doubts whether the facts presented a case or controversy as required by Article III of the Constitution, and found that principles of federalism counseled against the award of injunctive relief. *Id.* at 371-73, 377-80.

162. *Id.* at 376 (emphasis original).

163. Section 1983 provides for an action against any person who under color of state law "subjects, or causes to be subjected" any person to the deprivation of any constitutional or statutory right. 42 U.S.C. § 1983 (Supp. III 1979).

164. Monell v. Department of Social Servs., 436 U.S. at 692-94. The Court's rejection of respondeat superior has been criticized on its merits. Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 215 n.15 (1979); Comment, *Section 1983 Municipal*

This conclusion was compelled, in the Court's view, by the implicit meaning of the term "causes" and the legislative history of the act.[165] The Court readily acknowledged that a local government may cause an employee to violate another person's constitutional rights. Causation under *Monell*, however, requires a relationship between the government and the constitutional deprivation more substantial than the mere employment of the offending actor.[166] Some policy or custom fairly attributable to the government must be "responsible for"[167] or the "moving force"[168] behind the constitutional violation.

The requirement of direct responsibility in *Rizzo* and the rejection of respondeat superior in *Monell* inject a difficult issue into constitutional tort litigation: when is a local government or supervisor the "cause" of, or "responsible for," or the "moving force" behind constitutional deprivations inflicted by others? Lower courts struggling with this question have been left largely to their own devices. Neither common-law analogies[169]

Liability and the Doctrine of Respondeat Superior, 46 U. CHI. L. REV. 935, 938-51 (1979). It has also been classified as dictum. The application of respondeat superior to constitutional torts was not in controversy in *Monell*. It was not raised or briefed by either party nor was it addressed by the lower courts. Schnapper, *supra*, at 215-16. Thus, this aspect of the decision may properly be characterized as "merely advisory." Monell v. Department of Social Servs., 436 U.S. at 714 (Stevens, J., concurring in part).

Despite the substantive and procedural criticisms of this aspect of *Monell*, courts have generally adhered to it. Parratt v. Taylor, 101 S. Ct. 1908, 1913 n.3 (1981); Ellis v. Blum, 643 F.2d 68, 85 (2d Cir. 1981); Local No. 1903 v. Bear Archery, 617 F.2d 157, 160-61 (6th Cir. 1980); Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979). It would appear that for the present, principles of vicarious liability do not apply in constitutional tort actions.

165. 436 U.S. at 692 & n.57. The Court reasoned that "the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.* at 692. This analysis proceeds on an intuitive assumption that the doctrine of vicarious liability is inconsistent with a principle of assigning tort liability on the basis of causation.

The Court also relied on Congress' treatment of the Sherman Amendment to support its conclusion. *Id.* at 692 n.57. As has been demonstrated elsewhere, it is difficult to reach firm conclusions about the congressional view of vicarious liability from the amendment's rejection. Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 942-47 (1979). Some congressional leaders viewed the Sherman Amendment as rendering municipalities responsible for all constitutional violations occurring within their boundaries—whether committed by employees, citizens, or outsiders. The amendment thus proposed a type of liability significantly broader than that involved under traditional vicarious liability principles. The Sherman Amendment, moreover, was proposed as a separate section and not as a modification of what is currently 42 U.S.C. § 1983 (Supp. III 1979). *See id.*

166. 436 U.S. at 691-92.

167. *Id.* at 690.

168. *Id.* at 694.

169. The common law has long accepted the application of respondeat superior to municipalities. J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 766 (1872). This acceptance of vicarious liability principles pretermitted any need to develop

nor Supreme Court pronouncements[170] settle this issue.

The necessary direct causal link between the governmental defendant and the plaintiff's constitutional injury is most readily apparent when the injury results from the execution or implementation of some formally enacted policy. The enforcement or implementation of a policy that is unconstitutional may be seen to compel a constitutional injury. This type of situation is illustrated by *Monell*. The defendant's policy of requiring pregnant public employees to take unpaid leaves of absences irrespective of individual ability to work[171] compelled a violation of the plaintiff's rights secured by the fourteenth amendment.[172] Similarly, a school district's voluntary implementation of an unconstitutional statute[173] and a city's enforcement of an unconstitutional ordinance[174] have been found to cause a

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a more demanding theory of causation. *See* Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 955-62 (1979).

Perhaps an analogy could be drawn to the common-law doctrine of intervening cause. *See* text accompanying notes 134-57 *supra*. The offending actor could be considered a force invervening between the governmental defendant's conduct and the plaintiff's injury. It is clear, however, that such an analogy is of limited usefulness. Before a force can be "intervening" it must be distinct from that of the defendant. Thus, before a court can decide whether *A* is responsible for the intervening conduct of *B*, it must be determined that *B*'s conduct is distinct from *A*. When *B* is *A*'s employee the common law makes no such distinction. Thus, an intervening cause analogy would have to assume the very distinction it is called upon to make.

170. The *Monell* Court described the circumstances in which § 1983 municipal liability may attach in various ways. Liability may result if the injury is caused by "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or an action or policy that has "received formal approval through the body's official decision making channels" or "those . . . edicts or acts [that] may fairly be said to represent official policy." 436 U.S. at 690, 691, 694. There is no clear or established meaning attached to any of these phrases. *See* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 216 (1979).

171. The policy involved in *Monell* itself was adopted by lower city officials exercising delegated authority. No city regulation required pregnant employees to take unpaid leaves of absences. The city regulation allowed pregnant employees to continue working past the fifth month of pregnancy upon receiving agency and medical authorization. It was the unwritten practice of the Assistant Deputy Administrator for Personnel Management within the Department of Social Services that was challenged. The Assistant Deputy Administrator permitted any woman to work in the sixth and seventh months of pregnancy if physically able, allowed pregnant employees to work in their eighth month only if their jobs were unusually important to the Department, and prohibited all employees from working in their ninth month. *See* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 220 (1979). *See also* Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304, 306 (1979).

172. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974).

173. Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980). The court in *Briscoe* refused, however, to hold the county liable. It reasoned that the acts of the county judge in implementing the statute represented state, and not county, policy. *Id.*

174. Huemmer v. Mayor of Ocean City, 632 F.2d 371, 372 (4th Cir. 1980) (per curiam); Citizens for a Better Environment v. City of Chicago Heights, 480 F. Supp. 188, 191 (N.D. Ill. 1979); Stringer v. City of Chicago, 464 F. Supp. 887, 889-90 (N.D. Ill. 1979). *Cf.* Gordon v. City of Warren, 579 F.2d 386, 391 (6th Cir. 1978) (recognizing direct

deprivation of constitutional rights. In each of these instances, the relationship between the governmental defendant and the wrongful conduct is both clear and substantial.

The causal link is less clear when the named defendant does not command the offending conduct to occur, but through some act or omission, contributes to its occurrence. In these cases, the defendant does not command the offending actor to violate the plaintiff's constitutional rights. Rather, the defendant creates a reasonably foreseeable risk of the constitutional injury through an act or omission that is a substantial factor in producing the offending conduct. The courts have more readily found a causal link when the defendant's connection to the injury is some act that sets the offending force in motion than when its omission permits the harm to occur. For example, liability has been imposed upon individuals who participated in the formulation of a policy which, though not unconstitutional on its face, was implemented in an unconstitutional manner.[175] Similarly, a county prosecutor and assistant state prosecutor who personally participated in the planning of an early morning raid on Black Panther Headquarters may be found to have caused the constitutional violations committed by various officers during the raid. These supervisors did not order their subordinates to deprive others of constitutional rights, but such deprivations may have been reasonably foreseeable consequences of the plan they approved.[176] If in such situations the acts of the supervisory official may fairly be said to represent government policy, the governmental unit may also be held responsible under section 1983.[177]

Courts have evidenced more trepidation when addressing the claim that the defendant's omission caused the offending actor to violate the plaintiff's rights. It may be particularly useful in this context to distinguish between the concepts of duty and causation. Causation concerns the connection between the defendant's conduct and the plaintiff's injury. Duty issues, on the other hand, focus on whether the defendant owes any obligation to the plaintiff to protect the plaintiff from the threatened harm.[178]

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cause of action under fourteenth amendment against municipality to recover damages resulting from taking of property for public use without just compensation, pursuant to unconstitutional ordinance).

175. Wanger v. Bonner, 621 F.2d 675, 679-81 (5th Cir. 1980); Duchesne v. Sugarman, 566 F.2d 817, 827-28 (2d Cir. 1977).

176. Hampton v. Hanrahan, 600 F.2d 600, 627 (7th Cir. 1979), *modified on other grounds*, 446 U.S. 754 (1980); *accord*, Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979).

177. Quin v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 448 (2d Cir. 1980) (conduct of mayor represents official policy of city); Kingsville Indep. School Dist. v. Cooper, 611 F.2d 1109, 1112 (5th Cir. 1980) (school district can be sued for acts of its board of trustees because the only way it can act is by or through this board). *But cf.* Hoopes v. City of Chester, 473 F. Supp. 1214, 1226 (E.D. Pa. 1979) (act of mayor found not to represent policy or custom of city). For an excellent discussion of who may be regarded as governmental policy makers, see Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 217-27 (1979).

178. W. PROSSER, *supra* note 6, § 42, at 244-45.

Monell phrased the issue of the defendant's responsibility for the third party's conduct in terms of causation, but frequently the real concern masked by this reference to causation is the existence and scope of the defendant's duty.

Occasionally, the connection between the defendant's omission and the plaintiff's injury is the actual concern of the court. In *Mann v. Village of Walden*[179] the village was alleged to be responsible for the death of the plaintiff's child because it had failed to supervise and discipline its police officers who harassed young people. The child was killed in an automobile accident that terminated a high speed police chase. The connection between the alleged omission and the child's death was deemed an insufficient basis to impose liability because the decedent was operating the car in an unlawful manner when the pursuit began.[180] The officer would have pursued the vehicle even if the village had adequately supervised and disciplined its police force. Thus, the defendant's failure to supervise and discipline did not cause the child's death.[181]

More often, however, the courts are primarily concerned with determining whether the defendant has any obligation to protect the plaintiff from the offending actor's conduct. Indeed, many courts have resolved what they refer to as questions of causation in terms of duty. Courts have indicated that a defendant's failure to act may "cause" the plaintiff to be deprived of a constitutional right at the hands of a third party if the defendant had a duty to act.[182] In *Sims v. Adams*,[183] for example, the mayor of Atlanta and other supervisory officials were found to be potentially liable for an illegal arrest and physical assault committed by individual officers. These supervisors may have "caused" the constitutional tort because they were alleged to have breached a duty to supervise imposed by state and local law.[184] It is clear that the court was primarily concerned with whether the defendants were under any obligation to prevent the harm. The connection between the defendants' omission and the plaintiff's injury is the same regardless of the defendants' duty. The variable upon which liability hinges is the existence of the obligation. Resolving the threshold question of duty in terms of causation can only confuse both issues. Greater clarity and precision would be achieved if courts would recognize the distinction between duty and causation and analyze each in its own terms. The

179. 482 F. Supp. 154 (S.D.N.Y. 1979).

180. *Id.* at 157.

181. *See id. See also* Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir. 1980) (failure to discipline police officer who had unlawfully arrested plaintiff in 1971 was not a cause of plaintiff's second unlawful arrest by different officer in 1975).

182. Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978); Sims v. Adams, 537 F.2d 829, 831 (5th Cir. 1976); Norton v. McKeon, 444 F. Supp. 384, 387-88 (E.D. Pa. 1977), *aff'd without opinion*, 601 F.2d 575 (3d Cir. 1979); Santiago v. City of Philadelphia, 435 F. Supp. 136, 152 (E.D. Pa. 1977).

183. 537 F.2d 829 (5th Cir. 1976).

184. *Id.* at 831.

causation issue properly limited is whether the defendant's omission was a necessary antecedent condition for producing a reasonably foreseeable harm.

In cases considering a defendant's liability for the conduct of an employee or subordinate, courts have consistently incorporated the element of foreseeability into the issue of causation.[185] Surprisingly, however, there has been little discussion why this is so. Neither the causation clause of section 1983 nor the *Monell* decision expressly refer to foreseeability. It could be argued that the causation clause of section 1983 refers to factual causation in its *sine qua non* sense. For example, a city could arguably be said to have caused its employees to violate the plaintiff's constitutional rights when the employee's conduct, though unforeseeable, was motivated by an erroneous interpretation of municipal policy.[186] In such a situation, but for the municipal policy, the employee would not have deprived the plaintiff of her constitutional rights. Thus, the municipal policy could be seen as the cause in fact of the constitutional deprivation.

It is implicit from *Monell*'s rejection of respondeat superior, however, that factual causation in this traditional sense is not a sufficient basis for imposing liability under section 1983. If it were, then a city's employment of the offending actor, clothing the actor with authority, and placing the actor in a position to be able to deprive others of constitutional rights should provide a sufficient causal link between the city and the constitutional tort. *Monell* concludes that a more direct basis of responsibility is needed.[187]

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185. *E.g.*, Arnold v. IBM Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); Wanger v. Bonner, 621 F.2d 675, 680 (5th Cir. 1980); Beard v. Mitchell, 604 F.2d 485, 495-96 (7th Cir. 1979); Hampton v. Hanrahan, 600 F.2d 600, 627 (7th Cir. 1979), *modified on other grounds*, 446 U.S. 754 (1980); Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).

186. This situation is suggested by Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977). The defendants included supervisory personnel who participated in the adoption of the Inter-Agency Manual of Policy and Procedures (Manual) for the Bureau of Child Welfare. The Manual authorized welfare workers to take custody of children in emergency situations without parental consent or a court order. The Manual did not contain the qualification, required by state law and the Constitution, that all emergency removals be promptly ratified by court order. *Id.* at 830. Subordinate workers, acting pursuant to the Manual, took custody of the plaintiff's children. The subordinate workers placed the children in an institutional child care facility. Despite the repeated protests of the plaintiff, the Bureau retained custody of the children for 36 months without judicial authorization. While the initial taking of the children was permissible, the court found the retention without judicial ratification violated the plaintiff's constitutional right to family privacy. *Id.* at 828. The supervisory defendants were unaware of any actions taken regarding the plaintiff or her children. Their liability was predicated upon their participation in the adoption of the Manual which, by silence, appeared to sanction the subordinate worker's conduct. *Id.* at 831. The court further implied that, as a matter of state law, liability could attach even if the supervisors did not know and should not have known of the conduct taken with respect to the children. *Id.* at 832 n.31.

187. 436 U.S. at 694; Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 235 (1979).

Forseeability in this context refers only to the offending conduct or resulting injury. It is not essential that the plaintiff prove the constitutional nature of the injury is foreseeable. This proposition was suggested by *Monell*,[188] but made clear in *Owen*. In the latter case, the court stated that:

> [E]ven where some constitutional development could not have been foresēen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than allow its impact to be felt solely by those whose rights . . . have been violated.[189]

The Court thus rejected the contention that constitutional tort liability lies only when the defendant can foresee that its conduct may be constitutionally proscribed.[190]

It should be recognized, however, that a tension exists between the Court's rejection of respondeat superior in *Monell* and its refusal to recognize a qualified immunity for local governments in *Owen*. The loss-spreading, fairness, and deterrent rationales of *Owen* would seemingly justify the incorporation of vicarious liability principles into constitutional tort law. The Court in *Owen* attempted to harmonize its decision with *Monell* by distinguishing between situations in which the municipal defendant is clearly responsible for the offending conduct and those in which responsibility is in doubt.[191] Once responsibility is established as in *Owen*, considerations of loss spreading and fairness justify imposing liability regardless of the foreseeability of the constitutionality of the offending conduct.

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188. It is not clear whether it was foreseeable that a mandatory pregnancy leave of absence policy was unconstitutional at the time the defendants acted in *Monell*. When the plaintiff was compelled to take her unpaid leave of absence in 1971, neither the Supreme Court nor the Second Circuit had determined that such policies were unconstitutional. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974); Green v. Waterford Bd. of Educ., 473 F.2d 629, 636 (2d Cir. 1973). District courts were divided on the issue. *Compare* Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159, 1161 (E.D. Va. 1971) (unconstitutional), *rev'd*, 474 F.2d 395 (4th Cir. 1973) (en banc), *rev'd*, 414 U.S. 632 (1974) *with* LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208, 1214 (N.D. Ohio 1971) (constitutional), *rev'd*, 465 F.2d 1184 (6th Cir. 1972), *aff'd*, 414 U.S. 632 (1974).

189. 445 U.S. at 655.

190. Whether one can foresee that the offending conduct is constitutional is relevant to questions of an individual's liability. Its relevance, however, pertains to matters of defense and not to causation. An individual defendant is generally entitled to a qualified immunity from monetary liability if the defendant acted with an objectively reasonable and subjectively good faith belief that such acts were lawful. Butz v. Economou, 438 U.S. 478, 506-07 (1978); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). If an individual defendant in good faith cannot reasonably foresee that the consequences of the acts amount to constitutional violations, the defendant will generally not be held liable for money damages. This immunity is a matter of defense to be pleaded and proven by the defendant. Gomez v. Toledo, 446 U.S. 635, 640-41 (1980). It therefore does not affect the issue of causation that is part of the plaintiff's prima facie case.

191. 445 U.S. at 655 n.39. *See The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 221 (1980).

Foreseeability of the conduct itself, however, remains an important factor in assessing the municipality's responsibility for that conduct. The distinction here is not entirely satisfactory. It does not explain why the act of conferring an employee with power and position capable of inflicting constitutional abuse is not a sufficient basis for finding a causal connection between the municipality and the employee's conduct.[192]

The results in *Owen* and *Monell* reflect a pragmatic compromise between the goals of deterrence, compensation, and vindication on the one hand, and the desire to avoid unduly burdening government on the other. *Monell* and *Owen* vastly expand the potential for governmental liability for constitutional torts. This advances the deterrent, vindicatory, and compensatory goals of constitutional tort law. The dangers of federal intrusion into state and local affairs, increased centralization, and a drain on the public fisc are reduced by rejecting respondeat superior in the guise of causation. Thus, as in *Mt. Healthy* the Court has manipulated the concept of causation to accommodate these competing interests.

IV. CONCLUSION

In the law of constitutional torts, causation has played its familiar role of a convenient mechanism to restrict liability. Frequently it has been employed in a manner that disguises its purpose and underlying policy. The artfully ambiguous proximate cause rationale of *Martinez*, for example, allowed the Court to deny liability and avoid the issue of immunity without having to articulate the values underlying the decision.

The frequently stated goals of compensation, vindication, and deterrence are often given effect in the principles of causation. Yet, it is also clear that these values are tempered by a policy of avoiding a perceived undue burdening of governmental conduct. Thus, the approach to cause in fact embodied in *Mt. Healthy* allows the government, though influenced by unconstitutional considerations, to implement independently justifiable policy. Similarly, *Monell* opens local governments to constitutional tort liability but, through the guise of causation, establishes a more rigorous standard of responsibility than required at common law. Many of the issues presented by *Monell* that are phrased in terms of causation could be more appropriately analyzed in terms of duty.

Because causation in constitutional torts defines the extent of constitutional rights, there is a need for clarity and precision in judicial opinions. Common-law principles can provide the starting point of analysis, but should not be uncritically accepted as the basis of decision. Issues of

192. *See* Scheuer v. Rhodes, 416 U.S. 232, 243 (1974) (§ 1983 protects citizens against the "misuse of power, . . . made possible only because the wrongdoer is clothed with the authority of state law") (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); Comment, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 955 (1979)).

causation should be resolved consistently with the policies that underlie constitutional tort law. Through a more precise identification of those policies courts will be able to define more clearly the reaches of the Constitution.