Michigan Law Review

Volume 105 | Issue 7

2007

Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial

Joel Flaxman
University of Michigan Law School

NOTE

PROXIMATE CAUSE IN CONSTITUTIONAL TORTS: HOLDING INTERROGATORS LIABLE FOR FIFTH AMENDMENT VIOLATIONS AT TRIAL

*Joel Flaxman**

TABLE OF CONTENTS

INTRODUCTION

In 1996, a Texas trial court convicted eleven-year-old LaCresha Murray of injury to a child and gave her a twenty-five-year sentence.[1] An appeals court overturned LaCresha's conviction after she had spent three years in custody, finding that her confession should have been suppressed and not used at trial.[2] After her release from custody, LaCresha filed a lawsuit in federal district court under 42 U.S.C. § 1983, seeking damages from the officers who, she claimed, had violated her Fifth Amendment right against

---

* J.D. candidate, May 2007. I thank Kenneth Flaxman for editing, encouragement, and for first suggesting that I read the Fifth Circuit's opinion in *Murray*. For extraordinarily helpful comments, I thank Professor Christina Whitman. Finally, for their thoughtful and tireless editing work, I thank Liz Ryan, Jeremy Suhr, Krista Caner, Jeanne Long, and especially my Note Editor, Andrew Goetz.

1. Murray v. Earle, 405 F.3d 278, 283–84 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 749 (2005). For more background on LaCresha's case, see *American Justice: In the Hands of a Child* (A&E television broadcast 2002) (on file with author).

2. *In re* L.M., 993 S.W.2d 276, 291 (Tex. App. 1999).

self-incrimination by eliciting the involuntary confession used at trial to convict her.[3]

LaCresha's lawsuit presented an important question that the Supreme Court left open in *Chavez v. Martinez*.[4] In *Chavez*, the Court held that a plaintiff may not obtain damages for a Fifth Amendment violation on the basis of a coercive interrogation that is not introduced at trial, because without such use, the plaintiff's right against self-incrimination has not been violated.[5] The *Chavez* Court did not, however, address a situation like LaCresha's where the involuntary statements in question *were* used against her at a trial in which she was convicted. In LaCresha's federal lawsuit, *Murray v. Earle*, the Fifth Circuit held that such use *did* violate her Fifth Amendment right against self-incrimination.[6] Despite this violation of LaCresha's constitutional rights, a violation that was not present in *Chavez*, the Fifth Circuit held that she too was barred from obtaining damages from the officers who had coerced her involuntary confession.[7] The court explained that the officers' wrongdoing had not caused the Fifth Amendment violation because of the intervening act of the trial judge, who, acting as a "neutral intermediary," admitted the confession into evidence.[8] In the language of tort law, the officers were relieved of liability because their acts were not the proximate cause of the constitutional violation—the use of the confession at trial. Moreover, because judges and prosecutors are immune from § 1983 lawsuits,[9] the court's ruling effectively relieved all actors of liability and left LaCresha with no remedy whatsoever.

The combination of the Fifth Circuit's holding in *Murray* and the Supreme Court's decision in *Chavez* creates a nasty catch-22. If a coerced confession is not introduced at trial, the Fifth Amendment has not been violated and the officer responsible for the coercive interrogation is not liable, but if the confession is used—in violation of the Fifth Amendment—the

---

3. *Murray*, 405 F.3d at 284–85.

4. 538 U.S. 760 (2003).

5. *Chavez*, 538 U.S. at 766–67. In fact, the Court's opinion was a little more complicated. Oliverio Martinez, suspected of attempting to shoot a police officer, was questioned without *Miranda* warnings in an emergency room while he received medical treatment, but he was never charged with a crime. *Id.* at 763–64. The Court held that Chavez could not state a claim for damages for a Fifth Amendment violation: a three justice plurality would have held that a plaintiff like Martinez could never obtain damages for a Fifth Amendment violation, *id.* at 772 (Thomas, J., plurality opinion), while two justices concurred in the result and would have held only that on the given facts, damages for a Fifth Amendment violation were not available, *id.* at 778 (Souter, J., concurring). For a detailed dissection of the Court's six opinions in *Chavez*, see Carolyn J. Frantz, Chavez v. Martinez's *Constitutional Division of Labor*, 55 SUP. CT. REV. 269, 270–74 (2003).

6. *Murray*, 405 F.3d at 289.

7. *Id.* at 293.

8. *Id.*

9. Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (prosecutorial immunity); Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (judicial immunity).

officer responsible for the coercion is again not liable because she is not the proximate cause of the constitutional violation.[10]

This catch-22 was apparent to the Sixth Circuit in *McKinley v. City of Mansfield*, in which the court held that an officer whose conduct led to the violation of a criminal defendant's Fifth Amendment rights at trial could not escape liability for that violation by pointing to the intervening act of a prosecutor or judge.[11] The court explained that, because of prosecutorial and judicial immunity, "a rule barring suits against the police for Fifth Amendment violations is a rule barring *any* suits for Fifth Amendment violations."[12] The Sixth Circuit's focus on the vindication of the constitutional right in question[13] stands in sharp contrast to the Fifth Circuit's primary focus on intervening cause in tort law.[14] While the Fifth Circuit's opinion expressed regret about the consequences of its holding—the court wrote that it was "constrained to hold" that the interrogating officers were not liable[15]—the Sixth Circuit explicitly relied on the connection between its holding and the constitutional right in question.[16]

This Note argues for the approach taken by the Sixth Circuit in *McKinley*: a proper understanding of the Fifth Amendment requires holding that an officer who coerces a confession that is used at trial to convict a defendant in violation of the right against self-incrimination should face liability for the harm of conviction and imprisonment. Part I examines how the Supreme Court and the circuits have applied the concept of common law proximate causation to constitutional torts and argues that lower courts are wrong to blindly adopt common law rules without reference to the constitutional rights at stake. It suggests a different approach that is more faithful to Supreme Court precedent and better explains the variety of holdings among lower courts. Part II examines the conflicting opinions of the Fifth and Sixth Circuits in more detail and argues that the analysis of the Sixth Circuit is preferable because it more closely tracks Supreme Court precedent and the framework developed in Part I.

---

10. This logical statement exactly tracks the original Catch-22. JOSEPH HELLER, CATCH-22, at 45–46 (1961); *see* Appellate Law & Practice, http://appellate.typepad.com/appellate/2005/04/_murray_v_earle.html (Apr. 1, 2005, 6:54 PM).

11. 404 F.3d 418, 436–37 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1026 (2006).

12. *McKinley*, 404 F.3d at 438.

13. *Id.* at 437–38.

14. Murray v. Earle, 405 F.3d 278, 291–92. (5th Cir. 2005), *cert. denied*, 126 S. Ct. 749 (2005). In addition to being questionable from a constitutional perspective, the Fifth Circuit's holding is also questionable solely from a torts perspective. *See infra* notes 126–129 and accompanying text.

15. *Murray*, 405 F.3d at 293.

16. *McKinley*, 404 F.3d at 438.

I. THE COMMON LAW AS STARTING POINT ONLY FOR CONSTITUTIONAL TORT CAUSATION

This Part argues that common law rules of proximate causation are relevant to determining causation in constitutional torts,[17] but that courts should not apply them without reference to the underlying constitutional rights at stake. Section I.A examines Supreme Court precedent applying common law rules to constitutional torts and argues that the Court has refused the wholesale incorporation of common law causation into constitutional torts. Section I.B surveys circuit courts and concludes that, contrary to Supreme Court precedent, the circuits have applied causation rules from the common law to constitutional torts without sufficient consideration of the underlying constitutional questions presented. Section I.C looks to how the Court has instructed lower courts to analyze damages and immunities under § 1983 and suggests a similar path for analyzing causation questions.

A. *Supreme Court Precedent*

This Section begins by looking at how the Supreme Court has interpreted 42 U.S.C. § 1983, which creates a federal remedy against state actors who cause deprivations of constitutional rights.[18] First, it focuses on the Court's consistent use of the common law as a starting point in crafting rules for constitutional torts. Then, it looks specifically at decisions in which the Court has answered proximate causation questions in constitutional torts with reference to the common law. It demonstrates that for proximate causation, just as for other elements of constitutional torts, common law rules should only be used as a starting point. Although certain passages of dicta in these decisions may seem to suggest a wholesale incorporation of common law rules of proximate causation, this Section argues that this conclusion is wrong and misguided.

---

17. A "constitutional tort" refers to a private civil suit brought to redress a constitutional violation. Such suits may be brought under 42 U.S.C. § 1983 against state officials and directly under the Constitution against federal officials. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Although the two types of actions may differ in a few respects, they do not differ with respect to causation questions. *See, e.g.*, Egervary v. Young, 366 F.3d 238, 246 (3d Cir. 2004); *cf.* Butz v. Economou, 438 U.S. 478, 504 (1978) (holding that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials").

18. In relevant part, § 1983 reads:

> 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 proceeding for redress . . . .

42 U.S.C. § 1983 (2000). As its text demonstrates, § 1983 also creates a cause of action based solely on the violation of a federal statute. Maine v. Thiboutot, 448 U.S. 1, 4–6 (1980). Such actions are beyond the scope of this Note, which only considers § 1983 actions brought to remedy constitutional violations.

While the purpose of § 1983—enforcing constitutional rights—is clear,[19] the statute's silence regarding how federal courts are to achieve that purpose leaves to the courts the development of the elements of § 1983 actions.[20] The Court has at times looked to the debates of the Forty-Second Congress,[21] but those debates give support to several different conceptions of the statute.[22] Because the legislative history and the statutory language do not always provide complete answers, the Court often looks to common law rules, both those in place when the statute was passed and more recent developments.[23]

The Court's use of common law rules in § 1983 actions began with *Monroe v. Pape*,[24] in which the Supreme Court created the modern field of constitutional rights litigation.[25] The Court interpreted § 1983 to allow suits against state actors acting in violation of state law[26] and rejected an argument to import a specific intent requirement, writing that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[27] In *Monroe*, this command meant that plaintiffs could sue the police officers who, without search or arrest warrants, "broke into [their] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers," before subjecting one of the plaintiffs to a ten-hour interrogation.[28] *Monroe* was

---

19. Monroe v. Pape, 365 U.S. 167, 171 (1961) (holding that § 1983's purpose is clear from its title: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes").

20. Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 705 (1997) (explaining that common law concepts have been used to supply content to "barren statutory terms"); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 158 (1998) ("[R]eferring to the text of this statute is unavailing, because it does nothing more than authorize a remedy."); Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 18 (1980).

21. *See, e.g.*, Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 723–31 (1989) (O'Connor, J., plurality opinion); Mitchum v. Foster, 407 U.S. 225, 238–42 (1972); *Monroe*, 365 U.S. at 171–87.

22. *See* Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 763 (1992) (describing § 1983 as "fairly characterized as impervious to determinate historical analysis"); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 396–97 (1982) ("[A]lthough courts and commentators have devoted much attention to the legislative history of section 1983, there remains considerable dispute about the intended scope of that provision." (footnotes omitted)).

23. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 34 (1983) (summarizing use of the common law in interpretation of § 1983); *see also* Beermann, *supra* note 20, at 705–06 (describing four types of § 1983 issues in which the Supreme Court has drawn on the common law); Whitman, *supra* note 20, at 15 (describing three areas in which federal courts have drawn upon the common law to define the details of § 1983 actions).

24. 365 U.S. 167 (1961).

25. *See generally* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 Nw. U. L. REV. 277 (1965); Whitman, *supra* note 20.

26. *Monroe*, 365 U.S. at 187.

27. *Id.*

28. *Id.* at 169.

revolutionary,[29] but it provided only a starting point for later questions of constitutional tort causation.[30]

Whatever the *Monroe* Court meant by relying on "the background of tort liability,"[31] the Court subsequently made plain that it was not referring to a simplistic incorporation of all common law rules. For example, in *Imbler v. Pachtman*, the Court, in reading immunities into § 1983, described the statute as creating "a species of tort liability."[32] This phrase, like "background of tort liability," indicates that § 1983 liability is not identical to common law tort liability. The Court made this interpretation explicit in *Carey v. Piphus*, when it described the common law as "provid[ing] the appropriate starting point," but not a "complete solution," for determining damages under § 1983.[33] In *Heck v. Humphrey*, the Court again described the common law as a "starting point"[34] before it imported an element from the common law tort of malicious prosecution into a § 1983 claim.[35]

Common law rules have been particularly important in answering questions of causation under § 1983.[36] In contrast to concepts like limitations or immunities, causation is mentioned specifically in the statute, which creates liability against any state actor who "subjects, or causes to be subjected," another person to the deprivation of a constitutional right.[37] Thus, to interpret this bare statutory term, the Court understandably looks to the common law for guidance,[38] but the Court's few rulings on proximate causation reveal that, as in other areas, it has not endorsed the wholesale incorporation of common law rules.[39]

---

29. Between 1961, the year *Monroe* was decided, and 1979, the number of § 1983 suits filed in federal courts by non-prisoners rose from 296 per year to 13,168. Whitman, *supra* note 20, at 6 (citing ADMIN. OFFICE OF THE U.S. COURTS, 1979 ANNUAL REPORT OF THE DIRECTOR 6).

30. *See* Whitman, *supra* note 20, at 18 & n.81 (describing the Court's formulation as "obscure[]" and pointing out that it suggested that constitutional tort liability may be subject to the same standards as negligence tort liability).

31. *Monroe*, 365 U.S. at 187.

32. 424 U.S. 409, 417 (1976).

33. 435 U.S. 247, 258 (1978).

34. 512 U.S. 477, 483 (1994) (quoting *Carey*, 435 U.S. at 257–58).

35. *Heck*, 512 U.S. at 484–87. For arguments that *Heck* actually went much further than previous cases in its use of the common law, see *id.* at 492 (Souter, J., concurring); Beermann, *supra* note 20, at 713 (describing the importation of an element from malicious prosecution as "a startling new holding"). Justice Souter's more recent majority opinion in *Hartman v. Moore*, 126 S. Ct. 1695 (2006), however, did not follow the *Heck* approach. In *Hartman*, the Court held that a plaintiff in a retaliatory-prosecution action must plead and prove the absence of probable cause for the prosecution. *Id.* at 1707. Rather than basing its holding on whether malicious prosecution or abuse of process was the closer common law analog, the Court held that "the common law is best understood here more as a source of inspired examples than of prefabricated components." *Id.* at 1702.

36. Beermann, *supra* note 20, at 705; Whitman, *supra* note 20, at 17–18.

37. 42 U.S.C. § 1983 (2000).

38. Beermann, *supra* note 20, at 708.

39. *See* Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 530 (2001) ("[I]t remains somewhat of an unsettled question as to whether the causation requirement in Section 1983 is intended to be precisely the same as the proximate cause requirement that is used for common law tort cases.").

The *Monroe* Court's language discussing the type "of tort liability which makes a man responsible for the natural consequences of his actions"[40] may suggest that § 1983 contains the elements of a negligence tort,[41] but the Court rejected this suggestion in *Martinez v. California*.[42] The *Martinez* Court quoted the *Imbler* "species" language in holding that the survivors of a fifteen-year-old girl murdered by a parolee could not recover damages from the parole board on the theory of a due process violation, because the death was "too remote a consequence" of the parole board's acts.[43] The Court explicitly stated that its conclusion did not depend on whether a remedy might exist under state tort law.[44] That is, even if the common law of torts recognized a causal link between the acts of the parole board and the decedent's death, § 1983 did not.[45] Justice Stevens's opinion for the *Martinez* Court even cited *Palsgraf v. Long Island Railroad Co.*[46] as demonstrating the kind of common law proximate causation that was not the Court's concern.[47] Seven years later, Justice O'Connor further explained the *Martinez* Court's distinction, writing that "[t]he 'causation' requirement of § 1983 is a matter of statutory interpretation rather than of common tort law."[48]

Although two passages of dicta in later Supreme Court opinions suggest that, contrary to *Martinez*, the Court has incorporated common law proximate causation into § 1983, this interpretation is misguided. In the more recent opinion, *Brower v. County of Inyo*, the Court discussed a hypothetical set of facts involving a police roadblock.[49] The Court wrote that if police placed a roadblock in front of a driver whom they lacked probable cause to stop, and if the driver could have stopped before hitting the roadblock but instead crashed into it negligently or intentionally, the police would not be liable for the driver's death in the crash.[50] Even though the death would constitute an unreasonable seizure based on the lack of probable cause, liability would not attach because the unreasonable nature of the seizure had not

40. Monroe v. Pape, 365 U.S. 167, 187 (1961).

41. Whitman, *supra* note 20, at 18 n.81.

42. 444 U.S. 277, 285 (1980).

43. *Martinez*, 444 U.S. at 285 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

44. *Id.* ("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." (citations omitted)); *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 n.4 (1989) (reading the holding of *Martinez* as based primarily on proximate causation).

45. *Martinez*, 444 U.S. at 285.

46. 162 N.E. 99 (N.Y. 1928).

47. *Martinez*, 444 U.S. at 285.

48. City of Springfield v. Kibbe, 480 U.S. 257, 269 (1987) (O'Connor, J., dissenting and joined by Rehnquist, C.J., White & Powell, JJ.) (citing *Martinez*, 444 U.S. at 285), *denying cert. to* 777 F.2d 801 (1st Cir. 1985).

49. 489 U.S. 593, 599 (1989).

50. *Brower*, 489 U.S. at 599.

caused the driver's death.[51] The Court's analysis is questionable because, by focusing only on the lack of probable cause to place the roadblock, it failed to focus on the tortious conduct of the police as a whole.[52] Considering the complete extent of the police conduct—placing a roadblock and lacking probable cause to do so—it is arguable that, despite intervening conduct, the original tort should be considered to be the proximate cause of the driver's death. That is, the harm risked by placing an unauthorized road block is precisely that a motorist will crash into it.[53] Because the Court's use of a proximate causation analysis was questionable, because it addressed a hypothetical situation, and because it came only in dicta, it does not support the proposition that common law proximate causation is always a hurdle to imposing liability. At most, it supports the importation of the simple common law rule that when unforeseeable and negligent conduct by a third party intervenes between the initial tortious conduct and harm, the initial conduct ceases to be the "cause" of the harm.[54]

The other passage of dicta used to suggest that the Court has incorporated common law proximate causation into § 1983 came in *Malley v. Briggs*.[55] In *Malley*, the Court held that acting upon an arrest warrant grants an officer only limited immunity from liability for a false arrest.[56] The district court had shielded the officer from liability by reasoning that the judge's approval of the warrant "removed any causal connection between the acts of the police officer and the damage suffered by the plaintiffs due to their improper arrest."[57] The First Circuit had disagreed and held that the officers could be liable but were shielded by qualified immunity.[58] In a footnote to its opinion affirming the First Circuit, the Supreme Court addressed the proximate causation question, which, as in *Brower*, was not then before it:

> Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of § 1983. As we stated in *Monroe v. Pape*, 365 U.S. 167, 187 (1961),

51. *Id.*

52. Even under such a narrow focus, the lack of connection between the violation and the harm might be better described as a lack of but-for causation. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 265–68 (5th ed. 1984). That is, even if the police did possess probable cause to stop the driver, the driver's own negligent or intentional conduct would still have caused his death. *Cf.* N.Y. Cent. R.R. Co. v. Grimstad, 264 F. 334, 335 (2d Cir. 1920) (holding that there was no liability for failing to properly equip a boat with life-preservers when the presence of life-preservers could not have possibly saved the decedent from drowning).

53. *See* RESTATEMENT (SECOND) OF TORTS § 442A (1965).

54. *See id.* § 447.

55. 475 U.S. 335 (1986).

56. *Malley*, 475 U.S. at 341.

57. Briggs v. Malley, 748 F.2d 715, 717 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986).

58. *Id.* at 721.

> § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.[59]

A superficial reading of the footnote suggests that the rules of causation are identical in constitutional torts and common law torts, but it is far more plausible to read the *Malley* footnote as consistent with the command from *Martinez* not to rely only on common law rules.[60] Rather than implying that the common law is always the complete answer and that lower courts should ignore *Martinez*, the footnote suggests that in this single instance, the Court would choose to import a rule of causation from the common law tort of false arrest[61] because of the nature of § 1983 and the constitutional right at stake.[62]

B. *Proximate Causation in the Federal Circuits*

Lower court decisions reflect the Supreme Court's emphasis on common law rules, but many fail to limit the use of such rules to only a starting point. Too often, courts apply common law rules to constitutional torts without proper reference to the constitutional right implicated and its connection to the harm claimed. In a representative pronouncement, the Seventh Circuit has held that "the ordinary rules of tort causation apply to constitutional tort suits" and that a § 1983 plaintiff is entitled to only those damages that are the foreseeable consequence of the tort.[63] The Eleventh Circuit has agreed, holding that "[f]or damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortious acts or omissions in issue."[64] Such pronouncements would not be problematic if they were followed by careful considerations of the constitutional rights at

---

59. *Malley*, 475 U.S. at 344 n.7.

60. *See supra* notes 42–48 and accompanying text.

61. *See* KEETON ET AL., *supra* note 52, § 11, at 47–54 (defining the common law tort of false arrest).

62. *See infra* notes 105–106 and accompanying text.

63. Herzog v. Village of Winnetka, 309 F.3d 1041, 1044 (7th Cir. 2002) (holding that a plaintiff subjected to injury and humiliation as the result of an illegal arrest was allowed to recover for the "chain of indignities inflicted . . . including offensive physical touchings that would be privileged if the arrest were lawful").

64. Jackson v. Sauls, 206 F.3d 1156, 1168 (11th Cir. 2000); *see also* Hedges v. Musco, 204 F.3d 109, 121 (3d Cir. 2000). *But see* Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1415 (5th Cir. 1995) (holding that § 1983 did not merely incorporate common law tort principles, but had a "heightened standard of proximate cause"); Buenrostro v. Collazo, 973 F.2d 39, 45 (1st Cir. 1992) (applying common law causation after noting that "the Supreme Court has made it crystal clear that principles of causation borrowed from tort law are *relevant* to civil rights actions brought under section 1983" (emphasis added)). The dearth of citations to these two cases, even within the First and Fifth Circuits, suggests that they are outliers.

stake, but instead, courts typically follow such pronouncements with only a simplistic application of common law rules without any such consideration.

Despite ostensible agreement across circuits that common law rules apply to causation questions, courts routinely reach what they themselves describe as inconsistent results in cases involving an intervening cause. In tort law, an intervening cause is an act by a third party "which actively operates in producing harm to another after the actor's [tortious] act or omission has been committed."[65] For common law negligence torts, such an intervening cause is said to "supersede" the negligent act or omission and relieve the original actor of liability only if it is unforeseeable or not a normal consequence of the original act.[66] Dozens of published opinions address intervening cause in constitutional tort cases,[67] but, as the Second Circuit has explained, "courts have differed as to the circumstances under which acts of subsequent participants in the legal system are superseding causes that avoid liability of an initial actor."[68]

In the typical constitutional tort case involving an intervening cause, an initial actor's bad act influences or brings about an act by a subsequent actor in the legal system, such as a judge or prosecutor, and the plaintiff's harm only comes about after the actions of the subsequent actor. Three such cases are illustrative. In *Warner v. Orange County Department of Probation*, the Second Circuit held that a judicial ruling adopting a parole board recommendation that the plaintiff attend Alcoholics Anonymous meetings did not break the chain of causation between the parole board and the Establishment Clause violation based on the meetings' religious content.[69] By contrast, in *Townes v. City of New York*, the same court held that a plaintiff convicted based on evidence found in an illegal search could not hold the searching officer liable for his post-conviction imprisonment because the trial judge's decision not to suppress the evidence broke the chain of causation.[70] Similarly, the Third Circuit held in *Egervary v. Young* that a lawyer who made a legal misrepresentation to a judge about the judge's power could not be liable for a due process violation that resulted from a court ordering plaintiff's child returned to his mother in Hungary, because the judge's ruling broke the chain of causation.[71]

---

65. RESTATEMENT (SECOND) OF TORTS § 441 (1965).

66. *Id.* §§ 442–453; KEETON ET AL., *supra* note 52, § 44, at 301–19.

67. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 6.03[A], at 6–11 n.37 (2006) (collecting cases).

68. Zahrey v. Coffey, 221 F.3d 342, 351 (2d Cir. 2000); *see also* Hector v. Watt, 235 F.3d 154, 161 (3d Cir. 2000) ("[T]here is a great deal of tension in the caselaw about when official conduct counts as an intervening cause."). This uncertainty in the law was noted as early as 1983 by Justice White in a dissent from a denial of certiorari. Smith v. Gonzales, 459 U.S. 1005, 1007 (1982) (White, J., dissenting) (describing causation in § 1983 intervening cause cases as a "significant, recurring question that has divided the lower courts").

69. 115 F.3d 1068, 1072–74 (2d Cir. 1997).

70. 176 F.3d 138, 147 (2d Cir. 1999).

71. 366 F.3d 238, 246–51 (3d Cir. 2004).

While some of the differing results among courts can be explained with reference to the common law rules being applied,[72] they are much better explained with reference to the constitutional rights at stake, a fact that courts routinely fail to acknowledge. These constitutional rights are comparable to the underlying policy questions present in any proximate causation analysis,[73] but they are especially important in this setting because the courts must decide them with reference to the Constitution itself. Instead of openly acknowledging the constitutional rights involved, courts focus primarily on tort law, adopting questionable reasoning and citing precedent selectively.[74]

If courts would consider the constitutional rights at stake in a forthright manner, they could easily explain seemingly inconsistent results. For instance, the differing results in *Warner* and *Townes* are best explained by looking at the contours of the constitutional rights implicated and not by looking at how predictable the judicial ruling in question was.[75] Instead of ignoring *Townes*, as the Second Circuit did in a later holding that an independent intermediary did not break the chain of causation,[76] or calling it into question, as the court did in another subsequent holding,[77] the court should read *Townes* as grounded in an understanding that the Fourth Amendment is addressed to conduct that occurs at the time of arrest and does not give rise to damages for post-conviction harms.[78] The *Townes* court itself should not have held that the trial judge's ruling broke the chain of causation from the illegal search to the conviction because the judge's ruling was independent,

---

72. *See, e.g.*, Martin A. Schwartz, *Causation Under Section 1983*, N.Y. L.J., Dec. 21, 1999, at 3.

73. KEETON ET AL., *supra* note 52, § 41, at 264 ("Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.").

74. For example, the *Townes* court failed to cite at least two important cases holding that a judicial ruling did not break the chain of causation. One case, *Malley v. Briggs*, 475 U.S. 335, 341 (1986), came from the Supreme Court. The other, *Warner*, 115 F.3d 1068 (2d Cir. 1997), was issued by the Second Circuit itself. In *Kerman v. City of New York*, 374 F.3d 93, 127 (2d Cir. 2004), a case decided five years after *Townes* in which the Second Circuit held that an independent intermediary did not relieve an original actor of liability, it cited *Malley*, but ignored *Townes*.

75. Schwartz, *supra* note 72, at 4. Foreseeability is certainly relevant to any proximate cause inquiry, but with respect to judicial decisionmaking it may be difficult or impossible to determine how foreseeable a specific ruling was. It may be most accurate to argue that every judicial ruling is foreseeable. *See infra* note 129.

76. *Kerman*, 374 F.3d at 126.

77. Zahrey v. Coffey, 221 F.3d 342, 352 (2d Cir. 2000) ("Even if the intervening decisionmaker (such as a prosecutor, grand jury, or judge) is not misled or coerced, it is not readily apparent why the chain of causation should be considered broken where the initial wrongdoer can reasonably foresee that his misconduct will contribute to an 'independent' decision that results in a deprivation of liberty.").

78. There is, in fact, a split among the circuits on this question. *Compare* Hernandez v. Sheahan, 455 F.3d 772, 777 (7th Cir. 2006) ("[T]he fourth amendment drops out of the picture following a person's initial appearance in court."), *with* Gregory v. City of Louisville, 444 F.3d 725, 750 (6th Cir. 2006) (allowing a damage suit for post-conviction harms based on the "right under the Fourth Amendment to be free from continued detention without probable cause"). *See generally* Jacob Paul Goldstein, Note, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecution*, 106 COLUM. L. REV. 643, 653–57 (2006). The Supreme Court recently reiterated that it has not settled the question. Wallace v. Kato, 127 S. Ct. 1091, 1096 n.2 (2007).

because it came after the illegal search had long since ended, or because a similar rule is applied to illegal arrests.[79] Instead it should have based its holding on an understanding that the Fourth Amendment applies only to pre-trial conduct, and therefore, a pre-trial violator should not be liable for any post-trial harms.[80]

In contrast to the Fourth Amendment violation in *Townes*, the First Amendment violation claimed in *Warner* could only arise after judicial action approving the parole board's recommendation.[81] Therefore, the harm and the initial actor's responsibility for it are distinguishable from the harm and responsibility in *Townes*. Similarly, the Third Circuit's holding in *Egervary* can also be explained with reference to the constitutional right at stake, the right of due process.[82] The court's holding should not have been based on how foreseeable the judge's conduct was or on the court's categorical holding, discussed in more detail below, that a judge who does not act on the basis of a factual misrepresentations always breaks the chain of causation.[83] Rather, better support for dismissing the suit is a recognition that the right to due process does not include a right to use civil lawsuits in the place of appeals from erroneous holdings.[84]

The broad holding of *Egervary* is the worst example of a court neglecting the constitutional questions raised by intervening cause cases. In *Egervary*, the Third Circuit held, without reference to the constitutional rights at stake, that where the original actor's conduct misleads the intermediary as to relevant facts the causal chain is not broken, but in every case where the original actor does not make misleading statements about the facts, the causal chain is broken.[85] Applied to the facts of *Egervary*, this rule shielded the original wrongdoer from liability because his misrepresentations to the judge were legal and not factual. The Third Circuit's rule for the

---

79. The *Townes* court relied on each of these three rationales. Townes v. City of New York, 176 F.3d 138, 147 (2d Cir. 1999). The last one is the most troubling because it treats as identical the connection between an illegal arrest and subsequent conviction and the connection between an illegal search and subsequent conviction, later vacated. While an illegal search is often grounds for vacating a conviction, *see, e.g.*, Wong Sun v. United States, 371 U.S. 471, 488 (1963), an illegal arrest unrelated to the crime charged never is, *see, e.g.*, Frisbie v. Collins, 342 U.S. 519, 522 (1952). Thus, because a conviction following an unconstitutional arrest would never be reversed based on the unconstitutional arrest, awarding damages based on the harm from that conviction would be nonsensical. A conviction based on an unconstitutional search reversed because of the Fourth Amendment's exclusionary rule, however, may deserve different treatment.

80. Admittedly, the *Townes* court conducted a somewhat similar analysis but only as an alternative to its proximate cause holding. *Townes*, 176 F.3d at 147–48. The basis for this analysis is critiqued below. *See infra* notes 107–119 and accompanying text.

81. Warner v. Orange County Dep't of Prob., 115 F.3d 1068, 1071 (2d Cir. 1997) ("[I]t was the judge's sentencing decision . . . that caused the harm").

82. Egervary v. Young, 366 F.3d 238, 243 (3d Cir. 2004).

83. *Id.* at 250–51.

84. This understanding of due process did play a role in the court's reasoning, but the court only mentioned it in dicta after its proximate causation holding. *Id.* at 251 (explaining that the correct avenue for correcting the erroneous holding at issue was by pursuing a motion to reconsider and, if necessary, appealing the ruling).

85. *Id.* at 250–51.

first type of case is well settled: an officer whose falsehood about a constitutional violation leads to further harm is not relieved of liability by the conduct of an intervening actor.[86] Such officers, in the words of the Seventh Circuit, "cannot hide behind the officials whom they have defrauded."[87]

The second half of the Third Circuit's rule is problematic because, by ignoring differences between the distinct constitutional rights violated, it denies liability to deserving plaintiffs. It assumes that the compensable harm caused by any constitutional violation ceases at or before a judicial ruling that immediately causes the violation when that ruling is not based on any factual misrepresentations.[88] This rule paints with too broad a brush because it precludes all liability for rights not violated until a judicial ruling is made. These include the Fifth Amendment right against self-incrimination, rights under the Establishment Clause, and even the Fourth Amendment rights for which the Supreme Court allowed a remedy in *Malley v. Briggs*.[89] The Third Circuit may have created a rule that is easier to apply, but it did so only at the cost of abrogating its duty to adjudicate serious constitutional questions. The next Section provides a more comprehensive framework for such adjudication.

C. *Applying Common Law Rules While Paying Proper Respect to the Constitution*

Instead of looking primarily to the common law of torts, courts analyzing constitutional torts must pay proper respect to the constitutional rights at

---

86. *See, e.g.*, Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988) (holding that a prosecutor's decision to charge did not relieve officers of liability for the plaintiff's confinement because the prosecutor's decision was based on falsehoods provided by the police and was, therefore, not independent); Smiddy v. Varney, 665 F.2d 261, 267 (9th Cir. 1981) (holding that a police officer who does not "act maliciously or with reckless disregard for the rights of an arrested person" is not liable for damages suffered after a prosecutor files charges unless the plaintiff produces evidence to show that the prosecutor did not exercise independent judgment); Ames v. United States, 600 F.2d 183, 185 (8th Cir. 1979) (holding that a grand jury indictment breaks the chain of causation from the conduct of the F.B.I. and Justice Department employees to the criminal proceedings "absent any specific allegation, such as the presentation of false evidence or the withholding of evidence"); Dellums v. Powell, 566 F.2d 167, 193 (D.C. Cir. 1977) (holding that the prosecutor's decision to file an information broke the chain of causation from the investigating officer when it was "independent of any pressure or influence exerted by [the officer] and of any knowing misstatements [by the officer]"). *But see* Jones v. Cannon, 174 F.3d 1271, 1287–88 (11th Cir. 1999) (holding, partly based on absolute witness immunity, that an officer who gave false grand jury testimony was relieved of liability by the intervening acts of a prosecutor and grand jury).

87. *Jones*, 856 F.2d at 994.

88. *Egervary*, 366 F.3d at 250–51.

89. 475 U.S. 335 (1986). The Third Circuit argued that its rule did not contradict the Supreme Court's holding by suggesting that *Malley* included purposeful falsehoods in the officer's affidavit and thus fell under the first part of its categorical rule. *Egervary*, 366 F.3d at 248. In fact, there was no suggestion that the officer in *Malley* withheld or fabricated any evidence in his affidavit. *Malley*, 475 U.S. at 338; DAN B. DOBBS, THE LAW OF TORTS 1218 (2001) (describing the facts in *Malley* as including the presentation by the officer to the magistrate of "a fair statement of the facts"). Unfortunately, this misreading has also gained traction in the Seventh Circuit. *See* Juriss v. McGowan, 957 F.2d 345, 351 (7th Cir. 1992); *Jones*, 856 F.2d at 994.

stake.[90] This separate inquiry is demanded because the interests at stake in remedying constitutional torts are similar to, but in important ways distinct from, the interests present in other types of torts. Like other torts, constitutional torts must compensate plaintiffs for harms, deter future misconduct, and vindicate rights, but those rights are especially important when they are defined by the Constitution and can only be violated by government actors against whom victims may have no other defenses.[91] These policy considerations, which are distinct from those underlying common law torts,[92] suggest, and the Supreme Court has agreed, that the causal link required for constitutional torts is not the same as that required for common law torts.[93]

As the Court instructed in *Carey v. Piphus* when discussing compensatory damages, "rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question."[94] So too should rules governing causation. As with the rules of compensation, the common law is a starting point for determining causation,[95] but when the interests of constitutional torts diverge from those of common law torts, courts must adapt the rules to serve those distinct interests.[96]

The Court's two-tiered process for determining immunities under § 1983 is instructive:

> Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions. Thus, while we look to the common law

---

90. *See* Wells, *supra* note 20, at 212; Whitman, *supra* note 20, at 45.

91. Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) ("[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right . . . ."); Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 911–16 (2001); Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 444 (1982); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 669 (1997). Additionally, because constitutional torts impact government actors and government resources, overdeterrence is a serious concern. Eaton, *supra*, at 444–45. When state actors are sued in federal courts, federalism concerns also arise. *Id.* at 445; *see also* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that damage awards against governments are not effective deterrence because governments respond to political incentives and not financial ones).

92. Eaton, *supra* note 91, at 445–46; Whitman, *supra* note 91, at 669.

93. *See supra* notes 42–48 and accompanying text.

94. 435 U.S. 247, 259 (1978).

95. *Carey*, 435 U.S. at 257–58.

96. Furthermore, courts are capable of such adaptation. *Id.* at 259 ("[C]ourts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights." (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409 (1971) (Harlan, J., concurring))).

> for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form.[97]

Similarly, a court considering causation questions should not assume that Congress intended to incorporate every common law rule into § 1983. The court should ask whether liability would attach under common law rules of causation, but must also consider whether the answer from the common law is consistent with "§ 1983's history or purposes."[98] That is, the court should not be blind to the fact that its causation holding will help define the constitutional rights at stake and how they are or are not vindicated.[99] Thus, when courts apply common law rules of causation to constitutional torts, they should do so while making explicit reference to the constitutional rights at stake. Courts should identify the contours of those rights and adopt rules of causation that conform to them.[100]

In *Martinez v. California*, the Court paid proper respect to the constitutional rights at stake when it analyzed those rights without deciding how the common law would apply.[101] Even if common law causation pointed toward liability, the Court held, based on § 1983 and the constitutional right of due process, that liability was inappropriate under § 1983's causation requirement.[102] After *DeShaney v. Winnebago County Department of Social Services*, *Martinez* could conceivably be limited to a holding about the Due Process Clause—that, as *DeShaney* held, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[103] In a footnote, however, the *DeShaney* Court explained that *Martinez* was decided on "the narrower ground that the causal connection between the state officials' decision to release the parolee from prison and the murder was too attenuated to establish a 'deprivation' of constitutional rights within the meaning of § 1983."[104] In this explanation, the Court again acknowledged that constitutional tort and common law tort causation are different.

---

97. Malley v. Briggs, 475 U.S. 335, 339–40 (1986) (citations and internal quotation marks omitted).

98. *Id.* at 340.

99. *See* Whitman, *supra* note 20, at 45 n.204 ("[C]ausation requirements reflect policy decisions about the scope of responsibility and thus rest on the definition of the wrong done to the plaintiff."); *see also id.* at 65 (arguing that the Constitution and not a reasonable person standard should define the standard of care in constitutional torts).

100. For a similar suggestion, see Wells, *supra* note 20, at 212–14.

101. 444 U.S. 277 (1980); *see supra* notes 42–45 and accompanying text.

102. *Martinez*, 444 U.S. at 285. For a reading of *Martinez* as supporting a common law torts only approach, see Wells, *supra* note 20, at 174–76. This reading, however, ignores the Court's explanation of its holding as being made "[r]egardless of whether, as a matter of state tort law," i.e., common law, liability would attach. *Martinez*, 444 U.S. at 285; *see* Eaton, *supra* note 91, at 451 (arguing that *Martinez* "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").

103. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989).

104. *Id.* at 197 n.4.

Although footnote seven of *Malley v. Briggs* did not contain explicit reference to an analysis of the constitutional rights at stake,[105] the Court nevertheless suggested that an interpretation of § 1983 framed the causation inquiry when it explained that the district court's " 'no causation' rationale in this case is inconsistent with our interpretation of § 1983."[106] Thus, any application of common law rules to constitutional tort causation must include consideration of § 1983's purpose—vindicating constitutional rights.

The necessary inquiry into the contours of the constitutional right at stake resembles the common law harm-within-the-risk approach, but like any common law rule, this approach should not be the beginning and end of a court's inquiry. Under the harm-within-the-risk approach to negligence torts, a defendant is only liable if the harm is "within the scope of the risks by reason of which the actor is found to be negligent."[107] When courts apply this approach to statutory duties, as they often do, the statute defines the conduct of a reasonable person.[108] Liability only attaches, however, when the statute was intended to prevent the harm that actually occurred. For example, the shipowner in *Gorris v. Scott*[109] was not liable when the plaintiff's animals washed overboard in a storm.[110] Even though the animals were "lost by reason . . . of the neglect to comply" with a statute requiring pens that would have saved the animals,[111] the suit failed because the violated statute was aimed at protecting the animals from disease and not from being washed overboard.[112] One commentator[113] and two circuit courts[114] have suggested that courts should import this approach into constitutional torts so that when the harm done to a constitutional tort plaintiff is not one of the harms anticipated by the constitutional right at stake, liability should not attach.[115]

---

105. 475 U.S. 335, 344 n.7 (1986); *see supra* notes 56–59 and accompanying text.

106. *Malley*, 475 U.S. at 344 n.7.

107. ROBERT KEETON, LEGAL CAUSE IN THE LAW OF TORTS 10 (1963); *see also* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 225–47 (8th ed. 2004); KEETON ET AL., *supra* note 52, § 43, at 281–82.

108. *See* RESTATEMENT (SECOND) OF TORTS § 285(b) (1965); KEETON ET AL., *supra* note 52, § 36.

109. Gorris v. Scott, (1874) 9 L.R. Exch. 125, *reprinted in* EPSTEIN, *supra* note 107, at 230–31.

110. *Id.* at 127–30.

111. *Id.* at 127.

112. *Id.* at 127–30.

113. John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989).

114. Gauger v. Hendle, 349 F.3d 354, 362–63 (7th Cir. 2003), *abrogated in part by* Wallace v. City of Chicago, 440 F.3d 421 (7th Cir. 2006) (abrogating *Gauger*'s holding on claim accrual, but not on the extent of damages), *aff'd sub nom.* Wallace v. Kato, 127 S. Ct. 1091 (2007); Townes v. City of New York, 176 F.3d 138, 147–48 (2d Cir. 1999).

115. For arguments against this approach, see Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990); Wells, *supra* note 20, at 213.

The harm-within-the-risk approach is correctly used to impose liability in constitutional torts, but not necessarily to deny liability. Under the approach, when a constitutional right is violated, a court should ask, what does the constitutional right guarantee to the person who holds it? If the harm suffered was guaranteed against by the right violated, liability must attach. If, however, the harm suffered was not guaranteed against by the right violated, the court should not end its inquiry. There may be other factors, such as a special need for deterrence or fairness,[116] that require liability. Just as in common law torts, when applied to constitutional torts, the harm-within-the-risk approach should not be "carried to its logical extreme."[117]

In *Malley*, for example, the harm-within-the-risk approach strongly supports the imposition of liability because the harm, an illegal arrest, is certainly one of the harms meant to be prevented by the Fourth Amendment. In a situation like *Townes*, though, the result from the harm-within-the-risk approach may not be acceptable: under the Second Circuit's narrow interpretation of the Fourth Amendment, post-conviction harms such as a conviction on the basis of an illegal search are not anticipated by the Amendment. But in some cases, depending on other facts that may not have been present in *Townes*,[118] those harms should still be compensable.[119]

II. Properly Applying Causation Rules to Fifth Amendment Violations at Trial

This Part demonstrates the approach described in Part I by examining two divergent rulings on constitutional tort causation. The Fifth Circuit in *Murray* and the Sixth Circuit in *McKinley* addressed nearly identical problems, purported to apply nearly identical rules, and reached opposite results. Section II.A argues that the Fifth Circuit's ruling, made without proper consideration of the constitutional rights at stake, is contrary to the Supreme Court precedent discussed in Part I. Section II.B details the approach taken by the Sixth Circuit, which paid proper respect to the underlying rights and followed the path suggested in Section I.C.

---

116. *See* Wells, *supra* note 20, at 213.

117. KEETON ET AL., *supra* note 52, § 43, at 281.

118. Professor Nahmod's suggestion, which he quickly rejected, of solving this problem by introducing something akin to contributory negligence—a plaintiff is prohibited from recovering because his own illegal conduct is a cause of the harm—is helpful in imagining a scenario in which a plaintiff convicted on the basis of a Fourth Amendment violation *should* recover damages for his conviction. *See* Nahmod, *supra* note 115, at 1015 n.95. Such a situation is presented when a plaintiff is factually and not just legally innocent, for example, when an illegal arrest was exploited, in violation of the Fourth Amendment, to obtain a confession. That the Second Circuit's reasoning in *Townes* would prevent liability in such a case shows its weakness.

119. In *Gauger*, 349 F.3d at 359, Judge Posner, considering the implication of a Fourth Amendment rule similar to the Second Circuit's, explained that constitutional tort damages might not be available to a person legally arrested who is detained further and convicted on the basis of police fraud occurring after the legal arrest. He found this result unacceptable, writing that "it is shocking to think that a police frame-up which lands a person on death row is not a constitutional tort, though every false arrest made without probable cause is." *Id.*

A. *The Fifth Circuit's Overly Rigid Application of the Common Law*

In *Murray*, the Fifth Circuit applied a proximate causation analysis to protect interrogators from liability for the conviction and imprisonment that resulted from their illegal interrogation.[120] The court rigidly applied common law rules to a constitutional tort, adopting a one-size-fits-all approach by relying heavily on precedent concerning quite different constitutional rights than the one at issue in the case before it. The court's approach is inconsistent with Supreme Court precedent because it ignored the contours of the Fifth Amendment rights involved.

The Fifth Circuit did not, as the Supreme Court has instructed, use the common law as the "starting point"[121] for its analysis. Instead, it used the common law as the complete solution. Rather than looking to the contours of the Fifth Amendment right against self-incrimination, the Fifth Circuit simply followed decisions from other circuits applying proximate causation analysis to violations of the Fourth Amendment and the right to due process.[122] Based on this precedent, the Fifth Circuit held that the interrogating officers were not liable because the judge broke the chain of causation.[123] Under familiar common law rules, this conclusion must have been based on underlying reasoning that the risk of harm was unforeseeable[124] or that the acts by the intermediary in question were not a normal foreseeable consequence of the officer's acts.[125] With reference to the Fifth Amendment right at stake, however, neither argument can be maintained.

Just as a tortfeasor cannot escape liability when the party she harmed is further injured by a negligent doctor,[126] an interrogating officer who has illegally coerced a confession from a suspect cannot evade liability when a judge erroneously admits that coerced confession. The admission of a confession that is the product of a coercive interrogation is, like negligent medical care following an accident, a foreseeable consequence of the origi-

---

120. Murray v. Earle, 405 F.3d 278, 293 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 749 (2005).

121. Heck v. Humphrey, 512 U.S. 477, 483 (1994) (quoting Carey v. Piphus, 435 U.S. 247, 257–58 (1978)); *see supra* Section I.A.

122. *Murray*, 405 F.3d at 292 & nn.50–51. In all, the Fifth Circuit cited to fourteen cases applying a proximate causation analysis in a constitutional tort action. Eleven dealt with alleged Fourth Amendment violations and one with an alleged due process violation. Only two, *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972), and *Crowe v. County of San Diego*, 303 F. Supp. 2d 1050 (S.D. Cal. 2004), dealt with alleged Fifth Amendment violations. Although each one reached the same conclusion as the Fifth Circuit, relieving the officers of liability, the *Crowe* court's causation analysis came only as an alternative basis for that conclusion, *Crowe*, 303 F. Supp. 2d at 1092, and *Duncan*, now more than thirty years old, predates a great deal of development in the area.

123. *Murray*, 405 F.3d at 293.

124. RESTATEMENT (SECOND) OF TORTS §§ 442A–442B (1965).

125. *Id.* § 443.

126. *See, e.g.*, Weems v. Hy-Vee Food Stores, Inc., 526 N.W.2d 571 (Iowa Ct. App. 1994) (upholding the trial court's refusal to issue a jury instruction allowing the jury to find that a doctor who administered an epidural block eighteen months after plaintiff slipped and fell in defendant's store was a superseding cause relieving defendant of liability for plaintiff's injuries including those resulting from the epidural block); *see also* RESTATEMENT (SECOND) OF TORTS § 457 (1965).

nal harm.[127] The judge's failure to suppress the confession is foreseeable because, in the language of the Restatement (Second) of Torts, the admission is "normal," that is, "its intervention [is not] so extraordinary as to fall outside of the class of normal events."[128] Furthermore, a judicial ruling may be independent, but it is not the type of independent tortious conduct that the Restatement describes as relieving the original actor of liability.[129]

The Fifth Circuit's foreseeability inquiry was flawed because it ignored the contours of the Fifth Amendment right against self-incrimination. While the court showed its awareness of how damaging a false confession can be,[130] it held that recovery was barred based on "the independent roles of police officers, prosecutors, and judges."[131] These actors may act independently, but a holding that such independence breaks the chain of causation is contrary to the Supreme Court's reasoning in *Chavez v. Martinez* that the right against self-incrimination is only violated when an officer's coercive interrogation is used at trial.[132] The use at trial, which completes the violation, is not just the foreseeable consequence of the initial coercive interrogation; the harm from that use is precisely what makes the initial coercive interrogation illegal. Thus, intervening acts between the interrogation and the use do not relieve the interrogating officer of liability.[133] In contrast to the Fourth Amendment, which is violated entirely before trial and is relevant only at trial because it is protected by the exclusionary rule,[134] a

---

127. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 922 (2004) ("Judges are conditioned to disbelieve claims of innocence and almost never suppress confessions, even highly questionable ones."). Measuring how often judges fail to suppress unconstitutionally obtained confessions is no easy task. Some measure of empirical support for the proposition that suppression on the basis of a Fifth Amendment violation is very unlikely comes from studies showing the likelihood of exclusion under the Fourth Amendment to be ten percent or lower. *See* L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 691–708 (1998) (collecting studies).

128. RESTATEMENT (SECOND) OF TORTS § 443 cmt. b (1965).

129. Although judicial rulings may "actively operate[] in producing harm," *id.* § 441, even when they are incorrect, they are not considered to be "wrongful" to the party against whom they are made, *see id.* at § 442. Indeed, even if an intervening judicial ruling can be described as a wrongful act, it should not break the causal chain because "the degree of culpability of [the] wrongful act of [the] third person which sets the intervening force in motion," *id.*, is zero. This is so because an appeal only reverses an incorrect judicial ruling; it does not hold a judge culpable for issuing it. *See, e.g.*, United States v. Leon, 468 U.S. 897, 916 & n.14 (1984) (rejecting the contention that the Fourth Amendment exclusionary rule is necessary to deter incorrect judicial rulings).

130. Murray v. Earle, 405 F.3d 278, 295 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 749 (2005) ("The importance of deterring the improper obtaining of confessions, however, cannot be gainsaid.").

131. *Id.* at 296.

132. Chavez v. Martinez, 538 U.S. 760, 772 (2003) (Thomas, J., plurality opinion); *id.* at 778 (Souter, J., concurring).

133. RESTATEMENT (SECOND) OF TORTS § 449 (1965).

134. *See, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998) (clarifying that a Fourth Amendment violation is not committed at trial, but is "fully accomplished" by an illegal search and seizure before trial).

violation of the Fifth Amendment right against self-incrimination begins with a pre-trial interrogation and only ends when it is used at trial to convict.[135] Based on this proper consideration of the constitutional right at stake, the Fifth Circuit was wrong to shield the interrogating officers from liability.

B. *The Sixth Circuit's Proper Consideration of the Constitutional Rights at Stake*

The Sixth Circuit in *McKinley* employed the approach suggested in Section I.C and imposed liability on the interrogating officers, the opposite result of the Fifth Circuit.[136] Jeffrey McKinley, a former police officer, had been convicted of falsification and obstructing official business based on statements he made during investigatory questioning.[137] McKinley made the relevant statements during a *Garrity* interview, an investigative procedure used by public employers who may dismiss an employee who refuses to answer investigative questions but may not use any incriminating statements from the interview against the employee in a criminal prosecution regarding the matter under investigation.[138] An appeals court vacated McKinley's conviction, holding that the trial court erred in admitting statements from the *Garrity* interview, and he then sued his interrogators for violating his Fifth Amendment right against self-incrimination.[139] The Sixth Circuit confronted the same question that the Fifth Circuit had confronted in *Murray*: does the act of a judge or prosecutor in admitting a confession later ruled inadmissible relieve the original interrogator of liability for the constitutional harm?

Unlike the Fifth Circuit, the Sixth Circuit began its analysis by examining the constitutional right at stake.[140] The court observed that in *Chavez* and similar circuit court cases, the question was not *who* is liable for a Fifth Amendment violation, but "whether the requisite 'use' at a criminal pro-

---

135. The distinction is also visible in the context of habeas corpus petitions in which petitioners may challenge the admission at trial of interrogations taken in violation of *Miranda*, Withrow v. Williams, 507 U.S. 680 (1993), but may not challenge the admission at trial of evidence seized in violation of the Fourth Amendment, Stone v. Powell, 428 U.S. 465 (1976). In the first case, a fundamental right has been violated at trial, *Withrow*, 507 U.S. at 691–92, but in the second, only a prophylactic exclusionary rule has been violated and the Court has held that the deterrent effect of enforcing it so much later would not be worthwhile, *Stone*, 428 U.S. at 494–95.

136. McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1026 (2006).

137. *Id.* at 425.

138. *Id.* at 423, 425; *see also* Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

139. *McKinley*, 404 F.3d at 425–26. Interestingly, the Ohio Court of Appeals based its holding not on the Fifth Amendment, but on its conclusion that the parties had formed a contract prohibiting the Police Department from using the statements. *Id.* at 426; State v. McKinley, No. 01CA98, 2002 WL 1732136, at *3 (Ohio Ct. App. June 25, 2002). The Sixth Circuit held, however, that collateral estoppel did not bar McKinley's lawsuit on Fifth Amendment grounds, *McKinley*, 404 F.3d at 429, and that McKinley had presented enough evidence to survive summary judgment on the issue of whether the use of his statements at trial did violate his Fifth Amendment rights, *id.* at 431–36.

140. *McKinley*, 404 F.3d at 437.

ceeding occurred."[141] To determine causation, the Sixth Circuit relied on the Supreme Court's description of the right: "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. *Although conduct by law enforcement officials prior to trial may ultimately impair that right*, a constitutional violation occurs only at trial."[142] Actors who "ultimately impair[]" the right, the Sixth Circuit reasoned, could not escape liability for its violation.[143] Furthermore, a contrary ruling, when combined with prosecutorial and judicial immunity, would result in "a rule barring *any* suits for Fifth Amendment violations."[144]

After determining the scope of the right at stake, the court addressed causation and, unfortunately, explained that "[c]ausation in the constitutional sense is no different from causation in the common law sense."[145] Despite this assertion, however, the Sixth Circuit did not blindly apply common law proximate causation. The court correctly focused on the right against self-incrimination and held that, viewing the facts in the light most favorable to the plaintiff, "the use at trial of incriminating statements [Plaintiff] was compelled to make ... was a 'natural consequence of [Defendant's] actions.' "[146] The court left open the possibility that a similarly situated defendant could prove a lack of causation by showing other facts,[147] but refused to hold that the intervening acts of a prosecutor or judge would always relieve the interrogating officer of liability.

The Sixth Circuit's proper focus on the constitutional rights in question is further demonstrated by comparing its use of precedent to that of the Fifth Circuit in *Murray*. In contrast to the Fifth Circuit's voluminous citations to other circuit court decisions on intervening cause involving other constitutional rights,[148] the Sixth Circuit only cited the *Malley* footnote[149] and one other case.[150] Such a narrow focus reflects a refusal to apply rules for other rights to a case about the Fifth Amendment. *Crowe v. County of San Diego*,[151] the second and final case cited by the Sixth Circuit was, at the

---

141. *Id.*

142. *Id.* (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)). The Sixth Circuit noted that the *Chavez* plurality quoted the same passage. *Id.*

143. *Id.* at 437–38.

144. *Id.* at 438.

145. *Id.* at 438; *see supra* Section I.B.

146. *McKinley*, 404 F.3d at 439 (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

147. *Id.* ("A police officer may defend on the grounds that he attempted to prevent the use of the allegedly incriminating statements at trial, or that he never turned the statements over to the prosecutor in the first place.").

148. Murray v. Earle, 405 F.3d 278, 292 & nn.50–51 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 749 (2005); *see also supra* note 122.

149. *McKinley*, 404 F.3d at 438 (citing Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986)); *see supra* notes 56–61, 105–106 and accompanying text.

150. *McKinley*, 404 F.3d at 437 n.23 (citing Crowe v. County of San Diego, 303 F. Supp. 2d 1050, 1091–92 (S.D. Cal. 2004)).

151. 303 F. Supp. 2d 1050 (S.D. Cal. 2004).

time, one of only two reported intervening cause cases that dealt with an alleged Fifth Amendment violation. The other such case,[152] which was decided in 1972, reached a conclusion equivalent to that of the Fifth Circuit in *Murray*,[153] but did so without the benefit of more than thirty years of development in the law of constitutional torts.[154]

The Sixth Circuit's analysis is superior to the Fifth Circuit's because the Sixth Circuit more closely followed the purpose and intent of § 1983 as interpreted by the Supreme Court.[155] Unlike the Fifth Circuit in *Murray*, the *McKinley* court properly focused its analysis on the Fifth Amendment itself. In making this choice, the court recognized that the common law is only a starting point for determining constitutional tort causation; a complete analysis must include consideration of the constitutional right at stake.

CONCLUSION

This Note has argued that when courts use common law rules without reference to constitutional rights, as the Fifth Circuit did in *Murray*, they defy Supreme Court precedent and abrogate their duties to wronged plaintiffs and to the interests embodied in constitutional torts. It has suggested a different framework, which focuses more closely on the constitutional rights in question. Constitutional rights can only be properly vindicated when courts, as the Sixth Circuit did in *McKinley*, adopt this approach and give those rights the attention they deserve.

152. Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972).

153. *See id.* at 942.

154. *See supra* Section I.A.

155. *See supra* Section I.A.