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AFFIRMATIVE DUTY AND CONSTITUTIONAL TORT

Michael Wells* & Thomas A. Eaton†

Constitutional tort is an area of burgeoning interest to litigants and scholars alike,[1] and has received considerable attention from the Supreme Court in recent years. The Court has developed doctrine on such issues as whether cities and states may be sued,[2] the kinds of official conduct that can form the basis for constitutional tort,[3] the scope of official immunity from damage liability,[4] principles of damage assessment,[5] and causation.[6] Yet, on some important questions, constitutional tort doctrine remains primitive. One of these questions is the scope of affirmative duty: When, if ever, may a government or officer be held liable for failing to help a plaintiff in peril?

The Constitution ordinarily places only negative restrictions on government and does not require affirmative acts to assist individuals. The statutory vehicle for most constitutional tort litigation, 42 U.S.C. section 1983, echoes this constitutional principle. It extends liability to "[e]very person who . . . [under color of state law] subjects, or causes to be subjected, any . . . person"[7] to the deprivation of federal

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1. *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 950 & n.3 (1973); *id.* at 233-34 (1981 Supp.) (describing the increase in civil rights litigation over the past twenty years); Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

2. *See* Quern v. Jordan, 440 U.S. 332 (1979); Monell v. Department of Social Servs., 436 U.S. 658 (1978).

3. *See* Parratt v. Taylor, 451 U.S. 527 (1981); Baker v. McCollan, 443 U.S. 137 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); Paul v. Davis, 424 U.S. 693 (1976).

4. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980); Butz v. Economou, 438 U.S. 478 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Wood v. Strickland, 420 U.S. 308 (1975).

5. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); Carey v. Piphus, 435 U.S. 247 (1978). *See generally* Note, *Damage Awards in Constitutional Torts: A Reconsideration after* Carey v. Piphus, 93 HARV. L. REV. 966 (1980).

6. *See, e.g.*, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). *See generally* Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443 (1982).

7. 42 U.S.C. § 1983 (1976).

rights, and makes no provision for a duty on governmental defendants to stop others from harming the plaintiff.[8]

For some courts this principle disposes of affirmative duty claims forthwith. A noteworthy example is the recent seventh circuit case *Bowers v. DeVito*.[9] A man released from a state mental hospital killed a woman, and her estate brought a constitutional tort action against the officials responsible for his release. The court denied liability, explaining that "[t]he Constitution is a charter of negative liberties," that "it does not require . . . the state to provide . . . even so elementary a service as maintaining law and order," and that "as the State of Illinois has no federal constitutional duty to provide such protection its failure to do so is not actionable under section 1983."[10]

In spite of these constitutional and statutory principles, other courts have upheld affirmative duty claims in constitutional tort.[11] Their opinions, however, do not adequately explain the foundation and scope of these affirmative duties. In particular, they do not respond to the rationale of *Bowers*, that constitutional tort is available only to redress violations of constitutional rights.

This Article argues that the *Bowers* principle is wrong. It examines the issues of doctrine and policy that bear on the affirmative duty question in constitutional tort and contends that affirmative duties may be imposed even though constitutional rights are generally negative in character, as a matter of federal constitutional common law. It develops a foundation in doctrine and policy, so far lacking in the opinions, to support these duties and to place proper limits upon them.

Part I identifies issues of tort policy that arise in affirmative duty cases, while Part II addresses the distinctive problems that come up in the constitutional tort context. Part III utilizes the analysis and conclusions reached in the preceding parts of the Article to derive two proposed principles for decision of these cases: First, where a governmental defendant has no prior control over the plaintiff or the injurer, as where a policeman chances upon a mugging on a street corner, a duty should be imposed only when the defendant knows the facts regarding the danger, or recklessly disregards those facts, and can respond

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8. A related statute, 42 U.S.C. § 1986 (1976), explicitly imposes an affirmative duty to take action against KKK-style terrorism. *See* Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y. 1979).

9. 686 F.2d 616 (7th Cir. 1982).

10. 686 F.2d at 618. The court was wrong in characterizing this as an affirmative duty problem. The plaintiff's claim was based on the defendants' action in releasing a dangerous person. The claim may fail on other grounds, *cf.* Martinez v. California, 444 U.S. 277, 285 (1980) (ruling on similar facts that the death was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law"), but it does not present the question of what purely affirmative duties are owed by government.

11. *See, e.g.*, Putnam v. Gerloff, 639 F.2d 415, 423 (8th Cir. 1981); Byrd v. Brishke, 466 F.2d 6, 9-11 (7th Cir. 1972); Cottonreader v. Johnson, 252 F. Supp. 492, 499 (M.D. Ala. 1966).

to the danger immediately and with relative ease. Second, where the governmental defendant exercises control over the plaintiff or the danger, as when the plaintiff is a prisoner seeking protection from other inmates, the knowledge and ability requirements should be relaxed and liability imposed under a negligence, or perhaps gross negligence, standard.

I. A TORTS PERSPECTIVE

Long before section 1983 became a popular vehicle for claiming affirmative duties owed by government, plaintiffs brought such claims under common law principles. This part of the Article will sketch this case law and identify the conflicting policy considerations that underlie these decisions. The discussion will provide the necessary background for a consideration of the distinctive questions raised when an affirmative duty claim is asserted under the Constitution.

A. *The Initial Rule: No Duty to Act*

The first principle in the law of affirmative duties is that the government, like an individual, owes no general tort obligation to help anyone. Thus, there is no general duty owed by police to the citizenry to protect them from crime.[12] This principle is illustrated by the well-known case *Riss v. City of New York.*[13] A rejected suitor threatened on several occasions to injure the plaintiff if she married another man. The plaintiff relayed these threats to the police and repeatedly requested protection, but her requests were refused. The threats were carried out by a hired thug who threw lye in the plaintiff's face. The court dismissed her tort suit, holding that the city had no duty enforceable in tort to protect her from the attack.

The rationale for the no-duty rule differs sharply depending on whether the defendant is public or private. The no-duty rule as applied to individuals rests primarily on libertarian values. A state-imposed duty to act would seriously impinge upon individual freedom and autonomy. As Professor Epstein argues, if the government can legitimately require one person to act for the exclusive benefit of another, "it becomes impossible to tell where liberty ends and obligation begins."[14] Furthermore, a tort duty to act is thought to undermine

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12. *See* Turner v. United States, 248 U.S. 354 (1919); Warren v. District of Columbia, 444 A.2d 1 (App. D.C. 1981); De Honey v. Hernandez, 122 Ariz. 367, 595 P.2d 159 (1979); Bruttomesso v. Las Vegas Metro Police Dep't, 95 Nev. 151, 591 P.2d 254 (1979). *See generally* Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981).

13. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

14. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 199 (1973). Other scholars

the moral worth of an individual's decision to help another person in distress. The threat of tort liability adds an element of compulsion which muddles the question of motivation essential to determining the moral quality of the act.[15]

When the defendant is a government or its officer, individual autonomy is not an issue. Consequently, the no-duty rule must look elsewhere for support. Although courts employ several doctrinal formulas in deciding these cases,[16] the one most frequently invoked is the "public duty doctrine." In the typical affirmative duty case, the government defendant is subject to a statute or ordinance requiring it to provide some sort of service to its citizens. The plaintiff alleges that the government's negligent failure to provide these services caused his injury.[17] The public duty doctrine holds that this legislation creates only a duty owed to the public in general, and does not provide the basis for an individual negligence action. In *Cracraft v. City of St. Louis Park*,[18] for example, the plaintiff was injured when a drum containing duplicating fluid exploded at a high school. The plaintiff alleged that the defendant city was negligent in failing to discover the drum and have it removed pursuant to a local ordinance. In dismissing the action the court reasoned that a duty of care arises only when the municipality has attempted to protect a specific class of persons.[19]

These cases curiously suggest that because a duty is owed to everyone,

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have advanced utilitarian arguments against such a duty. *See* Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1975).

15. Epstein, *supra* note 14, at 200. Despite harsh criticism by commentators, the no-duty rule continues to apply generally to individuals. *See* Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

16. Courts may deny liability on the grounds that the requested government action involves a "discretionary" or "governmental" function. *See, e.g.*, Stevenson v. State Dep't. of Transp., 290 Ore. 3, 619 P.2d 247 (1980); Silver v. City of Minneapolis, 284 Minn. 266, 170 N.W.2d 206 (1969); Keane v. City of Chicago, 240 N.E.2d 321 (Ill. App. 1968).

17. *See, e.g.*, Whalen v. County of Clark, 96 Nev. 559, 613 P.2d 407 (1980) (alleged negligent failure to prosecute a dangerous person); Massingill v. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969) (alleged negligent failure to provide police protection); Baerlein v. State, 92 Wash. 2d 229, 595 P.2d 930 (1979) (alleged negligent failure to enforce state securities laws); Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704, 63 N.Y.S.2d 51 (1945) (alleged negligent failure to provide fire protection).

18. 279 N.W.2d 801 (Minn. 1979).

19. According to the court,

> [a] municipality does not owe any individual a duty of care merely by the fact that it enacts a general ordinance requiring fire code inspections or by the fact that it [undertakes an] inspection for fire code violations. A duty of care arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class of persons from the risks associated with fire code violations.

Id. at 806. For a general discussion of the public duty doctrine see 18 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 53.04b (3d ed. 1977).

it is enforceable by no one.[20] The proffered justification for this apparent paradox is the importance of preserving executive and legislative discretion in allocating limited public resources. Representative of the judicial philosophy underlying the public duty doctrine is the majority opinion in *Riss v. City of New York.*[21] In explaining why the city owed no duty to Miss Riss, Judge Breitel noted that before the court could hold the city responsible there should be a legislative determination of the scope of public responsibility.[22]

By emphasizing this discretion value, the cases acknowledge that protection of individuals from crime is only one of the many goals that government may pursue. Affirmative tort obligations would compel governments to allocate public resources in a particular way, or risk tort liability. The increasing demands on public resources might exceed economic or political limitations. The value of discretion holds that government officials must be given leeway to decide what mix of goals to pursue and how to spend public resources in pursuit of those goals.

In contrast with the libertarian rationale of the private no-duty cases, the discretion value does not evidence distrust of government. Rather, it is concerned with the distribution of power within government. Implicit in this view is a confidence that the legislative and executive branches can properly define the obligations of government and allocate resources to achieve public goals. These officials are commonly believed to be more sensitive to public attitudes than judges and to have better access to a wide range of information. To this extent, the no-

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20. In criticizing the majority opinion in *Riss*, Judge Keating noted "[i]t is not a distortion to summarize the essence of the city's case here in the following language: 'Because we owe a duty to everyone, we owe it to nobody.'" Riss v. City of New York, 22 N.Y.2d 581, 585, 240 N.E.2d 860, 862, 293 N.Y.S.2d 897, 901 (1968) (dissent).

21. 22 N.Y.2d 581, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

22. Judge Breitel argued that:

> [t]he amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided. Before such extension of responsibilities, there should be a legislative determination that that should be the scope of public responsibility.

Riss v. City of New York, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860-61, 293 N.Y.S.2d 897, 898 (1968). *See also, e.g.*, National Bd. of Y.M.C.A. v. United States, 395 U.S. 85, 95 (1969) (Harlan, J., concurring); Massingill v. Yuma County, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969); Warren v. District of Columbia, 444 A.2d 1, 8-9 (App. D.C. 1981); Simpson's Food Fair, Inc. v. City of Evansville, 149 Ind. App. 387, 272 N.E.2d 871, 875 (1971); Silver v. City of Minneapolis, 284 Minn. 266, 272, 170 N.W.2d 206, 209 (1969).

governmental-duty rule reflects a commitment to democratic values and the political process.[23]

B. *Exceptions To The No-Duty Rule*

Despite the general rule that police owe no tort duty to prevent crime, courts have imposed affirmative obligations on government to protect certain limited classes of people. Witnesses, informants, and other persons who cooperate in criminal investigations are said to have a special relationship with the government that entitles them to protection.[24] Affirmative duties also arise when government assumes custody of an individual. Once a police officer arrests an individual, the government must exercise reasonable care in providing medical and security services.[25] In both these instances the government has established a relationship between itself and the plaintiff sufficient to create an affirmative duty.

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23. The recent case of Warren v. District of Columbia, 444 A.2d 1 (App. D.C. 1981), contains an uncommonly detailed discussion of how the public duty doctrine advances the value of discretion and its corollary trust in the political process. In explaining why the police owed no duty to help three women who requested immediate assistance to stop an on-going violent assault, the court observed:

> The absence of a duty specifically enforceable by individual members of the community is not peculiar to public police services. Our representative form of government is replete with duties owed to everyone in their capacity as citizens but not enforceable by anyone in his capacity as an individual. Through its representatives, the public creates community service; through its representatives the public establishes the standards which it demands of its employees in carrying out those services and through its representatives, the public can most effectively enforce adherence to those standards of competence. As members of the general public, individuals forego any direct control over the conduct of public employees in the same manner that such individuals avoid any direct responsibility for compensating public employees.
>
> Plaintiffs in this action would have the Court and a jury of twelve additional community representatives join in the responsibility of judging the adequacy of a public employee's performance in office . . . . Consistent with this contention then, should a Court and jury also undertake to sift through clues known to the police in order to determine whether a criminal could reasonably have been apprehended before committing a second crime? Should a Court also be empowered to evaluate, in the context of a tort action, the handling of a major fire and determine whether the hoses were properly placed and the firemen correctly allocated? Might a Court also properly entertain a tort claim over a school teacher's ability to teach seventh grade English or over a postman's failure to deliver promptly an important piece of mail?

Id. at 8.

24. *See, e.g.*, Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); Estate of Tanasijevich v. City of Hammond, 583 N.E.2d 1081 (Ind. Ct. App. 1978); Christy v. City of Baton Rouge, 282 So. 2d 274 (La. Ct. App. 1973); Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966). *See generally* Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 824-25 (1981).

25. *See* Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1981); Daniels v. Anderson, 195 Neb. 95, 237 N.W.2d 397 (1975); Binkman v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 (1967); Porter v. County of Cook, 42 Ill. App. 3d 287, 355 N.E.2d 21, 561 (1976); Thomas v. Williams, 105 Ga. App. 321, 124 S.E.2d 409 (1962).

In other instances the duty arises from the relationship between the government and the third party tortfeasor. This relationship may be seen in a variety of contexts. In *Corridon v. City of Bayonne*,[26] for example, the plaintiff was shot with a service revolver by an intoxicated off-duty policeman. The court found that by arming the officer, the city assumed the duty to supervise him. The government had also been held to owe affirmative duties towards victims of crimes committed by certain persons released from government custody. In *Reiser v. District of Columbia*[27] the government obtained a job for a parolee as a handyman in an apartment complex. The government did not disclose to the employer that the parolee had a history of sex offenses and psychiatric problems and was then under suspicion in three murders. The parolee eventually killed the plaintiff's decedent, who resided in the apartment complex. The government's role in securing the employment coupled with its knowledge of the risks, gave rise to a special relationship between it and the residents of the apartment. The nature of the relationship between the government and the third-party tortfeasor in these examples varies considerably, yet each is considered a "special relationship" that requires the government to take some action for the benefit of potential victims.

Affirmative duties have been imposed on governments on account of some action they have undertaken voluntarily. In *City of Prichard v. Kelley*,[28] for example, the city had erected a stop sign at an intersection. It was removed sometime prior to the plaintiff's accident. The plaintiff alleged that the city's negligent failure to maintain the stop sign contributed to the accident. The city contended it owed the plaintiff no duty to maintain that stop sign. In ruling for the plaintiff, the court noted that by erecting the stop sign the city had volunteered to act, and consequently was thereafter responsible for acting with due care.[29] Similarly, if a government undertakes to inspect premises or warn a person of threatening danger, it must act with reasonable care.[30]

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26. 129 N.J. Super. 393, 324 A.2d 42 (App. Div. 1974). *Accord* Bonsignore v. City of New York, 683 F.2d 635 (2d Cir. 1982); Baker v. City of New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966).

27. 563 F.2d 462 (D.C. Cir. 1977), *aff'd en banc*, 580 F.2d 647 (D.C. Cir. 1978). *See generally* Comment, *Victims' Suit 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).

28. 386 So. 2d 403 (Ala. 1980).

29. City of Pritchard v. Kelley, 386 So. 2d 403, 406-07 (Ala. 1980). According to the court, because maintenance of the sign was necessarily a part of that responsibility, the city was under a duty to keep the sign maintained in a reasonable safe condition. *Id. Accord* McClure v. Nampa Highway Dist., 102 Idaho 197, 628 P.2d 228 (1981); Florence v. Goldberg, 44 N.Y.2d 189, 357 N.E.2d 763, 404 N.Y.S.2d 583 (1978); Padgett v. School Bd. of Escambia County, 395 So. 2d 584 (Fla. Dist. Ct. App. 1981).

30. *See* Adams v. State, 555 P.2d 235 (Alaska 1976); Brown v. MacPhearson's, Inc., 86 Wash. 2d 293, 545 P.2d 13 (1975).

Statutes, ordinances, and even constitutional provisions have provided the basis for affirmative public duties. Municipalities frequently are required by statute or ordinance to conduct various types of safety inspections. People injured in fires have successfully brought actions against cities for their negligence in failing either to discover some hazard or enforce code provisions.[31] Courts employing this rationale avoid the public duty doctrine by finding a legislative intent to protect from this particular risk an identifiable class of persons of which the plaintiff is a member.

The statutory duty rationale can be invoked in a variety of settings. In *Hoyem v. Manhattan Beach School District*[32] a ten year old boy was struck by a motorcycle after he left school without permission. The school board's liability was based on a statute prohibiting students from leaving school grounds during normal class hours. The court found this statute was intended to protect children, and therefore supported the duty of school officials to exercise reasonable care to prevent students from leaving the school grounds. Similarly, in *Saint Patrick Hospital v. Powell County*,[33] a state constitutional provision and implementing statute were held affirmatively to obligate counties to provide medical care to the indigent. The range of legislative pronouncements and the ease with which legislative intent can be manipulated renders the statutory duty rationale fertile grounds for potential expansion of public affirmative duties.

Two policy considerations support all these exceptions to the no-duty rule. One justification is that the general welfare will be improved if government is required to help individuals in need. The first premise of this policy is that government should play an active role in the affairs of the community. The Supreme Court articulated this view of government in *City of Chicago v. Sturges*.[34] In upholding the constitutionality of a statute holding cities strictly liable for damages resulting from mob violence occurring within their boundaries, the Court noted: "[p]rimarily, governments exist for the maintenance of social order[;] hence it is the obligation of government to protect life, liberty and property against the conduct of the indifferent, the careless, and the evil minded."[35]

The case for affirmative duties, however, does more than envision an active role for government. It also accepts the propriety of judicial input in defining the extent of that role. Those who favor public duties

31. Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976). *Cf.* Adams v. State, 555 P.2d 235 (Alaska 1976) (the same result reached by way of an undertaking-to-act rationale).

32. 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978).

33. 156 Mont. 153, 477 P.2d 340 (1970).

34. 222 U.S. 313 (1911).

35. City of Chicago v. Sturgis, 222 U.S. 313, 322 (1911).

to act approve of the use of tort law to encourage government to protect individuals from injury. A good exposition of this view can be found in Professor Shapo's book, *The Duty To Act.*[36] Professor Shapo takes the view that affirmative duties, both public and private, ought to be founded on the defendant's power to help and the plaintiff's dependency upon that power for protection. Suppose, for example, a building burns on account of a violation of a building code that the city negligently failed to enforce. Most people are unable to determine whether the buildings they occupy comply with pertinent safety regulations. They are dependent on government inspectors to detect violations and enforce the law. This combination of power and dependency gives rise to the government's duty to act. If the government inspector had enforced the building code, the fire might not have occurred or lives might have been saved. In such circumstances those who highly value protection maintain that the government's failure to act should give rise to liability.[37]

Some decisions imposing a duty to act on a government can be adequately explained in terms of discretion and protection values alone.[38] In many cases, however, there is a second policy consideration that strengthens the plaintiff's claim. In these cases the government is in some way connected with the plaintiff or his injury. Fairness between the plaintiff and the government defendant justifies governmental liability for failing to help.

Thus, many courts hold that it is fair to impose a duty to act when the government contributes to the creation of a dangerous condition. Requiring a police officer with a history of public intoxication to carry

36. M. SHAPO, THE DUTY TO ACT (1977).

37. *Id.* at 95-96.

38. *See, e.g.*, Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975). The city had actual knowledge that a landowner had placed electric lights in a stream in violation of a local ordinance. City officials were also aware that this condition presented a serious risk of death. Despite this knowledge, statutory enforcement procedures were not implemented until one person was killed and another was seriously injured. While adhering to the general public duty doctrine, the court found a special relationship to exist on the basis of the city's actual awareness of the dangerous condition. *Accord* Halvorson v. Dahl, 89 Wash. 2d 673, 574 P.2d 1190 (1978) (building code violation). Jurisdictions that are otherwise reluctant to recognize public affirmative duties indicate a willingness to do so if the governmental defendant has knowledge of a dangerous condition that violates a local ordinance. *See, e.g.*, Hanson v. City of St. Paul, 298 Minn. 205, 214 N.W.2d 346 (1976) (knowledge of a dog's vicious propensities created a duty to impound the animal that can support a tort action brought by a person subsequently bitten). *Cf.* Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806 (Minn. 1979) (rejecting a claim based on an alleged negligent failure to discover a violation of the municipal fire ordinance, but suggesting the outcome would be different if city officials had actual knowledge of the dangerous condition). In these cases, the defendants did not contribute to the creation of the dangerous condition, but merely failed to act on it. Recognition of a duty to act in this instance can be explained only in terms of the value of protection. Awareness of the danger coupled with the legislatively sanctioned responsibility to alleviate it overrides the concerns that underlie the discretion value.

a weapon at all times creates a substantial risk of danger to the public. Consequently, the city is obligated to supervise the officer.[39] The government also creates a dangerous condition when it provides persons with violent tendencies unique access to their potential victims.[40] The same rationale can justify imposing positive duties on governments with regard to their custody over inmates,[41] maintenance of roads,[42] and other types of undertakings.[43] In each instance the government, by affirmative conduct, has contributed to the risk facing the plaintiff and therefore may be required to act to protect him.

A second aspect of the fairness value is reliance on a promise. When the plaintiff or another relies on a government promise, it is fair to enforce that promise through tort law. In *Brown v. MacPherson's, Inc.*,[44] for example, a potential rescuer allegedly refrained from warning the plaintiff of the pending danger of an avalanche in reliance on government assurances that it would warn the plaintiff. The failure to act on that promise was held to provide an adequate theoretical basis for recovery. In *Brinkman v. City of Indianapolis*[45] the police promised potential rescuers that they would take the plaintiff to a hospital. Instead, they arrested the plaintiff for being intoxicated. The plaintiff died the night of his arrest from pneumonia. The unfulfilled promise of medical assistance provided a fair basis for imposing liability. In these and similar cases,[46] the duty to act rests, at least in part, on

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39. *See* Bonsignore v. City of New York, 683 F.2d 635 (2d Cir. 1982); Corridon v. City of Bayonne, 129 N.J. Super. 393, 324 A.2d 42, 44 (Sup. Ct. App. Div. 1974); Baker v. City of New York, 25 A.D.2d 770, 774, 269 N.Y.S.2d 515, 519 (1966).

40. *See* Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977), *aff'd en banc*, 580 F.2d 647 (D.C. Cir. 1978); Hicks v. United States, 511 F.2d 407 (D.C. Cir. 1975); Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

41. *See* Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1981); Daniels v. Andersen, 195 Neb. 95, 237 N.W.2d 397 (1975); Porter v. County of Cook, 42 Ill. App. 3d 287, 355 N.E.2d 561 (1976); Thomas v. Williams, 105 Ga. App. 321, 124 S.E.2d 409 (1962).

42. *See, e.g.*, City of Prichard v. Kelley, 386 So. 2d 403 (Ala. 1980); McClure v. Nampa Highway Dist., 102 Idaho 197, 628 P.2d 228 (1981); Symmonds v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 242 N.W.2d 262 (Iowa 1976).

43. *See, e.g.*, Lorshbough v. Township of Buzzle, 258 N.W.2d 96 (Minn. 1977) (the city owes a duty of care to adjacent landowners to safely maintain a public dumping site); Bradford v. Davis, 290 Or. 855, 626 P.2d 1376 (1981) (possible duty of care owed by state officials to a child in connection with his placement in foster homes).

44. 86 Wash. 2d 293, 545 P.2d 13 (1975).

45. 141 Ind. App. 662, 231 N.E.2d 169 (1967).

46. *See, e.g.*, Fair v. United States, 234 F.2d 288 (5th Cir. 1956) (the government's promise to warn the plaintiff if a dangerous patient was released gave rise to a duty to act on that promise); Silverman v. City of Fort Wayne, 171 Ind. App. 415, 357 N.E.2d 285 (1976) (dismissal of negligence complaint arising from a failure to protect property during a riot reversed in light of personal promise of protection); Baker v. City of New York, 25 A.D. 770, 269 N.Y.S.2d 515 (1966) (the issuance by the Domestic Court of a certificate authorizing the arrest of the plaintiff's estranged husband upon her request created a special duty to protect her); Bloom v. City of New York, 78 Misc. 2d 1077, 357 N.Y.S.2d 979 (1974) (alleged negligent provision of police protection held actionable in light of specific assurances of protection by police and reliance thereon by plaintiffs).

the affirmative representations by the government and detrimental reliance thereon by potential rescuers.

A third element of equity that appears in the cases is the concept of reciprocity. If a person comes forward at the government's request and assists it in performing some public endeavor, it is fair to require the government to protect that individual from risks associated with that activity. Thus, in *Schuster v. City of New York*,[47] the city owed a "reciprocal duty" to protect an informant from retaliation by a criminal suspect. Similarly, there is an affirmative duty to protect individuals who identify suspects, assist police in the apprehension of suspects, or otherwise cooperate with police in their investigation of crime.[48]

C. *The Ranking and Weighing of Values*

Labels such as "public duty" and "special relationship" do not assist greatly in the analysis of cases. One can ascertain what makes the duty "public" or the relationship "special" only by reference to underlying values. The values of discretion, protection, and fairness best explain judicial decisions in this area. But merely identifying these values does not by itself determine the outcome of cases. The ranking and weighing of values is crucial to the resolution of particular cases.

This proposition is best illustrated by the inspection cases. A statute or ordinance directs the government to inspect a building and provides some mechanism for enforcement. The plaintiff urges that negligence in connection with the inspection or enforcement proximately caused his injury. Liability hinges on whether the government owed a duty to the plaintiff. Several courts have found such a duty; others have not.[49] Although similar facts and statutes are involved, and the same doctrinal terminology is invoked, the cases reach diametrically opposite conclusions. These divergent results can be explained only in terms of differing assessments of the relative worth of protection and discretion values.

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47. 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

48. *See* Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966); Estate of Tanasijevich v. City of Hammond, 383 N.E.2d 1081 (Ind. Ct. App. 1978); Christy v. City of Baton Rouge, 282 So. 2d 724 (La. Ct. App. 1973). *Cf. In re* Quarles and Butler, 158 U.S. 532, 536 (1895) ("it is the duty of that government to see that he may exercise this right [to assist law enforcement] freely, and to protect him from violence while doing so, or on account of so doing.") (quoting *Ex parte* Yarbrough, 110 U.S. 651, 652 (1884)).

49. *Compare* Adams v. State, 555 P.2d 235 (Alaska 1976); Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979); *and* Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976), *with* Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979); Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059 (1973); Steman v. Coffman, 92 Mich. App. 595, 285 N.W.2d 305 (1979), *and* Dinsky v. Town of Framington, 438 N.E.2d 51 (Mass. 1982).

Courts also assign different weights to the fairness value. For some courts, reliance on a government's promise to act provides a sufficient equitable basis to impose affirmative tort obligations. In *Fair v. United States*[50] the government's promise to warn the plaintiff if a dangerous patient was released gave rise to a duty to act. Other courts, however, do not accord such weight to government representations. In *Henderson v. City of Petersburg*[51] the plaintiff requested and was assured by police of protection. The plaintiff followed police instructions, but the promised protection was not forthcoming and the plaintiff was shot. In upholding the dismissal of the action against the city, the court invoked the principle that police protection is a duty owed to the public and not to the plaintiff individually.[52]

The point here is that courts may place different weights on the value of discretion, protection, and fairness, and accordingly draw different conclusions on the issue of duty. A court less concerned with deferring to the other branches of government than with protecting children can seize upon a vaguely worded truancy statute to impose a tort duty on school officials to prevent unauthorized excursions from school.[53] The equitable considerations supporting a duty in such a case are weak and the potential impact on discretion is great.[54] The decision can best be understood in terms of the primacy of the protection value. On the other hand, a court more concerned with discretion can hold that police, with no urgent business to detain them, owe no duty to timely respond to a reported crime in progress.[55] The results in these cases do not depend on doctrinal labels, but the relative rank and weight of the competing values.

The foregoing discussion of common law tort policy provides the foundation necessary to examine affirmative duties in constitutional

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50. 234 F.2d 288 (5th Cir. 1956). *See also* cases cited *supra* notes 44-46.

51. 247 So. 2d 23 (Fla. Dist. Ct. App. 1971).

52. Henderson v. City of Petersberg, 247 So. 2d 23, 25 (Fla. Dist. Ct. App. 1971). *See also* Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981) (no duty owed to woman who returned to her apartment upon receiving assurances from the police that help was on the way); Falco v. City of New York, 34 A.D.2d 673, 310 N.Y.S.2d 524 (App. Div. 1970), *aff'd*, 29 N.Y.2d 918, 279 N.E.2d 854, 329 N.Y.S.2d 97 (1972) (police officer's statement to injured motorcyclist that he would obtain the name of the motorist who struck the motorcycle was a gratuitous promise and did not create a legal duty). *Cf.* Jackson v. Heymann, 126 N.J. Super. 281, 314 A.2d 82 (Law Div. 1973) (police officer's investigation of a vehicle/pedestrian accident did not create a duty to identify the driver of the vehicle).

53. *See* Hoyem v. Manhattan Beach City School Dist., 22 Cal. 3d 508, 585 P.2d 851, 150 Cal. Rptr. 1 (1978).

54. The school neither created the risk of the accident nor promised to protect the plaintiff from the harm. The recognition of a duty in this case may force local school officials to allocate more resources for security at the expense of academic needs. *Id.* at 527-28, 585 P.2d at 863, 150 Cal. Rptr. at 13 (Richardson, J., dissenting).

55. Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981) (en banc); Doe v. Hendricks, 92 N.M. 499, 590 P.2d 647 (1979).

tort. The tension between the values of discretion on the one hand, and protection and fairness on the other, is present in constitutional tort cases as well as in common law tort. The distinctive issue in constitutional torts is how the constitutional aspects of the suit should affect the policy choices that must be made. We now turn to the task of identifying additional values and doctrinal constraints that should be considered when the suit depends on the Constitution, and the question whether these considerations support a broader or narrower view of affirmative duties.

II. CONSTITUTIONAL PROBLEMS

The basic distinction between traditional common law tort and constitutional tort is the source of the defendant's obligations. Traditional tort obligations originate in judge's power to make common law and from specific legislative directives, while constitutional tort duties must be justified by reference to the federal Constitution. This characteristic of constitutional tort presents a serious obstacle to the development of affirmative duties, for the Constitution ordinarily protects the individual from state action directed against him, and does not entitle him to help from the state. There are some circumstances, examined in section A below, where the negative character of constitutional rights is not a problem, but for the bulk of cases it must either be answered or affirmative duty abandoned.

In section B we argue that this objection, based on the negative nature of constitutional rights, rests on a faulty premise: that constitutional tort is merely a mechanism for redressing violations of constitutional rights. A better view is that constitutional tort comprises both constitutional and tort principles. It is well-settled that tort principles can be employed to limit the protection of constitutional rights, as by rules that immunize government officers from liability. But tort principles may also be invoked to expand liability beyond constitutional rights to include the vindication of constitutional values as well. When a government failure to help affronts the constitutional value of concern and respect for persons, it is proper to impose liability even if the plaintiff can show no violation of his constitutional rights.

Besides this threshold objection, the use of the Constitution as a source of affirmative duties raises another question. How, if at all, does the analysis of a constitutional tort affirmative duty claim differ from the common law cases examined in Part I? In section C we show that both the discretion and protection interests are affected by the constitutional nature of the duty. The case for constitutional tort affirmative duty is sometimes stronger and sometimes weaker than for a common law duty, depending on how strongly a given case implicates

not only the plaintiff's interest in physical safety, but also the constitutional value of concern and respect.

Section D addresses an objection based on federalism that is made against constitutional tort in general, and therefore bears on affirmative duty cases as well. Most constitutional tort cases are brought in federal courts under federal substantive standards against state officers and local governments. Critics say that the value of state and local independence should restrain the imposition of constitutional tort duties. Affirmative duties may be especially vulnerable to restriction on this ground, because they rest on constitutional values and not rights, and because they may be deemed more intrusive on government prerogatives than negative duties. Even so, we argue against restrictions on constitutional tort that are motivated by values of federalism.

A. Constitutional Rights and Constitutional Tort

1. A constitutional right to protection?— The simplest and most common method for the plaintiff to establish a constitutional tort claim is to show that the defendant has violated some constitutional right, such as his right of free speech or his right against unreasonable searches. When he seeks to impose an affirmative duty on government, however, he often faces severe obstacles in establishing a constitutional violation. Constitutional rights are generally negative in character, protecting the individual against government invasions and guaranteeing his liberty to pursue his own ends, but not entitling him to help from government.[56] This feature of constitutional rights is reflected in the rule that state action must be shown to establish a constitutional violation, and in the limitation of section 1983 to action taken "under color of" state law.[57] The litigation concerning these rules focuses on whether conduct of nongovernmental actors can fit within their terms, but the premise underlying them is that the Constitution protects against harm

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56. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 318 (1980) (abortions); Maher v. Roe, 432 U.S. 464, 469 (1977) (medical treatment); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (housing). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 963-68 (10th ed. 1980).

57. 42 U.S.C. § 1983 (1976 & Supp. 1981). The "under color of" state law provision of section 1983 is equivalent to the "state action" limitation of the fourteenth amendment. Lugar v. Edmondson Oil Co., 102 S.Ct. 2744, 2753 (1982). *Lugar* emphasized the functional importance of the state action doctrine as follows:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Id. at 2754.

for which the state is responsible, and does not entitle him to protection by the state against harm from other sources.

There are circumstances where the state owes a duty to act on the individual's behalf, but most of these depend on some other government action that significantly affects him. For example, the eighth amendment prohibits cruel and unusual punishment. Compliance with this negative command requires prison officials to provide physical security and medical services.[58] Similarly, due process demands that the state provide training for retarded persons involuntarily committed to state institutions.[59] Such cases do not depart from the fundamental premise that constitutional rights only extend to protection against state action. The requisite state action is found in the assumption of custody over the inmate. The act of confinement preempts potential rescuers and reduces the inmate to a position of helplessness and dependency. In such cases courts can and do hold that there is a constitutional right to protection.

In some circumstances the plaintiff can rely on the equal protection clause as a source of a duty to act, as where the defendant refuses to help on account of the plaintiff's race[60] or religion.[61] But the utility of equal protection analysis in this area is severely limited by *Washington v. Davis*.[62] There the Court held that the plaintiff must show a purpose to discriminate in order to prevail on an equal protection theory. Applied to the affirmative duty problem, that standard appears to preclude any liability unless the defendant knows of the plaintiff's plight, so that reckless disregard of the facts would not be enough for liability. Even when the defendant is aware of the danger, that standard cannot support liability in the typical case, where the motivation behind the failure to help is not discrimination against the plaintiff, but laziness, incompetence, fear, or indifference.[63]

There remain many cases where the governmental defendant has not engaged in purposeful discrimination and is not responsible for the plaintiff's predicament. Consider the defendant policeman who does nothing when another policeman,[64] or some third person,[65] attacks the

58. Hutto v. Finney, 437 U.S. 678, 685-86 (1978); Estelle v. Gamble, 429 U.S. 97, 102-04 (1976).

59. Youngberg v. Romeo, 102 S. Ct. 2542 (1982). The Court has also held that the first amendment creates an affirmative right of access to criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). *See generally* Emerson, *The Affirmative Side of The First Amendment*, 15 GA. L. REV. 795 (1981).

60. Smith v. Ross, 482 F.2d 33, 36-37 (6th Cir. 1973). *Cf.* Plyer v. Doe, 102 S. Ct. 2382 (1982) (equal protection clause requires states to provide public education to children not legally admitted into the United States).

61. Cooper v. Molko, 512 F. Supp. 563, 567-68 (N.D. Cal. 1981). *See also* Downie v. Powers, 193 F.2d 760 (10th Cir. 1951).

62. 426 U.S. 229, 240 (1976).

63. *See, e.g.*, Reiff v. City of Philadelphia, 471 F. Supp. 1262, 1266 (E.D. Pa. 1979).

64. *See, e.g.*, Byrd v. Brishke, 466 F.2d 6, 9-11 (7th Cir. 1972).

65. *See, e.g.*, Peck v. United States, 470 F. Supp. 1003 (S.D.N.Y. 1979).

plaintiff. In the latter case, there is no positive governmental connection with the harm. The principle that the Constitution protects only against government acts seems to preclude finding a constitutional right to protection. In the former variation of the example, this question is closer. The harm comes from a government actor, but not this defendant. Unlike the prison officials, the passive officer has not contributed to the plaintiff's position of danger. Arguably, he "cannot fairly be blamed"[66] for the independent actions of another officer.

Some courts have upheld affirmative duty claims in these circumstances, but none of them has explicitly asserted that there is a constitutional right to protection. A typical opinion is *Byrd v. Brishke.*[67] The court said the passive policeman had breached his "duty to enforce the laws and preserve the peace,"[68] but did not characterize this as a constitutional duty, or cite any authority to support it. The court's failure to account for the source of this duty may be the result of a conflict between two strong impulses. On the one hand, they are aware of the Supreme Court's reluctance to create affirmative constitutional obligations and respect the policy considerations on which that caution rests. At the same time, these claims have strong intuitive appeal. The court in *Byrd* escaped the dilemma by imposing liability and leaving a gap in its reasoning on the issue of the source of the tort obligation.[69]

We will not pursue further the question of just how much and what kind of governmental involvement is necessary to justify a constitutional right to government action. Instead, we will argue that the plaintiff should recover whether or not there is a constitutional right to protection as a matter of constitutional common law right. Before proceeding with that argument, however, it will be useful to examine a special case where affirmative duties do have constitutional status in spite of the general principle that constitutional rights are negative.

2. *State law and constitutional duty*— The special case arises when state law forms the basis for a constitutional duty. A state may by its laws or customs create a liberty or property interest entitled to fourteenth amendment protection. If the state grants tenure to a college professor, for example, it creates a legitimate expectation that he will not be fired except in extraordinary circumstances. This amounts to

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66. Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2754 (1982).

67. 466 F.2d 6 (7th Cir. 1972). *See also* Hampton v. Hanrahan, 600 F.2d 600, 626 (7th Cir. 1979), *modified*, 446 U.S. 754 (1980); Wilkinson v. Ellis, 484 F. Supp. 1072, 1085 (E.D. Pa. 1980).

68. 466 F.2d at 11.

69. The failure of the *Byrd* court to identify the source of the obligation is characteristic of many cases in this area. *See, e.g.*, Putnam v. Gerloff, 639 F.2d 415, 423 (8th Cir. 1981); Beard v. Mitchell, 604 F.2d 485, 499 (7th Cir. 1979); Hamrick v. Lewis, 539 F. Supp. 1166, 1170 (N.D. Ill. 1982); Cottonreader v. Johnson, 252 F. Supp. 492, 499 (M.D. Ala. 1966).

a property interest that cannot be taken without fourteenth amendment due process.[70]

Similarly, the state might create a property interest in some form of government help. *Reedy v. Mullins*[71] will illustrate the point. Plaintiffs there were owners of a building destroyed by fire. They brought a constitutional tort suit against local officials for failure to put out the fire, arguing that state law created an expectation of adequate fire protection. The court rejected their claim on the merits, but only because they had failed to show any entitlement to fire protection under state law. It found no fault with the plaintiff's theory that state law might create a constitutionally protected right to affirmative action by government. If the plaintiff can establish a liberty or property right to government action under state law, that right cannot be deprived without due process. The failure to act in that instance could provide the basis for a constitutional tort action.[72]

This means of establishing a constitutional tort duty of protection may occasionally succeed, but it provides only a partial response to the problem of justifying affirmative duties. As a practical matter, it is unlikely to be effective, for the state may avoid a duty by carefully structuring the obligations of state officials and local governments so as to preclude legitimate expectations of assistance.[73] If it is held to have created such an expectation, it can change its laws and practices and thereby avoid creating them in the future.

These possibilities are the manifestations of a more fundamental objection to exclusive reliance on state law as a source of constitutional duty. The state law approach allows the state to determine just what degree of protection it will afford, and to whom. But the aim of constitutional standards, whether affirmative or negative, is to place restrictions on the state's exercise of discretion on the ground that constitutional values are paramount. One such value is the protection of state

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70. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972). *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).

71. 456 F. Supp. 955 (W.D. Va. 1978). *See also* Shortino v. Wheeler, 531 F.2d 938 (8th Cir. 1976); Wooters v. Jornlin, 477 F. Supp. 1140 (D. Del. 1979), *aff'd*, 622 F.2d 580 (3d Cir. 1980), *cert. denied*, 449 U.S. 992 (1980).

72. *See, e.g.*, Johnson v. Duffy, 588 F.2d 740, 744 (9th Cir. 1978), which might be read as implicitly relying on this rationale to uphold an affirmative duty claim that a sheriff should have prevented the transfer of a prisoner and his consequent loss of prison earnings. On the other hand, Johnson may be read as standing for the proposition that any violation of state law can be redressed through a section 1983 action. *See also* Sims v. Adams, 537 F.2d 829 (5th Cir. 1976); Walker v. Rowe, 535 F. Supp. 55, 59 (N.D. Ill. 1982); McCoy v. McCoy, 528 F. Supp. 712, 715 n.8 (N.D. W. Va. 1981). This proposition is wrong, as it conflicts with Paul v. Davis, 424 U.S. 693, 699-701 (1976). *See also* Gore v. Wochner, 620 F.2d 183, 185 (8th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980); Jones v. Diamond, 594 F.2d 997, 1011 (5th Cir. 1979), *cert. dismissed*, 452 U.S. 959 (1981); Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187, 1189 (5th Cir. 1978).

73. *See, e.g.*, Reedy v. Mullins, 456 F. Supp. 955, 958 (W.D. Va. 1978).

created liberty and property interests, but this is not the only one. Suppose state law is explicit that the policeman has no duty to warn the plaintiff of an attack.[74] If his claim is to succeed in constitutional tort, it will be necessary to develop some other foundation for it.

B. Constitutional Common Law and Constitutional Tort

Because of the state action requirement and the policy considerations against affirmative constitutional rights, the case for a constitutional right to protection is often difficult. The use of state law to support affirmative duties addresses only a small part of the problem. In this section we propose another source of constitutional tort affirmative duties. The thesis is that constitutional tort is best viewed as a kind of constitutional common law, for it shares the attributes of other constitutional common law rules.[75] Furthermore, the rules governing constitutional tort cases are generated by the interaction of constitutional law and tort principles. Within this framework, affirmative duty can be justified as a judge-made subconstitutional rule promoting a constitutionally based policy that government should protect individuals from injury.

1. Constitutional common law— From time to time, in a variety of contexts, the Supreme Court has made rules that promote constitutional values but lack constitutional stature.[76] An example is the fourth

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74. This hypothesis is not unrealistic. *See, e.g.*, Peck v. United States, 470 F. Supp. 1003, 1016-17 (S.D.N.Y. 1979); *see also* Liuzzo v. United States, 508 F. Supp. 923, 935-36 (E.D. Mich. 1981).

75. An objection to our common law approach is that it does not take into account the legislative history of section 1983. There are passages in the debates on the statute, for example, that might support the view that Congress did not intend to impose affirmative duties. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978). The legislative history upon which the *Monell* Court focused, however, is not clear on this point. Perhaps the most that can be said is that Congress declined to impose a strict liability standard with regard to affirmative duties. *See id.* at 692-93 n.57; *see also* Comment, *Section 1983 Municipal Liability and the doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 942-47 (1979). Our proposal, on the other hand, retains an element of fault. *See infra* Part III. In our view analysis of the legislative history of this statute is inadequate as a means of identifying the considerations that should count in deciding constitutional tort cases. The statute is over one hundred years old and its framers would not have contemplated the uses to which it is now put. With regard to current issues the legislative history is sufficiently ambiguous and contradictory to support either side of many issues. *Compare* Allen v. McCurry, 449 U.S. 90, 98-101 (1980), *with id.* at 106-11 (Blackmun, J., dissenting); Owen v. City of Independence, 445 U.S. 622, 636 (1980), *with id.* at 672-74 (Powell, J., dissenting); Quern v. Jordan, 440 U.S. 332, 341 (1979), *with id.* at 357-65 (Brennan, J., concurring in judgment); *Monell*, 436 U.S. at 664-89 (1978), *with id.* at 719-24 (Rehnquist, J., dissenting); *and* Monroe v. Pape, 365 U.S. 167, 172-83 (1961), *with id.* at 224-37 (Frankfurter, J., dissenting). In any event, the legislative history of section 1983 would be relevant only to actions brought under that statute and not to suits against federal officials, nor to actions against state officials implied from the fourteenth amendment.

76. *See* Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

amendment exclusionary rule, at least as it is viewed by most members of the present Court. The Court holds that the exclusionary rule is not a constitutional right but a prophylactic measure whose purpose is to deter constitutional violations. Accordingly, it may be ignored when the deterrence rationale is weak and countervailing considerations are strong.[77]

Constitutional common law rules have three identifying characteristics: (1) their purpose is to help enforce constitutional rights or protect constitutional values; (2) they are subject to modification by Congress; and (3) the Court does not accord them the absolute protection due a constitutional right. Rather, as with the exclusionary rule, the Court may decline to recognize these subconstitutional rights when their value in promoting constitutional principles is outweighed by other interests.

The Court has never explicitly characterized constitutional tort doctrine as constitutional common law, but that is no barrier to recognizing it as such. The term itself was coined by Professor Monaghan and has rarely received the Court's imprimatur in any of the areas to which it applies.[78] The central point is that constitutional tort rules meet the criteria common to these other areas. The primary significance of this conclusion for our inquiry is that affirmative duties can be defended without convincing the Supreme Court that it should recognize a constitutional right to protection. Instead, an affirmative duty tort can be viewed as a subconstitutional principle, the aim of which is to protect constitutional values.

2. *The common law attributes of constitutional tort*— Constitutional tort meets the first criterion of constitutional common law, for the purpose of constitutional tort recovery is plainly to vindicate constitutional values.[79] The second criterion is hard to test, because Congress has rarely attempted to alter a constitutional tort right. But there is convincing authority to support the proposition that Congress may do so if it wishes. In 1961, the Court in *Monroe v. Pape*[80] construed the Civil Rights Act as granting a cause of action against individuals, but not governmental units. The statute provides that "[e]very per-

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77. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 482-89 (1976); United States v. Peltier, 422 U.S. 531, 536-39 (1975); United States v. Calandra, 414 U.S. 338, 348 (1974). Other examples include implied actions for constitutional violations, *see* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 390-97 (1971); and, perhaps, negative commerce clause rulings, *see* Monaghan, *supra* note 76, at 15-17.

78. The Court cited, with approval, Professor Monaghan's discussion of the exclusionary rule when it held that rule inapplicable in habeas corpus proceedings. Stone v. Powell, 428 U.S. 465, 485 n.22 (1976). In Carlson v. Green, 446 U.S. 14 (1980), where the Court upheld an implied cause of action under the eighth amendment, the dissent objected to this particular use of constitutional common law. *Id.* at 51-53 (Rehnquist, J., dissenting).

79. *See* Gomez v. Toledo, 446 U.S. 635, 638-39 (1980); Owen v. City of Independence, 445 U.S. 622, 650-51 (1980).

80. 365 U.S. 167 (1961).

son" who violates constitutional rights can be liable. The Court ruled that governmental bodies are not persons within the meaning of the statute. In 1978, the Court in *Monell v. Department of Social Services*[81] reversed this holding. The Court explained that in the earlier case it had mistakenly construed the statute. In neither case did the Court express any doubt as to Congress' power to exempt municipalities from liability.

The most telling evidence favoring a common law perspective is the Court's own treatment of constitutional tort. Even when the defendant has committed constitutional violations, the Court permits him to assert an immunity defense against paying damages. Judges,[82] prosecutors,[83] and legislators[84] are granted an absolute immunity. Other officers are accorded a qualified immunity. They escape tort liability for their discretionary actions so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[85] The Court's explanation of these immunity rules is that without them officials would be too cautious and so would not perform their jobs effectively, and capable people might refuse government employment.[86] For the sake of efficient government, individuals are denied vindication of constitutional rights. Again, the clear implication is that the right to recover tort damages is not itself of constitutional dimension.

The Court's treatment of cause in fact also illustrates how the Court's respect for effective government can be implemented through subconstitutional doctrine. In *Mt. Healthy City School District Board of Education v. Doyle*[87] the Court held that the plaintiff school teacher could not recover in constitutional tort by showing that an unconstitutional reason was a substantial factor in the decision to dismiss him. Rather, he could prevail only if the trier of fact found that he would have been retained but for the unconstitutional reason. Accordingly, if there were two independently sufficient reasons for the decision, one of them constitutionally impermissible and the other legitimate, the plaintiff would lose. This test is a stricter limit on recovery than the "substantial factor" test embraced by most common law courts in dual

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81. 436 U.S. 658 (1978). *See also* Quern v. Jordan, 440 U.S. 332 (1979) (Congress could have, but chose not to apply section 1983 to state governments).

82. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

83. Imbler v. Pachtman, 424 U.S. 409 (1976).

84. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Tenney v. Brandhove, 341 U.S. 367 (1951).

85. Harlow v. Fitzgerald, 102 S. Ct. 2727, 2738 (1982). *See also* Butz v. Economou, 438 U.S. 478 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

86. *See* Wood v. Strickland, 420 U.S. 308, 320 (1975); Scheur v. Rhodes, 416 U.S. 232, 240 (1974). *See generally* Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

87. 429 U.S. 274, 285-87 (1977).

causation cases. That test holds that when either of two events is sufficient to cause the plaintiff's harm, the plaintiff can recover from a defendant culpably responsible for one of them if he can show it was a substantial factor in bringing about the harm.[88] The Court's principal justification for the more restrictive rule was that the effective functioning of government would be too greatly impaired by the substantial factor test. Government should be permitted to act when there are legitimate reasons to support its decisions, even if they are motivated by unconstitutional reasons as well.[89]

3. *Tort policy, affirmative duties, and constitutional tort*— In addition to showing that constitutional tort rights are best viewed as constitutional common law and not constitutional rights, the immunity and causation rules yield another insight into the nature of constitutional tort. They demonstrate that constitutional tort is a blend of constitutional and tort principles.[90] This area of tort is distinctive in that the Constitution, and not statutes or common law standards, governs the determination of the protected interests. But the extent to which those interests are vindicated through the damage remedy is a matter of tort policy. The physical, emotional, and other interests covered by common law tort are often subordinated to such competing policy considerations as avoiding overdeterrence of beneficial activity by the defendant.[91] The immunity and causation rules illustrate the same theme in the constitutional context.

This description of constitutional tort as a mixture of constitutional law and tort policy provides the necessary groundwork for the imposition of affirmative duties in constitutional tort. If tort policy can properly limit recovery for violation of constitutional rights, then other tort policy considerations can justify rules that broaden liability as well. In traditional common law tort, courts rely on the policy of protecting the plaintiff from harm to expand liability beyond negative duties and impose affirmative obligations.[92] That policy should be given similar

88. RESTATEMENT (SECOND) OF TORTS § 432(2), comment d, illustration 3 (1965); Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 943-45 (1935).

89. *See* 429 U.S. at 286; Eaton, *supra* note 6, at 453-57. *See also* Duncan v. Nelson, 466 F.2d 939 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972) (combination of immunity rules and causation rules precluded any recovery for nine years' unconstitutional imprisonment).

90. *See also* Carey v. Piphus, 435 U.S. 247 (1978) (applying tort principles to damage issues in section 1983 cases); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 408-10 (1971) (Harlan, J., concurring) (applying tort principles to determine whether to recognize an implied cause of action for money damages under the fourth amendment); Monroe v. Pape, 365 U.S. 167, 187 (1961) ("section [1983] must be read against the common law background of tort liability"); Harper v. Merckle, 638 F.2d 848, 860 (5th Cir.), *cert. denied*, 102 S. Ct. 93 (1981) ("A constitutional tort has both constitutional and tortious dimensions."); Burton v. Waller, 502 F.2d 1261, 1281 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975) (recognizing self defense as a defense in constitutional torts).

91. *See* Cass, *supra* note 86, at 1153-74; Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53-58.

92. *See* M. SHAPO, *supra* note 36. Our reliance on the immunity rules to support affirmative

scope in constitutional tort.

In ordinary tort the private defendant is generally under no duty to rescue, but a duty may be imposed if he is somehow connected with the plaintiff's distress, though not necessarily culpably responsible for it.[93] When the defendant is a government and the libertarian argument against a duty is absent, a common law court that ranks protection ahead of discretion may impose a duty to rescue even when the government has no connection to the harm.[94] Similarly, when the plaintiff's interest in protection attains constitutional status, courts should recognize a governmental affirmative duty to help even if the failure to help violates no constitutional right.

How can the plaintiff's claim to protection aspire to constitutional dimension when the passive defendant has violated no constitutional right? The answer lies in a distinction between constitutional rights and the values that underlie and support those rights. Suppose an officer stands aside as private individuals intimidate plaintiffs seeking to exercise their first amendment rights of assembly and expression.[95] His failure to prevent the intimidation may violate no constitutional right of the plaintiff, yet it reflects an utter disregard for the value of free speech on which that right is founded. This constitutional value of free expression deserves protection through a constitutional common law affirmative duty to prevent private interference with freedom of speech and assembly.

Most affirmative duty cases do not present such an obvious affront to values that are explicit in the constitutional text. Rather, the typical plaintiff has suffered an ordinary beating from a third person and argues that the governmental defendant should have prevented it. Intuitively, the plaintiff's claim is appealing. It should not be denied for lack of an obvious constitutional basis, without an effort to develop one. In our view, a persuasive argument can be made that the due process clauses of the fifth and fourteenth amendments support common law affirmative duties here. Those provisions declare that government may not "deprive any person of life, liberty, or property without due process of law . . . ."[96] The language and history of these provisions suggest that the individual's rights are violated only when government takes

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duty may be questioned on the ground that the immunity rules limit liability while the protection policy would expand it. The objection fails, because the permissibility of introducing the immunity defenses turns not on their restrictive character, but on the persuasive force of the effective government policy they implement. If equally convincing arguments can be adduced in favor of the protection policy, affirmative duty rules will stand on the same footing as immunity rules.

93. *See, e.g.*, Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628 (1931). *See generally* C. GREGORY, H. KALVEN, & R. EPSTEIN, CASES AND MATERIALS ON TORTS 325-60 (3d ed. 1977).

94. *See supra* text accompanying notes 34-38.

95. *See* Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966).

96. U.S. CONST., amend. XIV, § 1. The fifth amendment reads: "No person shall be deprived of life, liberty, or property, without due process of law. . . ."

some action against him and not when it fails to act.[97] The values underlying those rights, however, are more spacious. They include both a procedural goal of accurate decisionmaking, and a substantive commitment to the worth of the individual. One aspect of the latter value is that government should not be indifferent to individuals in matters of vital importance to them. Rather, in pursuing its goals government should show concern and respect for them.[98]

This is the thread that runs through much of the due process case law, particularly its substantive aspects. Consider four representative decisions, beginning with the seminal case *Meyer v. Nebraska*.[99] In striking down a statute that prevented the teaching of foreign languages in private schools, the Court stressed that the concept of liberty "denotes not merely freedom from bodily restraint but also the right of the individual to . . . enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[100] This emphasis on government respect for persons is echoed in such later cases as *Rochin v. California*,[101] where the Court relied upon "those canons of decency and fairness which express the notions of justice of English speaking peoples . . .", to forbid the forcible extraction of evidence from a suspect through the use of a stomach pump. Similarly, in *Griswold v. Connecticut*,[102] the Court struck down a statute outlawing the sale of contraceptives to married people, explaining that the marital relationship was "intimate to the degree of being sacred" and the statute sought "to achieve its goals by means having a maximum destructive impact on that relationship."[103] More recently, the Court in *Moore v. City of East Cleveland*[104] struck down a city zoning ordinance that rigidly defined permissible family relationships, ruling that "the Constitution prevents East Cleveland from standardizing its children — and its adults — by forcing them to live in certain narrowly defined family patterns."

These cases and others like them[105] do not explicitly articulate a con-

97. *See supra* text accompanying notes 56-57.

98. The term is borrowed from R. DWORKIN, TAKING RIGHTS SERIOUSLY 272 (1977). *See also* G. GUNTHER, *supra* note 56, at 647.

99. 262 U.S. 390 (1923).

100. *Id.* at 399.

101. 342 U.S. 165, 169 (1952).

102. 381 U.S. 479, 486 (1965).

103. *Id.* at 485.

104. 431 U.S. 494, 506 (1977) (plurality opinion). A concurring opinion is even more emphatic on the importance of concern and respect, charging that the ordinance reflected "a depressing insensitivity toward the economic and emotional needs of a very large part of our society." *Id.* at 508 (Brennan, J., concurring).

105. *E.g.*, Youngberg v. Romeo, 102 S. Ct. 2542 (1982) (treatment of involuntarily committed patients); Vitek v. Jones, 445 U.S. 480, 491-92 (1980) (liberty against physical constraints); Ingraham v. Wright, 430 U.S. 651, 673 (1977) (physical security); Roe v. Wade, 410 U.S. 113 (1973) (abortion).

stitutional value of concern and respect. Rather they focus on the particular objections to the statutes and practices under attack. What they share is a marked aversion to governmental rules that intrude, with inadequate justification, on the personal life of the individual — his body, close associations, and intellectual life. They ultimately rest on the notion that concern and respect for persons sometimes outranks the government's pursuit of its own goals.

Now suppose a policeman stands aside while a third person attacks someone. Had the policeman taken part in the attack, the plaintiff would have a good claim under the due process clause, for personal security from bodily harm is an aspect of "liberty."[106] But because the policeman did not act against him, the victim apparently has suffered no violation of his constitutional rights. Even so, the policeman has disregarded the constitutional value of concern and respect for the individual's vital interests just as surely as the State of Nebraska did in preventing the teaching of foreign languages, or the City of East Cleveland in forbidding extended families. It is appropriate to enforce that value through a constitutional tort affirmative duty, just as common law tort policies provide support for similar common law affirmative duties.[107]

4. *Objections to concern and respect*— The remainder of the Article proceeds on the premise that the constitutional value of concern and respect for persons can properly be relied upon to justify constitutional tort affirmative duties. Before proceeding with the argument it will be useful to deal with several criticisms of the premise. First, we derive concern and respect from the substantive due process cases, and substantive due process has been criticized as an open-ended and antidemocratic doctrine that permits judges to substitute their own values for those of legislative representatives.[108] The standard examples cited are the old economic due process cases and the more recent decision in *Roe v. Wade*, invalidating statutes that outlaw abortion.[109]

In our view the danger of judicial usurpation is worth running, for "meaningful freedom cannot be protected simply by placing identified realms of thought or spheres of action beyond the reach of government. . . ."[110] We share Professor Tribe's view that there are values

106. Ingraham v. Wright, 430 U.S. 651, 673 (1977).

107. It does not follow that *any* lack of regard for the individual's constitutional rights would support a constitutional tort affirmative duty claim. For example, failure of an officer to protect the plaintiff against illegal extradition from another state is, arguably, a far less serious violation of the value of concern and respect than failure to protect his physical safety. *Cf.* McBride v. Soos, 679 F.2d 1223 (7th Cir. 1982) (rejecting affirmative duty in the extradition context, but doing so on the ground that the defendants had not violated the plaintiff's constitutional rights).

108. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 14-21 (1980); *see also* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 177 (1970).

109. Roe v. Wade, 410 U.S. 113 (1973); Lochner v. New York, 198 U.S. 45 (1905).

110. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-2 at 889 (1978). Professor Tribe con-

sufficiently fundamental to call for constitutional protection, yet lacking specific textual support in the document. Our confidence in this judgment is bolstered by the persistence of substantive due process in Supreme Court doctrine, despite sustained attack from articulate critics both on and off the Court.[111]

Another objection is that we extend constitutional common law beyond its proper boundaries. The argument here is that other constitutional common law doctrines are strictly remedial in character. When the state violates the individual's fourth amendment right against unreasonable search, for example, constitutional common law provides a remedy for the violation, in the form of an exclusionary rule or an action for damages. In affirmative duty cases, constitutional common law would be used as the source, not of a remedy, but of a substantive tort obligation.

This objection amounts to a contention that constitutional common law may only be employed to protect constitutional rights, and not constitutional values. Admittedly, the case for constitutional common law is stronger where a violation of a constitutional right would otherwise go without a remedy. It does not follow, however, that the doctrine should extend only to such situations. The test should be whether persuasive arguments can be made to support a particular extension. When that test cannot be met, as with the application of the exclusionary rule to grand jury and habeas proceedings,[112] the Supreme Court refuses to extend a remedy even for the violation of a constitutional right.[113] At the same time, it seems appropriate to employ constitutional common law when there are persuasive arguments for recognizing a substantive tort obligation not itself required by the Constitution, as in the affirmative duty context.[114]

Third, a critic might grant the theoretical propriety of substantive due process and substantive constitutional common law rights in a proper case, yet argue: (a) that concern and respect does not deserve much

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tinues this passage with the assertion that "[u]ltimately, the affirmative duties of government cannot be severed from its obligations to refrain from certain forms of control; both must respond to a substantive vision of the needs of human personality." *Id.*

111. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976). For recent resort to substantive due process theory see Youngberg v. Romeo, 102 S. Ct. 2542 (1982); Ingraham v. Wright, 430 U.S. 651, 673 (1977). *Cf.* Zablocki v. Redhail, 434 U.S. 374, 395-96 (1976) (Stewart, J., concurring) (invalidating a state regulation of marriage on a substantive due process analysis).

112. *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338 (1974).

113. Recall also that in some circumstances tort policy considerations can wholly preclude any remedy for a constitutional violation even where there is an otherwise applicable statutory remedy. *See supra* text accompanying notes 80-89.

114. Professor Monaghan suggests that the invalidation of state-created trade barriers under the negative implications of the commerce clause may be an example of constitutional common law. Monaghan, *supra* note 76, at 17. Such cases illustrate the use of constitutional common law to establish substantive rules.

weight against the countervailing discretion value, because executive officers are better able than courts to determine how to use resources in the public interest and can be trusted to do so; or (b) that concern and respect is a vague and indefinite concept that can easily be abused to require any number of government services; or (c) that a tort obligation might have the perverse effect of giving government officers an incentive to avoid seeking out dangers, for fear they may be held liable when they do not render adequate aid. The first of these points, like the objection to substantive due process, reflects a dispute about value choices and cannot be made to yield to analysis or argument. It can be partially deflected, however, by crafting principles of decision that cabin the range of concern and respect, and by taking care to impose affirmative duties only in situations where discretion is a relatively weak value. By giving specific scope to concern and respect, the development of decisional guidelines will also meet the contention that the concept is too vague to be of use in fashioning doctrine. These problems are more fully confronted in Part III.

The merits of the final objection, on perverse incentives, turn on the empirical questions of how much disincentive the duty would produce, and whether those untoward consequences are greater than the benefits to be gained from the increased incentive to help when the governmental defendant is nevertheless confronted with a plaintiff in peril.[115] The empirical work has not been done, and the questions are so difficult that they might never be resolved with confidence. The better course may be to refrain from basing legal rules on such considerations.[116]

C. *Distinctive Features of Constitutional Affirmative Duty Tort*

The foregoing discussion of constitutional tort demonstrates that affirmative duty has sound theoretical underpinnings despite the negative character of constitutional rights. It also lays the foundation for identifying several differences between constitutional tort and common law tort. Because of these differences the analysis and the result of a constitutional tort affirmative duty case may differ markedly from a common law case.

1. Discretion— Constitutional tort is similar to common law tort in that the value of discretion is a counterweight to the plaintiff's interest in protection, and therefore acts as a restraint on the imposition of government affirmative duties. It might be objected that discretion

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115. *See* Landes & Posner, *supra* note 14, at 119-24.

116. *See* Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1720-21 (1982).

should carry no weight in the constitutional context, because constitutional claims cannot be denied on the basis of anything less than a compelling state interest. The trouble with this argument is its implicit premise that constitutional tort law is nothing but constitutional law. As we have seen, it is in fact a mixture of tort and constitutional principles, and tort principles can and do sometimes preclude the vindication of constitutional claims. Even when the constitutional tort claims derive from constitutional rights, the immunity defenses often preclude their satisfaction. The discretion value that limits the scope of affirmative duty claims is closely related to the concerns for efficiency, effective government, and administrative judgment that motivate the immunity rules.

There is, however, an important difference between common law tort and constitutional tort with respect to discretion. A common law court may place a low value on democratic and administrative decisionmaking, and consequently might impose many common law affirmative tort obligations on government. Even so, the court's rulings would be subject to political checks, as the legislature could nullify the decisions.[117] This political constraint may permit the court to exercise a freer hand in imposing affirmative duties. Any misjudgments it makes about the views of the voters as to the proper role of government can be corrected legislatively.

Constitutional tort affirmative duties are less flexible. They cannot be abrogated by state legislatures,[118] except in the special case where they depend on state law creating a liberty or property interest. On the other hand, if these are properly characterized as constitutional common law rules, then Congress may later reject them, just as it might preclude suit against municipalities or enact immunity rules. Instead of fifty state legislatures, only the United States Congress can act as a check on judicially created constitutional common law tort rules. This reduction is avenues for popular political redress necessarily makes these rules less susceptible to change.[119]

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117. *Cf.* Connor v. Great W. Sav. and Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), where the court held that a lender owes an affirmative duty to home purchasers to oversee the building of the houses. The legislature promptly nullified the decision. CAL. CIV. CODE § 3434 (Dearing 1972). *See generally* Note, *Liability of the Institutional Lender for Structural Defects in New Housing*, 35 U. CHI. L. REV. 739 (1968).

118. Martinez v. California, 444 U.S. 277, 284 (1980) (state legislatures cannot immunize state officials from section 1983 liability).

119. The Court's opinion in Carlson v. Green, 446 U.S. 14 (1980), suggests that there may be limits on Congress' power in this regard. *Carlson* held that a federal prisoner may bring an implied cause of action under the eighth amendment, even though Congress in the Federal Torts Claims Act permitted suit only against the United States. The Court said that it would deny an implied action if "Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Id.* at 18-19 (emphasis in original).

This language suggests that Congress may not abolish recovery entirely. That conclusion is

2. *Protection.*— In traditional common law torts the justification for imposing affirmative duties is the plaintiff's claim to government protection of his physical and emotional well-being against threats from sources other than the defendant. The justification for a constitutional tort affirmative duty is different in a subtle but important way. Here the basis for tort liability is that it promotes constitutional values, in particular the constitutional value of government concern and respect for individuals' life, liberty, and property. Therefore, an affirmative duty should be imposed on government only when these constitutional values are threatened, and not any time the plaintiff's physical and emotional safety are in danger.

With this difference in mind, the question whether protection is a stronger or weaker interest in constitutional tort cannot be answered in the abstract. It requires a further inquiry into whether concern and respect (or, in a rare case, some other constitutional value)[120] are in jeopardy in a given case. If that value is at issue, then the case may be appropriate for a constitutional tort duty even though a common law court would deny the claim. On the other hand, if the circumstances indicate no particular threat to constitutional values, the case is inapposite for constitutional tort even though a common law court might impose an affirmative duty.

Whether a case poses a threat to concern and respect, and thereby

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not at all clear, however. Read broadly, it seems inconsistent with well-settled doctrine that both individual and governmental defendants can be excepted from liability. *See supra* text accompanying notes 80-86. The issue in *Carlson* was not whether Congress could abolish the tort remedy but whether the Court should recognize an additional avenue of relief on which Congress was silent. Taken in context, then, the Court's standard might well be directed only to that narrow issue and not Congress's power to abrogate. In any event, the most the statement could be read for is that Congress cannot abrogate tort relief for violations of constitutional rights. If, as we have argued, affirmative duty claims are often not constitutional rights, the *Carlson* standard would not bar Congressional abrogation of those claims.

120. Occasionally first amendment values are at stake in affirmative duty cases. *See* Cooper v. Molko, 512 F. Supp. 563 (N.D. Cal. 1981) (religion); Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966) (expression).

121. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 670-71 n.39, 672 (1977); Paul v. Davis, 424 U.S. 693, 701 (1976); Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600, 604 (3d Cir. 1975) (plurality opinion); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90-92 (1973).

Some commentators have argued that the large number of cases reaching the federal courts under section 1983 is by itself a good reason for limiting the scope of constitutional tort. *See, e.g.*, Whitman, *supra* note 1, at 26-30. This is a weak argument, for at least three reasons. First, it wholly ignores the less drastic solution of routing the cases to state courts, for decision under federal constitutional standards. This seems a more appropriate answer to the problem of crowded federal dockets than restricting substantive constitutional tort rights. Second, the caseload problem is not by itself an adequate justification for choosing constitutional tort as the candidate for restriction. Why not narrow the scope of diversity jurisdiction instead? *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 401 (1971) (Harlan, J., concurring). Third, as the Court recently noted in response to such a resources argument, caseload problems are the responsibility of Congress under its Article III power to regulate the federal court system. *See* Patsy v. Board of Regents, 102 S. Ct. 2557, 2566 n.13 (1982).

qualifies for a constitutional tort affirmative duty, turns on the defendant's state of mind and his ability to help. The more he knows about the plaintiff's danger and the easier it is for him to respond, the more seriously his inaction disregards that constitutional value. Thus, the policeman who watches as the plaintiff is beaten flouts concern and respect more than the policeman who negligently fails to inquire into suspicious cries, and the negligent policeman shows less concern and respect than the officer who has no reason to know of the attack. There is no basis for an affirmative constitutional tort duty in the last situation. There is a strong case in the first, though some courts have rejected liability even here. The hard question, which we take up in Part III and answer in the negative, is whether the negligent policeman should be liable.

D. Federalism and Constitutional Tort

This account of protection in constitutional tort has an important corollary. Most constitutional tort suits are brought in federal court under section 1983, and seek to impose federal constitutional obligations on state and local governments. This use of federal judicial power to enforce federal standards against state and local officials creates friction between federal and state governments, and raises the question whether a proper regard for the independence of state governments in the federal system justifies restrictions on constitutional tort, including but not limited to affirmative duties.

Critics of constitutional tort invoke the values of federalism and contend that many of these cases should be routed to state courts for decision under state tort law.[121] They point out that many constitutional tort claims arise from fact situations that could also support common law tort claims. The plaintiff has suffered some injury to person or property and seeks compensation, either from the governmental actor responsible or, in the case of affirmative duties, a government or officer who failed to act. Proponents of federalism as a restraint on constitutional tort argue that state courts and state law can deal adequately with these tort cases and that constitutional tort is an unnecessary intrusion into state prerogatives.[122]

A premise of this argument is that the plaintiff loses little except his choice of courtrooms when the litigation proceeds under state common law rules. This premise is incorrect, for there is a fundamental difference between the analysis of a state law tort case and a constitu-

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122. *See, e.g.*, Whitman, *supra* note 1, at 30-40; Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Caseload*, 1973 LAW & SOC. ORD. 557.

tional tort case. Common law tort deals with the clash between the plaintiff's interest in physical and emotional well being and the defendant's interest in acting as he wishes. In constitutional tort the plaintiff's interests include constitutional rights and values. In the affirmative duty context, constitutional tort differs in that not only the plaintiff's physical and emotional well being are at stake but also the constitutional value of concern and respect. Common law courts may take this value into account, but they have no obligation to do so, and there are indications in the case law that many do not. In *Doe v. Hendricks*,[123] for example, the police were warned of a possible serious crime in progress. A strange man had taken a small boy into an abandoned building. Yet, with no pressing business to detain him, the police officer who took the warning call took no action at all for twenty minutes. The court engaged in a traditional common law analysis and, finding no "special relationship," denied liability. It gave no attention at all to the constitutional value of concern and respect. Yet consideration of that value could lead to a different result.[124]

Recognizing that constitutional torts implicate different values than common law torts does not entirely dispose of the federalism rationale for limits on constitutional tort. We have already seen that tort policy plays a large role in fashioning constitutional tort rules. It might be argued that, in spite of the differences between constitutional and common law tort, federalism should also play a part in restricting the scope of constitutional tort.[125] Unlike the earlier version, there is no analytical flaw in this refined federalism rationale. The Court might choose to weigh federalism as heavily as the efficiency value that motivates the immunity rules. In that event it might proceed to make various restrictions on the availability of constitutional tort remedies, and limits on affirmative duties may be one of these.

The difficulty with the revised federalism rationale is that it requires a choice of values that we, and perhaps the Court as well, are unwilling to make. Its premise is that constitutional rights and values should be compromised out of regard for state and local independence.[126] In other contexts the Court has rejected that premise. In the past it held that the fourteenth amendment applies less stringent restrictions on

123. 92 N.M. 499, 590 P.2d 647 (1979). *See also* Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981).

124. In Part III, *infra* notes 131-52, we develop the argument that reckless disregard of suspicious facts can support an affirmative duty. The facts of *Doe* arguably meet that test. Other examples of cases like *Doe* are cited *supra* notes 23 & 52.

125. Perhaps this modified federalism rationale is what the proponents of federalism, cited *supra* notes 121-22, have in mind when they call for limits on constitutional tort. Their reasoning is sufficiently ambiguous and suggestive to support either version of the federalism argument.

126. For more elaboration of this point, see Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723 (1979); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977).

the states than the Bill of Rights imposes on the national government. But over the past fifty years it has incorporated virtually every important provision of the Bill of Rights into the fourteenth amendment.[127] Today it invokes federalism to limit federal jurisdiction under various comity doctrines,[128] but the effect of federalism is to allocate constitutional decisionmaking to state courts, not to limit substantive guarantees.[129] Proponents of federalism-based restraints on constitutional tort must demonstrate why this area is different and demands a greater role for federalism, a task they have not yet begun.[130]

III. TWO DECISIONAL GUIDELINES

What rules should govern the resolution of affirmative duty constitutional tort cases? The task here is to devise rules that suitably accommodate the constitutional value of concern and respect on the one hand, and the discretion value on the other. Toward that end, affirmative duties should be imposed only when the discretion value is weak and the defendant's affront to concern and respect is egregious. We propose two general principles. First, when the government actor knows the plaintiff is in danger and can easily help him, he should be liable for failure to act. In contrast, if either knowledge or ability is lacking, no duty should be imposed. Second, when the government is in some way connected to the plaintiff's distress, the requirements of knowledge and ability should be relaxed. The degree of knowledge and ability demanded for liability should vary inversely with the extent of the defendant's responsibility for the plaintiff's threat. These guidelines are articulated only fitfully in the case law, although many of the results can be reconciled with them. We will show that they lead to better results and more convincing justifications than the reasoning offered by the opinions.

A. *Knowledge and Ability*

Unless the defendant bears some responsibility for the plaintiff's

127. The history is recounted in G. GUNTHER, *supra* note 56, at 476-501.

128. *See* Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981).

129. Moreover, in allocating constitutional issues to state courts, the Supreme Court has emphasized its confidence in their ability and willingness to uphold constitutional standards. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 105 (1980); Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975).

130. Indeed the Court is as yet unwilling even to allocate constitutional decisionmaking to state courts in this area, or to require the exhaustion of state administrative remedies. Patsy v. Board of Regents, 102 S. Ct. 2557 (1982). *But cf.* Fair Assessment in Real Estate, Inc. v. McNary, 102 S. Ct. 177 (1981) (requiring resort to state court for damage claims arising from allegedly unconstitutional taxation, relying on comity and the policy of the tax injunction act).

danger, courts should impose a duty to help only when the defendant knows of the plaintiff's need and can easily help. The case for a duty of easy rescue is intuitively appealing and can be justified analytically in terms of the discretion and protection values that shape government affirmative duty law. The protection value is especially strong because this failure to help is a flagrant violation of the values underlying the fourteenth amendment. The fourteenth amendment safeguards personal security against government invasion,[131] and the foundation for that protection is the value of governmental concern and respect for the individual. The government officer who stands aside as a third person attacks the plaintiff does not himself violate the fourteenth amendment, but he offends the value of concern and respect on which it is based.

At the same time, the discretion value is especially weak. Here a decision to help does not require a large commitment of resources. By hypothesis, rescue can be affected easily. Nor does the imposition of a duty entail a debatable choice among alternative views of the goals that government should pursue. Virtually everyone agrees that engaging in easy rescue is a proper task of government.[132]

Despite these considerations some courts have rejected a constitutional tort duty in this situation. For example, the plaintiff in *Howell v. Cataldi*[133] was attacked by a policeman. Two policemen were present at the time and the plaintiff did not know which had beaten him, so he sued both of them. The court held he could not recover against either, not having identified his assailant.

On the basis of the strong protection interest here, the court should have held that both could be liable, one for the beating and the other for not preventing it. But the court did not pause to examine the competing values. It disposed of the claim by stating a maxim on the law of battery, and citing a treatise: "[m]ere presence of a person, where an assault and battery is committed by another, even though he mentally approves of it, but without encouragement of it by word or sign, is not sufficient of itself to charge him as a participator in the assault."[134] This black letter rule is inapposite because it deals with the obligations of individuals and not governments.

Other courts, while not denying affirmative duties altogether, have placed unjustifiable limits on liability. For example, the plaintiff in *McCoy v. McCoy*[135] was a prisoner who had been beaten by one guard

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131. Ingraham v. Wright, 430 U.S. 651, 673 (1977).

132. *See, e.g.*, City of Chicago v. Sturges, 222 U.S. 313, 322 (1911); Lee v. State, 490 P.2d 1206, 1209 (Alaska 1971); Wood v. Morris, 109 Ga. App. 148, 135 S.E.2d 484, 487 (1964).

133. 464 F.2d 272 (3d Cir. 1972). *See also* Howard v. Gonzales, 658 F.2d 1331, 1338-39 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981) (by implication).

134. 6 C.J.S. Assault and Battery § 27 (1955), *quoted in* 464 F.2d at 282.

135. 528 F. Supp. 712, 715 (N.D. W. Va. 1981).

while the defendant, another guard, looked on. The court denied recovery and said that liability would be appropriate only if the passive onlooker were the attacker's superior. The court did not explain why liability should be limited to supervisors. It dealt with the issue merely by citing an earlier fourth circuit case, *Davis v. Zahradnick*,[136] in which the court had upheld supervisory liability, but had not spoken to the issue presented in *McCoy*.

Perhaps the court in *McCoy* was uncomfortable with the notion of an affirmative duty untied to a pre-existing responsibility for oversight.[137] If the defendant were a private actor, libertarian values would support the court's hesitation. If the governmental defendant were not aware of the danger or unable to act on it, the discretion value would be a strong counterweight to liability. But in the circumstances of *McCoy*, there is no persuasive argument against an affirmative duty, and the court's limitation of liability to supervisors draws a distinction where there is no significant difference.[138]

The line drawn in *McCoy* between supervisors and other officers suggests another, equally bad distinction. Under *McCoy*, the existence of an affirmative duty apparently depends on whether the attacker is himself a government actor. Most courts have rejected such a limitation.[139] Even when the attacker is a policeman, the courts have justified the imposition of liability on broader grounds. Thus, in *Byrd v. Brishke*,[140] the passive defendant was held liable not merely because the attacker was a policeman, but because he breached his "duty to uphold the law and preserve the peace," a duty that is equally applicable to the officer who fails to stop an attack by a private individual. While the courts have not explained why they reject this distinction, their intuition is consistent with our analysis of protection and discretion. Whether the attacker is an officer or not does not significantly affect either the plaintiff's interest in rescue or the actor's discretion interest. The threat to constitutional values may be greater when the third party is a government actor, but that threat is strong enough to support liability no matter who the attacker is. Indeed, liability would be appropriate even when the threat is from some natural catastrophe like a fire, provided the requirements of knowledge and ability are met.

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136. 600 F.2d 458 (4th Cir. 1979).

137. The court suggested a different result might be reached if state law imposed a duty to intervene. 528 F. Supp. at 715 n.8. For reasons previously discussed, deference to state law in defining federal constitutional protections is generally unwarranted and unwise. *See supra* text accompanying notes 120-29.

138. *See also* Putnam v. Gerloff, 639 F.2d 415, 423-24 (8th Cir. 1981), (finding liability on facts similar to those of *McCoy*).

139. *See* Beard v. Mitchell, 604 F.2d 485, 495-99 (7th Cir. 1979) (upholding jury verdict for defendant); Cooper v. Molko, 512 F. Supp. 563, 566-68 (N.D. Cal. 1981).

140. 466 F.2d 6, 11 (7th Cir. 1972).

Other courts seem to have implicitly held that there is no affirmative duty to protect the plaintiff's property. In *Harris v. City of Roseburg*[141] a creditor utilized self-help repossession to enforce his lien on plaintiff's tractor. Fearing a violent confrontation, the creditor asked the police to be present. Granting a motion for summary judgment the court held that "mere acquiescence" by the city and the policeman in a repossession was insufficient to support an action against them. Rather, they could only be held liable if they had "assist[ed] in effectuating a repossession over the objection of a debtor or so intimidated a debtor as to cause him to refrain from exercising his legal right to resist a repossession."[142] But suppose the debtor attempted to resist, as he had a legal right to do, and the police stood by while the creditor took the property illegally. This case differs from a beating case only in that the plaintiff's property and not his personal security is threatened. The fourteenth amendment protects property as well as personal security, and the police show an equal lack of concern and respect for property in an illegal repossession case as they do for personal security in a beating case. The affirmative obligations of government should include protection of the plaintiff's property as well as his personal security.[143]

The facts of *Cooper v. Molko*[144] suggest another possible limit on recovery, relating to the defendant's motive. In that case a youthful member of the Unification Church had been abducted by his parents and held for deprogramming. He alleged that the defendant police officers knew of this and did nothing. Even after he managed to escape and requested their help, they refused it because he was a member of the Unification Church. The court held that he could recover if he could prove these facts.

Suppose the motive was not disapproval of the church, but only indifference or incompetence. The court does not address the question whether liability would be appropriate in those circumstances, but its reliance on bad motive suggests that it might treat them differently. Again, the distinction seems inappropriate. If the motive for failing to act is disapproval of the plaintiff's religion, the case for an affirmative duty is all the stronger. The defendant has disregarded not only the plaintiff's general liberty interests in freedom of movement and

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141. 664 F.2d 1121, 1126-27 (9th Cir. 1981). *See also* United States v. Coleman, 628 F.2d 961, 964 (6th Cir. 1980); Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 510 & n.4 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980); Hollis v. Bailey, 534 F. Supp. 565, 567 (E.D. Mo. 1981).

142. 664 F.2d at 1127.

143. It might be argued that these cases are more defensible than we have suggested, because the policeman might have reasonably thought the repossession was legal and hence that the taker had done no wrong. That rationale would be acceptable, but it is beside the point. The difficulty with *Harris* and cases like it is that the courts stress the mere lack of action by the police and not their beliefs about whether any wrongdoing had taken place.

144. 512 F. Supp. 563, 566-68 (N.D. Cal. 1981).

personal security, but also the specific first amendment value of freedom of religion. Yet, the former value is strong enough standing alone to justify an affirmative duty, even when the motive does not relate to first amendment values.

Persuasive arguments can be made against all of these limitations on the duty to help when the defendant knows of the danger and can easily help. The harder question is just how much knowledge should be required, and how easy the rescue must be. Knowledge and ease of rescue are both continuums, so there is no readily identifiable point at which lines can be drawn. Even so, the analysis of discretion and protection is helpful, for it suggests that the requisite knowledge should be substantial. Defendants should not be liable for carelessly failing to pursue suspicious facts. Nor should the defendant be liable when a prudent officer would have made sure he had the ability to help, and this defendant negligently had no opportunity. In short, the standard of care demanded should be knowledge of danger or reckless disregard of the facts, and not the reasonable care required by the traditional common law negligence standard.

This departure from the common law rule is justified by several distinctive features of constitutional tort, especially with respect to affirmative duties. The justification for constitutional tort is that constitutional rights and values are not adequately taken into account in the traditional common law of torts. In particular, that body of law gives no special weight to the plaintiff's constitutional right against arbitrary government deprivations of life, liberty, and property,[145] or to the value of concern and respect for the individual on which those rights are founded. This rationale supports constitutional tort affirmative duties only to the extent that value is threatened. The more the defendant knows, the more seriously it is endangered.

The value of concern and respect, then, is distinct from the plaintiff's interest in rescue. It is at issue only when the government defendant acts or fails to act with some disregard for the plaintiff's welfare. Negligence in failing to pursue suspicious facts or to take proper steps against dangers might show some lack of concern, but it might also manifest incompetence, panic, general laziness, and other qualities that have little or nothing to do with the government actor's concern and respect for the plaintiff. In any event, negligence demonstrates far less indifference to the plaintiff than knowing or reckless failure to act.

When the government or its officer is a defendant in an affirmative duty case, the considerations against recognition of a duty are summarized by the discretion value. Either out of respect for the political

145. Even today there are many state tort rules immunizing governments and officers from various forms of liability. *See generally* Owen v. City of Independence, 445 U.S. 622, 680-83 (1980) (Powell, J., dissenting). *See also* cases cited *supra* note 52.

process or for reasons of institutional competence in defining the role of government, courts should hesitate to create affirmative duties. These concerns are weak or absent when the defendant knows of the danger and can take steps against it, because there is widespread agreement that this is a proper role of government and no massive shifts in resource use are required. In contrast, a negligence standard permits courts to make controversial decisions about what degree of knowledge should provoke further inquiry, and what commitment of resources, for example policemen or fire trucks, is a reasonable response to the general problem of crime or fire prevention. Perhaps a common law court, confident of its own ability to decide what government should do and in any event subject to legislative reversal, legitimately could impose affirmative duties under a negligence test.[146] But discretion is a stronger impediment to affirmative duty in constitutional tort, because the courts' decisions are less subject to legislative nullification.

With these observations in mind, consider *Reiff v. City of Philadelphia*.[147] The plaintiff was shot by an armed robber and sued the city for damages. She claimed that the city violated her constitutional right to police protection by its "policy of not responding to calls until a crime has actually been committed and . . . [by] the alleged failure to provide adequate police protection in a high crime area." Finding that "the Constitution does not explicitly or implicitly provide a right to adequate police protection,"[148] the court rejected her claim.

The court's rationale is subject to question, as it focuses only on whether there is a constitutional right to police protection, and does not consider whether a constitutional tort duty should be imposed to vindicate constitutional values. The reasoning in the opinion could be used to deny a tort claim when the police know of the plaintiff's danger and fail to respond. On the facts of *Reiff*, however, the court's result seems proper. Here the plaintiff did not assert that the police knew of the immediate danger to her, but relied on the general inadequacy of police policies on crime prevention. The relation between those policies and any absence of concern and respect for any particular plaintiff is somewhat attenuated. In addition, the plaintiff effectively asked

146. *Compare* Symmonds v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 242 N.W.2d 262 (Iowa 1976) (county may be held liable for negligently failing to erect a stop sign at a railroad crossing), *with* Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1982) (failure to install a traffic light preemptor circuit at an intersection near a railroad crossing is not redressable under section 1983); *compare* Lewis v. State, 256 N.W.2d 181 (Iowa 1977) (state may be held liable for the negligent design and construction of a highway), *with* York v. City of Cedartown, 648 F.2d 231 (5th Cir. 1981) (allegation of negligently designed and constructed street and drainage system did not state a cause of action under section 1983).

147. 471 F. Supp. 1262 (E.D. Pa. 1979). *See also* Tetalman v. Holiday Inn, 500 F. Supp. 217 (N.D. Ga. 1980).

148. 471 F. Supp. at 1264.

the court to make broad policy decisions about the allocation of government resources among police and other departments of city government, and within the police department itself. A judicial decision at such a high level of generality would have seriously impeded the discretion of elected policymakers to determine what goals government should pursue and how to attain them.

There is another, less abstract but equally important reason why discretion mandates a knowing or reckless disregard standard. Under a negligence standard, the required precaution will often be the detention or surveillance of a third person suspected of planning an attack on the plaintiff. The police will be required to make a reasonable judgment whether some action is necessary. Inevitably, they will sometimes mistakenly harass an innocent person. This might result in violation of that person's constitutional rights, and, in turn, it could subject the police to liability to him.[149]

Beard v. Mitchell[150] illustrates the point. Plaintiff's decedent was killed by a man under investigation by the FBI for other crimes. He sued the FBI agent in charge for failing to prevent the murder by arresting the murderer on the other charges before the crime. The court correctly rejected the plaintiff's theory, holding that plaintiff must show the agent knew the murder would take place or recklessly disregarded facts showing it.[151] In response to the plaintiff's claim that the agent should have arrested the assailant sooner on other charges, the court said "[w]e would certainly be reluctant to embrace a rule of law which *constitutionally required* an investigating officer to arrest an individual in the early stages of an investigation."[152] Both the general argument for discretion and these specific untoward consequences of a negligence rule argue in favor of a knowing or reckless disregard standard.

B. Control and Responsibility

Suppose the plaintiff's assailant is a policeman, and plaintiff wishes to recover from his supervisor or the local government that employs him for failure to take steps to stop the attack; or the plaintiff is a prisoner who is attacked by a guard or another inmate, and wishes to sue the prison superintendent for failure to take proper precautions against attacks. Such cases arise frequently in constitutional tort litigation.

149. *See, e.g.*, Terket v. Lund, 623 F.2d 29 (7th Cir. 1980) (affirming summary judgment for defendants).

150. 604 F.2d 485 (7th Cir. 1979).

151. The only problem with the court's opinion on this score is its insistence that the plaintiff must show the violation of a constitutional right. *See id.* at 495.

152. *Id.* at 500 (emphasis in original).

1. Relaxing the knowledge and ability rule— These plaintiffs seek to impose affirmative duties on governments and government officers, yet they differ from the cases previously examined in one important aspect. In these cases the governmental defendant is in some way implicated in the plaintiff's misfortune. Governmental connection with the harm introduces considerations of fairness into the duty analysis, which strengthen the plaintiff's case and thus justify relaxation of the strict knowledge and ability principle. Government control over the plaintiff and defendant or government responsibility for the plaintiff's vulnerability can support a duty to learn about the danger and to assure that there are resources available to deal with it.[153]

This principle is analogous to the common law exception to the no-duty rule when the defendant is connected with the plaintiff or his injury in some way. The individual may have an obligation to help if this conduct is causally, though not culpably, related to the harm,[154] or if he has undertaken to help the plaintiff,[155] or if there is some special relationship between him and the plaintiff, like common carrier and passenger[156] or landlord and tenant.[157] With respect to the common law tort obligations of government actors, this principle is reflected in the cases discussed in Part I where courts point to governmental involvement or promises or special relationships as a basis for affirmative duty.[158]

The insight motivating all of these exceptions is that it is unjust to permit the defendant to ignore the plaintiff's predicament when he himself has played some role in bringing it about. This precept applies to constitutional tort as well. Here the justification for a departure from the knowledge and ability rule is that the constitutional duty to show concern and respect demands more care when the government has control of the plaintiff and renders him vulnerable, as with a prison inmate, or when government is at least partially responsible for the threat posed by his assailant, as when the assailant is a policeman. In such circumstances it is not enough for government to act only when it knows of a danger and can easily respond. It also should face an obligation to find out about dangers and to take precautions in advance to assure that rescue will be feasible. In practice, most courts

153. Because the state action requirement is met in these cases, the plaintiff's right may be characterized as a constitutional right and need not depend on constitutional common law for support. *See* Youngberg v. Romeo, 102 S. Ct. 2542 (1982) (right to treatment). *See also supra* text accompanying notes 56-59.

154. L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334, 41 N.E.2d 356 (1942).

155. Black v. New York, N.H. & H.R.R., 193 Mass. 448, 79 N.E. 797 (1907).

156. Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959).

157. Kline v. 1500 Massachusetts Avenue Corp., 439 F.2d 477 (D.C. Cir. 1977). *See generally* C. GREGORY, H. KALVEN & R. EPSTEIN, *supra* note 93, at 325-60; R. KEETON & P. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS 384-405 (2d ed. 1977).

158. *See supra* text accompanying notes 39-48.

have recognized a stricter governmental duty to supervise employees and protect persons in custody, although they do not explicitly note the distinction or give reasons for it. They do not require knowledge and easy rescue; instead, some of them use formulas like "gross negligence" and "deliberate indifference" to describe the requisite standard of care,[159] while others have adopted a negligence standard.[160]

2. *Negligence versus gross negligence*— Whether negligence is preferable to gross negligence or deliberate indifference requires a rather fine value choice between the plaintiff's claim to fair treatment and the competing demands for discretion. It is a choice that could legitimately be made either way in both the supervisory and custody cases.[161] In making that choice, however, courts should take account of two further analytical points.

First, if a single standard is used to govern all variations on the theme of control and responsibility, it should not be applied woodenly to each fact situation. Rather, its application should take account of differences from case to case in the degree of government responsibility for the plaintiff's plight. For example, the deliberate indifference standard should impose a stricter duty on prison officials to protect inmates from guards and other prisoners, where the government has virtually absolute control over the plaintiff and substantial responsibility for the danger, than in other situations where its connection with the danger is more attenuated.

The perceptive opinion in *Doe v. New York City Department of Social Services*[162] recognized as much. There the plaintiff was a foster child who had been mistreated by her foster father. She sued the placement agency that put her in the home for failure adequately to supervise her placement. The court adopted deliberate indifference as the test for liability, but pointed out that "deliberate indifference ought not to be inferred from a failure to act as readily as in a prison context . . . ."[163] The court explained that prison officials and other institutional administrators "can readily call in subordinates for consultation . . . [and] can give orders with reasonable assurance that they

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159. *See, e.g.*, Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982); Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

160. *See, e.g.*, Gullatte v. Potts, 654 F.2d 1007, 1012 (5th Cir. 1981); McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979).

161. Courts have differed sharply on the value choice. *Compare* Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir. 1982) (liability only for "training that is so reckless or grossly negligent that future police misconduct is almost inevitable"), *with* McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979) ("The standard to be applied is the conduct of a reasonable person, under the circumstances . . . .").

162. 649 F.2d 134 (2d Cir. 1981).

163. *Id.* at 142.

will be followed . . . ."[164] The placement agency, in contrast, was forced "to rely upon occasional visits for its information gathering, and its relationships to the foster family was less unequivocally hierarchical than is the case with prison guards and a warden . . . The agency felt . . . pressured to minimize intrusiveness, given its goal of approximating a normal family environment for foster children."[165] In short, because prison officials can exercise more control over the plaintiff's environment, more care can be demanded of them regardless of the formula used to determine liability.

The second point follows from the first. Courts have not distinguished among these control and responsibility cases, some applying a negligence standard to the lot and others a gross negligence standard, regardless of the particular circumstances. Given wide variations in the degree of control and responsibility, a better approach may be to use two standards rather than one. A distinction could be made between cases where control and responsibility is greater and those where it is less, and the former could be governed by a negligence standard and the latter by gross negligence.

The low control group includes *Doe* as well as the more common case where a policeman hurts the plaintiff and the plaintiff sues the policeman's supervisor or municipal employer.[166] The most common fact pattern in the high control category is the suit by an inmate against prison officials for failure to protect him against an attack.[167] It also includes such cases as *Hall v. Tawny*,[168] in which a public shool student was severely paddled by a teacher and sought to hold supervisors liable for failing to prevent the beating, and *White v. Rochford*,[169] in which the police arrested the driver of a car on an expressway and took him away, leaving the child passengers stranded and helpless.

The argument for a negligence standard is stronger in cases like these than in the police supervisory cases because government responsibility for the plaintiff's well being is greater. The government has made the plaintiff vulnerable to extraordinary dangers, has taken away his ability to defend himself and has removed other sources of protection. Fair treatment requires that the government provide equivalent protection to what it has taken away. In addition, the countervailing discretion value is not strong when the plaintiff and the attacker are both members of a closed environment like a prison or school and relatively small shifts in resources are at issue. In these circumstances, a

164. *Id. See also* McKenna v. County of Nassau, 538 F. Supp. 737 (E.D.N.Y. 1982) (applying "deliberate indifference" standard to inmate beating case).

165. *Id.*

166. *See, e.g.*, Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982).

167. *See, e.g.*, Gullatte v. Potts, 654 F.2d 1007 (5th Cir. 1981).

168. 621 F.2d 607, 615 (4th Cir. 1980).

169. 592 F.2d 381 (7th Cir. 1979).

reasonable care standard may be the appropriate measure of tort obligation.[170]

Now consider the case where a policeman or some other government officer does harm and the plaintiff sues a supervisor or the local government that employs him. The defendant is partially responsible for the injury, for he gave the attacker a gun and a police uniform. Without these the attacker may never have encountered the plaintiff, and the plaintiff would have been less vulnerable to him.[171] At the same time, this fact pattern differs from the custody cases in that the defendant has no control over the plaintiff. Nor can he easily restrain the policeman attacker, or even find out about the danger he represents, without some commitment of resources. Discretion is a stronger value here and fairness a less compelling one. Perhaps a gross negligence standard is an appropriate compromise.[172]

CONCLUSION: TOWARD ANALYTICAL CLARITY

The biggest problem with the constitutional tort affirmative duty cases is not the results, many of which can be reconciled with our two decisional guidelines, but the methods by which courts reach those results. In pure affirmative duty cases like *Byrd v. Brishke*[173] courts have failed to identify the source of the constitutional duty to render

170. An objection to the negligence test proposed in the text is that the high control case does not differ at all from the no-government-connection case with respect to the potential impact of affirmative duty upon the rights, and potential legal claims, of putative third party attackers. *See supra* text accompanying notes 149-52. The prison official might face "a Hobson's choice between alternative eighth amendment claims" of the inmate who is attacked and one who is segregated on account of suspicion that he might attack another; accordingly, officials should not be liable for negligence in safeguarding prisoners. Miller v. Twomey, 479 F.2d 701, 721 (7th Cir. 1973). The trouble with this argument is that in a high control case like *Miller* the problem can be handled by transferring or segregating the complaining prisoner away from the potential assailant.

171. *See* Scheuer v. Rhodes, 416 U.S. 232, 243 (1974) (section 1983 protects citizens against the "misuse of power, . . . made possible only because the wrongdoer is clothed with the authority of state law") (footnote omitted) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

172. Of course, like most legal distinctions, the line between these two kinds of cases is not a sharp one. Perhaps there is more control in the *Doe* case than in the police supervisory cases with which we have grouped it, for in *Doe* the plaintiff was unable to care for herself and was dependent on the defendant. Similarly, some inmate cases involve less control than the typical attack case. *See, e.g.*, Swietlowich v. County of Bucks, 610 F.2d 1157 (3d Cir. 1979) (prisoner committed suicide).

There are also cases featuring some government involvement in the plaintiff's harm, but not enough to warrant a departure from the knowledge and ability principle. *See, e.g.*, Beard v. Mitchell, 604 F.2d 485 (7th Cir. 1979) (defendant FBI agent dealt with an informant who assisted in murder of plaintiff's decedent); Maiorana v. MacDonald, 596 F.2d 1072, 1077-78 (1st Cir. 1979) (policeman who allegedly gave drugs, money, and guns to decedent informant was not responsible for his shooting by other police).

173. 466 F.2d 6 (7th Cir. 1972).

aid, adverting to a "duty to enforce the laws and preserve the peace," but not explaining how this attains constitutional status or how far it extends. The absence of a convincing rationale in doctrine and policy for the constitutional duty to help invites the apparent distinction drawn in the repossession cases between harm to the person and harm to property, and the distinctions between private and governmental assailants, and between supervisors and co-workers, on which *McCoy v. McCoy*[174] appears to rest. It also helps explain why judges search for other constitutional grounds on which to base affirmative duty. An illustrative case is *Cooper v. Molko*,[175] where the plaintiff's allegations could support religious freedom and equal protection claims.

Affirmative duties, however, should not be so limited. The rationale developed here identifies the constitutional value of concern and respect as the policy basis for affirmative duties and utilizes constitutional common law as the doctrinal vehicle for implementing that policy. It provides a persuasive basis for affirmative duty, avoids artificial limits on it, and properly restricts it to circumstances where the countervailing value of governmental discretion lacks force.

Where there is governmental connection with the harm, the courts' results are generally consistent with the principle that control and responsibility justify relaxing the knowledge and ability requirements.[176] But the opinions arrive at those results by routes far different from the one suggested here. In the prison context, courts justify affirmative duties on the ground that negligence or gross negligence in failing to protect inmates amounts to cruel and unusual punishment.[177] In the supervisory context their approach has been shaped by the Supreme Court's holding in *Monell v. Department of Social Services*:[178] that governments are not vicariously liable for the constitutional torts of their employees. Instead, a municipality can only be held liable if the employee was acting in accordance with the city's "policy or custom." How, then, can the city be liable when a policeman beats a suspect and the city does not direct, encourage, or condone the beating of suspects? Because the courts respect the policy considerations underpinning the principle of control and responsibility, they have devised a means of enforcing that principle in spite of the rule against respondeat superior. They say that negligence or gross negligence in training or

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174. 528 F. Supp. 712 (N.D. W. Va. 1981).

175. 512 F. Supp. 563 (N.D. Cal. 1981).

176. There are exceptions. *See, e.g.*, Ragusa v. Streator Police Dep't, 530 F. Supp. 814, 817 (N.D. Ill. 1981) (police not liable for damages to plaintiff's impounded car unless they knew it would be vandalized and did nothing to protect it).

177. *See, e.g.*, Gullatte v. Potts, 654 F.2d 1007, 1012 (5th Cir. 1981); Jones v. Diamond, 594 F.2d 997, 1004 (5th Cir. 1979), *cert. dismissed*, 453 U.S. 950 (1981).

178. 436 U.S. 658 (1978).

supervision of employees can amount to a "policy or custom" within the *Monell* rule.[179]

One difficulty with these rationales is that they can permit artificial distinctions between cases that are analytically similar. The cruel and unusual punishment approach used in the prison cases cannot comfortably be adapted to other cases where the government exercises substantial control over the plaintiff and the assailant. For example, the court in *Hall v. Tawny*[180] said that school supervisors had no affirmative duty to protect a pupil from unconstitutionally brutal corporal punishment by a teacher unless the knowledge test was met. But school officials exercise nearly as much control over the pupil, in the course of a school day, as prison officials over the inmate.[181] Accordingly, they should be held to a gross negligence standard, if not ordinary negligence.

This example reflects a more fundamental defect in the courts' methods. Characterizing grossly negligent prison administration as punishment permits them to reach acceptable results, but the characterization itself is unconvincing. It twists the concept of punishment out of shape to apply it to conditions that are not deliberate. A more cogent explanation for liability is that the grossly negligent prison officials have not shown adequate concern and respect for those in their charge. The courts' approach to the problem of municipal liability is similarly artificial. Grossly negligent supervision violates the constitutional value of concern and respect and justifies liability. In the ordinary use of language, however, policies and customs are conscious, deliberate, and well-known practices.[182] Courts must distort these words to reach results that could be more directly, and more persuasively, explained in terms of the analysis advanced here.[183]

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179. *See, e.g.*, Hays v. Jefferson County, 668 F.2d 869, 875 (6th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3254 (U.S. Oct. 4, 1982) (No. 81-2256); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979). *See* Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979).

180. 621 F.2d 607, 615 (4th Cir. 1980).

181. *But cf.* Ingraham v. Wright, 430 U.S. 651, 668-71 (1977) (distinguishing prisoners from school children on the issue of whether the eighth amendment applies to school discipline).

182. This certainly appears to be the *Monell* Court's understanding of these terms. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690-95 (1978). *See also* Addickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970).

183. The Court's efforts to delineate the proper scope of liability of individual supervisors for the acts of their subordinates have also been inadequate. Rizzo v. Goode, 423 U.S. 362 (1976), states that supervisors cannot be held responsible for the constitutional violations of others unless their own conduct was "causally linked" to those breaches, *id.* at 375, and some of the Court's language appears to preclude any affirmative duty to control underlings, *id.* at 376. Two years later, in *Monell*, the Court characterized *Rizzo* as having held only that supervisors cannot be held liable on account of "the mere right to control without any control having been exercised and without any failure to supervise . . . ." 436 U.S. 658, 694 n.58 (1978). This standard apparently allows liability when there is a failure to supervise; *see, e.g.*, Spriggs v. City

Finally, the courts' focus on such concepts as policy and punishment diverts their attention away from the question of control and responsibility, which is the most important issue these cases present. More attention to differences among cases with regard to control and responsibility might facilitate the distinction suggested earlier, between custody cases where government control is higher and negligence may be the appropriate standard, and supervisory cases where government control is less and gross negligence may be the better test. As matters stand, the courts' cruel and unusual punishment rationale cannot easily support a negligence rule in inmate cases, as that standard would depart even further than gross negligence from ordinary conceptions of punishment.[184] Yet good arguments of policy can be made that negligence is the better test in inmate cases and other high control cases. An explanation that begins with the constitutional value of concern and respect can more easily justify a negligence test for liability.

Analytical clarity is an important goal in the development of doctrine, not only for the sake of candor and intelligible rules, but also because the mode of analysis influences the shape of the substantive standards. Calling supervisory carelessness a form of punishment or inadequate training a policy turns these concepts into fictions. Fictions sometime serve a useful purpose, as where doctrine has calcified on some point of law and for that reason cannot be challenged openly.[185] But there is no compelling reason to introduce them into constitutional tort, for the law in this area is not yet frozen into black letter rules. There is still time to ground affirmative duties in the constitutional value of concern and respect, where they belong.

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of Chicago, 523 F. Supp. 138, 141-42 (N.D. Ill. 1981), but does not identify the source of the duty to supervise or the standard of care by which to measure official conduct. Again, our analysis supplies what is missing in the opinions. It provides a foundation for the duty in the constitutional value of concern and respect and justifies a negligence or gross negligence standard of care by the principle of control and responsibility.

184. *See, e.g.*, Miller v. Twomey, 479 F.2d 701, 720 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

185. *See* L. FULLER, LEGAL FICTIONS 56-59 (1967).