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Section 1983 Liability for Negligence

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Note

Section 1983 Liability for Negligence

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[1]

I. INTRODUCTION

Section 1983[2] was enacted to provide a federal remedy for individuals deprived of their civil rights by others acting under color of state law.[3] The language of the statute does not require that the act causing the injury be intentional rather than negligent in order for liability to result,[4] and such a distinction does not appear relevant to the interpretation of the statute.[5] Nonetheless, many courts begin their inquiry into whether a claim for relief exists under section 1983 by examining the character of the act which gave rise to the injury.[6] If it is determined that the injury was caused by a negligent act, the suit is often dismissed.

To date, there has been only one case in which the United States Supreme Court has dealt directly with the character of an act in determining section 1983 liability.[7] In *Monroe v. Pape*,[8] the

1. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1976)).
2. 42 U.S.C. § 1983 (1976).
3. *Id.*
4. It may be argued that the verb "subject to" implies that an intentional act is required. However, BLACK'S LAW DICTIONARY 1594 (4th ed. 1968) defines "subject to" as "subordinate, subservient, inferior, obedient to, *governed or affected by*," a definition which encompasses negligence as well as intent. (Emphasis added.)
5. *See, e.g.*, Bonner v. Coughlin, 517 F. 2d 1311, 1318 (7th Cir. 1975), *aff'd on other grounds*, 545 F.2d 565 (7th Cir. 1976) (en banc); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 23 (1974).
6. *See, e.g.*, Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972).
7. Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978). The portion of the decision in *Monroe* which dealt with the intent requirement was not dealt with in *Monell*. *Monroe* was overruled only insofar as it granted total immunity from section 1983 liability to local governmental units. 98 S. Ct. at 2022.
8. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978).

Court rejected the contention that damages could be awarded only if the defendant acted with a specific intent to deprive the injured person of his or her civil rights,[9] concluding that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[10] This conclusion was based on the Court's examination of congressional purpose in enacting section 1983:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance *or otherwise*, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[11]

Because the common law of tort provides liability for negligent as well as intentional acts and because the Court employed the word "neglect" in its explanation of congressional purpose, *Monroe* became the basis for lower federal court decisions that held damages may be awarded for deprivations of federal rights

9. 365 U.S. at 187. Section 1983, at the time of the events giving rise to the opinion in *Monroe*, was codified at 42 U.S.C. § 1979. In *Monroe*, the Court compared section 1983 to its criminal counterpart, 18 U.S.C. § 242 (1976), which had been interpreted in Screws v. United States, 325 U.S. 91, 103 (1945), to require "a specific intent to deprive a person of a federal right," and concluded that such an interpretation should not be given a provision for a civil remedy. 365 U.S. at 187.

The primary issue in *Monroe* was not whether intent to deprive a person of a federal right was required to maintain a section 1983 action, but whether police officers conducting a search violative of the fourth amendment could be characterized as acting "under color of state law." 365 U.S. at 175-84. Justice Frankfurter, dissenting as to the Court's interpretation of "under color of state law," agreed that specific intent to deprive a person of a federally protected right is not a prerequisite for section 1983 liability:

> First, the word "wilfully" . . . from which the requirement of intent was derived in *Screws* does not appear in [section 1983]. Second, . . . the constitutional scruples concerning vagueness which were deemed to compel the *Screws* construction have less force in the context of a civil proceeding, and [section 1983], insofar as it creates an action for damages, must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts. Third, even in the criminal area, the specific intent demanded by *Screws* has proved to be an abstraction serving the purposes of a constitutional need without impressing any actual restrictions upon the nature of the crime which the jury tries.

Id. at 206-07 (Frankfurter, J., dissenting in part) (footnotes omitted). Justice Frankfurter further noted that "[c]ivil liability has always been drawn from such indefinite standards as reasonable care, a man of ordinary prudence, foreseeability, etc." *Id.* at 207 n.6.

10. 365 U.S. at 187.

11. *Id.* at 180 (emphasis added).

resulting from negligent acts.[12] Although the majority of the circuits appear to have approved actions based on negligence,[13] a minority has imposed liability only for injuries arising from grossly negligent or intentional acts.[14] As a result of the conflict among the circuits, the Supreme Court granted certiorari in *Procunier v. Navarette*[15] to decide the issue.[16] However, the Court disposed of

12. *See, e.g.*, Whirl v. Kern, 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).
13. Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1975) (negligence of prison warden in allowing inhumane conditions to exist); McCray v. Maryland, 456 F.2d 1, 5 (4th Cir. 1972) (negligent failure of clerk of courts to file prisoner's application for post-conviction relief); Carter v. Estelle, 519 F.2d 1136, 1136-37 (5th Cir. 1975) (negligence of prison guards in allowing prisoner's property to be exposed to theft); Fitzke v. Shappell, 468 F.2d 1072, 1077 n.7 (6th Cir. 1972) (failure to provide medical assistance following car accident); Navarette v. Enomoto, 536 F.2d 277, 281 (9th Cir. 1976), *rev'd on other grounds sub nom.* Procunier v. Navarette, 434 U.S. 555 (1978) (negligent failure to mail prisoner's correspondence); Dewell v. Lawson, 489 F.2d 877, 882 (10th Cir. 1974) (placing in drunk tank man in diabetic shock; conduct "grossly incompetent, inadequate or excessive"); Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973) (negligent supervision of subordinates).
14. Hoitt v. Vitek, 497 F.2d 598, 601 (1st Cir. 1974) (complaint must allege malice, excessive neglect or arbitrary acts); Howell v. Cataldi, 464 F.2d 272, 279 (3d Cir. 1972) ("wrongful intention or culpable negligence" necessary); Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (en banc) ("mere negligence" not actionable); Brown v. United States, 486 F.2d 284, 287 (8th Cir. 1973) (dicta). *But see* Byrd v. Brishke, 466 F.2d 6, 10 (7th Cir. 1972) (liability "for misfeasance and for nonfeasance").

    Two district courts in the Eighth Circuit, including one in Nebraska, have recently upheld section 1983 actions alleging negligence on the part of prison officials. In Taylor v. Parratt, No. 76-L-57 (D. Neb. Oct. 25, 1978), the court granted summary judgment to a prisoner who failed to receive a mail-order hobby kit as a result of the negligence of prison officials in distributing the mail. The court stated: "The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for [the plaintiff], which loss should not go without redress." *Id.*, slip op. at 5.

    In another recent case, a district court in the Eighth Circuit upheld a section 1983 claim based on the negligent failure of county officials to provide a prison guard. The negligence resulted in the death of one inmate and injury to another in a fire. Hamilton v. Covington, 445 F. Supp. 195 (W.D. Ark. 1978).
15. 434 U.S. 555 (1978).
16. The question on which the Court granted certiorari was "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983." *Id.* at 559 n.6.

    Certiorari was not granted on the other two questions contained in the prison officials' application:

    > 2. Whether removal of a prisoner as a prison librarian and termination of a law student-inmate visitation program in which he participated states a cause of action under the Civil Rights Act for either knowingly or negligently interfering with the prisoner's right of access to the courts.
    > 3. Whether deliberate refusal to mail certain of a prisoner's corre-

the case on other grounds, and the issue remains unsettled.[17]

Although the language of the statute does not limit liability to intentional acts,[18] there has been reluctance on the part of many courts to permit the application of the statute to negligent acts.[19] This reluctance stems in part from philosophical concerns about the substitution of federal for state tort law remedies,[20] specifically, from fear that section 1983 has created "a body of general federal tort law."[21] It also stems from administrative concerns about the increasingly heavy case load imposed on federal courts by civil rights actions, particularly those brought by prisoners.[22]

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spondence in 1971-1972 prior to *Procunier v. Martinez* . . . and refusal to send certain correspondence by registered mail states a cause of action for violation of his First Amendment right to free expression.

Id. at 559-60 n.6

17. The Court held that the defendants were entitled to good faith immunity from damage liability under section 1983:

> [T]here was no "clearly established" First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972. As a matter of law, therefore, there was no basis for rejecting the immunity defense on the ground that petitioners knew or should have known that their alleged conduct violated a constitutional right. Because they could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct "cannot reasonably be characterized as in good faith."

Id. at 565 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)) (footnote omitted).

Chief Justice Burger dissented on the ground that the Court ought to have answered in the negative the question on which it had granted certiorari: "I would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim is not liable for damages under § 1983." *Id.* at 568.

Had the Court granted certiorari on the second question presented in the petition for certiorari, *see* note 16 *supra*, it would have been unable to dispose of the case on the ground that good faith immunity was established as a matter of law. The second question alleged both negligent and intentional interference with the prisoner's right of access to the courts, a right well established at the time the alleged violation occurred. For a discussion of the development of the constitutional right of access to the courts, see Potuto, *The Right of Prisoner Access: Does* Bounds *have Bounds?*, 53 IND. L.J. 207 (1978).

18. *See* note 4 & accompanying text *supra*.
19. *See, e.g.*, Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (en banc); Brown v. United States, 486 F.2d 284, 287 (8th Cir. 1973).
20. Paul v. Davis, 424 U.S. 693, 698-701 (1976).
21. *Id.* at 701.
22. In 1976, 7,460 civil rights actions were filed in federal district courts by prisoners and 12,329 were filed by non-prisoners. These actions were filed both under 42 U.S.C. § 1983 (1970) and directly under the United States Constitution, and they comprised 5% of the federal civil docket in 1976. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 129, 133, tbl. C-2 (1976). To place this figure in perspective it should

Because the resolution of the issue remains uncertain, this note will examine the development of liability based on negligence,[23] the framework established by Supreme Court decisions,[24] and the usefulness of distinguishing between negligent and intentional acts to determine the scope of section 1983 in light of its historical purpose.[25]

II. DEVELOPMENT OF LIABILITY BASED ON NEGLIGENCE

Monroe v. Pape[26] provided the underlying rationale for section 1983 actions based on negligence because, although it involved an intentional act, the Supreme Court suggested that inquiry ought to focus on whether the defendant caused a deprivation of a federal right while acting under color of state law, and not on his or her state of mind.[27] The cases credited with establishing liability for negligent acts, *Joseph v. Rowlen*[28] and *Whirl v. Kern*,[29] also involved intentional torts. However, the language employed by the courts in those decisions was sufficiently broad to provide a basis for subsequent section 1983 actions based on negligence.

In *Joseph v. Rowlen*,[30] the court upheld an action for false arrest, an intentional tort, but noted that nothing in the language of the statute requires a showing of flagrancy or improper motive.[31] *Whirl v. Kern*[32] involved the intentional tort of false imprisonment, but the action (or non-action) causing the injury was negligent rather than intentional. In *Whirl*, the plaintiff was lawfully imprisoned, but the charges were later dropped. As a result of negligence in processing records, the sheriff did not discover the dismissal

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be noted that 25,736 non-constitutional tort actions were filed, comprising 19.8% of the civil docket. *Id.* at 174. Diversity jurisdiction cases numbered 31,675 and comprised 24.3% of the civil docket. *Id.* at 122.

See Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501, 501-02 (1977). *See also* Burger, C.J., *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1128 (1973) (suggestion of alternative procedures for handling prisoner civil rights actions).

23. *See* § II of text *infra*.
24. *See* § III of text *infra*.
25. *See* § IV of text *infra*.
26. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978).
27. *Id.* at 187. *See* notes 7-11 & accompanying text *supra*.
28. 402 F.2d 367 (7th Cir. 1968).
29. 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).
30. 402 F.2d 367 (7th Cir. 1968).
31. *Id.* at 369. In Bonner v. Coughlin, 545 F.2d 565, 568 (7th Cir. 1976) (en banc), the seventh circuit reanalyzed *Joseph* and concluded that because the police officer did not have probable cause at the time of the arrest, liability was in actuality based on intent.
32. 407 F.2d 781 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

and retained the prisoner for nine months after the charges were dropped.[33] The Court of Appeals for the Fifth Circuit concluded that the language in *Monroe* stating that section 1983 was intended to protect federal rights infringed "by reason of prejudice, passion, *neglect*, intolerance *or otherwise*"[34] "suggests that a federal forum is no less desirable for the inadvertent than for the malicious violation of constitutionally protected rights."[35] It held that the sheriff had a duty to his prisoner to release him when the charges were dismissed and that his failure to learn of the dismissal was "as a matter of law, ignorance for an unreasonable time."[36]

Since the decisions in *Joseph* and *Whirl*, courts have upheld section 1983 actions based on negligence in a variety of situations, among them the negligent failure to file papers necessary for a prisoner to apply for state post-conviction relief,[37] negligent failure to mail a prisoner's correspondence,[38] negligent failure to protect a prisoner's property from theft,[39] and failure to act to prevent other police officers from beating a suspect.[40] As a result of the Supreme Court decision in *Estelle v. Gamble*,[41] isolated instances of medical malpractice or failure to provide medical treatment can no longer give rise to section 1983 damage actions brought by prisoners alleg-

33. *Id.* at 786. At trial, in response to special interrogatories, the jury found that the sheriff was not negligent in detaining the prisoner, that the prisoner was contributorily negligent for failing to seek release, and that no damages were sustained as a result of the nine-month imprisonment. *Id.*

34. 365 U.S. 167, 180 (1961), *quoted in* Whirl v. Kern, 407 F.2d at 788 (emphasis added).

35. 407 F.2d at 788. The court also stated, "We find the facts of the instant case clearly illustrative of the great harm which may be done to constitutional rights even in the absence of malice or negligence." *Id.* n.7.

36. *Id.* at 792. Although the court used the traditional negligence terms of "duty" and "reasonableness," it held that the sheriff had constructive notice of the prisoner's release and was thus liable as a matter of law for the intentional tort of false imprisonment. The court may have found this result necessary in view of the jury verdict that the sheriff was not negligent.

37. McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972). *Contra*, Jenkins v. Meyers, 338 F. Supp. 383 (N.D. Ill. 1972), *aff'd mem.*, 481 F.2d 1406 (7th Cir. 1973). In *Jenkins*, the prisoner's transcript was negligently mailed to an incorrect address.

38. Navarette v. Enomoto, 536 F.2d 277, 281 (9th Cir. 1976), *rev'd on other grounds sub nom.* Procunier v. Navarette, 434 U.S. 555(1978).

39. Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975). *Cf.* Taylor v. Parratt, No. 76-L-57 (D. Neb. Oct. 25, 1978) (prisoner granted summary judgment in action alleging prison officials' negligence in distributing mail resulted in theft of his property). *Contra*, Bonner v. Coughlin, 545 F.2d 565, 568-69 (7th Cir. 1976) (en banc).

40. Byrd v. Brishke, 466 F.2d 6, 10 (7th Cir. 1972). *Contra*, Howell v. Cataldi, 464 F.2d 272, 279 (3d Cir. 1972).

41. 429 U.S. 97 (1976).

ing cruel and unusual punishment.[42] However, recovery for negligent failure to provide medical care has not been entirely foreclosed. In *Fitzke v. Shappell*,[43] the negligent failure to provide medical care to a prisoner injured in an automobile accident led the court to sustain a fourteenth amendment claim alleging a deprivation of life without due process of law.[44]

Although causes of action based on negligence have arisen in a variety of contexts, they have been most useful as a means of reaching supervisory officials who are negligent in overseeing and training subordinates.[45] Section 1983 has been held to incorporate elements of state law protecting supervisory officials from vicarious liability for torts committed by their subordinates;[46] therefore, plaintiffs have found it necessary to sue supervisory officials directly for negligent performance of duty in order to encourage official responsibility or to reach someone financially capable of

42. "Deliberate indifference" must be alleged. *Id.* at 106. *See* notes 75-79 & accompanying text *infra*.

43. 468 F.2d 1072 (6th Cir. 1972).

44. *Id.* at 1077 n.7.

> While it might be said that appellants have asserted that appellees were negligent in failing to provide medical care for Fitzke, the argument that appellees' omission does not rise to constitutional proportions ignores the fact that as a result of arrest and incarceration by appellees the appellant was effectively denied the opportunity of obtaining the aid which might have prevented serious brain damage.

45. Kellerman v. Askew, 541 F.2d 1089, 1092 (5th Cir. 1976) (negligent failure to make inquiries); Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972), *cert. denied*, 409 U.S. 885 (1975) (warden "knew or should have known" of subhuman prison conditions); Beverly v. Norris, 470 F.2d 1356 (5th Cir. 1972) (negligent failure to supervise police officer); Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972) (failure to act to prevent other police from beating plaintiff); Roberts v. Williams, 456 F.2d 819, 826 (5th Cir.), *cert. denied*, 404 U.S. 866, *modified*, 456 F.2d 834 (1971) (negligent entrustment of prison trusty with gun); Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973) (negligent supervision of subordinates); Culp v. Devlin, 437 F. Supp. 20, 22-23 (E.D. Pa. 1977) (negligence in supervising and training police); Doe v. Swinson, 45 U.S.L.W. 2304 (E.D. Va. Nov. 24, 1976) (sheriff failed to fulfill responsibility to protect prisoner); Smith v. Wickline, 396 F. Supp. 555, 563 (W.D. Okla. 1975) (dictum) (police supervisor could be held liable for acts of subordinate); Moon v. Winfield, 368 F. Supp. 843 (N.D. Ill. 1973) (supervisor's negligent failure to act).

46. *See, e.g.*, Navarette v. Enomoto, 536 F.2d 277, 282 (9th Cir. 1976), *rev'd on other grounds sub nom.* Procunier v. Navarette, 434 U.S. 555 (1978); Jennings v. Davis, 476 F.2d 1271, 1274 (8th Cir. 1973); Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The-State-of-Mind Requirement*, 46 U. CINN. L. REV. 45, 60-61 (1977). *But see* Carter v. Estelle, 519 F.2d 1136, 1136 (5th Cir. 1975) (prison officials may be held vicariously liable for acts of subordinates). *See also* Comment, *Section 1983, the Eleventh Amendment, and General Principles of Tort Immunities and Defenses: Who is Left to Sue?* 45 U.M.K.C. L. REV. 29, 47-48 (1976).

compensating for their injuries.[47] If section 1983 actions based on negligence were abolished, supervisory officials and local political bodies would seldom be found to have the intent to cause injury that would be necessary to hold them liable for committing an intentional tort.[48]

III. FRAMEWORK ESTABLISHED BY THE SUPREME COURT

In addition to the suggestion in *Monroe* that actions based on negligence may be cognizable under section 1983,[49] there appears to be an implicit recognition of such actions in the Supreme Court's development of tests for a good faith defense to section 1983 actions. In *Wood v. Strickland*,[50] the Court promulgated both a subjective and an objective test for good faith immunity. The subjective test is whether the official acted with "malicious intention to cause a deprivation of constitutional rights or other injury";[51] the objective test is whether the official "knew or reasonably should have known" that his or her actions would violate "clearly established constitutional rights."[52] In order to understand the import of these tests, it is necessary to examine traditional concepts of intent and negligence.[53] The *Restatement of Torts*[54] provides the following explanation of the distinction between intentional and negligent acts:

> It is not enough that the act itself is intentionally done and this, *even though the actor realizes or should realize* that it contains a very grave risk of bringing about the [injury]. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the [injury] will result, the actor has not that intention which is necessary to make him liable . . . .[55]

47. Kirkpatrick, *supra* note 46, at 60-61.
48. *Id.* *See* text accompanying note 55 *infra*.
49. *See* notes 7-11 & accompanying text *supra*.
50. 420 U.S. 308 (1975).
51. *Id.* at 322.
52. *Id.*
53. 2 RESTATEMENT (SECOND) OF TORTS § 282 (1965) defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregardful of an interest of others." Intent is defined as denoting "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." 1 *id.* § 8A.
54. 1 RESTATEMENT OF TORTS § 13, Comment *d* (1934).
55. *Id.* (emphasis added). This comment was replaced by 1 RESTATEMENT (SECOND) OF TORTS § 8A (1965), quoted in note 53 *supra*. The Reporter's Notes indicate that it was intended that § 8A incorporate the rule of Comment *d* as applied in Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955), *second appeal*, 49 Wash. 2d 499, 304 P.2d 681 (1956). 1 RESTATEMENT (SECOND) OF TORTS § 8A app. (1966).

The language in the *Restatement* indicates that a "knew or reasonably should have known" standard goes to negligent rather than intentional conduct,[56] for intent requires that the actor be substantially certain an injury will result. By holding that an official may not claim good faith immunity if he or she "knew or reasonably should have known"[57] that the action would lead to a deprivation of a federal right, the Supreme Court seems to have acknowledged that section 1983 actions may be brought for negligent acts.[58] Indeed, in *Scheuer v. Rhodes*,[59] one of the cases in which the Court developed the standards for good faith immunity,[60] the action of state officials in sending armed national guardsmen onto the Kent State Campus seems more properly characterized as negligent rather than intentional, as alleged in the complaint.[61] If common law standards of intent and negligence are to be employed, it would seem impossible to establish that the officials knew to a substantial certainty that the guardsmen would fire on the students.[62]

Two recent Supreme Court decisions, *Carey v. Piphus*[63] and *Monell v. Department of Social Services*,[64] lend additional support to the adoption of a negligence standard for section 1983 liability.

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56. 2 RESTATEMENT (SECOND) OF TORTS § 289 (1965):
> The actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising
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> (a) such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would have; and
>
> (b) such superior attention, perception, memory, knowledge, intelligence, and judgment as the actor himself has.

57. Wood v. Strickland, 420 U.S. 308, 322 (1975).

58. If the actor should have known, but did not know, the result of the act, it is difficult to understand how he or she could be found to have known with substantial certainty the consequences that would follow. *See* Brief for American Civil Liberties Union, *Amicus Curiae*, at 9-11, Procunier v. Navarette, 434 U.S. 555 (1978).

59. 416 U.S. 232 (1974).

60. *See* Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1967).

61. The complaint charged that the defendants "intentionally, recklessly, willfully and wantonly" sent guardsmen onto the campus, resulting in the death of three students. 416 U.S. at 235.

62. > Often the only way to effect meaningful change in a pattern of unconstitutional conduct by a government agency, such as a police department, is by extending potential liability to the policy-making officials in that agency. Accordingly, if a negligence theory of liability were not recognized under section 1983, it rarely would be possible to reach such officials, because it is often difficult to prove their active involvement in the unconstitutional conduct.
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> Kirkpatrick, *supra* note 46, at 60-61 (footnote omitted).

63. 435 U.S. 247 (1978).

64. 98 S. Ct. 2018 (1978).

In *Monell*, the Court overturned the portion of the decision in *Monroe* that held municipalities and other local governmental units immune from liability.[65] The Court stated that "there can be no doubt that [section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."[66] In *Carey*, the Court endorsed the award of only nominal damages unless actual damages are proved,[67] stating that the "basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights,"[68] not to deter such deprivations.[69] If compensation for the deprivation of constitutional rights is indeed the purpose of section 1983, it does not seem to be relevant whether that deprivation occurred as a result of a negligent or an intentional act.

The Supreme Court has established a basis for allowing actions based on negligence, but language in three recent decisions indicates that it may not favor such actions.[70] In *Paul v. Davis*,[71] the Court refused to allow a section 1983 action claiming damages for loss of reputation caused by police negligence in mailing a circular identifying the plaintiff as a shoplifter. The Court concluded that no constitutional deprivation had occurred because reputation is not an interest protected by the fourteenth amendment.[72] Mr. Justice Rehnquist, in his opinion for the Court, stated that claims of this type ought to be pursued under state tort law, not section 1983:

> [S]ince it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983.
>
> It is hard to find any logical stopping place to such a line of reasoning. [The plaintiff's] construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment.[73]

Although the result in *Paul* was based on the Court's determina-

65. *Id.* at 2022. The Court's holding was limited to the immunity of municipalities and local governmental units from liability under section 1983 and did not disturb state and federal decisions extending immunity to these entities in other areas of the law.
66. *Id.* at 2041.
67. 435 U.S. at 266.
68. *Id.* at 254.
69. *Id.* at 256.
70. Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976).
71. 424 U.S. 693 (1976).
72. *Id.* at 701.
73. *Id.* at 698-99.

tion that no deprivation of a federal right had occurred, its language has been quoted as support for the position that negligence is not actionable under section 1983.[74]

In another section 1983 action, *Estelle v. Gamble*,[75] the Court held allegations of medical malpractice insufficient to establish cruel and unusual punishment under the eighth amendment. It stated that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[76] The Court noted that deliberate indifference could be "manifested by prison doctors in their response to the prisoner's needs or by prison guards in *intentionally* denying or delaying access to medical care or *intentionally* interfering with the treatment once prescribed."[77]

In dissent, Mr. Justice Stevens criticized the Court's emphasis of intent:

> [B]y its repeated references to "deliberate indifference" and the "intentional" denial of adequate medical care, I believe the Court improperly attaches significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted. Subjective motivation may well determine what, if any, remedy is appropriate. . . . However, whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.[78]

Although *Estelle* requires "deliberate indifference" rather than mere negligence to recover for medical mistreatment of prisoners,[79] it is important to note that the Court focused not on whether

74. Bonner v. Coughlin, 545 F.2d 565, 566 (7th Cir. 1976) (en banc):

> In *Paul v. Davis* . . . the Supreme Court refused to hold that the due process clause of the Fourteenth Amendment and Section 1983 "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims." Bonner does not contend that the guards deliberately took his trial transcript in violation of the due process clause. Rather he asserts that their negligence permitted some one else to take it. As *Paul* explains, the Fourteenth Amendment does not extend to such a claim.

As far as it goes, this reading of *Paul* as turning on the interpretation of the fourteenth amendment is correct. The court then quotes the passage from *Paul* dealing with creating a "body of general federal tort law" from the civil rights statutes, 424 U.S. at 701, and concludes: "If Section 1983 is to be extended to cover claims based on mere negligence, the Supreme Court should lead the way." 545 F.2d at 567.

75. 429 U.S. 97 (1976).
76. *Id.* at 106.
77. *Id.* at 104-05 (emphasis added) (footnotes omitted).
78. *Id.* at 116 (Stevens, J., dissenting) (footnotes omitted).
79. Kirkpatrick, *supra* note 46, at 58 (footnote omitted).

the character of the defendant's act was actionable under section 1983, but on whether a violation of the constitutional prohibition of cruel and unusual punishment had, in fact, occurred. This is analogous to the Court's decision in *Paul* which turned on whether a fourteenth amendment violation had occurred, not on whether the act was intentional or negligent.[80]

Another recent Supreme Court decision contains language which may be construed as restricting section 1983 actions based on negligence. In *Rizzo v. Goode*,[81] the Court held that a federal district judge exceeded his power to provide equitable relief under section 1983 by placing the Philadelphia Police Department under court supervision when a pattern of police misconduct had not been clearly established.[82] Although the Court's decision was based on the scope of federal equitable power, Mr. Justice Rehnquist, writing for the Court, discussed the absence of affirmative misconduct on the part of supervisory officials:

> The theory of liability . . . urged upon us by [plaintiffs] is that even without a showing of direct responsibility for the actions of a small percentage of the police force, [defendants'] *failure* to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in *Hague* and *Medrano*. [Plaintiffs] posit a constitutional "duty" on the part of [defendants] (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in [defendants'] stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983.[83]

While this language suggests that negligence of a supervisory official in supervising and training subordinates may not be sufficient to support liability, it is not central to the Court's decision and thus is not determinative of the issue.

IV. ANALYSIS

The use of an intent-negligence standard as a means of determining the scope of section 1983 actions is deficient in that (1) courts often blur the distinction between intent and negligence,[84]

80. *See* text accompanying notes 71-74 *supra*.
81. 423 U.S. 362 (1976).
82. *Id.* at 373-77, 379-80.
83. *Id.* at 375-76. In the quotation, the Court cited Hague v. CIO, 307 U.S. 496 (1939), and Allee v. Medrano, 416 U.S. 802 (1974), both of which enjoined police harassment of union organizers.
84. *See* notes 87-96 & accompanying text *infra*. The blurring of the distinction between intent and negligence has been used to defeat recovery by deserving plaintiffs in other areas of the law as well. In Moos v. United States, 118 F. Supp. 275 (D. Minn. 1954), *aff'd*, 225 F.2d 705 (8th Cir. 1955), the court pre-

(2) the standard does not provide an effective tool for determining which actions are more properly left to state tort law determination,[85] and (3) it is not a discriminating method of limiting the burden civil rights actions impose on the federal courts.[86]

That the distinction between intent and negligence has been blurred by courts relying on the standard is evident in a recent decision by the Court of Appeals for the Seventh Circuit. In *Bonner v. Coughlin*,[87] the court concluded that section 1983 actions may not be based on negligence[88] but, instead of overruling prior decisions in which it had appeared to approve liability for negligent acts,[89] the court simply reanalyzed its earlier holdings.[90] Thus in *Byrd v. Brishke*,[91] in which some police officers stood by while others beat a suspect, intent was found in their "purposeful nonfeasance"[92] in allowing the beating to continue. Although it may be arguable that an omission to act is intentional if the individual realizes that the consequences are "substantially certain to result,"[93] omissions to act have traditionally been characterized as negligent.[94] For example, in *Howell v. Cataldi*,[95] a case involving a similar fact pattern, the court dismissed the action because the

vented recovery under the Federal Tort Claims Act by holding that the mistaken amputation of plaintiff's left leg rather than his right leg constituted an assault and battery, *i.e.*, an intentional rather than a negligent tort. The Federal Tort Claims Act waives governmental immunity for negligent but not for most intentional torts. *See* 28 U.S.C. § 2680(h) (1976). The court based its conclusion on the premise that nonconsensual surgery results in assault and battery "regardless of lack of intent or negligence." 118 F. Supp. at 276. *See* 38 MINN. L. REV. 890 (1954); 7 VAND. L. REV. 283 (1954).

85. *See* notes 97-114 & accompanying text *infra*.
86. *See* notes 115-19 & accompany text *infra*.
87. 545 F.2d 565 (7th Cir. 1976) (en banc).
88. *Id.* at 567. "[T]he introduction of a general intent yardstick into the determination of whether conduct is State action or has been performed 'under color of state law' does not mean that mere negligence is actionable under Section 1983."
89. Spence v. Staras, 507 F.2d 554 (7th Cir. 1974); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972); Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968).
90. 545 F.2d at 568-69. The court recharacterized its prior holdings in the following manner: Spence v. Staras, 507 F.2d 554 (7th Cir. 1974) (defendants knew of repeated assaults on decedent); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972) ("purposeful nonfeasance"); Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968) (police knew they lacked probable cause to arrest).
91. 466 F.2d 6 (7th Cir. 1972).
92. 545 F.2d at 568.
93. 1 RESTATEMENT (SECOND) OF TORTS § 8A (1965). *See* note 53 *supra*.
94. 2 RESTATEMENT (SECOND) OF TORTS § 284 (1965). Since courts have been reluctant even to hold a defendant negligent for failure to rescue, *e.g.*, a doctor who does not come to the aid of an accident victim, it is doubtful that they would characterize a failure to act as an intentional tort. *See* Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631 (1952).
95. 464 F.2d 272 (3d Cir. 1972).

plaintiff did not allege "wrongful intention or culpable negligence."[96] If an intentional act can be discerned in a failure to act, it seems probable that intent will also be discerned in other acts which courts have traditionally characterized as negligent. In view of this blurring of the line between negligence and intent, the Seventh Circuit's decision not to allow section 1983 actions based on negligence appears meaningless.

Another difficulty with employing an intent-negligence standard is that it does not provide a reliable method of differentiating between claims which are properly cognizable under section 1983 and those which are more appropriately consigned to state tort law.[97] The example that Justice Rehnquist provided in *Paul v. Davis*[98] of an arguable fourteenth amendment claim arising out of a fatality caused by a sheriff's negligent operation of a government vehicle[99] offers a useful starting point for analysis. Even if one accepts Justice Rehnquist's premise that negligence claims of this nature are properly ones for state tort law determination, it does not follow that all negligent torts committed by state officials should be allocated to state law and all intentional torts should be allocated to section 1983. For example, if an on-duty police officer assaults a neighbor whose child has broken the police officer's window, the tort is intentional but it seems improbable that Justice Rehnquist would wish to allow recovery for it under section 1983 any more than for the automobile accident. On the other hand, if a police department has an established policy of permitting high speed chases arising out of minor traffic infractions, it is arguable that those injured in resultant accidents have a fourteenth amendment civil rights claim, if not against the individual police car operator, then against those individuals who established the policy. And, despite the Court's language in *Rizzo v. Goode*,[100] such a claim should arise even though supervisory officials had merely acquiesced in rather than actually established such a policy.

One proposed method of distinguishing between state tort claims and federal civil rights claims is a constitutional duty approach.[101] One commentator has stated that "[n]otions of negligence and intentional conduct tend to obscure the threshold concern in 1983 cases. That concern should be whether a constitutional duty derived from the fourteenth amendment has been breached."[102] Thus in the case in which some police officers stood

96. *Id.* at 279.
97. *See* Paul v. Davis, 424 U.S. 693, 698-701 (1976).
98. 424 U.S. 693 (1976).
99. *Id.* at 698.
100. 423 U.S. 362, 375-76 (1976). *See* note 83 & accompanying text *supra*.
101. Nahmod, *supra* note 5, at 22.
102. *Id.* at 23.

by while others beat a suspect,[103] their nonaction could be characterized as a breach of a constitutional duty to protect citizens from police brutality. The constitutional duty approach was cited with approval by Mr. Justice Stevens when he sat on the Seventh Circuit Court of Appeals.[104]

The constitutional duty approach does not, however, appear to provide a more definitive standard for determining liability under section 1983 than existing standards. Embedded in the concept of a constitutional duty are the two requirements for any cause of action under section 1983: (1) whether the individual was deprived of a federal right and (2) whether the individual causing the injury acted under color of state law.[105] The requirement that the claimant be deprived of a right guaranteed by the constitution or laws of the United States was properly the focus of the Supreme Court's decisions in *Paul v. Davis*[106] and *Estelle v. Gamble*.[107] In *Paul* the relevant inquiry was whether loss of reputation is a deprivation of liberty within the meaning of the fourteenth amendment,[108] not whether the police officers acted negligently or intentionally in disseminating the circular identifying the claimant as a shoplifter. And in *Estelle*, the proper object of the Court's attention was whether a simple incident of medical malpractice violates the eighth amendment ban against cruel and unusual punishment,[109] not whether negligence is actionable under section 1983.

The requirement that the act leading to liability be committed by an individual acting under color of state law also provides a possible means of differentiating between state tort law claims and federal civil rights actions. The injury must result from a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ."[110] However, if the acts are committed in pursu-

103. Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).

104. Bonner v. Coughlin, 517 F.2d 1311, 1318 (7th Cir. 1975), *aff'd on other grounds*, 545 F.2d 565 (7th Cir. 1976) (en banc). Justice (then Judge) Stevens characterized as "broad and somewhat abstract" the issue whether negligence is actionable under section 1983. *Id.*

A constitutional duty on the part of supervisory officials was also a basis for liability in Norton v. McKeon, 444 F. Supp. 384, 387 (E.D. Pa. 1977), and Santiago v. City of Philadelphia, 435 F. Supp. 136, 152 (E.D. Pa. 1977).

105. *See* text accompanying notes 1-2 *supra*.

106. 424 U.S. 693 (1976).

107. 429 U.S. 97 (1976).

108. 424 U.S. at 701.

109. 429 U.S. at 104-05. For a different approach to this issue, see Kirkpatrick, *supra* note 46, at 59-67. He asserts "that the standard of liability under section 1983 should vary depending upon the constitutional claim being asserted." *Id.* at 49.

110. United States v. Classic, 313 U.S. 299, 326 (1941), *quoted in* Monroe v. Pape,

ance of an official duty,[111] it is not necessary that the actions be "officially authorized, or lawful."[112] Although the under color of state law requirement has been construed broadly to include actions of private individuals acting in accordance with customs or usages having the force of state law,[113] it is not clear whether the interpretation would extend to a state officer committing a tort arising in a personal rather than an official context. For example, it is arguable that the on-duty police officer is not misusing power "clothed with the authority of the state" when assaulting a neighbor on a personal matter. Because the tort arises out of a personal grudge, which did not arise in conjunction with an official duty, it may be possible to conclude that liability should be determined under state rather than federal law. Conversely, the misuse—or disuse—of power bestowed by the state is a reason supervisory officials have been held liable for negligence in supervising and training subordinates who have acted to deprive others of their constitutional rights.[114]

Although careful inquiry into whether a constitutional right has been infringed or whether the act was committed by an individual acting under color of state law would lead to results more consistent with the purpose of section 1983, more judicial time would be consumed than if the action were summarily dismissed because it was based on negligence.[115] For that reason, reliance on the intent-negligence standard has been described as a "floodgates" position designed to prevent civil rights actions from inundating the federal courts.[116] The dissent in *Bonner v. Coughlin*[117] stated that "[t]here can be no question but that it performs that task admirably. The same function would be served, however, by rejecting every section 1983 case brought by plaintiffs with last names beginning with letters that come after 'K' in the alphabet."[118] Other criteria, such as the constitutional duty approach,[119] may require some judicial time, but they more effectively redress the deprivation of civil rights—the purpose for which section 1983 was enacted.

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365 U.S. 167, 184 (1961), *overruled in part*, Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978).

111. Monroe v. Pape, 365 U.S. at 184.
112. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970).
113. *Id.* at 162-69.
114. *See* cases cited in note 45 *supra*.
115. For statistics on the number of civil rights actions filed in federal district courts, see note 22 *supra*.
116. Bonner v. Coughlin, 545 F.2d 565, 572 (7th Cir. 1976) (en banc) (Swygert, J., dissenting).
117. *Id.* at 569.
118. *Id.* at 572.
119. Nahmod, *supra* note 5, at 22. *See* text accompanying notes 99-101 *supra*.

V. CONCLUSION

It is unfortunate that the Supreme Court did not take advantage of the opportunity presented by *Procunier v. Navarette*[120] to dismiss as irrelevant the issue of whether negligence is actionable under section 1983. Although elimination of the intent-negligence standard will not assist in reducing the heavy case load imposed by section 1983 suits, it will lead the courts to develop more fully the tests for whether a constitutional right has been infringed and whether an action has been committed under color of state law. Such a development will result in greater fulfillment of the purpose of section 1983. In *Monroe v. Pape*,[121] Justice Frankfurter advocated the elimination of the specific intent requirement by stating, "If the courts are to enforce [section 1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation."[122] The intent-negligence standard serves no purpose other than to obstruct the operation of section 1983 and, consequently, ought to follow the specific intent requirement into the decisional graveyard.

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120. 434 U.S. 555 (1978).
121. 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Serv., 98 S. Ct. 2018 (1978).
122. *Id.* at 207 (Frankfurter, J., dissenting in part). *See* note 9 *supra*.