Federal civil rights actions brought by prison inmates seeking redress of alleged constitutional violations by state prison officials have proliferated in recent years. A significant number of these suits are damage actions brought pursuant to 42 U.S.C. § 1983, alleging violations of the eighth amendment's guarantee of freedom from cruel and unusual punishment. These cases raise some of the most difficult legal issues in the field of civil rights litigation. One question is the sufficiency of allegations of official negligence to support a cause of action in eighth amendment claims brought pursuant to 42 U.S.C. § 1983.
suant to section 1983. This Comment will address that issue, focusing on both statutory and constitutional standards. The analysis will consider: 1) Whether allegations of official negligence are sufficient to state a cause of action under section 1983 in general, and 2) If so, whether negligence is sufficient under the constitutional standard imposed by the eighth amendment.

Judicial confusion is often apparent in opinions dealing with standards of conduct under section 1983. Frequently courts fail to recognize that the issue of statutory standards is both separable and distinct from the question of the requirements imposed by particular constitutional guarantees. The Supreme Court has provided little guidance to resolve this confusion: presented with three opportunities to address the question of the sufficiency of a claim of negligence to support a cause of action brought under section 1983, the Court focused on the requisite constitutional standards in two of the cases, and decided the third, a case in which certiorari was granted specifically to resolve the section 1983 negligence issue, on immunity grounds. Some lower courts have interpreted these deci-
sions to require more than negligence in all section 1983 cases. The Court’s carefully limited opinions cannot be read to confirm or contradict this interpretation. It is equally possible that the decisions are based on other grounds because there is no general standard of conduct under section 1983. In light of the Court’s silence, the safest and most logical conclusion is that it has simply chosen not to address the question.

The controversy surrounding the proper interpretation of the scope of section 1983 centers on the problem of the “constitutional tort.” Those favoring a restrictive interpretation of the statute argue that negligence on the part of state officials can never be sufficient to establish a cause of action under section 1983, even when the negligent act or omission results in the violation of a constitutionally protected right. Proponents of a narrow interpretation of section 1983 make the federalism argument that the statute should not be used to provide remedies for “constitutional torts” since these are problems more properly regulated by the states.

Those who take a broader view of the scope of section 1983 contend that the statute itself establishes no general standard of care; any such standard must turn on the nature of the specific constitutional guarantee. Supporters of this interpretation argue that the drafters of the statute intended section 1983 to be a federal remedy for constitutional torts because Congress perceived something inherently more serious than an ordinary tort in an act or omission by a state official, clothed in the authority of state law, resulting in the deprivation of a constitutional right.

If the statute imposes no restrictions upon actions founded in negligence, possible constitutional standards of conduct must be considered. This issue is especially difficult to resolve in the case of the eighth amendment, since it prohibits the infliction of cruel and unusual punishment.

specific question “[w]hether negligent failure to mail certain of a prisoner’s outgoing letters states a cause of action under section 1983,” id. 559 n.6, the Court based its decision on immunity grounds. Reversing the Ninth Circuit, the Supreme Court ruled in favor of the prison officials and held their good faith immunity defense applicable because no clear first and fourteenth amendment right of freedom from interference with outgoing mail had been judicially established at the time of the alleged infringement. Id. 565. For a brief discussion of federal immunity doctrines, see note 99 infra.

9 See cases cited in note 77 infra.

10 The essential notion is that official misconduct, even that resulting in constitutional deprivations, should be regulated by state law. Section 1983 suits would be allowed only in very special circumstances, such as instances of outrageous conduct. See Shapo, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, 60 Nw. U.L. Rev. 277, 320-29 (1965). See also McCormack, Federalism and Section 1983, 60 Va. L. Rev. 1, 54-55 (1974).

and unusual punishment. It must be determined whether suffering resulting from the negligence of prison officials, rather than from their reckless or intentional misconduct, violates a constitutionally imposed duty of care, and, as such, constitutes cruel and unusual punishment. Lower federal courts diverge in their answer to the question of general requirements applicable to all eighth amendment claims, but converge on the answer to the question of what standards are necessary for medical malpractice claims. The Supreme Court had the opportunity to resolve these legal conundrums in 1976 with its decision in *Estelle v. Gamble*.\(^{12}\) Unfortunately, this decision did little more than approve the standard applied by the great majority of the lower federal courts in medical claims cases; the opinion failed to clarify the proper standard for other eighth amendment actions or for section 1983 suits in general.

This Comment argues that section 1983 does not impose a standard of conduct requirement. It argues further that the requisites of an eighth amendment cause of action may be satisfied by allegations of negligent misconduct in many, though not all, circumstances. The analysis below begins in section II with a discussion of the statutory requirements. This discussion considers the statute’s legislative history, the case law interpreting section 1983, and policy considerations relevant to modern interpretation of its language. Section III examines possible standards imposed by the eighth amendment, considering in brief the development of recent case law concerning eighth amendment actions brought pursuant to section 1983. Following this discussion is an analysis of relevant aspects of *Estelle v. Gamble*, in section IV, including four subsequent lower court decisions. Section V presents a proposed test to determine the sufficiency of negligence in eighth amendment actions. This test is based on the character of the official act or omission and the extent to which the risk of the particular harm suffered is increased by imprisonment.

II. The Statutory Standard

Section 1983 provides that:

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

\(^{12}\) 429 U.S. 97 (1976).
secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.\textsuperscript{13}

The language of section 1983 was originally enacted as the first section of the Civil Rights Act of 1871,\textsuperscript{14} the primary purpose of which was to enforce the fourteenth amendment through the imposition of civil and criminal liabilities\textsuperscript{15} on those who deprived

\textsuperscript{15} Section 1983 is one of the civil liability provisions of the 1871 act. The other sections of the 1866 and 1871 Civil Rights Acts surviving today are 42 U.S.C. §§ 1981, 1982, 1985(3) (civil liability) and 18 U.S.C. §§ 241 & 242 (criminal liability). In full, the 1871 Act provided:

CHAP. XXII.—An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication;" and the other remedial laws of the United States which are in their nature applicable in such cases.

SEC. 2: That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his
person or property on account of any verdict, presentment, or indictment
lawfully asssented to by him, or on account of his being or having been,
such juror, or shall conspire together, or go in disguise upon the public
highway or upon the premises of another for the purpose, either directly or
indirectly, of depriving any person or any class of persons of the equal
protection of the laws, or of equal privileges or immunities under the laws,
or for the purpose of preventing or hindering the constituted authorities of
any State from giving or securing to all persons within such State the equal
protection of the laws, or shall conspire together for the purpose of in any
manner impeding, hindering, obstructing, or defeating the due course of
justice in any State or Territory, with intent to deny to any citizen of the
United States the due and equal protection of the laws, or to injure any
person in his person or his property for lawfully enforcing the right of any
person or class of persons to the equal protection of the laws, or by force,
imimidation, or threat to prevent any citizen of the United States lawfully
entitled to vote from giving his support or advocacy in a lawful manner
towards or in favor of the election of any lawfully qualified person as an
elector of President or Vice President of the United States, or as a member
of the Congress of the United States, or to injure any such citizen in his
person or property on account of such support or advocacy, each and every
person so offending shall be deemed guilty of a high crime, and, upon
conviction thereof in any district or circuit court of the United States or
district or supreme court of any Territory of the United States having
jurisdiction of similar offences, shall be punished by a fine not less than
five hundred nor more than five thousand dollars, or by imprisonment, with
or without hard labor, as the court may determine, for a period of not less
than six months nor more than six years, as the court may determine, or
by both such fine and imprisonment as the court shall determine. And if
any one or more persons engaged in any such conspiracy shall do, or cause
to be done, any act in furtherance of the object of such conspiracy, whereby
any person shall be injured in his person or property, or deprived of having
and exercising any right or privilege of a citizen of the United States, the
person so injured or deprived of such rights and privileges may have and
maintain an action for the recovery of damages occasioned by such injury
or deprivation of rights and privileges against any one or more of the
persons engaged in such conspiracy, such action to be prosecuted in the
proper district or circuit court of the United States, with and subject to the
same rights of appeal, review upon error, and other remedies provided in
like cases in such courts under the provisions of the act of April ninth,
eighteen hundred and sixty-six, entitled "An act to protect all persons in
the United States in their civil rights, and to furnish the means of their
vindication."

Sec. 3. That in all cases where insurrection, domestic violence, un-
lawful combinations, or conspiracies in any State shall so obstruct or hinder
the execution of the laws thereof, and of the United States, as to deprive
any portion or class of the people of such State of any of the rights, privi-
leges, or immunities, or protection, named in the Constitution and secured
by this act, and the constituted authorities of such State shall either be
unable to protect, or shall, from any cause, fail in or refuse protection of
the people in such rights, such facts shall be deemed a denial by such
State of the equal protection of the laws to which they are entitled under
the Constitution of the United States; and in all such cases, or whenever
any such insurrection, violence, unlawful combination, or conspiracy shall
oppose or obstruct the laws of the United States or the due execution
thereof, or impede or obstruct the due course of justice under the same, it
shall be lawful for the President, and it shall be his duty, to take such
measures, by the employment of the militia or the land and naval forces
of the United States, or of either, or by other means, as he may deem nec-
ecessary for the suppression of such insurrection, domestic violence, or com-
Sec. 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the Government of the United States, and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown: Provided, That all the provisions of the second section of an act entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March third, eighteen hundred and sixty-three, which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section: Provided further, That the President shall first have made proclamation, as now provided by law, commanding such insurgents to disperse: And provided also, That the provisions of this section shall not be in force after the end of the next regular session of Congress.

Sec. 5. That no person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution based upon or arising under the provisions of this act who shall, in the judgment of the court, be in complicity with any such combination or conspiracy; and every such juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath in open court that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy; and each and every person who shall take this oath, and shall therein swear falsely, shall be guilty of perjury, and shall be subject to the pains and penalties declared against that crime, and the first section of the act entitled "An act defining additional causes of challenge and prescribing an additional oath for grand and petit jurors in the United States courts," approved June seventeenth, eighteen hundred and sixty-two, be, and the same is hereby, repealed.

Sec. 6. That any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives, for all damages caused by any such wrongful act which such first-named person or persons by reasonable diligence could have prevented; and such damages may be recovered in an action on the case in the proper circuit court of the United States, and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in such action: Provided, That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any
target of the legislation was the Ku Klux Klan, the overall scope of the Act was much broader. The debates show that Congress was not only concerned with punishing those who violated others' constitutional rights; the Act also was intended to remedy the failure of state officials to apprehend, and the inability or unwillingness of some Southern courts to convict and sentence, such offenders. It was for these reasons that Congress provided a federal forum for civil and criminal actions under the Act.

The 1871 Civil Rights Act, encompassing section 1983, reflected a shift in American perceptions of the dangers of abuse of governmental power. The Bill of Rights was adopted in 1791 to protect citizens from potential excesses of a strong federal government. The Reconstruction Era evidenced a new concern—that the states would not afford all citizens the fundamental human rights guaranteed by the Constitution. Congress responded to this new fear, premising "[t]he legislative program of the post-Civil War days... on the belief that the fundamental rights of the individual should be defined and enforced by the federal government."  

The language of section 1983 does not on its face establish any standard of conduct requirement. It is reasonable to conclude that

Sec. 7. That nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; and any offenses heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

APPROVED, April 20, 1871.


16 The Civil Rights Act of 1871 is often referred to as the "Ku Klux Klan Act." Despite the enactment of the fourteenth amendment and the passage of a civil rights statute in 1866, ch. 31, 14 Stat. 27 (1870), conditions in much of the South operated to deprive blacks of their newly-acquired rights, and similarly infringed upon the rights of whites viewed as anti-slavery sympathizers. For discussions of Ku Klux Klan outrages, see, e.g., Cong. Globe 42d Cong., 1st Sess. 155-60, 320-22, 487 (1871); id. app. 15-26, 29-40.

17 See, e.g., Cong. Globe, 42d Cong., 1st Sess. 504 (1871) (remarks of Rep. Pratt); id. 508 (remarks of Rep. Pratt) (1871). See also Note, Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1154 (1977) [hereinafter cited as Section 1983 and Federalism]. “A full reading of the debates compels the conclusion that the Act was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages.” Id.


Congress did not intend to impose any such requirements, because the activities the statute was specifically enacted to prevent resulted in large part from the neglect of law enforcement duties by southern officials. This conclusion is buttressed by an examination of the legislative history of the statute and the state of tort law in 1871. The Supreme Court's recent decision in *Monell v. New York City Department of Social Services* demonstrates the validity and importance of the legislative history of section 1983 to judicial interpretation of the statute.

A. Legislative History

1. The Debates

The Civil Rights Act of 1871 was passed only one month after then President Grant requested emergency legislation to deal with incipient anarchy in parts of the South. During that month, however, Congress heatedly debated the bill. The debates focused on the more radical provisions of the Act, which granted the President special powers, including authorization to send federal troops into a state to ensure the protection of lives and property. Section 1, now codified at 42 U.S.C. § 1983, was the least controversial part of the legislation, but as Justice Douglas pointed out in *Monroe v. Pape*, enough discussion took place with respect to section 1 to ascertain that

one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice,

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23 In pertinent part the President's message read:

A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing law, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

*Cong. Globe*, 42d Cong., 1st Sess. 236 (1871). The President's message was delivered on March 23, 1871; the Civil Rights Act of 1871 was enacted on April 20, 1871.

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.25

Vehement objections to section 1 were voiced by several members of both the House and the Senate. The thrust of these objections was expressed by one speaker who charged:

The first section of the bill . . . vests in the Federal courts jurisdiction to determine the individual rights of citizens of the same State; a jurisdiction which of right belongs only to the State tribunals, and to rob them of it by the power of the Federal Government is an infraction of the Constitution so flagrant that the people will hold to a strict accountability those men and that party who perpetrate the outrage.26

In spite of such objections, the views of another speaker prevailed:

Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and . . . this may be done . . . [b]y giving him a civil remedy in the United States courts for any damage sustained in that regard.27

These statements indicate that a broad remedy was intended, as both factions understood. The intended breadth of the Statute is further evidenced by the following statement by a supporter of the bill:

This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.28

25 365 U.S. at 180. It is also important to note that Monell carefully analyzed the legislative history of § 1 of the 1871 Act, despite the relative paucity of debate. 436 U.S. 658, 683-89 (1978). See note 22 supra.


27 Id. 477 (remarks of Rep. Dawes) (emphasis added).

28 Id. app. 68 (remarks of Rep. Shellabarger).
The speeches of several debaters support the idea that section 1 provided a remedy for constitutional deprivations caused by negligent as well as by reckless or intentional conduct. In the words of an opponent, law enforcement officials could be held liable "for a mere error in judgment." even though "as pure in duty as a saint and as immaculate as a seraph." Senator Thurman, perhaps the most vocal opponent of the 1871 Act's civil liability provision, warned:

It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts. . . .

This interpretation is not merely an example of the hyper-active imaginations of the Bill's detractors. In the words of a supporter:

Whatever they be, he . . . who invades, trenches upon, or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers . . . all there is in the first and second sections of this bill.

Moreover, there is no reason to read into the statute limitations that do not appear on its face. In the words of one of the debaters, the legislation was "neither defined nor specific, thus leaving the widest latitude to those who may be called on to execute it." Senator Thurman remarked: "there is no limitation whatsoever upon the

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30 Id.
31 Id. app. 216 (emphasis added).
32 Id. 476 (remarks of Rep. Dawes).
33 Mention was made in the debates of the need to construe the language of §1 liberally. Id. app. 68 (remarks of Rep. Shellabarger, quoting 1 J. Story, Commentaries on the Constitution of the United States §429 (1833)); see Monell v. Department of Soc. Serv. of New York, 436 U.S. 658, 683-86 (1978).
terms that are employed, and they are as comprehensive as can be used.” Finally, Mr. Dawes, a strong supporter of the bill, expressed his view of the legislation as follows:

The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. . . . No subject for legislation was ever brought before the American Congress so broad and comprehensive. . . .

It has been suggested that even if section 1983 does permit actions based on negligence, it was intended only to apply to special circumstances, primarily involving rights of blacks. It is undeniable that the legislation was prompted by the special situation of the blacks in the South, but it is unnecessary to seek contemporary analogs to justify using section 1983 to its fullest extent. None of the other civil rights amendments or statutes have been so interpreted, and none of the courts dealing with section 1983 to date have felt so constrained. One positive factor noted by one of the Act's opponents was articulated as follows: “[T]here is one good feature in this bill; that is, it applies to all . . . .” A supporter stated: “I would legislate to meet apprehended as well as existing conditions. I would make a law applicable alike to every part of the country and to be permanently upon the statute-book.”

In summary, the legislative history of section 1983 demonstrates that the statute was intended to provide a far-reaching remedy for all deprivations of federally protected rights. The language of the debates indicates that negligent acts or omissions resulting in constitutional deprivations were considered sufficient to subject state officials to liability.

35 Id. app. 217 (remarks of Sen. Thurman).
36 Id. 475.
37 See Shapo, supra note 10, at 320-29; Section 1983 and Federalism, supra note 17, at 1137.
38 See id. 1137.
40 Id. See also text accompanying note 28 supra.
2. Tort Law in 1871

The conclusions reached above are strengthened by the fact that negligence was a commonly known element of tort law when the Civil Rights Act of 1871 was passed.

Negligence, both as an element of specific types of tortious conduct and as an independent tort, achieved full recognition as early as 1825.\textsuperscript{41} By 1871, numerous cases held persons liable in civil actions based on negligent misconduct—both for affirmative acts and for omissions.\textsuperscript{42} A cause of action against holders of public office dates back to a much earlier period.\textsuperscript{43} One of the oldest forms of negligence liability was the liability “of those who professed competence in certain callings.”\textsuperscript{44} The doctrine achieved full bloom in Blackstone’s Commentaries.\textsuperscript{45} It was “stated in terms that [made] everyone who profess[ed] a common calling liable for neglect, whether by act or omission.”\textsuperscript{46} Included among those considered to have a “common calling” were sheriffs and other holders of public office.\textsuperscript{47} Blackstone specifically addressed the question of official negligence in his treatment of “public wrongs” in volume four of the Commentaries.\textsuperscript{48} The rule set forth reads as follows: “[T]he negligence of public officers intrusted with the administration of justice, as sheriffs, coroners, constables, and the like, . . . makes the offender liable to be fined; and in very notorious cases will lead to a forfeiture of his office, if it be a beneficial one . . . .”\textsuperscript{49}

This traditional liability of sheriffs and other public officials for negligent acts or omissions strengthens the proposition that Congress intended to extend civil liability under the first section of the 1871 Act for negligence. Many of the legislators had legal train-

\begin{footnotes}
\item[42] \textit{Id.} 199-201. The existence of a tort cause of action for negligence was dealt with in considerable detail in F. Hilliard, \textit{The Law of Torts or Private Wrongs} 124-30 (1859), an early textbook on American tort law published in 1859, 12 years before the enactment of the original version of § 1983.
\item[43] \textit{Id.} 189-90.
\item[44] \textit{Id.} 185.
\item[45] 3 W. Blackstone, \textit{Commentaries} \textsuperscript{*}164, \textit{cited in} Winfield, \textit{supra} note 41, at 189.
\item[46] Winfield, \textit{supra} note 41, at 189.
\item[47] 3 W. Blackstone, \textit{supra} note 45, at \textsuperscript{*}164.
\item[48] 4 W. Blackstone, \textit{Commentaries} \textsuperscript{*}140.
\item[49] \textit{Id.} (emphasis in original). In a related footnote Blackstone stated: “A judge is not indictable for an error in judgment; but this rule extends only to judges in courts of record and not to ministerial officers.” \textit{Id.} n.70 (quoting W.O. Russell, \textit{A Treatise on Crimes and Misdemeanors} \textsuperscript{*}200).
\end{footnotes}
ing and presumably were fully aware of the legal significance of what they were doing; Blackstone was cited as authority several times during the course of the debates. Once again, the logic of a straightforward reading of the statute is apparent: Congress did not include a standard of conduct requirement in the statute because it did not intend to foreclose actions based on negligence. Given this analysis of the legislative history of section 1983, it is important to examine how courts have interpreted the statute.

B. Judicial Interpretation of Section 1983

1. The First Ninety Years

Although there were some exceptions, the initial chapter of section 1983’s judicial history was characterized by decisions that interpreted the language of the statute very narrowly, thereby severely limiting the scope of its application. These decisions evidenced a return by the federal judiciary to a protective attitude toward states’ rights, an outlook clearly at variance with the belief of the statute’s drafters that the time had come for the federal government to protect the civil rights of all Americans.

The two principal limitations imposed by the courts were accomplished through restrictive interpretations of the scope of the protections offered by the fourteenth amendment and the meaning of the “under color of law” language of section 1983. The Slaughterhouse Cases “limited the interests protected by the amendment to only those rights correlative with the existence of national government, effectively excluding almost all civil rights from its purview.” A series of cases interpreting the phrase “un-
der color of law" held that conduct by state officials in excess of their authority was not within the statute. "Thus, that very lawlessness of government agents the prevention of which had been the primary object of the Act of 1871 was immunized from federal sanction." It is significant, however, that, even during this period of judicially-imposed limitations upon section 1983, there were no decisions restricting the statute's reach through the imposition of standard of conduct requirements.

In the 1940's these court-erected barriers began to fall. In *United States v. Classic*, the Supreme Court held that "[m]isuse of power, possessed by virtue of state law, ... is action taken 'under color of' state law." In *Screws v. United States*, the Court reaffirmed this interpretation, stating, "[a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." Although both *Classic* and *Screws* were cases brought pursuant to the criminal liability provisions of the 1871 Act, this new interpretation of "under color of" state law set the stage for the reemergence of section 1983 as a means for obtaining civil redress of deprivations of civil rights. The gradual incorporation of various of the guarantees found in the Bill of Rights into the fourteenth amendment began shortly thereafter, thereby expanding the protections to which citizens of the several states were entitled under the federal constitution.

2. *Monroe v. Pape*

In 1961, ninety years after the original language of the statute was enacted, the modern phase of litigation under section 1983 began with the Supreme Court's decision in *Monroe v. Pape*. The *Monroe* plaintiffs were six black children and their parents who brought a section 1983 suit alleging violations of their fourth amend-

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56 Id. 1160-61; see id. 1160 n.138.
57 313 U.S. 299 (1941).
58 Id. 326.
59 325 U.S. 91 (1945).
60 Id. 111. In dictum, Justice Douglas stated that "[t]he fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." Id. 108-09. This language is dictum, and at any rate, when it was written the eighth amendment had not yet been incorporated into the fourteenth. See Robinson v. California, 370 U.S. 660 (1962). Thus, although a state prior to incorporation had certain obligations to prisoners under the due process clause, it is conceivable that activities that were clear violations of the provision against cruel and unusual punishment would not have violated a state's due process duty to its prisoners. See text accompanying notes 113-26 infra.
The defendants were the City of Chicago and thirteen police officers. The Court partially limited the scope of section 1983 by holding that the City was not a “person” within the meaning of the statute and therefore was not subject to suit, because “Congress did not undertake to bring municipal corporations within the ambit of [section 1983].” This particular holding, however, has since been overruled.

An element of the decision that was far more significant in expanding the applicability of section 1983, and that is particularly relevant to this inquiry into possible statutorily-mandated standards of conduct, was the Court’s ruling that the plaintiffs had a valid cause of action against the defendant police officers. The Court based this decision on a reaffirmance of the Classic and Screws definition of “under color of” state law, and on the finding that the legislative history of section 1983 showed that plaintiffs were not barred from bringing suit under the federal statute merely because state law afforded them an adequate remedy.

This disregard of the adequate state remedy requirement sparked a great deal of controversy. Justice Douglas, writing for the Court, supported this conclusion by stating: “It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”

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62 The plaintiffs alleged that
13 Chicago police officers broke into [their] home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. [They] further allege[d] that Mr. Monroe was then taken to the police station and detained on ‘open’ charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him.


63 In later years the lower federal courts extended this exclusion to states and institutions controlled by state and local governments.

64 365 U.S. at 187.

65 The Monroe limitation of the definition of a “person” under §1983 was overruled in the Court’s recent decision in Monell v. Department of Soc. Serv. of New York, 436 U.S. 658 (1978). See note 22 supra.


67 Id. 183.

68 Id. It is now well settled that exhaustion of state remedies is not a prerequisite to §1983 actions. See Section 1983 and Federalism, supra note 17, at 1264 & n.1. For a general discussion of exhaustion, see id. 1264-74.
The most significant language in *Monroe*, in terms of resolving the question of what standards of conduct are required by the statute, was Justice Douglas' description of the federal remedy provided by section 1983:

In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." . . . We do not think that gloss should be placed on [section 1983] which we have here. The word "wilfully" does not appear in [section 1983]. Moreover, [section 1983] provides a civil remedy, while in the *Screws* case we dealt with a criminal law. . . . Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.69

Some lower courts have given this language an extremely narrow reading, saying that it means only that section 1983 does not require specific intent to deprive an individual of his constitutional rights.70 Such an interpretation ignores the breadth of the emphasized language: "liability for the natural consequences of [one's] actions" encompasses more than a lack of specific intent. Critics of this more straightforward reading argue that such a broad interpretation is incompatible with a federal system. Justice Harlan's concurring opinion in *Monroe* provides an effective response to this argument. Justice Harlan stated:

One can agree . . . that Congress had no intention of taking over the whole field of ordinary state torts . . . without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern.72

3. After *Monroe*: The Search for a Standard

In the years following the Supreme Court's decision in *Monroe v. Pape*, the lower federal courts generally applied the opinion's language broadly.73 Many agreed with the view that:

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69 Id. 187 (emphasis added).
72 Id. 193 (Harlan, J., concurring).
73 See Shapo, supra note 10, at 297-319.
The Act prescribes two elements for recovery: (1) the conduct complained of must have been done by some person acting under color of law; and (2) such conduct must have subjected the complainant to the deprivation of rights, privileges, or immunities secured to him by the Constitution and laws of the United States.  

A few lower courts expressed misgivings about allowing section 1983 actions based on negligent, rather than intentional or reckless, misconduct.  Some took pains to find that the facts of particular cases evidenced more than "simple negligence," while others simply held that negligence alone would not suffice under the statute, despite proof of constitutional deprivations.  Some of these courts expressed the fear that allowing actions for constitutional deprivations resulting from official negligence would convert section 1983 into a federal torts statute that would thereby infringe upon state power.  These decisions ignore the plain meaning of the language

74 Howell v. Cataldi, 464 F.2d 272, 279 (3d Cir. 1972). See also, e.g., 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); Kish v. Milwaukee, 441 F.2d 901, 904 (7th Cir. 1971); Batista v. Welr, 340 F.2d 74, 79 (3d Cir. 1965); Stringer v. Dilger, 313 F.2d 536, 540 (10th Cir. 1963); Marshall v. Sawyer, 301 F.2d 639, 649 (9th Cir. 1959). Cf. Puckett v. Cox, 456 F.2d 233, 234-35 (6th Cir. 1972) ("It is incorrect as a general rule . . . to state that the negligent conduct of a person acting under color of state law cannot be the basis for relief under § 1983."); 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) (defendants held "subject to suit under § 1983 for any negligent breach of duty that may have caused appellant to be subjected to a deprivation of constitutional rights").

75 See, e.g., Palmigiano v. Mullen, 491 F.2d 978, 980 (1st Cir. 1974); Brown v. United States, 486 F.2d 284, 287 (8th Cir. 1973).

76 See, e.g., Parker v. McKeithen, 468 F.2d 553, 556 n.8 (5th Cir.), cert. denied, 419 U.S. 838 (1974); Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970).


78 Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978), provides an example. The case involved a § 1983 claim based on the due process clause of the fourteenth amendment. The majority opinion relied heavily on Paul v. Davis, 424 U.S. 693 (1976), but instead of deciding the case on grounds of the due process clause alone as in Paul, the circuit court ruled on the sufficiency of negligence under § 1983. In Paul, the Supreme Court held that the plaintiff had not established a violation of a specific constitutional guarantee. He could not rely on the fourteenth amendment as a general federal tort law absent the showing of such a deprivation. The Bonner majority not only held that the plaintiff in that case had not established the violation of a constitutional right, but that negligent conduct is "not of sufficient magnitude to constitute a deprivation of rights under Section 1983." 545 F.2d at 567. To allow § 1983 actions based on negligence, the court stated, would cause federal courts to "be inundated with state tort cases." Id. 568. Dissenting Judge Swygert pointed out the fallacies of this conclusion. See text accompanying note 92 infra.
of section 1983 and Justice Douglas' language in *Monroe v. Pape*, as well as the logic of Justice Harlan's distinction between ordinary torts and official torts resulting in the deprivation of constitutionally-protected rights.\(^7^9\)

The confusion that subsequently developed over the sufficiency of negligence to support a section 1983 action was due in part to the failure of many courts to articulate clearly whether decisions in section 1983 cases were based on statutory or constitutional interpretations. In some cases, however, the courts recognized that the question whether negligence is sufficient to state a cause of action under section 1983 is distinct and separable from the question whether negligence is sufficient to state a cause of action under the particular constitutional guarantee that has allegedly been violated. The legislative history demonstrates that this is clearly the best mode of analysis. These latter opinions evidenced judicial comprehension of the complexity of the two issues and a careful framework of analysis, properly concluding that section 1983 does not preclude actions based on allegations of official negligence. For example, in *Navarette v. Enomoto*, the Ninth Circuit made it clear that section 1983 was not to be interpreted to impose any general standard of conduct. In so doing the court stated a rule that this Comment concludes is appropriate for all section 1983 cases: "A 1983 plaintiff must show that he has been deprived of a federally protected right by reason of official conduct." Once a constitutional deprivation is established, "the plaintiff's allegations that state officials negligently deprived him of those rights state a cause of action." This same notion was expressed by the District of Columbia Circuit in *Carter v. Carlson*: "[A state official is] subject to suit under § 1983

\(^7^9\) Monroe v. Pape, 365 U.S. 167, 187 (1961); see note 69 supra & accompanying text. The Fourth Circuit has pointed out that "constricting the possibility of recovery under section 1983 is consistent with neither the plain language of the act nor the mandate to read it 'against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" Jenkins v. Averett, 424 F.2d 1228, 1233 (4th Cir. 1970) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

\(^8^0\) 365 U.S. at 193 (Harlan, J., concurring); see text accompanying note 72 supra.

\(^8^1\) 536 F.2d 277 (9th Cir. 1976), rev'd on other grounds sub nom. Procunier v. Navarette, 434 U.S. 555 (1978).

\(^8^2\) 536 F.2d 277, 281 (9th Cir. 1976).

\(^8^3\) Id. 282. The court also stated that § 1983 "places no narrow limitation on the nature or quality of the conduct which makes it actionable, but concerns itself entirely with the consequences of that conduct." Id. 281.

for any negligent breach of duty that may have caused [the plaintiff] to be subject to a deprivation of constitutional rights."  

Unfortunately, the Supreme Court's decision in *Estelle v. Gamble,* an eighth amendment medical mistreatment case brought pursuant to section 1983, has been interpreted by a few lower courts to require a section 1983 plaintiff to allege more than mere negligence. As discussed more fully in section IV, infra, *Estelle* was decided on eighth amendment, rather than statutory, grounds. The validity of this conclusion is apparent in the Supreme Court's grant of certiorari during the succeeding term to decide the specific question of the sufficiency of negligence to support a cause of action under section 1983. This case, *Procunier v. Navarette,* however, did not resolve the issue, because it was decided on immunity grounds.

The case law demonstrates that courts have not resolved the question of the sufficiency of allegations of negligence to state a cause of action under section 1983. The better view is that the statute imposes no general standard of conduct requirement; the sufficiency of allegations is determined on a case-by-case basis.

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A better analysis is found in *Hampton v. Holmesburg Prison Officials,* 546 F.2d 1077 (3d Cir. 1976). The Third Circuit used the *Estelle* standard properly—i.e., to determine whether a constitutional violation could have been established by the complaint's allegations.

It is possible that the court in *Gamble v. Estelle,* the remand of *Estelle v. Gamble,* might have reached the same decision under a properly applied constitutional analysis. The distinction between a statutory and constitutional analysis, however, could affect the decision in other cases.


Many courts have held negligence actionable under § 1983, although some have subsequently held otherwise. See text accompanying notes 184-209 infra. For cases holding negligence sufficient to state a cause of action under § 1983, see, e.g., *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) ("plaintiff's allegations that state officials negligently deprived him of [constitutional] rights state a cause of action"); *Byrd v. Briske,* 466 F.2d 6, 10 (7th Cir. 1972); *Roberts v. Williams,* 456
ficiency of negligence should turn on the nature of the particular constitutional guarantee in question. Those courts that have held otherwise have misread *Monroe v. Pape*, and, more importantly, have ignored the legislative history of the statute.

**C. Policy Considerations with Respect to Section 1983 Negligence Actions**

Several policy reasons have been suggested in support of a narrow reading of section 1983. One commonly asserted justification is the need to reduce the federal courts’ caseload. This is hardly a viable argument, however. There is no guarantee that elimination of negligence as a foundation for section 1983 claims would have a significant effect on the caseload. The result, for example, might well be a simple terminology change, at least in the initial complaint stage. A more important consideration in opposition to the goal of judicial economy has been pointed out by Judge Swygert of the Seventh Circuit:


The decision whether to allow a plaintiff to proceed with a § 1983 action based on official negligence is often made in response to a motion to dismiss for failure to state a claim upon which relief can be granted, *Fed. R. Civ. P. 12(b)(6)*, or a motion for summary judgment, *id. 56(c)*. If the Supreme Court were to hold negligence insufficient and adopt a standard such as deliberate indifference, see text accompanying notes 86-88 supra, for all § 1983 cases, it is likely that the result would be a simple change in terminology. It is unlikely that courts would often be able to apply this fine legal distinction to ascertain either that the facts alleged did not state a cause of action, see *Fed. R. Civ. P. 12(b)(6)*, or that no genuine issue of material fact existed, see *id. 56(c)*. But see Gamble v. Estelle, 554 F.2d 653 (5th Cir. 1977), cert. denied, 434 U.S. 974 (1977). This determination would be even more difficult in pro se cases, which account for a substantial part of federal litigation, particularly in prisoner cases. See Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, in Prisoners' Rights* (M. Hoit & M. Hermann eds. 1972). “As the Court unanimously held in *Haines v. Kerner*, 404 U.S. 519 . . . a pro se complaint, ‘however inartfully pleaded,’ must be held to ‘less stringent standards than formal pleadings drafted by lawyers’ . . . .” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

If judicial economy is the goal, an equally unappealing but much more effective way of achieving it would be to change the in forma pauperis rules, see note 1 supra. See also *Limitation of State Prisoners' Civil Rights Suits*, supra note 1, at 119-22. Without the ability to proceed in forma pauperis many prisoners and other indigents would be unable to bring suit. *Id. 116* (citing Bailey, *The Realities of Prisoners’ Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 Loy. Cat. L.J. 527, 530 (1975)).
The distinction between negligence and intentional conduct... has no explanatory power either in determining whether the plaintiff's interest which he alleges has been infringed is protected under the Constitution or whether the defendants' conduct is action under color of state law. It is relied upon... to prevent the inundation of the federal courts with state tort claims. There 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. Mere efficiency is not enough to justify a dichotomy that screens out cases which are obviously within the ambit of the injuries for which Congress intended to provide a remedy in section 1983.92

Judge Swygert's position is well taken. Not only is judicial economy an improper motive for restricting the scope of a congressionally-created remedy, but excluding negligence claims from section 1983 actions does not prevent the statute from serving as a federal torts law. Generally, "[i]ncluded under the head of torts are a miscellaneous group of civil wrongs, ranging from simple, direct interferences with the person... up through various forms of negligence." 93 Therefore, even if negligent acts or omissions are excluded from its purview, section 1983 will still serve as a federal torts statute. There is no rational, principled basis for excluding negligence actions alone.

The contention that negligence actions should be the exclusive domain of the state courts is equally unacceptable. This federalism question was debated in Congress in 1871.94 The issue is the acceptability of the federal regulation of any type of conduct of state
officials. The majority of the members of both Houses of Congress found that the danger that fundamental rights would not be protected in the absence of the legislation was compelling enough to overcome objections based on principles of federalism. It is not for the courts to overrule this decision by resurrecting the argument to support an ultimately artificial distinction among types of constitutional torts. The key, as Justice Harlan noted in 1961, is that Congress perceived something special about tortious conduct resulting in the deprivation of a federally protected right. The infringement on state jurisdiction resulting from permitting tort suits to be brought in the federal courts is outweighed, therefore, by the need to provide an unquestionably impartial forum in which to litigate the denial of constitutional rights.

One argument offered for excluding negligence from section 1983 is that intentional or reckless conduct does more violence to the Constitution than does negligent misconduct; the intentional infringement of another's constitutional rights is a greater attack upon the particular constitutional guarantee, and, as such, is entitled to greater protection than a negligent infringement of that same right. Although this is a more viable argument than either judicial efficiency or federalism, it is not convincing. The debates reveal that the primary focus of concern in the enactment of what

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95 See text accompanying note 72 supra.
96 Protection against the violation of constitutional rights by public officials is particularly important:
Any misuse of public authority threatens the equilibrium of a system resting so fundamentally on the consent of the governed, but the threat is most acute when the misconduct injures a citizen directly—especially if it denies him a constitutionally protected right.

Nowhere is this threat more dangerous than in the administration of criminal justice, where large numbers of society's least powerful members confront awesome governmental power. The unlawful arrest, the unjustified search, the prosecution based on evidence known to be false, the mistreatment by a jailer—all victimize the most vulnerable of the citizenry. Their individual liberty, privacy, and physical well-being are the initial casualties.


97 See, e.g., Shapo, supra note 10, at 326-27. Shapo suggests that the increased use of § 1983 as a basis for civil rights suits has led to "the development of a federal common law without a correspondingly compelling federal interest." Id. It is difficult to understand why the federal government has no compelling interest in securing the rights guaranteed by the United States Constitution and Bill of Rights. Indeed, one of the primary functions of a federal government should be to enforce federal rights. In the words of Representative Perry, responding to similar objections in 1871: "It is clear that rights, privileges, and immunities under the Constitution and laws of the United States are proper subjects for the jurisdiction of the Federal courts. It appears to me so clear that I must ask pardon for having argued it." CONG. GLOBE, 42d Cong., 1st Sess. app. 79 (1871) (remarks of Rep. Perry).
is now section 1983 was the harm, however incurred, to the individuals whose rights were violated, not any conception of the damage done to the Constitution by those who deliberately ignored its precepts. 98

Another fallacious argument offered against holding negligence actionable under section 1983 is that the possibility of incurring negligence liability will deter qualified, competent persons from holding state office or being employed by the state. As long as one takes reasonable steps to ensure that he fulfills the duties inherent in his position he need not fear liability. Before a state official can be held liable, negligence must be shown; presumably competent individuals will seldom unreasonably deprive others of constitutional rights. Moreover, federal immunity doctrines 99 protect state

98 See text accompanying notes 23-40 supra.

99 Since its decision in Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court has ruled in several cases that the immunities available to governmental officials at common law are available in § 1983 actions. In Pierson v. Ray, 386 U.S. 547 (1967), the Court held that police officers were entitled to a "good faith and probable cause" defense, id. 556, in § 1983 actions. This defense, however, gave rise to a qualified rather than an absolute immunity from suit. Scheuer v. Rhodes, 416 U.S. 232 (1974), extended this defense to high state executive officials, but, as in Pierson, the Court declined to hold these officials absolutely immune, stating that, "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion, and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action." Id. 247.

Finally, in Wood v. Strickland, 420 U.S. 308 (1975), the Court held that school administrators were entitled to the same type of qualified immunity. This immunity from § 1983 damages would be lost only if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." Id. 322. See also O'Connor v. Donaldson, 422 U.S. 563 (1975).

Last term the Supreme Court applied the standards developed in Pierson, Scheuer, and Wood to prison administrators in Procunier v. Navarette, 434 U.S. 555 (1978), a case involving an alleged deprivation of a prisoner's first and fourteenth amendment right to freedom from interference with his outgoing mail. Although certiorari was granted to resolve the question whether allegations of negligent deprivations of constitutional rights are actionable under § 1983, see note 8 supra, the Court based its decision on immunity grounds, finding that at the time of the alleged deprivation "there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners." 434 U.S. at 565. The Court held that "[a]s a matter of law, therefore, there was no basis for rejecting the immunity defense on the ground that petitioners [state officials] knew or should have known that their alleged conduct violated a constitutional right." Id. Chief Justice Burger dissented in an opinion stating that the Court should have decided the negligence question. Id. 567-68 (Burger, C.J., dissenting). Justice Stevens also dissented, but for a different reason. He argued that the Court "acted unwisely in reaching out to decide the merits of an affirmative defense before any evidence [had] been heard." Id. 674 (Stevens, J., dissenting). Previously, immunity had been viewed as an issue for the jury. See Section 1983 and Federalism, supra note 17, at 1211 n.126.

For an overall review of developments in federal immunities law to date, see Butz v. Economou, 98 S. Ct. 2894 (1978); Freed, Executive Official Immunity for
officials in instances where the constitutional right in question is not clearly established at the time of the alleged deprivation. As the Supreme Court recently decided in *Procunier v. Navarette*, there is no cause of action for negligence when the official could not have known of the existence of the right. Thus, recovery for negligent misconduct is possible only in cases of neglect of duties related to clearly established constitutional rights. An individual who is not willing to assume responsibility for violating clearly established constitutional rights is hardly a desirable public servant. As the Second Circuit expressed so aptly in *Wright v. McMann*:

We are not moved by the suggestion that if we uphold liability today competent persons tomorrow will refuse to become superintendents, as the title is presently designated. In the unlikely event that a prospective superintendent in fact turns down an offer for fear of personal liability, we think that the position is probably better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit.

All of the previously advanced policy reasons for limiting the scope of section 1983 are in conflict with the intended purposes of the statute. As the Supreme Court noted in *Monell v. Department of Social Services of New York*, Representative Shellabarger made the following statement with respect to section 1983:

This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally

*Constitutional Violations: An Analysis and a Critique*, 72 NW. L. Rev. 526 (1977). It should be noted that the question whether the defendants are immune from damages is separable from the question whether negligence is sufficient to support a cause of action in a § 1983 suit. In *Navarette*, both Justice White, writing for the majority, and Justice Stevens, dissenting, assumed without deciding that negligent misconduct violates § 1983. 434 U.S. at 569 n.4 (Stevens, J., dissenting). But see *Bogard v. Cook*, 536 F.2d 399 (5th Cir. 1978). In *Bogard* the plaintiff's ability to sue the defendant officials depended on the second prong of the *Wood* test, because the law was unclear at the time of the alleged constitutional deprivation. The court held that, with respect to this subjective standard, "*Navarette* squarely establishes that proof of simple negligence is not enough to pierce an official's immunity under § 1983." *Id.* 411.

102 *Id.* 136. A supervisor's potential liability is further limited by the lack of respondeat superior in § 1983 actions. A supervisor can only be held liable for his own negligence; he is not responsible for the negligence of those he supervises. See *Section 1983 and Federalism*, supra note 17, at 1207.
and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people . . . . Chief Justice Jay and also Story say:

"Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws."—1 Story on Constitution, sec. 429.104

This is the spirit in which the statute should be interpreted.

III. THE CONSTITUTIONAL STANDARD: THE EIGHTH AMENDMENT

The preceding section of this Comment has argued that section 1983 imposes no general standard of conduct requirement. Given this conclusion, the actionability of claims based on official negligence must turn on the nature of the particular constitutional guarantee in question and on the character of the deprivation. It is therefore appropriate to consider whether a standard of conduct is incorporated within the eighth amendment.

The eighth amendment, the origins of which can be traced to the Magna Carta,105 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."106 The ban on cruel and unusual punishments was intended by the original English drafters as a prohibition of disproportionate punishments, but was originally interpreted in America as a prohibition of cruel methods of punishment.107 This restric-
tive view of the amendment's prohibitions was expanded by the Supreme Court in the early twentieth century to include a prohibition of disproportionate punishments. In *Weems v. United States*, the Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." In determining what constitutes cruel and unusual punishment the Supreme Court has focused on the gravity of the harm suffered. Chief Justice Warren stated in *Trop v. Dulles* that "[t]he amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society."

It is difficult, however, to translate the notion of contemporary standards of decency into a positive statement of what the eighth amendment actually requires. The amendment's deceptively simple language conceals complex concepts that are not easily grasped. Two such concepts—the constitutional duty imposed by the eighth amendment and the sufficiency of an allegation of negligence to support a claim of violation of the cruel and unusual punishment provision—are discussed below.

### A. The Eighth Amendment Duty of Care

It was apparently assumed by the drafters of the Constitution that the inherent powers of government included the punishment of lawbreakers. The framers of the Bill of Rights accepted the existence of this power but sought to prevent its abuse by prohibiting cruel and unusual punishments. Clearly, imprisonment in and of itself does not violate the eighth amendment prohibition.

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109 Id. 367.
111 Id. 101.

For a general explanation of a methodology for deciding what the eighth amendment requires, see Radin, *The Jurisprudence of Death: Evolving Standards For the Cruel and Unusual Punishments Clause*, 126 U. PA. L. Rev. 989 (1978). Radin's discussion is basically concerned with the means of punishment and its proportionality. The focus of this Comment is on what Radin terms "nonjudicial discretion," *id.* 995, by which the eighth amendment places limits on "official discretion to carry out otherwise permissible punishment." *Id.*

112 The power to punish appears several times in the Constitution. E.g., U.S. Const. art. 1, § 3, cl. 6; U.S. Const. art. 1, § 8, cl. 6, 10; U.S. Const. art. 3, § 3; U.S. Const. art. 4, § 2, cl. 2.
The nature of incarceration as a punishment, however, makes it necessary for the government to take affirmative steps to provide basic necessities of life to those it imprisons. When the government denies fundamental essentials to prisoners, incarceration as a form of punishment becomes cruel and unusual and therefore unconstitutional. As the Supreme Court stated in *Estelle v. Gamble*,115 "it is but just that the public be required to care for the prisoner who cannot by reason of the deprivation of his liberty, care for himself." 116

The constitutional duty of the state to provide prison conditions comporting with fundamental human rights and contemporary standards of human dignity was expressed by the Sixth Circuit as follows:

An individual incarcerated, whether for a term of life for the commission of some heinous crime, or merely for the night to “dry out” in the local drunk tank, becomes both vulnerable and dependent upon the state to provide certain simple and basic human needs. Examples are food, shelter, and sanitation. Facilities may be primitive but they must be adequate. Medical care is another such need. Denial of necessary medical attention may well result in disabilities beyond that contemplated by the incarceration itself. The result may be crippling injury . . . [or] the very deprivation of life itself, since, restrained by the authority of the state, the individual cannot himself seek medical aid or provide the other necessities for sustaining life and health.117

Because of the inherent attributes of prison life, an affirmative duty to provide adequate food, shelter, medicine, protection, and other essentials to prisoners is a constitutional mandate implicit in the eighth amendment. Thus in *Wright v. McMann*,118 the Second Circuit recognized that even prisoners in segregation have rights to adequate heat, light, and sanitation; 119 in *Estelle v. Gamble*,120 the Supreme Court held that “the government [has an] obligation to provide medical care for those whom it is punishing

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116 Id. 104 (quoting Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291 (1926)).
118 387 F.2d 519 (2d Cir. 1967).
119 Id. 526.
120 429 U.S. 97 (1976).
by incarceration”; and in Woodhous v. Virginia, the Fourth Circuit upheld the right of a prisoner “to be reasonably free from constant threat of violence and sexual assault by his fellow inmates.” Many other decisions have similarly upheld the rights of prisoners to such fundamental necessities.

It is thus well settled that the government has a constitutional duty to provide for those whom it is punishing by incarceration. When the government fails to fulfill this duty it violates the eighth amendment.

B. Section 1983 Negligence Cases Prior to Estelle v. Gamble

The Supreme Court’s decision in Monroe v. Pape in 1961, and the incorporation of the eighth amendment into the fourteenth

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121 Id. 103.
122 487 F.2d 889 (4th Cir. 1973).
123 Id. 890. See also Little v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978). Cf. Kish v. Milwaukee, 441 F.2d 901 (7th Cir. 1971) (implicit recognition of duty when assault on prisoner was caused by overcrowding, not by any fault of prison officials).
125 At times courts will look to state statutes to find the necessary duty of care on the part of prison officials. See, e.g., Estelle v. Gamble, 429 U.S. 97, 103 n.8 (1976). Although such statutes may be illustrative of the duties of prison officials, they are not determinative. The activities held violative in cases depending on a statute for the existence of a duty would constitute cruel and unusual punishment, even in the absence of such a statute.
126 At one time federal courts frequently invoked the “hands-off” doctrine, refusing to entertain state prisoners’ petitions on the ground that prison administration was properly within the scope of the executive and legislative branches of government. Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969). See Robbins & Buser, supra note 124, at 893-900; Comment, Inadequate Medical Treatment of State Prisoners: Cruel and Unusual Punishment?, 27 AM. U.L. REV. 92, 100-01 (1977) [hereinafter cited as Inadequate Medical Treatment]; Note, Beyond the Ken of Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506 (1963).
127 In recent years the effects of the doctrine have been substantially lessened. As the Fifth Circuit stated in Parker v. McKeithen, 488 F.2d 553 (5th Cir. 1973), “it can no longer be correctly asserted that the federal courts are unwilling in all situations to review the actions of state prison administrators to determine the existence of possible violations of constitutional rights.” Id. 556. Although courts sometimes refer to the wide area of unreviewable discretion that must be accorded to prison administrators, see United States ex rel. Miller v. Twomey, 479 F.2d 701, 721 (7th Cir. 1973), cert. denied sub nom. Gutierrez v. Department of Pub. Safety, 414 U.S. 1145 (1974); Sostre v. McGinnis, 422 F.2d 178, 205 (2d Cir. 1971), the federal courts no longer hesitate “to entertain petitions asserting violations of fundamental rights and, where indicated, to grant relief.” Wright v. McMann, 387 F.2d 522 (2d Cir. 1967).
in *Robinson v. California*\(^{128}\) in 1962, made it possible for state prisoners to bring federal suits to redress eighth amendment violations committed by state prison officials. Eventually the question arose whether allegations of official negligence were sufficient to support an eighth amendment action brought pursuant to section 1983.

1. Non-Medical Cases

In non-medical cases decided prior to *Estelle v. Gamble*,\(^{129}\) the lower federal courts were divided as to the proper answer to the question of the sufficiency of negligence under the eighth amendment. In *Roberts v. Williams*,\(^{130}\) the Fifth Circuit ruled that a prison farm director could be held liable for injuries to a young prisoner who had been negligently shot by a trusty.\(^{131}\) The director was liable for having negligently entrusted a shotgun to the trusty without providing instructions as to its proper use.\(^{132}\) Similarly, in *Byrd v. Brishke*,\(^{133}\) the Seventh Circuit upheld a claim against police officers who failed to prevent other officers from injuring the plaintiff. The court stated that “to hold otherwise would be to insulate nonsupervisory officers from liability for reasonably foreseeable consequences of the neglect of their duty to enforce the laws.”\(^{134}\)

In *Wright v. McMann*,\(^{135}\) the plaintiff suffered injuries as a consequence of spending time in a strip cell. The circuit court upheld the district court’s award of damages to the plaintiff, holding that the warden was or should have been aware of the unconstitutional conditions existing in this segregation unit. The court held the warden liable for the natural consequences of his actions in failing to effect a remedy.\(^{136}\)


\(^{129}\) 429 U.S. 97 (1976). It should be noted that this discussion of the pre-*Estelle* case law is historical in nature. The positions taken by various courts on § 1983 eighth amendment questions may no longer be consistent with the decisions cited, although the cases have not been formally overruled. *Compare*, e.g., Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978) (holding that immunity doctrines may sometimes preclude § 1983 actions based on negligence) *with* Roberts v. Williams, 456 F.2d 819 (5th Cir. 1972) (holding a prison director subject to liability for negligently entrusting the gun that injured plaintiff to a trusty); and Patzig v. O’Neil, 577 F.2d 841 (3d Cir. 1978) (stating that in order to establish an eighth amendment violation deliberate indifference is required) *with* Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1973) (noting the possibility of an eighth amendment action based on culpable negligence).

\(^{130}\) 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971).

\(^{131}\) A “trusty” is an inmate given special tasks and privileges.

\(^{132}\) 456 F.2d 819, 823 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971).

\(^{133}\) 466 F.2d 6 (7th Cir. 1972).

\(^{134}\) *Id.* 11.

\(^{135}\) 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972).

\(^{136}\) *Id.* 135.
One circuit court looked to patterns of danger or misconduct to determine whether the plaintiff’s eighth amendment rights had been violated. In Woodhous v. Virginia,\textsuperscript{137} the Fourth Circuit ruled that a prisoner could bring an eighth amendment claim based on sexual attack and assault by other prisoners. The circuit court reversed the district court’s dismissal and remanded to determine whether the plaintiff could show whether “a pervasive risk of harm to inmates from other prisoners” existed and “whether the officials [were] exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm.”\textsuperscript{138}

In United States ex rel. Miller v. Twomey,\textsuperscript{139} a Seventh Circuit case decided one year after Byrd v. Brishke, the court rejected plaintiff’s claim that a single instance of negligence on the part of prison officials constituted cruel and unusual punishment. The Miller court focused on the nature of the word “punishment,” concluding that the officials’ alleged negligence, although it resulted in serious injury to the plaintiff who consequently was attacked by a fellow inmate wielding a baseball bat, was not “punishment” within the meaning of the eighth amendment.

The above discussion has demonstrated that non-medical eighth amendment cases decided prior to the Supreme Court’s decision in Estelle v. Gamble in 1976 came to varied conclusions regarding the actionability of negligence under the eighth amendment. Despite the divergence of opinion among the circuits with respect to non-medical eighth amendment actions, in the area of medical mistreatment claims judicial opinion coalesced around a common standard.

2. The Special Case of Medical Mistreatment

Although the case law did not develop a commonly accepted general standard for all section 1983 eighth amendment claims, “deliberate” or “callous” indifference gained widespread acceptance as the appropriate standard to be applied in medical cases.\textsuperscript{140} In

\textsuperscript{137} 487 F.2d 889 (4th Cir. 1973).
\textsuperscript{138} Id. 890.
Williams v. Vincent,\(^{141}\) the Second Circuit noted that "deliberate indifference by prison authorities to a prisoner's request for essential medical treatment"\(^{142}\) states a cause of action under section 1983 and the eighth amendment; in Wilbron v. Hutto,\(^{143}\) the Eighth Circuit stated that "[a]llegations of mere negligence in the treatment of a prisoner's condition or claims based upon differences of opinion over matters of medical judgment fail to state a federal constitutional question absent special circumstances."\(^{144}\) The Seventh Circuit pointed out the special nature of medical mistreatment by stating: "Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient."\(^{145}\)

The standard of deliberate indifference for medical cases has even been applied in circuits where some form of negligence was recognized as actionable for other section 1983 eighth amendment claims.\(^{146}\) These courts have held that to establish an eighth amendment action under section 1983 for incidents of medical mistreatment, the medical mistreatment must be the result of deliberate indifference. In Estelle v. Gamble,\(^{147}\) the Supreme Court approved the actions of the lower federal courts by requiring that standard.

IV. Estelle v. Gamble and Its Progeny

A. Estelle v. Gamble

In November 1976, the Supreme Court decided the case of Estelle v. Gamble,\(^{148}\) its only opinion in an eighth amendment case brought pursuant to 42 U.S.C. § 1983 alleging violation of a state prisoner's right to freedom from cruel and unusual punishment by

Lawson, 489 F.2d 877 (10th Cir. 1974); Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973); Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970); Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970).


\(^{141}\) 508 F.2d 541 (2d Cir. 1974).

\(^{142}\) Id. 544.

\(^{143}\) 509 F.2d 621 (8th Cir. 1975).

\(^{144}\) Id. 622.


\(^{146}\) E.g., compare Russell v. Sheffer, 528 F.2d 318 (4th Cir. 1975) with Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973).

\(^{147}\) 429 U.S. 97 (1976).

\(^{148}\) 429 U.S. 97 (1976); see text accompanying notes 170-80 supra.
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medical mistreatment. The Court’s holding affirmed the de-
liberate indifference standard applied by most lower federal courts
in similar cases. Nevertheless, Estelle’s approach to the complex
issues involved is of interest and importance to future litigation.

Justice Marshall, writing for the Court, examined initially the
standards developed by the Court in prior eighth amendment cases,
thereby avoiding the question of possible statutory standards of
conduct under section 1983. It is significant that the Court based
the Estelle decision on an interpretation of the eighth amendment
as applied to the states through the fourteenth. Although not de-
terminative, the fact that the Court did not look to the statute but
instead went directly to the constitutional standards necessary to
decide the case, appears to indicate that the Court does not interpret
section 1983 as imposing a general standard of conduct.

The Court decided the constitutional issue on the basis
of eighth amendment precedent, concluding that “infliction of
unnecessary suffering is inconsistent with contemporary standards
of decency.” Justice Marshall noted that denial of medical care
could violate this test by resulting in such an infliction of unneces-
sary suffering. An inmate depends upon prison authorities to treat
his medical needs; if these needs are not met,

[i]n the worst cases, such a failure may actually produce
physical “torture or a lingering death,” . . . the evils of
most immediate concern to the drafters of the Amendment.
In less serious cases, denial of medical care may result in
pain and suffering which no one suggests would serve any
penological purpose.

The Court thus first focused solely on the nature of the harm
suffered. In enunciating a standard by which to judge the action-
ability of eighth amendment claims, however, the Court changed
the focus of the analysis, stating that “deliberate indifference to
serious medical needs of prisoners constitutes the ‘unnecessary and

149 The plaintiff prisoner brought the action against the state corrections depart-
ment medical director and two correctional officers, claiming that as a result of in-
adequate treatment of a back injury he received while doing a prison work assign-
ment he was subjected to cruel and unusual punishment. Id. 98, 101.

150 Id. 104, 106 n.14.

151 The Court has also directly considered the constitutional issues in Village of
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Wash-

152 429 U.S. 97, 103-04 (1976).

153 See text accompanying notes 113-25 supra.

154 429 U.S. at 103-04.
wanton infliction of pain' . . . proscribed by the Eighth Amendment." The Court failed to explain adequately this incorporation of the subjective motivation of prison officials; a partial explanation can be gleaned from language found later in the opinion, which states:

An accident, although it may produce added anguish, is not on that basis alone to be considered as wanton infliction of unnecessary pain. . . . Similarly, in the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind."

From this language it may be inferred that serious harm standing alone is not sufficient to violate the eighth amendment in cases of alleged medical mistreatment; the motivation of the individual whose act or omission produces the harm must also be considered. This inference helps to explain why the Court adopted the deliberate indifference standard for medical cases. The Court stated that the eighth amendment is violated when deliberate indifference is 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. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

Even though the Court adopts a deliberate indifference standard, however, the scope of this standard is unclear. On the one hand, an element of intent is introduced, but it is one that can be manifested by any form of deliberate indifference. More important for the purposes of this inquiry, however, is whether the deliberate indifference standard applies to both prison doctors and guards as well. The latter question arises as a result of an

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155 Id. 104
156 Id. 105-06.
157 Id. 104-05 (footnotes omitted).
158 It is unlikely that the Court envisioned "deliberate indifference" as involving an element of intent, however, because many of the circuit court cases cited by the Supreme Court as authority for the deliberate indifference standard defined it to include gross incompetence or recklessness. See note 140 supra.
159 Some of the circuit courts using the deliberate indifference standard for medical cases specifically referred to doctors in applying the standard. See text accompanying notes 140-47 supra.
example given by the opinion and by the Court's disposition of the case with respect to the individual defendants. First, the Court gave the following illustration of a medical claim to which the deliberate indifference standard is applicable: "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." This illustration would appear to be applicable only to medical personnel, in opposition to the earlier enunciation of the deliberate indifference standard.

The breadth of the deliberate indifference standard is further confused by the Court's disposition of the case. The action against the prison doctor was ordered dismissed, but the case was remanded for consideration of whether a cause of action was stated against the other prison officials. This resolution leaves unanswered the question whether deliberate indifference excludes malpractice actions against physicians without precluding medical mistreatment actions based on the negligence of other officials.

There is a reasonable distinction to be drawn between a doctor's liability for medical malpractice and a guard's liability for negligence that results in a medical injury to a prisoner. As discussed above, a prisoner must rely on prison officials to treat his medical needs. Thus the government has an "obligation to provide medical care for those whom it is punishing by incarceration." Malpractice on the part of a physician would not constitute a violation of this governmental duty. Although the doctor's acts as an agent of the state constitute state action, the tortious conduct is uniquely related to his medical skill, not to his position as a prison official (unless, of course, the doctor is deliberately indifferent to the prisoner's medical needs because he is a prisoner). It is questionable whether the same can be said of the negligent failure of prison guards to inform a doctor that a prisoner is in need of medical treatment. Such a failure is directly related to the

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160 429 U.S. at 106.
161 See text accompanying note 157 supra.
163 See text accompanying note 121 supra.
165 Some acts of prison doctors, or officials in analogous circumstances, therefore, do constitute constitutional violations. Deliberate indifference is an appropriate test to determine whether conduct of officials not ordinarily directly related to the penal function or the obligations of the state to care for its prisoners results in serious harm. See text accompanying note 168 infra.
guard's function as a correctional officer and to the state's obligation to provide medical treatment. If the state provides a licensed physician, the prisoner is not deprived of medical care by virtue of his imprisonment. If, on the other hand, a guard fails to report a prisoner's need for treatment and unnecessary suffering results, the question is no longer one of medical judgment properly the domain of state law in the fora of state courts. In this situation the eighth amendment duty to provide medical care has been breached. In this instance there is no need for deliberate indifference on the part of the guard to constitute cruel and unusual punishment. The special circumstances that require an examination of intent for medical personnel are nonexistent for the regular staff and supervisors in the prison.

Another issue resolved ambiguously by Estelle v. Gamble is whether the deliberate indifference standard is applicable to all section 1983 eighth amendment claims, or only those involving medical mistreatment. In some circuits, the lower federal courts applied a different standard of conduct in medical cases. Estelle is also limited on its facts to the medical mistreatment situation. Consideration of the following hypothetical cases demonstrates the undesirability of applying the Estelle deliberate indifference standard to all eighth amendment actions.

Since a prisoner's risk of medical malpractice is not notably increased as a result of his imprisonment, the deliberate indifference standard makes sense in that context. A different situation, however, is presented by an eighth amendment claim that the negligence of prison officials subjected the plaintiff to homosexual rape and assault by other prisoners. The risk of such attacks is clearly greater in prison than on the outside.

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166 Malpractice is clearly a matter for the state courts and not the federal judiciary.
167 See note 146 supra.
168 Mistreatment is a matter of judgment. A failure to provide treatment is a breach of a duty owed by the state to its prisoners under the eighth amendment, see id. 103-04; text accompanying notes 113-26 supra, unless the decision that treatment is not required is a deliberate one made by a member of the medical profession.
169 "However they happen to arrive in jails homosexuals pose special problems. The fact of life is that homosexuals (men and women) seem to be in abundance in all correctional institutions . . . ." R. GoldeFarb, Jails: THE ULTIMATE GHETTO 90 (1975). In Kish v. Milwaukee, 441 F.2d 901 (7th Cir. 1971) testimony in the record showed the widespread nature of the problem of homosexuality and homosexual rape in prisons. The problem may be equally bad for female prisoners, but women file few civil rights suits, and less research has been done. Haft, Women in Prison: Discriminatory Practices and Some Legal Solutions, 8 CLEARINGHOUSE REV. 1 (1974).

Recently homosexual attacks have been recognized as a defense to escape. See, e.g., Note, Duress—Defense to Escape, 3 AM. J. CRIM. L. 331 (1975).
Suppose, for instance, that proper supervision of a prison requires that guards be posted on each floor. As a result of the negligence of a supervisor, no guard is scheduled to work on "D" block during the evening shift. Consequently, a young prisoner is gang raped by several other inmates; no one is available to come to his assistance. The supervisor's negligence clearly was a breach of the constitutional duty to extend reasonable protection to prison inmates.

The sole dissenter in *Estelle* was Justice Stevens, who objected to the reasoning of the majority on three grounds: (1) the Court incorrectly applied the standards of *Haines v. Kerner*, construing the handwritten complaint of the plaintiff prisoner too strictly, and consequently dismissing the case against some of the defendants prematurely; (2) the Court failed adequately to explain the reasons why certiorari was granted in the case; and (3) the Court used ambiguous language that incorrectly implied that subjective motivation is relevant to an inquiry whether the eighth amendment prohibition of cruel and unusual punishment has been violated.\(^{171}\)

The third part of Justice Stevens' dissent is most relevant to this Comment; this is especially true because the *Estelle* dissent seems to be a departure from the position taken by Justice (then Judge) Stevens in his opinion in *United States ex rel. Miller v. Twomey*.\(^{172}\) In *Miller*, the Seventh Circuit held that

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\text{the [eighth] amendment may be violated either by the intentional infliction of punishment which is cruel or by such callous indifference to the predictable consequences of substandard prison conditions that an official intent to inflict unwarranted harm may be inferred. In the former instance, the issue is whether the punishment inflicted is "cruel and unusual"; in the latter, the issue is whether the harm suffered . . . is "punishment" within the meaning of the Eighth Amendment. Quite clearly the allegation that defendants . . . were negligent . . . on one occasion is insufficient to establish that they inflicted "punishment" on [plaintiff].}^{173}\]

The above language, written by Justice Stevens when he was a circuit judge three years prior to the Supreme Court's decision in


\(^{172}\) 479 F.2d 701 (7th Cir. 1973).

\(^{173}\) Id. 719-20.
Estelle v. Gamble, suggests both that subjective motivation is relevant to the question whether the eighth amendment has been violated and that official mistreatment of, or failure to protect, a prisoner must in itself constitute punishment in order to violate the eighth amendment. In contrast, Justice Stevens’ dissent in Estelle stated that

by 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 against a particular defendant. 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.175

This language implies that Justice Stevens might view Miller somewhat differently today than he did when the case was decided in 1973, at least with respect to the question of the relevancy of the defendant’s state of mind to the establishment of an eighth amendment violation. Moreover, a textual footnote to this language suggests that Justice Stevens’ view of punishment also has changed. In that note, Justice Stevens focused on imprisonment itself rather than the actions of the individual state official as punishment, in contrast to Miller:

If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. As a part of that basic obligation the State and its agents have an affirmative duty to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crimes.177

Thus, the views expressed by Justice Stevens in Estelle may be summarized as follows: (1) subjective motivation is not a consid-

175 Id. 116-17.
176 Id. 116 n.13.
177 Id.
eration in determining whether the eighth amendment has been violated; and (2) the misconduct of the state official need not constitute "punishment" in itself, because the "punishment" is imprisonment; therefore the correct question in prisoners' eighth amendment actions is whether the state has violated its duty to provide adequate conditions of confinement—i.e., whether the conditions of the imprisonment are cruel and unusual. This mode of analysis is preferable to that of Miller. It leads to the conclusion that, whether prison conditions are "the product of design, negligence, or mere poverty," the correct question is whether these conditions are "cruel and inhuman"; if so, the eighth amendment has been violated.

Precluding section 1983 suits based on the negligent violation of the eighth amendment easily could make correctional officers less cognizant of their constitutional obligations to prisoners. This is especially true with respect to supervisory officials. It is often very difficult to show that these people were deliberately indifferent to a prisoner's needs. It is also true that state immunities can make state suits against these officials fruitless. If he cannot bring an

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178 This Comment is essentially in agreement with this reading of the Stevens dissent in Estelle. The test proposed at text accompanying notes 210-25 infra does not preclude consideration of subjective motivation in certain limited circumstances in which the risk of the particular harm suffered by the prisoner is not increased by incarceration. For example, in the words of Justice Stevens, "[i]ke the rest of us, prisoners must take the risk that a competent, diligent physician will make an error." 429 U.S. at 116 n.13. The risk of medical malpractice is not ordinarily increased by incarceration. In cases such as medical malpractice, wherein the risk is not increased by imprisonment, the eighth amendment may still be violated by wanton infliction of pain resulting from the intentional misconduct or deliberate indifference of prison officials. When a doctor is deliberately indifferent to a prisoner's medical needs, or intentionally mistreats a prisoner-patient, he engages in the wanton infliction of unnecessary pain that violates the eighth amendment, whether or not the risk of the harm suffered is increased by incarceration.


180 Id. 117 n.13.

181 Without allowing § 1983 eighth amendment actions based on negligence, it would frequently be impossible to show that a supervisor was deliberately indifferent to the danger leading to the harm suffered by a prisoner, especially if the prisoner is required to show deliberate indifference to him personally. Although some eighth amendment claims based on negligence of supervisory officials involve attacks by other inmates on the plaintiff, the negligence of the official is a substantial contributing factor in the injury. Of course, even if eighth amendment negligence actions are allowed, the official would be protected by ordinary principles of tort law when his act or omission was reasonable; in such cases the harm occurring was not within the scope of the risk, or the official's conduct was not the proximate cause of the harm. Respondeat superior is not applicable. See note 102 supra.

182 For example, "[a]s a rule, state courts are unreceptive to inmates' medical malpractice actions against state correctional personnel." Inadequate Medical Treatment, supra note 126, at 116. For a discussion of state court obstacles to prisoner medical mistreatment actions, see id. These difficulties, involving state immunities and other barriers to suit, are illustrative of obstacles encountered in bringing other
eighth amendment action in federal court, a prisoner may find himself without a remedy for the unnecessary suffering inflicted upon him.

A distinction between complaints based on medical decisions and those based on other grounds is therefore justified. There are valid reasons why deliberate indifference should be the standard applied to malpractice against physicians' claims and to some other medical suits brought as eighth amendment actions under section 1983. In the medical cases, the duty to the prisoner is not violated by negligence. It takes a level of neglect rising to the standard of deliberate indifference to constitute cruel and unusual punishment. The considerations underlying other eighth amendment actions differ a great deal however. For these claims, the deliberate indifference standard is not appropriate.\(^1\)

In summary, the decision in *Estelle* approved a standard employed by most of the lower federal courts. The Court did not intertwine section 1983 requirements with the constitutional standards imposed by the eighth amendment, and it clearly identified the amendment as the basis of the decision. In these ways the Supreme Court provided some guidance for the lower courts in similar situations.

**B. Case Law After Estelle**

Many of the cases decided after *Estelle v. Gamble*\(^1\) involved medical malpractice claims. Since the *Estelle* decision affirmed the application of the standard applied by most lower federal courts, these cases have not been affected by *Estelle* in any significant way.\(^1\)

The standard of "deliberate indifference" simply is given the added weight of a Supreme Court citation. A few of the subsequent non-medical section 1983 cases have been decided in disturbing fashions however: *Gamble v. Estelle*\(^1\) (the *Estelle* case on remand to the Fifth Circuit); *Little v. Walker*,\(^1\) a Seventh Circuit case; *Patzig v.*

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\(^1\) The delineation of the scope of the deliberate indifference standard is beyond the scope of this Comment. For two lower courts' answers, see text accompanying notes 194 & 195 infra.

\(^1\) 429 U.S. 97 (1976).


\(^1\) 554 F.2d 653 (5th Cir.), cert. denied, 434 U.S. 974 (1977).

\(^1\) 552 F.2d 193 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978).
O'Neil,\textsuperscript{188} a Third Circuit case; and Jones v. McElroy,\textsuperscript{189} a case before a judge in the Eastern District of Pennsylvania, provide examples.

In Gamble v. Estelle, the Fifth Circuit, on remand, affirmed the district court's dismissal of the claim against the director and the warden.\textsuperscript{190} The court made this decision on the basis of a lack of evidence of any "deliberate indifference" on the part of the non-medical personnel.\textsuperscript{191} This decision is disturbing in that it reads the Estelle case as requiring the deliberate indifference standard for all prison personnel in medical mistreatment cases. As was explained earlier, there are valid distinctions to be drawn under the eighth amendment between medical and nonmedical personnel in such cases.

In Little v. Walker, the plaintiff filed a civil rights suit under section 1983 claiming that he "repeatedly suffered acts and threats of physical violence, sexual assaults, and other crimes perpetrated by other inmates"\textsuperscript{192} as a result of the failure of prison officials and Illinois Department of Corrections authorities to provide him with reasonable protection from such attacks. The court applied the deliberate indifference standard of Estelle v. Gamble, departing from some earlier Seventh Circuit decisions allowing actions based upon negligence. As discussed earlier in this Comment, it is questionable whether this standard is appropriate in non-medical cases.\textsuperscript{193}

The Little court did, however, define "deliberate indifference" to include both actual intent and recklessness,\textsuperscript{194} the definition most favorable to suits by prisoners if the standard is to be used in non-medical eighth amendment cases. The district court's dismissal of the claim was reversed, and the case was remanded for further proceedings consistent with the circuit court's opinion. Still, by excluding negligence the court may have made the plaintiff's case much harder to prove, and the prison officials were absolved from

\textsuperscript{188} 577 F.2d 841 (3d Cir. 1978).
\textsuperscript{190} 554 F.2d 653, 654 (5th Cir.), cert. denied, 434 U.S. 974 (1977).
\textsuperscript{191} Id.
\textsuperscript{192} 552 F.2d 193, 194-95 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978).
\textsuperscript{193} \textit{See} text accompanying notes 140-49 \textit{supra}.
\textsuperscript{194} 552 F.2d 193, 197-98 n.8 (7th Cir. 1977). Some courts have also recognized that a pattern of negligent acts or omissions may evidence deliberate indifference. \textit{See}, e.g., Mitchell v. Chester Co. Farms Prison, 426 F. Supp. 271 (E.D. Pa. 1976).
the necessity of doing their jobs as well as possible. In an era when it is commonly demanded that public officials be more responsible in fulfilling the duties and obligations entrusted to them, Little v. Walker substantially reduces the threat of civil liability for a whole class of potential defendants if these demands for greater responsibility are not met.

Even more disturbing than Little, in Patzig v. O'Neil the Third Circuit summarily stated that "[i]n order to establish a constitutional violation under the eighth amendment, it is necessary that there be a deliberate indifference to the prisoner's needs." Moreover, the court defined deliberate indifference to require more than callous acts or omissions on the part of the defendants, a definition clearly at variance with the Supreme Court's reading of the callous and deliberate and callous indifference standards as interchangeable.

Jones v. McElroy, a fourteenth amendment due process case, is troublesome in another respect. In a thoughtful examination of the actionability of negligence under section 1983, Judge Luongo recognized that courts are frequently unclear whether their decisions in section 1983 actions are based on statutory or constitutional standards. Judge Luongo admitted that "[t]he degree of culpability necessary for civil rights liability is an unanswered question," but he went on to conclude that "negligence will not support an action for deprivation of constitutional rights, whether that action is asserted under § 1983 or directly under the Fourteenth Amendment." To support this conclusion Judge Luongo cited three recent Supreme Court opinions as suggesting "that intent, and possibly specific purpose, is needed to constitute a constitutional violation." Estelle v. Gamble was one of the decisions cited.

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105 Even though the threat of a federal lawsuit may not eliminate all or even most acts of official negligence, it may encourage state and local prison officials to take more care in the exercise of their duties.

106 See note 96 supra.

107 577 F.2d at 847.


109 Id. 862.

110 Id. 863.

201 Id. 862. The decisions cited were: Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Estelle v. Gamble, 429 U.S. 97 (1976); Washington v. Davis, 426 U.S. 229 (1976). It is important to note that Estelle did not require intent, and that Arlington Heights and Washington were equal protection cases. Even if the equal protection clause imposes a constitutional requirement of some type of intent, there is no reason to infer from this that intent is required to establish any other constitutional deprivation.

Since Justice Marshall specifically stated that *Estelle* was based on the eighth amendment, it is unfortunate that it is used to support a general standard for all section 1983 actions. It is equally disturbing to find a federal judge interpreting *Estelle* to require intent.

In the preceding subsection of this Comment, some of the ambiguities of *Estelle v. Gamble* were discussed. *Gamble v. Estelle, Little v. Walker, Patzig v. O'Neil,* and *Jones v. McElroy* illustrate how lower courts may interpret the opinion as a result of these ambiguities. This could result in an application of standards appropriate for medical cases to other eighth amendment actions without a consideration of the underlying policies and implications of such an extension. Another potential outcome of the lower courts' reading of *Estelle* may be a *sub silentio* "overruling" of *Monroe v. Pape* by the lower courts with the consequence that a general standard of care for all section 1983 actions will be assumed to be mandatory, and the language of *Monroe* that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions" ignored. The Supreme Court has declined to go this far, and perhaps its handling of *Estelle v. Gamble,* *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* and *Washington v. Davis* should be interpreted as tacit recognition that different standards of conduct are required to state a valid cause of action under different constitutional guarantees. If other courts follow *Jones v. McElroy,* however, it will be necessary for the Supreme Court to take a stand on the issue.

This Comment concludes that no general standard of care applicable to all section 1983 actions exists, and that it is inappropriate to have a single standard for all eighth amendment claims. Whether the Supreme Court ultimately would agree with these conclusions or not, it is disturbing that in one of the most significant section 1983 cases since *Monroe v. Pape* the Court merely reaffirmed the case law developed in the lower federal courts, and failed to provide adequate guidance on any of the difficult issues that have created.

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203 Id. 147.
205 Id. 187.
great confusion and divergence of opinion among circuit and district court judges.

V. A PROPOSED TEST

Assuming, as argued in the preceding sections of this Comment, that section 1983 imposes no general standard of care, and that negligent acts and omissions can result in a violation of the eighth amendment, a method is needed for determining when negligence is actionable in section 1983 eighth amendment cases. This section proposes a test to enable such a determination to be made.

In the sixteen year interval separating Estelle v. Gamble and Monroe v. Pape, the lower federal courts generally agreed that deliberate indifference was the appropriate standard for eighth amendment medical claims; this was true even in those circuits in which negligence was recognized as actionable in non-medical eighth amendment cases. In Estelle, the majority opinion expressed the view that "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." In his dissent Justice Stevens articulated the problem:

[N]ot every instance of improper health care violates the Eighth Amendment. Like the rest of us prisoners must take the risk that a competent, diligent physician will make an error. Such an error may give rise to a tort claim but not necessarily to a constitutional claim. But when the State adds to this risk, . . . then the prisoner may suffer from a breach of the State's constitutional duty.

The decisions of the lower courts, the illustration used by the Estelle majority, and Justice Stevens' views suggest a certain uniqueness about medical malpractice. This in turn suggests a general test for determining the sufficiency of negligence to establish a state prisoner's section 1983 action based on the violation of his eighth amendment right to freedom from cruel and unusual punishment:

212 See, e.g., cases cited in note 140 supra.
213 See note 146 supra.
215 Id. 116-17 n.13 (Stevens, J., dissenting).
216 See text accompanying note 160 supra.
217 The limitations of ordinary tort law such as foreseeability of the risk would apply as in any other negligence action.
(1) Whether the harm suffered is serious in nature; and

(2) Whether the risk of the harm is increased substantially by the plaintiff's incarceration in a state prison.\(^{218}\)

The first question is a necessary component of any eighth amendment test, for if the harm suffered is not sufficiently severe it cannot be called cruel and unusual and there can be no violation of the eighth amendment.\(^{219}\) The second question offers an opportunity to ask whether an eighth amendment violation is claimed "merely because the victim is a prisoner,"\(^{220}\) or whether the foundation of the claim is harm resulting from a risk made much more grave by reason of the prisoner's incarceration. This second criterion incorporates the question of violation of a state's constitutional duty, e.g., to provide medical care, or to afford reasonable protection from violent attacks and sexual assaults by other prisoners.

This test might be expressed as follows: the sufficiency of negligence to establish a violation of the eighth amendment is a function of the gravity of the harm suffered and the increase in the risk of the harm resulting from incarceration. Where this test is met, the negligence of the official amounts to a breach of the state's constitutional duty to the prisoner\(^{221}\) and is therefore a violation of the eighth amendment. Under this standard, negligence is not sufficient in the case of medical malpractice, for however serious the harm, the increase in risk due to incarceration is not substantial.

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\(^{218}\) This criterion is very similar to the approach taken by the Fourth Circuit in prison assault cases. In Woodhous v. Virginia, 487 U.S. 889 (4th Cir. 1973), the Court held that official negligence in failing to prevent attacks on one prisoner by another would violate the eighth amendment if plaintiff could establish a pervasive risk of harm. In Doe v. Swinson, No. 76-91-A (E.D. Va., filed Nov. 24, 1976), vacated, Dec. 22, 1976 (appeal dismissed upon settlement of $20,000 to be paid by defendant sheriff's indemnifier), the district court stated that "the necessary pattern of violence need not be limited to the inmate or even a single penal institution in which the inmate is held but may be that occurring in similar institutions in the area." No. 76-91-A, slip op. at 11. The requirement of a pervasive risk of harm is thus directed to whether there is an increased risk of the particular harm. These Fourth Circuit cases do not require a pattern of negligence. But cf. United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973) (single incidence of official negligence cannot constitute punishment). In cases in which there is an increased risk of the harm because of incarceration, a single negligent act can violate the eighth amendment. This was the case in Swinson.

\(^{219}\) Whether any unnecessary suffering inflicted upon a prisoner constitutes cruel and unusual punishment regardless of the gravity is not considered in this Comment. Such a possibility is suggested by Justice Marshall in Estelle v. Gamble, 429 U.S. 97, at 103-04 (1976).

\(^{220}\) Id. 106.

\(^{221}\) See, e.g., 429 U.S. at 103 (duty to provide medical care); Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (duty to provide reasonable protection from violence and sexual assault).
The following cases are illustrative of situations in which the proposed test will not be met:

(1) Prisoner is injured by negligently driven prison truck. (There is no increased risk of this harm due to incarceration. The negligent failure to guard against this risk is not violative of any constitutional duty.)

(2) Prisoner is hurt when a kitchen employee negligently drops a tray on his foot. (Here again, the risk is not substantially increased.)

(3) Prisoner suffers with a slight eye irritation for two days when a guard negligently fails to inform the prison doctor that the prisoner wants to see him. (While in this case the negligence is of constitutional dimension, the gravity of the harm suffered is not severe enough to constitute “cruel and unusual” punishment.)

Negligence would be sufficient to create a cause of action in the following hypothetical cases:

(1) Prison warden negligently fails to supervise guards properly. As a result a guard is not posted on a floor where a young inmate is quartered, and the young man is raped by a gang of other inmates.222 (The risk of homosexual rape is substantially increased by imprisonment.223 Negligent failure to protect therefore violates the constitutional duty. The harm of a gang rape is serious enough to satisfy the cruel and unusual requirement.)

(2) Prison guard negligently fails to inform doctor that prisoner is in severe pain. Prisoner suffers ruptured appendix. (The risk of inability to obtain access to a doctor is increased by incarceration; the harm to the prisoner is severe.)

Estelle v. Gamble,224 then, is decided correctly under this test with respect to the liability of the prisoner's doctors.225 To the

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223 See note 169 supra.


225 The action against the doctor was dismissed. Id. 108.
extent that Estelle is meant to require more than negligence with respect to the acts or omissions of the prison guards and other officials, it is wrong. The state has a duty to provide medical care to those whom it punishes by imprisonment. The risk of being unable to acquire adequate medical attention is increased by incarceration. The failure of the prison guard to take the prisoner to the infirmary is, therefore, an eighth amendment violation. The risk of medical malpractice is not similarly increased. Therefore negligence on the part of prison doctors is not actionable under this test. A prison doctor, however, can still be liable for deliberate infliction of unnecessary pain upon a prisoner; the proposed test only answers the question of when negligence is actionable.

This test does not provide for strict liability for serious harm caused to prisoners in situations of increased risk due to incarceration. An initial determination of negligence must still be made. The activities of the particular defendant must be unreasonable given the circumstances.226 There is a general duty of tort law not to act (or fail to act) unreasonably; there is in addition a constitutional duty to provide certain necessities to prisoners. This test is concerned with when a violation of the initial duty—a negligent act—rises to the level of the second—a constitutional deprivation. The former is a requisite of the latter under this test. This burden should be sufficient to protect the discretion of prison officials in administering their prisons.

This test will not solve all of the complex problems of eighth amendment claims. It does, however, provide a mode of analysis; this is one thing that has been sorely lacking in many cases.

VI. CONCLUSION

It has now been over one hundred years since Congress enacted the statute we know today as section 1983. The legislative history demonstrates that section 1983 was intended as a remedy for all violations of fundamental constitutional rights by state officials. There is no logical basis for reading into the statute a standard of conduct requirement, and to do so as a means of reducing the number of prisoner complaints brought in federal court is both arbitrary and unjust. Whether a cause of action is stated by a plaintiff bringing a section 1983 action based on official negligence should turn on the standard of conduct required for the specific constitutional deprivation he alleges.

226 The plaintiff failed to pass this reasonableness test in Kish v. Milwaukee, 441 F.2d 901 (7th Cir. 1971).
The language of the eighth amendment suggests that not all instances of official negligence resulting in harm to prisoners result in deprivation of constitutional rights. Courts have struggled to determine when official negligence should be actionable under the eighth amendment, but the results have been unsatisfactory in many cases. In *Estelle v. Gamble*, the Supreme Court appeared to require intentional or reckless conduct to state an actionable claim with respect to medical mistreatment cases. This Comment has argued that this choice is justified in the case of a malpractice claim against a prison doctor. A like result would be correct with respect to any injury suffered by a prisoner resulting from the negligence of a prison official in an area not directly related to the punishment function and concurrent obligations of the state. Support for this conclusion is found in the fact that even among the circuit courts holding some form of negligence sufficient to state an eighth amendment cause of action, medical malpractice claims were required to allege deliberate or callous indifference on the part of prison medical personnel to establish a constitutional deprivation. It is possible to infer from these decisions that judges were intuitively acting upon the belief that if the risk of a particular injury is not significantly increased by imprisonment, then the injury complained of must be the result of deliberate indifference to the plaintiff's welfare on the part of the defendant prison official. This is the essence of the eighth amendment test proposed by this Comment.

Whether or not the test proposed herein is regarded as a useful means of determining whether the eighth amendment has been violated, some coherent framework of analysis for eighth amendment claims must be developed. Equally important, the general question of a standard of conduct under section 1983 must be decided. Until the Supreme Court addresses these issues directly, courts may well continue to intermingle statutory and constitutional interpretations producing results that are neither sound nor just.