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Thomas L. Horvath

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NOTES

CONSTITUTIONAL LAW — Punitive Damages Authorized In Section 1983 Action When “Reckless Disregard” Shown. *Smith v. Wade*, 103 S. Ct. 1625 (1983).

Section 1983¹ is a powerful legislative “sword”² enacted by Congress for the protection of constitutional rights against infringement by the states.³ In *Smith v. Wade*⁴ the United States Supreme Court decided what constitutes a “proper case” for an award of punitive damages under this statute. The Court, in a five to four decision,⁵ explicitly authorized punitive damages under section 1983 and established a “reckless disregard” standard as the requisite mental state for their imposition.⁶

This note begins with a synopsis of the underlying facts in *Smith*. Next, the development of punitive damages under section 1983 is discussed, followed by an analysis of the majority and dissenting opinions. Finally, this note considers the impact of the decision by examining the role that punitive damages will play in future constitutional tort litigation.

I. THE FACTS IN *SMITH V. WADE*

Daniel Wade was an inmate at Alcoa Reformatory, a

1. 42 U.S.C. § 1983 (Supp. IV 1980). The statute provides in part:

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

2. The metaphor is used in the sense that the remedies available under section 1983 include not only compensatory damages and injunctive relief, but also punitive damages—the focus of this note.

3. The purpose of section 1983 was “to stamp out widespread violations of constitutional rights at virtually any cost” *Adickes v. Kress & Co.*, 398 U.S. 144, 234 (1970) (Brennan, J., concurring in part and dissenting in part).

4. 103 S. Ct. 1625 (1983).

5. Justice Brennan delivered the opinion of the Court in which Justices White, Marshall, Blackmun and Stevens joined. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice Powell joined. Justice O'Connor filed a separate dissenting opinion.

6. *Smith*, 103 S. Ct. at 1640.

unit for youthful first offenders.⁷ Although Wade had voluntarily checked into the protective custody unit, he was removed to administrative segregation for disciplinary violations. During his first day in administrative segregation, Wade was placed in a cell with another inmate from the general prison population. When guard William Smith came on duty, he placed a third inmate in Wade's cell. According to Wade, his cellmates beat and sexually assaulted him.⁸

Wade brought a section 1983 action against Smith and four other guards and correctional officers, alleging that his eighth amendment⁹ right to be free from cruel and unusual punishment had been violated.¹⁰ Wade sought both compensatory and punitive damages.

At trial, Wade established that the third inmate added to his cell had been placed in the administrative unit for fighting. Smith had made no effort to discover whether another cell was available, although there was at least one cell containing only one occupant. Furthermore, another inmate had been beaten to death a few weeks earlier in the same dormitory during Smith's shift. Based on these facts, Wade claimed that Smith knew or should have known that an assault against him was likely to occur.¹¹

The district court judge instructed the jury that it may award punitive damages upon a finding that the conduct shows "a reckless or callous disregard of, or indifference to, the rights or safety of others."¹² The jury found only Smith liable and awarded Wade \$25,000 in compensatory damages and \$5,000 in punitive damages.¹³

The Court of Appeals for the Eighth Circuit sustained

7. *Smith v. Wade*, 103 S. Ct. 1625, 1627 (1983).

8. *Id.* At the time of the assault Daniel Wade was 18 years old, five feet, eight inches tall and weighed approximately 130 pounds. *Wade v. Haynes*, 663 F.2d 778, 780 (8th Cir. 1981), *aff'd sub nom.* *Smith v. Wade*, 103 S. Ct. 1625 (1983).

9. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

10. *Smith*, 103 S. Ct. at 1627.

11. *Id.* This would defeat Smith's qualified immunity defense. *See infra* note 66.

12. *Smith*, 103 S. Ct. at 1628 (emphasis omitted).

13. *Id.*

the award of punitive damages.¹⁴ The Supreme Court granted certiorari¹⁵ and affirmed both the award of such damages and the legal standard applied by the district court.¹⁶

II. BACKGROUND

A. Development of Punitive Damages under Section 1983

Section 1983¹⁷ provides a civil remedy for deprivation of constitutional rights under color of state law.¹⁸ Although enacted as part of the Civil Rights Act of 1871,¹⁹ the statute remained relatively dormant until the United States Supreme Court decision in *Monroe v. Pape*²⁰ ninety years later.²¹ Recent Supreme Court decisions have established that local governments are subject to suit as persons within section 1983,²² and have sanctioned section 1983 damages for violations of federal law as well as constitutional violations.²³

Section 1983 does not prescribe the appropriate legal remedy, but merely states that a defendant "shall be liable to

14. *Wade v. Haynes*, 663 F.2d 778, 786 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade*, 103 S. Ct. 1625 (1983).

15. *Smith v. Wade*, 456 U.S. 924 (1982).

16. *Smith*, 103 S. Ct. at 1640.

17. Section 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3) (Supp. V 1981), began as section 1 of the Ku Klux Klan Act of April 20, 1871, Pub. L. No. ___, 16 Stat. 433 (1871), which was enacted by Congress pursuant to section 5 of the fourteenth amendment in order to enforce that amendment. *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

18. See generally S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (1979 & Supp. 1983); Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

19. 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (Supp. IV 1980)).

20. 365 U.S. 167 (1961) (overruled in part by *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978)).

21. See generally Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334-36 (1952); Note, *supra* note 18, at 1137-75.

22. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978). See also S. NAHMOD, *supra* note 18, at §§ 6.01-.09; Carlisle, *Owen v. City of Independence: Toward Constructing a Model of Municipal Liability after Monell*, 12 URB. LAW. 292 (1980); Schappner, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979). Governmental units are absolutely immune, however, from liability for punitive damages under section 1983. See *infra* text accompanying notes 43-49.

23. *Maine v. Thiboutot*, 448 U.S. 1 (1980). See also Note, *Section 1983: Carte Blanche Remedy for Federal Statutory Violations?*, 10 STETSON L. REV. 507 (1980).

the party injured in an action at law."²⁴ In *Monroe* the Court intimated that all forms of monetary relief available at common law were available in section 1983 actions.²⁵ Seventeen years later, in *Carey v. Phipus*,²⁶ the Court expressly held that the common law of torts was the appropriate starting point for determining section 1983 damages.²⁷

Reasoning that the dispute sounded in tort, the availability of punitive damages under section 1983 was first proclaimed in dictum by the Court of Appeals for the Third Circuit in 1939.²⁸ In the leading case, *Basista v. Weir*,²⁹ the Third Circuit justified an award of punitive damages on the theory that it would serve the congressional purpose of "vindicating civil rights in civil suits."³⁰ The court further held that punitive damages may be awarded even in the absence of actual damages.³¹

While the Supreme Court had not gone as far explicitly as the Third Circuit in *Basista*, it nevertheless strongly suggested in three recent decisions³² that punitive damages were appropriate in constitutional tort actions. In *Carey v. Phipus*³³ the Supreme Court adopted the view that, at least

24. 42 U.S.C. § 1983 (Supp. IV 1980).

25. Justice Douglas stated that section 1983 "[s]hould be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe*, 365 U.S. at 187.

26. 435 U.S. 247 (1978).

27. *Id.* at 257-58. Earlier in the opinion the Supreme Court stated: "[Section 1983] was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Id.* at 253 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

28. See *Hague v. CIO*, 101 F.2d 774 (3d Cir.), *modified*, 307 U.S. 496 (1939).

29. 340 F.2d 74 (3d Cir. 1965).

30. *Id.* at 86. As noted by one commentator, the court in *Basista* justified punitive damages in a brief discussion in which it "neglected to explain precisely how punitive damages would vindicate civil rights . . ." Comment, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 CALIF. L. REV. 191, 202 (1972).

31. *Basista*, 340 F.2d at 87. The general rule under federal common law is that nominal damages will support a punitive damage award. See, e.g., *Brady v. Smith*, 656 F.2d 466 (9th Cir. 1981); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976); *Spence v. Staras*, 507 F.2d 554 (7th Cir. 1974); *Stolberg v. Members of Bd. of Trustees*, 474 F.2d 485 (2d Cir. 1973).

32. The decisions are: *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Carlson v. Green*, 446 U.S. 14 (1980); *Carey v. Phipus*, 435 U.S. 247 (1978). See also Note, *Punitive Damages in Constitutional Tort Actions*, 57 NOTRE DAME LAW. 530 (1982).

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

in the context of procedural due process, an award of compensatory damages must be fashioned to redress actual harm suffered and cannot be justified solely on the basis of deterring future constitutional rights violations. The Court stated that "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages."³⁴

While this language seems to foreclose the recovery of punitive damages, the Court also indicated that punitive damages might be awarded in a "proper case" under section 1983 with the specific purpose of deterring and punishing violations of constitutional rights.³⁵ The Court recognized that six of the circuits allowed punitive damages in section 1983 actions,³⁶ but it expressly refused to approve or disapprove them. The only explicit guidance the Court offered on the issue of punitive damages was that no basis existed for such damages in *Carey* because "[t]he District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their right or to do them other injury."³⁷

In *Carlson v. Green*³⁸ the Court considered whether a remedy was available directly under the Constitution in a *Bivens v. Six Unknown Named Agents*³⁹ action when the plaintiff's allegations could also support a claim under the

34. *Id.* at 256-57.

35. *Id.* at 257 n.11.

36. *Id.* The decisions of the six circuits are: *Silver v. Cormier*, 529 F.2d 161, 163-64 (10th Cir. 1976); *Stengel v. Belcher*, 522 F.2d 438, 444 n.4 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976); *Spence v. Staras*, 507 F.2d 554, 558 (7th Cir. 1974); *Caperci v. Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F.2d 573, 576 (5th Cir. 1967); *Basista v. Weir*, 340 F.2d 74, 84-88 (3d Cir. 1965). See also *infra* notes 53 and 57 for other courts allowing punitive damages in section 1983 actions.

37. *Carey*, 435 U.S. at 257 n.11. This factual finding was made by the district court in the context of holding that the defendants had not abused their qualified immunity by acting in subjective bad faith. *Id.* at 251 n.6.

38. 446 U.S. 14 (1980).

39. 403 U.S. 388 (1971). In *Bivens* the Supreme Court established an implied cause of action directly under the Constitution against federal officials. The *Bivens* remedy is essentially a judicially created equivalent of section 1983, except that it applies to persons violating constitutional rights under color of federal law.

Federal Tort Claims Act.⁴⁰ Writing for the majority, Justice Brennan examined several factors, including the availability of punitive damages in a *Bivens* action, before he concluded that the *Bivens* remedy was superior.⁴¹ Concerning punitive damages, the Court stated:

[O]ur decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are "a particular remedial mechanism normally available in the federal courts," . . . and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. Moreover, punitive damages are available in "a proper" § 1983 action⁴²

In the third and most recent case, *City of Newport v. Fact Concerts, Inc.*,⁴³ the Court ruled that a municipality may not be held liable for punitive damages under section 1983 because municipal corporations were immune from such damages at common law.⁴⁴ The Court's opinion, written by Justice Blackmun, analyzed the role of punitive damages in constitutional tort actions. The Court stated that the purpose of punitive damages was retribution and deterrence, not compensation.⁴⁵ Regarding retribution, Justice Blackmun noted that the Court "never has suggested that punishment is as prominent a purpose under the statute as are compensation and deterrence."⁴⁶ The Court concluded that

40. Federal Tort Claims Act, ch. 753, title IV, 60 Stat. 842 (1946) (the principal provisions of the Act are codified at 28 U.S.C. §§ 1346(b), 2671-80 (1976)).

41. *Carlson*, 446 U.S. at 23.

42. *Id.* at 21-22. In his dissent, Justice Rehnquist stated that despite assertions to the contrary, the Court had never decided whether punitive damages were available in *Bivens* actions or in section 1983 actions. *Id.* at 47 (Rehnquist, J., dissenting).

43. 453 U.S. 247 (1981).

44. *Id.* at 271. The Supreme Court has preserved many of the traditional immunities under section 1983, including four absolute immunities: *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (regional legislators); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators). There are also several qualified immunities: *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (mental hospital administrators); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (government officers); *Pierson v. Ray*, 386 U.S. 547 (1967) (police officers).

45. *Newport*, 453 U.S. at 266-67.

46. *Id.* at 268.

awarding punitive damages here would only "punish" innocent taxpayers and that "neither reason nor justice" dictated such a result.⁴⁷

Turning to the major objective of punitive damages, the Court maintained "that the deterrence of future abuses of power by persons acting under color of state law is an important purpose of section 1983."⁴⁸ After questioning whether assessing punitive damages against the municipality would deter officials from wrongdoing, the Court found a more effective means of deterrence: "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations."⁴⁹ This, the Court concluded, would provide sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office.

Thus, the Supreme Court has indicated that punitive damages are appropriate in certain constitutional tort actions. The Court has provided less guidance, however, on the related issue of the state of mind necessary for a recovery of such damages.

B. The Requisite Mental State

Concerning the mental state required for an award of punitive damages under section 1983, the Supreme Court, in dicta, has offered two different standards. This inconsistency is reflected in the conflicting standards adopted by the lower federal courts.⁵⁰

In *Adickes v. Kress & Co.*⁵¹ Justice Brennan stated in a concurring opinion that punitive damages were appropriate in a section 1983 action whenever the defendant acted "with actual knowledge that he was violating a [constitutional]

47. *Id.* at 267.

48. *Id.* at 268.

49. *Id.* at 269.

50. For citations of lower federal court cases which have adopted different standards, see *infra* notes 53 & 57. See also Annot., 14 A.L.R. FED. 608 (1973) (punitive damages in actions for violations of federal civil rights acts).

51. 398 U.S. 144 (1970).

right" or with "reckless disregard of whether he was thus violating such a right."⁵² Several lower federal courts have adopted this actual knowledge or reckless disregard standard as the state of mind requirement for the recovery of punitive damages in section 1983 actions.⁵³ Several commentators have also approved of this standard.⁵⁴

In *Carey v. Piphus*,⁵⁵ on the other hand, Justice Powell noted that there was no basis for a punitive damages award because the defendant had not acted with "malicious intent" to deprive plaintiffs of their rights.⁵⁶ Several lower courts have adopted a malice standard requiring a higher degree of culpability than the knowledge or reckless disregard standard.⁵⁷

III. THE *SMITH* Opinions

A. *The Majority*

Writing for the majority in *Smith v. Wade*,⁵⁸ Justice Brennan first stated that the Court's earlier decisions made it clear that punitive damages are available under section 1983.⁵⁹ Turning to the issue at hand, the Court rejected a

52. *Id.* at 233.

53. *See, e.g.*, *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978) ("acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so"); *Simpson v. Weeks*, 570 F.2d 240, 243 (8th Cir. 1978) ("willfully and in gross disregard for the [plaintiffs] rights"); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977) ("willfully and with gross disregard for the plaintiff's rights"); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976) ("reckless indifference to the property rights of others, ill will, a desire to injure or malice").

54. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1279-81 (1979); McClellan & Northcross, *Remedies and Damages for Violations of Constitutional Rights*, 18 DUQ. L. REV. 407, 466-71 (1980).

55. 435 U.S. 247 (1978). In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Supreme Court addressed the meaning of "malicious intent" in the context of a qualified immunity claim. The Court there stated: "This part of the rule speaks of 'intentional injury,' contemplating that the actor intends the consequences of his conduct." *Id.* at 566.

56. *Carey*, 435 U.S. at 257 n.11 (1978). *See supra* text accompanying note 37.

57. *See, e.g.*, *Vetters v. Berry*, 575 F.2d 90, 96 (6th Cir. 1978) ("malicious and wanton disregard"); *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975) ("willful and malicious"); *Gill v. Manuel*, 488 F.2d 799, 801 (9th Cir. 1973) ("willful and malicious"); *Skinner v. Spellman*, 480 F.2d 539, 540 (4th Cir. 1973) (per curiam) ("malice"); *Caperici v. Huntoon*, 397 F.2d 799, 801 (1st Cir.) (per curiam, *cert. denied*, 393 U.S. 940 (1968) ("outrageous invasion of plaintiff's privacy").

58. 103 S. Ct. 1625 (1983).

59. *Id.* at 1629.

malicious intent standard as the degree of culpability which would permit an award of punitive damages, and instead held that a reckless disregard standard was the proper rule.⁶⁰

Noting that there was little in the legislative history of section 1983 on damages, the Court looked to the rule at common law as it existed in 1871.⁶¹ After an exhaustive review of the federal and state decisions in the late nineteenth century, the Court concluded that the majority rule permitted punitive damages awards on various standards of recklessness or other culpable conduct short of actual malicious intent.⁶² This same rule, the Court noted, is applied today.⁶³

The Court then determined that the policies and purposes of section 1983 did not require a departure from the rules of tort common law. The Court stated: "We discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action."⁶⁴

The Court rejected the argument that a reckless disregard standard was too vague to provide clear guidance and reasonable deterrence.⁶⁵ Nor did the Court feel that a higher standard was required in this case even though the same

60. *Id.* at 1640.

61. *Id.* at 1628. In interpreting section 1983, the Court has often looked to the common law as it existed in 1871, in the belief that, when Congress was silent on a point, it intended to adopt the principles of the common law. *Id.* at 1659 (O'Connor, J., dissenting). See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); *Carey v. Piphus*, 435 U.S. 247, 255 (1978).

62. *Smith*, 103 S. Ct. at 1631-35. See also *Minneapolis & St. L. Ry. v. Beckwith*, 129 U.S. 26, 34 (1889) ("culpable negligence"); *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 521 (1885) ("gross negligence"); *Milwaukee & St. P. Ry. v. Arms*, 91 U.S. 489, 493 (1876) ("willfully" or "reckless indifference" which is "equivalent to an intentional violation"); *Philadelphia, W. & B. Ry. v. Quigley*, 62 U.S. 202, 214 (1859) ("wantonly" or "maliciously" implying a "spirit of mischief" or "criminal indifference").

63. *Smith*, 103 S. Ct. at 1635. The Court cited the RESTATEMENT (SECOND) OF TORTS § 908(2) (1979), which provides in part: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." See also RESTATEMENT (SECOND) OF TORTS § 500 comment a (1965) (discussing what constitutes "reckless" conduct).

64. *Smith*, 103 S. Ct. at 1636.

65. *Id.* at 1636-37. The Court noted that in the important area of first amendment freedoms, a similar standard was adopted for imposing punitive damages in defamation actions. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("knowledge of falsity or reckless disregard for the truth").

reckless indifference standard had been applied to determine Smith's liability in the first instance due to his qualified immunity.⁶⁶ The Court maintained that while the same threshold of liability was applied for both compensatory and punitive damages, this did not mean that both forms of damages were equally available. The Court explained that while compensatory damages are mandatory, an award of punitive damages is within the discretion of the jury which must make a moral judgment that the defendant's conduct warranted punishment and deterrence. Moreover, the Court noted that there has never been a general common law rule that the threshold for punitive damages must always be higher than that for compensatory liability.⁶⁷

B. The Dissenting Opinions

Justice Rehnquist dissented, vigorously attacking both the reasoning and the result of the majority opinion.⁶⁸ He viewed the majority's decision as "blindly" adopting a remedy which has been "vigorously criticized throughout the Nation's history."⁶⁹ Although he suggested several times that punitive damages should not be allowed under section 1983, Justice Rehnquist stated that the proper standard for an award of such damages under section 1983 required some degree of bad faith or improper motive on the part of the

66. *Smith*, 103 S. Ct. at 1638. The Supreme Court has extended a qualified immunity to various public officials including prison guards. See *supra* note 44. The requirements for a qualified immunity are: (1) that the official has a reasonable belief in the legality of his actions under the circumstances, and (2) that he must have acted in good faith. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Thus, the qualified immunity defense would be unavailable to a government official who knew that he was violating the Constitution (subjective bad faith) or should have known that he was violating the Constitution (objective bad faith). *Id.*

Furthermore, in eighth amendment cases, unless the prison official's behavior constitutes "deliberate indifference" to the prisoner's plight, thereby constituting the "unnecessary and wanton infliction of pain" proscribed by the eighth amendment, the officer cannot be liable under section 1983, since no right has been violated. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

67. *Smith*, 103 S. Ct. at 1638. The *Second Restatement of Torts* states that "in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages." RESTATEMENT (SECOND) OF TORTS § 908 comment c (1977).

68. *Smith*, 103 S. Ct. at 1640-41 (Rehnquist, J., dissenting).

69. *Id.* at 1656.

defendant.⁷⁰ He claimed that this standard was the majority rule in 1871, and that the Court had misinterpreted those nineteenth century cases.⁷¹

Justice Rehnquist further criticized the Court for inadequately assessing the public policies implicated in its decision. In his judgment, the dangers that accompany the vague recklessness standard adopted by the Court far outweighed the deterrence achieved.⁷² He perceived the dangers to include encouraging unnecessary litigation, which would further add to the federal backlog,⁷³ and impeding decisive action by public officials who may be intimidated by the threat of punitive damages.⁷⁴

Justice O'Connor, in a separate dissent, disagreed with the approaches taken by the Court and Justice Rehnquist.⁷⁵ She maintained that once it is established that the common law of 1871 provides no "real guidance,"⁷⁶ the issue should be resolved by determining which rule best accommodates the policies underlying section 1983. Since compensatory damages coupled with attorney's fees⁷⁷ already provide sig-

70. *Id.* at 1640.

71. *Id.* at 1646. Justice Rehnquist read the cases cited in *supra* note 62 as "unambiguously" supporting an actual malice standard. *Id.* See also *Scott v. Donald*, 165 U.S. 58, 86 (1897) ("evil motive, actual malice, deliberate violence or oppression"); *Lake Shore & Michigan So. R. v. Prentice*, 147 U.S. 101, 107 (1893) ("wanton, malicious or oppressive intent"); *Day v. Woodworth*, 54 U.S. 363, 371 (1851) ("wanton and malicious or gross and outrageous").

72. *Smith*, 103 S. Ct. at 1657 n.16 (Rehnquist, J., dissenting).

73. *Id.* at 1657-58. One can hardly read about section 1983 without seeing a reference to the overwhelming number of section 1983 cases. Between the enactment of the statute in 1871 and 1939, there were only 19 section 1983 cases reported. In 1960, the year prior to *Monroe*, only 280 cases were filed. By 1970, the number had risen to 3,586, and the upward trend continued in 1971 with an increase to 4,609. The most recent data indicate that there are approximately 13,000 new filings annually. See Comment, *The Supreme Court Corrals a Runaway Section 1983*, 34 MERCER L. REV. 1073, 1075 n.24 (1983). But see Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 533 (1982) (asserting that dividing these recent figures by two, or even three, would yield a more accurate estimate of the number of section 1983 cases).

74. *Smith*, 103 S. Ct. at 1656 (Rehnquist, J., dissenting). But see *infra* text accompanying notes 92-95.

75. *Smith*, 103 S. Ct. at 1658-59 (O'Connor, J., dissenting).

76. *Id.* at 1659. Justice O'Connor reasoned that since there was a significant split in authority over the common law standard, one simply could not assume that Congress intended one view to govern rather than the other. *Id.*

77. The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (Supp. IV 1980). See *infra* note 96.

nificant deterrence, she concluded that the policies against awarding punitive damages for reckless acts of public officials outweighed the desirability of any incremental deterrent effect that such awards may have.⁷⁸

IV. ANALYSIS

In determining the impact of this decision on constitutional tort litigation, it is necessary to consider the purposes that punitive damages have traditionally served. Generally, punitive damages have been awarded to achieve three distinct objectives: punishment, deterrence, and law enforcement.⁷⁹

While punishment is not a "prominent" purpose under section 1983, punitive damages as authorized in *Smith v. Wade*⁸⁰ will appropriately serve this objective by imposing such awards on those whose aggravated conduct has intentionally or recklessly violated another's constitutional rights.⁸¹ Congress enacted the Civil Rights Act of 1871 to suppress the organized violence of the Ku Klux Klan.⁸² The Act includes criminal as well as civil sanctions.⁸³ Awarding punitive damages under section 1983 compliments the objectives of its criminal counterpart.⁸⁴ This is particularly important when the enforcement of criminal sanctions is lax.⁸⁵

The major objective of both section 1983 and punitive

78. *Smith*, 103 S. Ct. at 1659 (O'Connor, J., dissenting).

79. *Electric Workers v. Foust*, 442 U.S. 42, 48 (1979). See also D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.9, at 205 (1973); J. GHIARDI & J. KIRCHER, *PUNITIVE DAMAGES LAW AND PRACTICE* ch. 2 (1981); K. REDDEN, *PUNITIVE DAMAGES* § 2.1 (1980); Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1277-78 (1976).

80. *Smith v. Wade*, 103 S. Ct. 1625 (1983).

81. One commentator has suggested that the retributive purpose of punitive damages is justified as a means of deterring self-help while vindicating important rights. See Comment, *supra* note 30, at 207.

82. See Gressman, *supra* note 21, at 1334-36; Note, *supra* note 18, at 1153-56.

83. 18 U.S.C. § 242 (1976) imposes a criminal sanction on any person who willfully violates the civil rights of another under color of state law. See *Screws v. United States*, 325 U.S. 91 (1945) (prosecution requires proof of specific intent).

84. See generally 18 U.S.C. § 242 (1976).

85. For a discussion of the difficulties of enforcing criminal sanctions against civil rights violators, see Caldwell & Brodie, *Enforcement of the Criminal Civil Rights Statute*, 18 U.S.C. Section 242, in *Prison Brutality Cases*, 52 GEO. L.J. 706 (1964).

damages is to deter future egregious conduct.⁸⁶ To fully evaluate the deterrent effect of punitive damages in section 1983 actions, it is instructive to consider some of the criticisms which have been raised against such damages.⁸⁷

One criticism of punitive damages is that its deterrence justification does not take into account the fact that imposing compensatory damages is also an effective deterrent.⁸⁸ However, in the context of section 1983, this argument carries less weight. After *Carey v. Piphus*,⁸⁹ a perpetrator of outrageous conduct in violation of procedural due process could escape monetary liability if the plaintiff were not able to prove compensable injury.⁹⁰ Thus, punitive damages may provide the only effective source of deterrence for such violations. Furthermore, the Court of Appeals for the Third Circuit observed that "[t]he availability of punitive damages as a deterrent may be more significant than ever today, in view of the apparent trend of decisions curtailing the powers of federal courts to impose equitable remedies to terminate [constitutional] violations."⁹¹

Another argument against allowing punitive damages is that the awards will deter public officials from holding public office.⁹² However, this danger is not very significant be-

86. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

87. See generally D. DOBBS, *supra* note 79, § 3.9; J. GHIARDI & J. KIRCHER, *supra* note 79, ch. 2; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2 (4th ed. 1971); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133 (1982); Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303 (1980).

88. See Schwartz, *supra* note 86, at 137-38.

89. 435 U.S. 247 (1978).

90. *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980). In addition to this requirement of proof of actual injury, other barriers to recovering damage awards under section 1983 include absolute and qualified immunities, restrictions on vicarious liability, and requirements of proof of causation. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 42-47 (1980). This commentator concluded that because of the numerous barriers to section 1983 recovery, damages are not available to fulfill the goals conventionally said to be served by a tort action—deterrence, affirmation of the plaintiff's right, punishment and compensation. *Id.* at 47.

91. *Cochetti v. Desmond*, 572 F.2d 102, 105-06 (3d Cir. 1978). See generally S. NAHMOD, *supra* note 18, ch. 5.

92. *Smith v. Wade*, 103 S. Ct. 1625, 1656-57 (Rehnquist, J., dissenting); *id.* at 1659 (O'Connor, J., dissenting).

cause the public official immunity doctrine⁹³ provides substantial protection against the imposition of damages for good faith violations of the Constitution.⁹⁴ Moreover, once the protected sphere of a qualified immunity has been exceeded, punitive damages are more apt to serve as an effective deterrent against public officials who are capable of recurrent constitutional violations by reason of their office.⁹⁵

Concerning the final objective, that of law enforcement, the Civil Rights Attorney's Fees Awards Act of 1976⁹⁶ already provides an incentive for constitutional tort plaintiffs to act as private attorneys general. However, a typical plaintiff will often be unwilling to sue for nominal damages and attorney fees. Therefore, the possibility of recovering punitive damages in aggravated cases would create an additional incentive to bring suit, thereby fulfilling the law enforcement function of punitive damages.⁹⁷

V. CONCLUSION

In *Smith v. Wade*⁹⁸ the Supreme Court established punitive damages as an integral component of the relief available in section 1983 actions. By sanctioning such awards, the Court advanced one of the specific purposes underlying section 1983, that of preventing future violations of constitu-

93. See *supra* note 66.

94. See Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?*, 13 URB. LAW. 1 (1981).

95. Punitive damages are likely to have their greatest deterrent effect when they are levied against "going concerns with an institutional motivation to respond." D. DOBBS, *supra* note 79, § 3.9.

96. 42 U.S.C. § 1988 (Supp. IV 1980). The statute provides in pertinent part that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

97. One commentator stated:

Availability of punitive damages may make it worthwhile for plaintiffs to sue defendants who should be sued but who, in the absence of punitive awards, would not be, because of the trifling nature of the actual damages suffered by the plaintiff. The public interest requires these defendants to be admonished. The prospect of punitive damages encourages the plaintiff to seek the admonishment.

Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 878 (1976) (footnote omitted).

98. 103 S. Ct. 1625 (1983).

tional rights. The decision properly reflects the compelling need to punish and deter aggravated misconduct when interests as important as constitutional rights are at stake. Furthermore, by adopting a reckless disregard standard, the Court avoided unduly restricting the availability and effect of punitive damages in section 1983 actions. Preserving a strong civil rights cause of action is essential to a continued dedication to individual liberties.

THOMAS L. HORVATH