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NOTES

A RECKLESSNESS STANDARD FOR PUNITIVE DAMAGES IN SECTION 1983 ACTIONS

Smith v. Wade[1]

Punitive damages are a potent weapon in the enforcement of civil rights.[2] In appropriate circumstances, a jury is permitted to assess nearly any amount it believes necessary to punish and deter violations of civil rights.[3] Federal courts have long allowed punitive awards in a variety of civil rights actions.[4]

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1. 103 S. Ct. 1625 (1983).

2. *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO § 1983, §§ 4.08-4.12 (1979); Annot, 14 A.L.R. FED. 608 (1973).

Most cases to date have been brought under the Civil Rights Act of 1866, codified at 42 U.S.C. § 1982 (1982); the Civil Rights Act of 1870, codified at 42 U.S.C. § 1981 (1982); and the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (1982). There is little case law concerning the availability of punitive damages under the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h(6) (1982). Although the Civil Rights Act of 1968, codified at 42 U.S.C. § 3601 *et seq.* (1982), is the only federal civil rights statute containing an express provision covering punitive damages, there are few decisions interpreting this provision.

3. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978). An award of punitive damages is beyond that necessary to compensate the injured plaintiff and often has little or no relationship to the extent of injury. *See* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965) (punitive damages permitted in the absence of actual damage). The jury has great discretion in the amount of punitive damages it may award. An award of punitive damages will not be overturned absent a showing that it is grossly excessive or "is so high as to shock the judicial conscience." Zarcone v. Perry, 572 F.2d 52, 56-57 (2d Cir. 1978).

4. *See* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965) (leading case for proposition that punitive damages may be awarded under 42 U.S.C. § 1983); Hague v. Committee for Indus. Org., 101 F.2d 774 (3d Cir.) (earliest case recognizing the possibility of awarding punitive damages in a civil rights action), *modified on other grounds*, 307 U.S. 496 (1939); *see also* Cofield v. City of Atlanta, 648 F.2d 986 (5th Cir. 1981) (punitive damages awarded for deprivation of free speech and assembly); Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981) (due process); Vetters v. Berry, 575 F.2d 90 (6th Cir. 1978) (freedom from unlawful assault or arrest); Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971) (prisoner's right's), *cert. denied*, 404 U.S. 1049, *cert. denied*, 405 U.S. 978 (1972); Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1968) (per curiam) (the right to privacy), *cert. denied*, 393 U.S. 940 (1968).

Their decisions, however, have been marked by confusion and disagreement over the proper standard of culpability for such an award.[5]

In *Smith v. Wade*, a closely divided United States Supreme Court held that a jury may assess punitive damages in a section 1983 action[6] if they find the defendant's conduct involved "a reckless or callous disregard of, or indifference to, the rights or safety of others." A jury need not find an intent to cause harm.[7] Further, the Court held that recklessness is the appropriate standard even when the standard for compensatory liability is also recklessness or its equivalent.[8] The decision was the product of an exhaustive survey of American tort law. The dissenters rejected the majority's methodology and were persuaded that policy considerations made intent the more suitable punitive standard for section 1983.[9] While the Court's holding rests on generally accepted tort priniciples, it is unfortunate that the majority gave only cursory treatment to the legitimate policy concerns that favor limiting the availability

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5. Some courts, for example, appear to require a recklessness standard. *See, e.g.*, Cochetti v. Desmond, 572 F.2d 102, 106 (3d Cir. 1978) (knowledge or reckless disregard); Silver v. Cormier, 529 F.2d 161, 163-164 (10th Cir. 1976) (reckless indifference, ill will, a desire to injure, or malice). Other cases appear to require conduct beyond recklessness. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971) (pattern of inappropriate behavior), *cert. denied*, 404 U.S. 1049, *cert. denied*, 405 U.S. 978 (1972); Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970) (willfully and in gross disregard); Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.) (per curiam) (evil intent), *cert. denied*, 393 U.S. 940 (1968); Pierce v. Stinson, 493 F. Supp. 609, 612 (E.D. Tenn. 1979) (malice); Jones v. Institutional Classification Comm., 374 F. Supp. 706, 714 (W.D. Va. 1974) (actual malice); United States *ex rel.* Motley v. Rundle, 340 F. Supp. 807, 811 (E.D. Pa. 1972) (malicious actions in gross disregard); Sexton v. Gibbs, 327 F. Supp. 134, 142-143 (N.D. Tex. 1970) (willful or malicious), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

6. 42 U.S.C. § 1983 (1982). Section 1983 provides in relevant 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.

7. 103 S. Ct. at 1628. This note employs the term "intent" to describe the standard argued for by the petitioner, instead of the term "actual malice" which he used. The petitioner defined "actual malice" to include "ill will, spite, or intent to injure." *Id.* at 1630. The petitioner did not use "actual malice" as the Court has in defamation cases to refer to recklessness. *Id.*; *see* New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). This note uses "intent" to avoid the confusion surrounding the term "actual malice." *See* 103 S. Ct at 1630-31 n.6; 22 AM. JUR. 2D *Damages* § 250 (1965). "Recklessness" is the term employed to describe the less restrictive standard approved by the Court. *See infra* text accompanying notes 62-66. Much of the confusion surrounding the culpability required to justify an award of punitive damages can be attributed to judicial terminology. *See* 22 AM. JUR. 2D *Damages* § 249 (1965); note 5 *supra*.

8. 103 S. Ct. at 1640.

9. *Id.* (Rehnquist, J., dissenting); *id.* at 1658 (O'Connor, J., dissenting).

of punitive damages.

Smith v. Wade arose in 1976, when eighteen year old Daniel Wade was transfered to administrative segregation at the Algoa Reformatory in Missouri.[10] Wade was placed in a cell with another inmate. Later the same day, prison guard William Smith placed a third inmate in Wade's cell. That night Wade's two cellmates beat and raped him. Wade sued Smith and four other correction officers, alleging that his eighth amendment rights had been violated.[11]

Although the evidence was insufficient to prove that Smith intended to cause Wade harm, it indicated that Smith knew or had reason to know that an assault was likely to occur.[12] The district court judge instructed the jury that if it found that Smith had acted with reckless disregard of, or indifference to Wade's rights or safety, then it could assess punitive damages in order to punish and deter such conduct.[13] The jury found for Wade and awarded $25,000 for compensatory damages and $5,000 for punitive damages. A divided panel of the United States Court of Appeals for the Eighth Circuit approved the punitive damage jury instruction and upheld the punitive damage award.[14]

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10. Wade had been in protective custody because of prior incidents of violence against him. *Id.* at 1627.

11. The district court directed a verdict for two of the correction officers and the jury found for the other two but against Smith. *Id.* at 1628.

12. The third inmate had been placed in administrative segregation for fighting. At the time Smith placed the third inmate in Wade's cell, at least one other available cell held only one inmate. Smith made no effort to check whether another cell was available. The prison had an unwritten policy of segregating general population inmates from inmates in protective custody. In addition, just a few weeks earlier another inmate had been beaten to death while Smith was on duty. Wade v. Haynes, 663 F.2d 778, 781 (8th Cir. 1981), *aff'd,* 103 S. Ct. 1625 (1983).

13. The instruction on punitive damages read in relevant part:

> In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.
>
> If you find the issues in favor of the plaintiff, and if the conduct of one or more of the defendants is shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others, then you may assess punitive or exemplary damages in addition to any award of actual damages.
>
> . . . The amount of punitive or exemplary damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct.

103 S. Ct. at 1628. This instruction varied little from the standard jury instruction under Missouri law. MAI 10.02 (1978 Revision).

14. Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981), *aff'd,* 103 S. Ct. 1625 (1983). The majority noted the split among the circuits as to the proper standard for punitive damages. It reasoned that malice may be inferred from a dereliction of duties amounting to recklessness and that this conduct should be deterred. *Id.* at 786. It also cited federal case law to support the proposition that a finding of liability against a prison official in a section 1983 action automatically triggers the jury's consideration of punitive damages. *Id.* at 785. Judge Gibson dissented and argued that an award of

The Supreme Court affirmed in a five to four decision.[15] All the Justices agreed that punitive damages were available in a proper case under section 1983.[16] The harder issue, however, concerned the proper standard of culpability for such an award.

In writing for the majority, Justice Brennan noted that there was little in the legislative history of section 1 of the Civil Rights Act of 1871 concerning the availability of punitive damages.[17] Consequently, he turned to the common law for guidance. He surveyed American tort law from 1871 to the modern era. Through a maze of judicial terminology describing culpability requirements, he concluded that then, as now, the prevailing law permitted punitive awards without showing an actual intent to injure.[18]

The majority rejected Smith's argument that an intent standard is preferable because it is less vague than a recklessness standard. Justice Brennan explained that the recklessness standard has survived years of intense debate and remains the most widely adopted standard of punitive liability in American tort law.[19] He could discern no reason why section 1983 defendants should be given greater protection. Moreover, he observed that recklessness served as

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punitive damages must be based on a stricter standard of wrongdoing than that necessary for compensatory liability in the first instance. *Id.* at 787 (Gibson, J. dissenting). This split of opinion reflects the confusion and divergence of opinion that has existed among the courts of appeals concerning the appropriate standard for an award of punitive damages. *See supra* note 5. The Supreme Court granted certiorari to quell this confusion. 456 U.S. 924 (1982).

15. 103 S. Ct. 1625 (1983). Justice Brennan delivered the opinion of the Court, 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.

16. Although the Supreme Court had not previously ruled on the availability of punitive damages under section 1983, it had made clear that they might be available in appropriate circumstances. *See* Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978) (punitive damages should be available for the specific purposes of deterring or punishing violations of constitutional rights). In Carlson v. Green, 446 U.S. 14, 22 (1980), the Court made punitive damages available against federal officers for eighth amendment violations, stating that it would be anomalous to allow punitive awards against state but not federal officers. In City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981), the Court held that a municipality is immune from punitive damages under § 1983. The Court reasoned that deterrence of constitutional violations would be adequately accomplished by allowing punitive damage awards directly against the responsible individuals. *Id.* at 269-270.

17. 103 S. Ct. at 1628.

18. *See, e.g.*, Philadelphia, W. & B. R.R. v. Quigley, 62 U.S. (21 How.) 202, 214 (1858) (spirit of mischief or criminal indifference to civil obligations); Milwaukee & St. P. Ry. v. Arms, 91 U.S. 489, 493, 495 (1875) (reckless indifference equivalent to an intentional violation, or that entire want of care which would raise the presumption of a conscious indifference to consequences); *see also* RESTATEMENT (SECOND) OF TORTS § 908(2) (1977) (conduct that is outrageous because of evil motive or reckless indifference to the rights of others).

19. 103 S. Ct. at 1637; *see* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 4.01 (1979).

the threshold standard for compensatory liability in this case. Consequently, Justice Brennan concluded that any argument that the concept of recklessness is too vague to deter misconduct should be applied to the compensatory standard since it is this standard to which officials should look in shaping their conduct in the first place.[20]

The majority then rejected Smith's argument that intent was required in this case because the threshold for punitive damages must always be higher than that for compensatory liability. Again, Justice Brennan found no support for this proposition at common law.[21] More importantly, he explained that in reality the standards *are* different; compensatory damages are awarded as a matter of right, while punitive damage awards rest in the discretion of the jury.[22] Finally, the Court noted that punitive damages may be the only significant remedy available in section 1983 actions where liability exists but the victims cannot prove pecuniary injury.[23]

Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, dissented at length and concluded that section 1983 requires proof of intentional injury before punitive damages are appropriate. He denied that the prevailing standard during the Forty-second Congress was anything less than intent,[24] and he relied on the traditional criticism of punitive damages to strengthen his argument.[25] Moreover, he pointed out that the plain language of section 1983

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20. 103 S. Ct. at 1637.

21. *Id.* at 1638.

22. *Id.*; *see* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973).

23. 103 S. Ct. at 1639 n.21; *see* Carey v. Piphus, 435 U.S. 247, 264 (1978) (compensatory damages are not allowed without proof of actual injury even if injuries are difficult to prove).

24. 103 S. Ct. at 1650-54 (Rehnquist, J., dissenting).

25. *Id.* at 1641; *see, e.g.*, Fay v. Parker, 53 N.H. 342, 382 (1872) ("The idea of [punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law."). Many cases remark that such damages have been traditionally disfavored in the law. *See generally* 25 C.J.S. *Damages* § 117(1), at 1114 n.18.5 (1966).

The debate over punitive damages continues to rage. Critics have levelled three principal criticisms at punitive damages. First, punitive damages are a windfall to the plaintiff, who ought to receive compensation but no more. Second, a punitive award is criminal in nature but unaccompanied by the safeguards associated with a criminal trial. Third, the permissible discretion allowed juries in awarding punitive damages is outweighed by the costs, "such as the encouragement of unnecessary litigation and the chilling of desirable conduct." 103 S. Ct. at 1642 (Rehnquist, J., dissenting).

The defenders of punitive damages advance equally impressive arguments. Punitive damages, they maintain, serve the important functions of punishment and deterrence, especially where the criminal justice system may be inadequate. They serve as an incentive to sue when the defendant's conduct was egregious, but the prosecutor is too busy to notice and the wronged individual otherwise would not find a lawsuit worth the trouble. Punitive damages may also provide compensation for injuries that are difficult to prove. Finally, the jury's discretion is not unbridled; the award is assessed under the supervision of the court which may reduce the award or order a new trial. For the pros and cons of punitive damages, see D. DOBBS, *supra* note 22, § 3.9; W. PROSSER,

provides only "for redress" of constitutional violations. Accordingly, he questioned whether the Forty-second Congress ever intended to allow anything other than purely compensatory remedies.[26] Even if Congress did intend to allow punitive damages, Justice Rehnquist concluded that it would not have intended as expansive a standard as recklessness. In contrast to the majority, he eschewed the use of modern tort law in interpreting section 1983 to arrive at the appropriate standard.[27] He reasoned that cases decided after 1871 are irrelevant to the intent of the Forty-second Congress. Consequently, he concluded that the majority's reliance on post-1871 common law was a gross deviation from fundamental statutory construction.[28]

Policy concerns with respect to section 1983 liability in general ultimately explain Justice Rehnquist's preference for the more restrictive standard of intent. He argued that by expanding potential liability, a recklessness standard for punitive damages would erode the protection that qualified immunity affords state officials.[29] He cautioned that such an expansive standard would create an imbalance in inducements to litigate since compensatory damages and attorney's fees are already available in section 1983 actions.[30] As a result, he warned, the number of frivolous section 1983 claims will continue to tax an already overburdened judicial system.[31]

Justice O'Connor dissented in a separate opinion.[32] She chastised both Justice Brennan and Justice Rehnquist for their futile attempts to ascertain the intent of the Forty-second Congress by examining the myriad of ambiguous standards found in the case law in the latter half of the nineteenth century.[33] She thought policy considerations should control instead. While she did not join in Justice Rehnquist's wholesale condemnation of punitive damages, she did share his concern that a recklessness standard would have a chilling effect on state officials and would unnecessarily increase the workload of the

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HANDBOOK OF THE LAW OF TORTS § 2, at 9-14 (4th ed. 1971); J. GHIARDI & J. KIRCHER, *supra* note 19, § 2; C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77 (1935); Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 5-8 (1980).

26. 103 S. Ct. at 1655 (Rehnquist, J., dissenting). He also cited two other statutes enacted by Congress about the same time as section 1983 was enacted. *See* 16 Stat. 198, 207 (1870); 12 Stat. 696, 698 (1863). Both included provisions for punitive damages in the form of civil fines. Consequently, Justice Rehnquist concluded that "if Congress wanted to subject persons to a punitive remedy it did so explicitly." 103 S. Ct. at 1655 (Rehnquist, J. dissenting).

27. 103 S. Ct. at 1645 (Rehnquist, J., dissenting).

28. *Id.*

29. *Id.* at 1656-57 (Rehnquist, J., dissenting).

30. *Id.* at 1657-58. The Civil Rights Attorneys Fees Awards Act of 1976 provides that the prevailing party in a section 1983 action may recover "a reasonable attorneys fee." 42 U.S.C. § 1988 (1982).

31. 103 S. Ct. at 1658 (Rehnquist, J., dissenting); *see* notes 50 & 52 *infra.*

32. 103 S. Ct. at 1658-59 (O'Connor, J., dissenting).

33. *Id.*

federal courts.[34]

Justice O'Connor is correct in pointing to the futility of arguing congressional intent in the absence of relevant legislative history. In 1871, the law on punitive damages was ambiguous and unsettled.[35] Therefore, it is no surprise that Justice Brennan and Justice Rehnquist could cite several identical Supreme Court decisions from the late nineteenth century for their respective positions.[36] Nor is it surprising that Justice Brennan concluded that a large majority of the states required only a showing of recklessness, while Justice Rehnquist concluded that a solid majority required intentional injury.[37] In

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34. *Id.* at 1659 (O'Connor, J., dissenting).

35. The required culpability was characterized as "wilfulness, wantoness, maliciousness, gross negligence or recklessness, opression, outrageous conduct, indignity and contumely, insult or fraud or gross fraud." 22 AM. JUR. 2D *Damages* § 249 (1965). There were several types of "malice" all representing different standards. *Id.* § 250. The only agreement was that something more than mere negligent misconduct was required. *See supra* note 5 (confusion in federal courts).

36. Justice Rehnquist concluded that Philadelphia, W. & B. R.R. v. Quigly, 62 U.S. (21 How.) 202 (1858) did not stand for a recklessness requirement, as Justice Brennan had argued. *See supra* note 18 and accompanying text. He argued that the criminal nature of punitive damages implied a criminal mental state requirement. Therefore, "criminal indifference" should be read as requiring wrongful intent. 103 S. Ct. at 1646-1647 (Rehnquist, J., dissenting). Justice Brennan refuted this position by noting that crimes such as manslaughter required merely reckless conduct to create liability. 103 S. Ct. at 1632 n.9; *see* MODEL PENAL CODE § 2.02 (Tent. Draft No. 4, 1955) (criminal liability often rests on recklessness, and for some offenses even negligence). Also contrary to Justice Brennan's interpretation, Justice Rehnquist read Milwaukee & St. P. R.R. v. Arms, 91 U.S. 489, as requiring proof of intent. He argued that *Arms* merely allowed recklessness as circumstantial evidence of an evil motive and not as a standard for liability. 103 S. Ct. at 1648 (Rehnquist, J., dissenting).

Two major nineteenth century treatises also disagreed over the standard followed by the contemporary Supreme Court. *Compare* A. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 526 (8th ed. 1891) (recklessness is only evidence of evil motive and not the standard for liability) *with* 12 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 13 n.13, 24 n.2 (2d ed. 1899) (reckless conduct will support an award of punitive damages).

The differences may be reconcilable. It seems both positions are just rejecting an objective standard for punitive liability in favor of a subjective one. An evil motive does not necessarily require an intent to harm; conscious indifference is sufficient, and this is generally provable only by evidence of reckless conduct. *See* W. PROSSER, *supra* note 25, at 185. Thus recklessness, in the sense of requiring a subjective awareness of a risk of harm appears to have been the prevailing standard. This is the standard the Court adopted in *Smith*. *See infra* notes 62-66 and accompanying text.

37. Most commentators described the prevailing standard in the states as one of recklessness. *See* 12 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 13, 21-31 (2d ed. 1899); J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 723-24 (1883). *But see* A. SEDGWICK, *supra* note 36, at 526 (actual malice is required to sustain an award of punitive damages).

The contrary conclusions by Justice Brennan and Justice Rehnquist stem largely from their different definitions of the terms "willful" and "wanton." *See* 103 S. Ct. 1631 n.8. Justice Rehnquist incorrectly attributed to these terms an evil motive requiring an intent to harm. It is generally accepted, however, that "willful" and "wanton"

view of this confusion, it is impossible to assume that the Forty-second Congress intended one standard or the other.[38]

Justice Brennan sidestepped the brunt of Justice O'Connor's criticisms by resting his decision in large measure on modern tort law, in which the prevailing punitive standard clearly is recklessness.[39] It was this reliance on modern tort law that sharply divided the Court. While Justice Rehnquist argued that case law decided after 1871 is irrelevant in determining congressional intent[40], Justice Brennan presumed that Congress intended to incorporate generally applicable legal principles as they evolved.[41]

Three observations indicate that Justice Brennan's methodology is sound. First, it is doubtful that Congress would want to perpetuate tort law priniciples that become obsolete. It is generally accepted that section 1983 was intended to create a "species of tort liability,"[42] and it is axiomatic that standards of tort liability must change as social realities evolve. Congress has provided guidance on this issue. Section 1988 directs the courts to look to the common law of the states whenever "necessary to furnish suitable remedies" under section 1983.[43]

Second, the methodology Justice Brennan employed has guided the Court's interpretation of section 1983 since *Monroe v. Pape*.[44] In *Monroe*, Justice Douglas announced that section 1983 "should be read against the back-

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are practically indistinguishable from "reckless disregard." *See* W. PROSSER, *supra* note 25, at 9-14; RESTATEMENT (SECOND) OF TORTS § 500 Special note (1977).

38. Justice O'Connor, commenting on the incredible survey of the common law undertaken by Justices Brennan and Rehnquist, stated that "the battle of string citations can have no winner." 103 S. Ct. at 1659 (O'Connor, J., dissenting). But measured by sheer numbers, Justice Rehnquist gets the nod. He cited 78 decisions from 27 states, one of the largest footnotes in the Supreme Court's history. *See* 103 S. Ct. at 1651 n.12 (Rehnquist,J., dissenting).

39. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1977); J. GHIARDI & J. KIRCHER, *supra* note 19, § 4.02. Even Justice Rehnquist conceded that in recent years many courts have adopted the recklessness standard. 103 S. Ct. at 1651 (Rehnquist, J., dissenting).

40. *Id.* at 1645.

41. 103 S. Ct. at 1628-29 n.2.

42. Imbler v. Pachtman, 424 U.S. 409, 417 (1976); *accord* Carey v. Piphus, 435 U.S. 247, 253 (1978).

43. 42 U.S.C. § 1988 (1982); *see also* Carey v. Piphus, 435 U.S. 247, 258 n.13 (1978) (relying on section 1988 to justify reliance on state tort law in construing section 1983); Zarcone v. Perry 572 F.2d 52, 55 (2d Cir. 1978) (application of common law leading to availability of punitive awards under section 1983 is based on section 1988); Basista v. Weir, 340 F.2d 74, 85-86 (3d. Cir. 1965) (same). *But see* Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 PA. L. REV. 499 (1980) (section 1988 was not meant as a general instruction to fill gaps in federally created causes of action with state rules, but was intended only to apply to actions removed from state to federal court).

44. 365 U.S. 167 (1961). *See generally* S. NAHMOD, *supra* note 2; Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974); Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 14-21 (1980).

ground of tort liability."[45] Recent Court decisions involving questions of liability[46] and immunity[47] have adhered to this approach in interpreting section 1983.

Third, it is sensible to apply modern tort principles to section 1983. Courts and litigants alike are familiar with them.[48] Because legislative history with respect to damages is scant, reliance on modern tort law enhances predictability.[49]

While the majority's methodology may have been sound, the costs of implementing the resulting standard were virtually ignored. A major recurring concern for section 1983 liability is its effect on the federal case load.[50] Unlike the successful plaintiff in a tort action, a successful section 1983 plaintiff is

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45. 365 U.S. at 187.

46. *See, e.g.,* Carey v. Piphus, 435 U.S. 247, 257, 258 (1978) (common law of damages provides "appropriate starting point for the inquiry under § 1983"); Adickes v. S.H. Kress & Co., 398 U.S. 144, 231-232 (1970) (Brennan, J., concurring) (application of tort doctrines concerning mental elements for the existence and amount of liability appropriate when construing section 1983). *But see* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) (an underlying assumption of Court's decisions is that the forty-second Congress intended *then contemporary* common law tort principles to control).

47. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409, 418, 421 (1976) (section 1983 immunity doctrine to be fashioned in harmony with general principles of tort immunity); Wood v. Strickland, 420 U.S. 308, 318 n.9 (1975) (section 1983 to be construed by "common law traditions"); Piersen v. Ray, 386 U.S. 547, 556-557 (1967) (citing both historical and modern tort law). *But see* Tenney v. Brandenhove, 341 U.S. 367, 376 (1951) (Court limits inquiry to common law prior to 1871).

48. *See* S. NAHMOD, *supra* note 2, at 61; Whitman, *supra* note 44, at 18.

49. *See* Basista v. Weir, 340 F.2d 74, 86 (3d Cir. 1965); Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968) (per curiam), *cert. denied*, 393 U.S. 940 (1968); Whitman, *supra* note 44, at 12.

50. 103 S. Ct. at 1657-1658 (Rehnquist, J., dissenting); *id.* at 1659 (O'Connor, J., dissenting); *see* Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1980) (Powell, J., dissenting) (expansion of section 1983 to encompass negligent conduct increases the federal case load and hence dilutes the federal court's ability to defend significant constitutional rights); Maine v. Thiboutot, 448 U.S. 1, 23 (1980) (Powell, J., dissenting) (overburdened federal courts is a reason for narrowly construing section 1983); Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971) (Burger, C.J., dissenting) (docket congestion justifies abstention).

Congress has also shown concern. *See Municipal Liability under 42 U.S.C. § 1983; Hearings on S. 585, & S. 990 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 15 (1981) (statement of Sen. Thurmond) (hearings on proposed amendments to section 1983 reflect concern about the number of cases).

Even sympathetic critics mention the burdens that section 1983 imposes on the federal courts. *See* Nahmod, *The Mounting Attack on Section 1983 and the 14th Amendment*, 67 A.B.A. J. 1586 (1981); Whitman, *supra* note 44, at 5, 6, (1980). *But see* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 523-524 (1982) (volume of section 1983 cases no serious threat to federal court system and neither the number nor the nature of section 1983 cases justify major doctrinal change).

entitled to reasonable attorney's fees.[51] The availability of punitive damages adds additional incentive to litigate. Section 1983 already accounts for a staggering number of lawsuits each year.[52] The ready availability of punitive damages can only exacerbate the burden on the federal courts by increasing the number of frivolous section 1983 claims.[53]

A second significant concern is the effect of a recklessness standard on qualified immunity. Qualified immunity protects state officials from section 1983 liability for conduct that "does not violate clearly established" rights.[54] The rationale underlying the Supreme Court's immunity decisions is the belief that the threat of personal liability interferes with official initiative and judgment,[55] and discourages qualified persons from seeking public positions.[56] Therefore, the specter of huge and unpredictable punitive awards on a showing of recklessness undermines this policy by threatening additional liability.

The *Smith* majority justified its decision by focusing on the increased deterrence provided by a recklessness standard. Although society clearly has an important interest in deterring all reckless misconduct, this deterrence should not be bought at any cost.[57] In any event, much of the force of the majority's

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51. *See* 42 U.S.C. § 1988 (1982).

52. State prisoners alone filed 16,741 section 1983 claims in 1982. This is twice the number filed in 1977 and nearly eight times as many as were filed in 1970. ANNUAL REPORT OF THE DIRECTOR OF ADMINISTRATORS OFFICE OF THE U.S. COURTS 102-103 (1983).

53. It is readily conceded that restricting frivolous claims necessarily restricts some meritorious claims as well. In addition, injuries resulting from violations of federally protected rights are often difficult to prove, and consequently, in the light of the Court's decision in Carey v. Piphus, 435 U.S. 247 (1979) (restricting compensatory recovery to provable injury), punitive damages may be the only significant remedy available to that class of plaintiffs who are unable to prove actual injury. Moreover, consistent with Justice Brennan's reasoning, the constitutional guarantees protected by section 1983 are more jealously guarded than those interests protected by tort law. *See* Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 11 (1974). Therefore, an army of private attorneys general as guardians of these closely held rights seems desirable. Finally, the third circuit has suggested that punitive damages may be more significant today than ever in view of recent Supreme Court decisions curtailing the power of the federal courts to grant injunctive relief in section 1983 cases. *See* Cochetti v. Desmond, 572 F.2d 102, 105-106 (3d Cir 1978). *See generally* S. NAHMOD, *supra* note 2, at 80-85; McClellan & Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 DUQ. L. REV. 509, 566 (1980).

In answer to these countervailing concerns, it should be remembered that the argument is not for eliminating punitive damages, but merely for a less expansive standard in awarding them. Punitive damages would still be available to redress particularly egregious constitutional violations.

54. *See* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (state officials are protected from liability for damages as long as their "conduct does not violate clearly established statutory or constitutional rights").

55. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

56. *See* 103 S. Ct. at 1657 n.16 (Rehnquist, J. dissenting).

57. Justice Rehnquist accused Justice Brennan of ignoring the costs of deterrence. *Id.*

deterrence argument is diminished by the availability of insurance against an award of punitive damages in a section 1983 action.[58] While many states prohibit insurers from providing coverage against punitive damages in tort actions,[59] courts generally hold that public policy does not preclude coverage in a section 1983 action.[60] Thus, in section 1983 actions, a recklessness standard buys little additional deterrence.[61]

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58. The insurance issue is conspicuously absent from Justice Brennan's opinion.

59. *See, e.g.,* Northwestern Nat. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962) (against public policy in Florida and Virginia since defeats purpose of deterrence and is analogous to insuring against criminal penalties); Brown v. Western Casualty & Sur. Co., 448 P.2d 1252 (Colo. App. 1971); Crull v. Gibb, 382 S.W.2d 17 (Mo. Ct. App. 1964); Esmond v. Liscio, 209 Pa. Super. 200, 224 A.2d 793 (1966); LaRocco v. New Jersey Manuf. Indem. Ins. Co., 82 N.J. Super. 323, 197 A.2d 591 (1964). *But see* Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964); Harrell v. Travelers Indem. Co., 279 Ore. 199, 567 P.2d 1013 (1977); Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 502 P.2d 522, 523 (1972). *See generally* J. GHIARDI & J. KIRCHER, *supra* note 19, §§ 7.11-7.14.

60. *See* Harris v. Racine County, 512 F. Supp. 1273, 1283 (E.D. Wis. 1981) (encourages enforcement and avoids the chilling effect on official performance); Fagot v. Ciravola, 445 F. Supp. 342, 344 (E.D. La. 1978) (in section 1983 case of police liability, public policy does not proscribe insurance coverage for punitive damages). *But see* Hartford Accident & Indem. Co. v. Village of Hempstead, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S. 2d 47 (1979) (public policy prohibits coverage of punitive damages in a civil rights action brought against municipal officers). *See generally* Note, *Limiting the Role of Insurance in Civil Rights Litigation: As an Enforcement Mechanism*, 5 J. CORP. L. 305 (1980).

61. It is clear that insurance may cover punitive damages in a section 1983 action arising out of reckless conduct; it is less clear whether it may also cover conduct evincing an intent to cause injury. Though there is no case law involving section 1983 that makes the distinction, if insurance were permitted for reckless but not intentional conduct, Justice Brennan's recklessness standard would anomalously provide less deterrence than an intent standard. While such a distinction is unlikely, it is plausible that, had the Court adopted an intent standard, insurance coverage may have been denied as against public policy, substantially boosting deterrence. There is little case law respecting insurance against punitive damages under section 1983, and the little that is available is not entirely consistent. *See supra* note 60. Though the states are split on the availability of insurance for punitive damages, many states make the distinction between intent and recklessness in allowing coverage. *See* City Prods. Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494, 500-501 (1979) (limiting restriction on coverage of punitive damages to intentional injury, e.g., malicious prosecution); City of Newark v. Hartford Accident & Indem. Co., 134 N.J. Super. 537, 342 A.2d 513 (1975) (punitive damage coverage violates public policy when city is liable for false arrest, detention or imprisonment, and malicious prosecution).

In addition, the procoverage position is strongest in cases where recklessness will sustain a punitive award. *See* Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013, 1021 (1977); J. GHIARDI & J. KIRCHER, *supra* note 19, § 7.14, at 55. Moreover, those states that require intent for a punitive recovery uniformly prohibit coverage. City Prods. Corp. v. Globe Indem. Co., 88 Cal. App. 3d 31, 151 Cal. Rptr. 494, 500-510 (1979). Ironically then, based on the common law, an intent standard would have faired a far better chance of providing a significant deterrent than a recklessness standard.

The foregoing concerns justify at least slight modification in the common law. While punitive damages should not be rejected entirely, they should be limited to intentional misconduct. Under an intentional standard, punitive awards remain available for particularly egregious constitutional violations, the spirit of the common law is preserved, and policies underlying section 1983 liability are protected. Nevertheless, the majority adopted the prevailing common law precisely. Consequently, practitioners must look to this standard of recklessness to anticipate the impact of *Smith v. Wade* on civil rights litigation.

The *Smith* standard for punitive liability is subjective.[62] The requisite state of mind may be characterized as conscious disregard or deliberate indifference. Three elements must be present for conduct to meet the recklessness standard: (1) an intentional act, (2) a substantial probability that the act will cause injury, and (3) actual awareness of the risk of injury.[63] Each of these elements distinguish the Court's standard from negligence. Negligence may be shown when the act is inadvertent, the risk merely foreseeable, or the actor unaware.[64] Negligence does not require an inquiry into the actor's state of mind; instead, the actor's conduct is measured by an external, objective standard of reasonableness. The Court's standard may be clarified further by noting that it differs from the intent standard advocated by the *Smith* dissent only in the likelihood of injury required.[65] While recklessness requires probability, intent demands substantial certainty. Both standards, however, re-

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62. *See* 103 S. Ct. at 1630 n.6. While RESTATEMENT (SECOND) OF TORTS (1972) states that there are two types of reckless conduct, one subjective and one objective, *id.* § 500 comment a, it seems to restrict reckless conduct sufficient to sustain punitive damages to a subjective standard. *Id.* § 908 comment b (requires outrageous conduct similar to that usually found in a crime; evil motive or reckless indifference may supply necessary state of mind). The requisite common law state of mind for punitive damages is closely associated with criminal recklessness, requiring subjective consciousness. *See* MODEL PENAL CODE § 2.02 (Tent. Draft No. 4, 1955); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 30 (1972). But as a practical matter even recklessness requiring conscious awareness often becomes an objective standard. It is a rare instance when a defendant will admit to conscious indifference. Consequently, this state of mind must be inferred from conduct and circumstances demonstrating an entire want of care, hence some objective standard of reasonableness is required. *See* W. LAFAVE & A. SCOTT, *supra* at 212; W. PROSSER, *supra* note 25, at 185.

63. *See* 103 S. Ct. at 1630 n.6, 1631 n.8; RESTATEMENT (SECOND) OF TORTS, § 500 comment a (1977); W. PROSSER, *supra* note 25, at 9, 184-185; W. LAFAVE & A. SCOTT, *supra* note 62, at 208-216.

64. RESTATEMENT (SECOND) OF TORTS, § 500 comment g (1977); W. LAFAVE & A. SCOTT, *supra* note 62, at 215; W. PROSSER, *supra* note 25, at 32.

65. Justice Brennan claimed that Justice Rehnquist had confused the standards by blending together the distinct concepts of "intent to cause" injury, on the one hand, and "subjective consciousness" of the risk of injury on the other. 103 S. Ct. at 1630 n.6. He correctly pointed out that consciousness of wrongdoing does not require injurious intent, but is equally consistent with indifference toward or disregard for consequences. *Id.*

quire an intentional act and subjective consciousness by the actor.[66]

After *Smith v. Wade*, plaintiffs' attorneys should request punitive damages in most section 1983 cases. Official misconduct necessary for compensatory liability will often be sufficient to meet the *Smith* standard, and hence trigger consideration of punitive damages. Although section 1983 imposes no express state of mind requirement,[67] a number of constitutional deprivations clearly imply one.[68] An eighth amendment violation requires recklessness,[69] while both sixth amendment[70] and equal protection violations[71] require intent. At least for these constitutional deprivations, therefore, punitive liability is a necessary concomitant to compensatory liability.[72]

In addition, although the Supreme Court has implied that negligence is sufficient to support a due process claim,[73] it has yet to find section 1983 liability based on negligence.[74] The lower courts have been reluctant to do so as

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66. *See* RESTATEMENT (SECOND) OF TORTS, § 500 comment f (1977); W. PROSSER, *supra* note 44, at 9: W. LAFAVE & A. SCOTT, *supra* note 62, at 215.

67. Parratt v. Taylor, 451 U.S. 527, 535 (1981). All that is required for the "initial inquiry" into section 1983 liability is: (1) whether the conduct complained of was under color of state law, and (2) whether the conduct deprived a person of fourteenth amendment or federal statutory rights, privileges, or immunities. *Id.* at 535. *See generally* Esbeck, *Current Practice Under 42 U.S.C. Section 1983*, 10 BARRISTER 31 (1983).

68. *See Parratt*, 451 U.S. at 547 (Powell, J., concurring); Baker v. McCollan, 443 U.S. 137, 140 n.1 (1979) (defendant's state of mind relevant to existence of constitutional violation apart from the section 1983 inquiry); Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 HAST. CONST. L.Q. 545, 566 (1982) (eighth, fourteenth, and fifteenth amendment violations require state of mind); *see also* S. NAHMOD, *supra* note 2, at 65 (possible that violation of the same constitutional provision may in different circumstances require different states of mind).

69. Estelle v. Gamble, 429 U.S. 97, 105 (1976) ("deliberate indifference" required to constitute infliction of cruel and unusual punishment).

70. Weatherford v. Bursay, 429 U.S. 545 (1977) (either intent to intercept lawyer-client conversations or their subsequent intentional use required to make out sixth amendment violation).

71. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (invidious discriminatory purpose required for claim of racial discrimination under the equal protection clause); Washington v. Davis, 426 U.S. 229 (1976).

72. *See* Wade v. Haynes, 663 F.2d 778, 785 (8th Cir. 1981), *aff'd*, 103 S. Ct. 1625 (1983).

73. Parratt v. Taylor, 451 U.S. 527, 532-35 (1981).

74. *Id.* at 533. The Court in *Parratt* held that adequate state tort remedies satisfied due process. *Id.* at 543. Until *Parratt*, the Court had avoided the question of whether negligence could support a section 1983 claim. *See* Baker v. McCollan, 443 U.S. 137, 139-140, 146-47 (1979) (negligent wrongful detention not violation of due process); Procunier v. Navarette, 434 U.S. 555, 565-66 (1978) (finding qualified immunity bar to section 1983 claim based on negligent interference with prisoner's outgoing mail); Paul v. Davis 424 U.S. 693, 711-14 (1976) (no deprivation of due process resulting from defamatory publication circulated by police). At least three of the current Justices have argued that negligence will not support a section 1983 claim. *See* Parratt v. Taylor, 451 U.S. 527, 546 (1981) (Powell, J., concurring); Baker v. McCollan, 443 U.S. 137, 147 (1979) (Blackmun, J., concurring) (reprehensible conduct is an element

well.[75] The fundamental section 1983 requirement of causation,[76] the availability of adequate state tort remedies,[77] the requirement of provable injury,[78] and the state of mind requirement for certain constitutional violations,[79] all tend to defeat negligence claims. Many more negligence claims will be defeated by qualified immunity.[80] To overcome the immunity defense, the plaintiff must show that the right violated was clearly established.[81] Since evidence sufficient to hurdle qualified immunity necessarily tends to support conscious awareness by the government official, the judge ordinarily should not withhold the question of punitive liability from the jury. The Supreme Court recently pared the good faith, subjective, element from the qualified immunity defense because it rarely could be decided on summary judgment.[82] The good faith inquiry is the same as the inquiry for punitive damages under *Smith*.[83] By

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under section 1983); Procunier v. Navarette, 434 U.S. 555, 568 (1978) (Burger, C.J., dissenting) (no liability under section 1983 absent intent or callous indifference). The Court has expressed concern that if negligence were a proper basis of section 1983 liability, then section 1983 would in effect become a federal tort law, engulfing or making irrelevant state tort law involving government officials as defendants. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 699-701 (1976) (section 1983 negligence liability would make fourteenth amendment a "font of tort law" to be superimposed over state systems). In *Baker*, the Court described the relationship between negligence and section 1983 as "more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." 443 U.S. 137, 139-40.

75. *See* Parratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., concurring) ("overwhelming number" of lower courts reject due process claims premised on negligence); *see also, e.g.*, Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980) (section 1983 liability requires the defendant's act be intentional or in reckless disregard of plaintiff's constitutional rights). *But see* Murray v. City of Chicago, 634 F.2d 365, 367 (7th Cir. 1980) (Swygert, J., concurring) (improper arrest based on negligent issue of warrant actionable), *cert. dismissed*, 456 U.S. 604 (1981).

76. *See* Friedman, *supra* note 68, at 563-64. Negligence is not actionable unless it causes a constitutional deprivation. *Compare* Paul v. Davis, 424 U.S. 693, 698 (1976) (dicta) (no cognizable section 1983 claim against sheriff for negligent driving since no constitutional issue at stake) *with* Douthit v. Jones, 619 F.2d 527, 532 (5th Cir. 1980) (cognizable claim against sheriff who imprisoned plaintiff because he erroneously believed that certain costs had not been paid).

77. *See* Parratt v. Taylor, 451 U.S. 527, 543 (1981).

78. *See* Carey v. Piphus, 435 U.S. 247 (1979).

79. *See supra* notes 67-72 and accompanying text.

80. *See* Procunier v. Navarette, 434 U.S. 555, 556-566 (1978).

81. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Although *Harlow* was a *Bivens*-type action against federal officers, the Supreme Court implied that the same immunity standard would apply to section 1983 defendants. *Id.* at 819 n.30.

82. *Id.* at 816-818. The Court eliminated the good faith defense so that insubstantial claims could be defeated without constant recourse to trial. *Id.* When it can be shown that the right violated was "clearly established," a reasonable inference is that the defendant was aware of such a right.

83. The good faith defense for qualified immunity that had been available under Wood v. Strickland, 420 U.S. 308 (1975), rested on the same standard of culpability as the Court approved in *Smith*. Ladnier v. Murray, 572 F. Supp. 544, 547 (D. Md. 1983).

analogy, therefore, when the plaintiff can show deprivation by a government official of a clearly established constitutional right, he ordinarily will be able to get the question of punitive damages to the jury.

Punitive damages premised on a showing of recklessness, also should be available in other civil rights actions. A showing of recklessness triggers consideration of punitive damages under Title VIII of the Civil Rights Act of 1968.[84] Furthermore, since the federal courts usually apply the rules developed under section 1983 in *Bivens*-type cases,[85] the recklessness standard will apply to federal officers as well.[86] The recklessness standard for punitive liability also should apply to civil rights actions under sections 1981 and 1982.[87] Finally, although its application is less clear in other civil rights actions, the recklessness standard, in all likelihood, will become a constant in federal civil rights law.

The Supreme Court's decision in *Smith v. Wade* flows from familiar principles of tort law. Unfortunately, it virtually ignores the serious policy consequences attendant in a strict application of the prevailing tort law to section 1983 liability. While it might have seemed anomalous to set a higher threshold in section 1983 than in tort, an intent standard would have adequately served the purposes of section 1983 without departing drastically from the example at common law.

Adoption of the recklessness standard reflects the Court's confidence in jurors' notions of fairness. In nearly all instances of actionable civil rights violations, the question of whether punitive damages are appropriate will be left to the jury. Therefore, the jury becomes a powerful force in the policing of civil rights.

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84. *See* 42 U.S.C. § 3612 (1979) (the award is limited to $1,000); Fountilla v. Carter, 571 F.2d 487 (9th Cir. 1978).

85. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

86. *See* Ellis v. Blum, 643 F.2d 68, 84 (3d Cir. 1981) (practice to incorporate section 1983 law into *Bivens* suit); *see also* Carlson v. Green, 446 U.S. 14, 22 (1980) (suggesting that identical rules should govern the availability of punitive damages in section 1983 and *Bivens* actions).

87. Damage rules developed under section 1983 are regularly applied to sections 1981 and 1982. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) (federal rules on damages applied to section 1982); Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist. 670 F.2d 1 (1st Cir. 1982) (based on Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981), a section 1983 case, punitive damages likewise not available against municipalities in section 1981 actions), *cert. denied*, 425 U.S. 985 (1982). *But see* Lee v. Southern Home Sites Corp. 429 F.2d 290, 294 (5th Cir. 1970) (wanton, oppressive, or malicious conduct required for punitive damages under sections 1981 and 1982, citing Wills v. Trans World Airlines, 200 F. Supp. 360, 367 (S.D. Cal. 1961)).