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## SMITH V. WADE: A GREEN LIGHT FOR PUNITIVE DAMAGES IN CIVIL RIGHTS ACTIONS

Section 1983,<sup>1</sup> originally enacted as the Civil Rights Act of 1871, was an effort by Congress to put teeth into the guarantees of the fourteenth amendment. Section 1983 provides a federal forum for the redress of the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Although compensatory damages are routinely awarded in section 1983 actions where actual injury has been proven, the availability of punitive damages has only been recognized in theory by the Supreme Court.<sup>2</sup>

### I. INTRODUCTION

In *Smith v. Wade*<sup>3</sup> the Court for the first time squarely addressed the appropriate circumstances for an award of punitive damages where a violation of plaintiff's constitutional rights has occurred. The central question posed in *Smith* was whether actual malice on the part of the defendant is required before punitive damages can be awarded, and if not, whether a showing of some circumstances or conduct in excess of that needed to establish liability for compensatory damages is required.

This comment will outline the history of section 1983, define the constitutional tort, discuss eighth amendment standards, and analyze damages in the context of a constitutional tort. This comment takes the position that punitive damages should be available in a proper section 1983 action where either actual or implied malice on the part of the defendant is proven.

### II. BACKGROUND

#### A. History of Section 1983

Section 1983 was originally enacted as section one of the Civil Rights Act of 1871.<sup>4</sup> The Act, commonly known as the Ku Klux Klan Act, was enacted by Congress as an attempt to deal with widespread legal abuses and physical violence perpetrated against southern blacks and union sympathizers. The Act represented an early exercise of congressional power under section five of the fourteenth amendment to enforce the amendment's equal

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1. 42 U.S.C. § 1983 (1982) reads 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.

2. See *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring and dissenting); cf. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (punitive damages available under 42 U.S.C. § 1981 (1982)).

3. 103 S. Ct. 1625 (1983).

4. Act of April 20, 1871, ch. 22, 17 Stat. 13.

protection provisions.<sup>5</sup> The main goals of the legislation were: 1) to override discriminatory state laws;<sup>6</sup> 2) to provide a remedy when state law was inadequate;<sup>7</sup> and 3) to provide a federal remedy when the state remedy, although theoretically adequate, was not available in practice.<sup>8</sup>

The interpretation given section 1983 recently has been considerably broadened. Early holdings, as evidenced in the *Slaughterhouse Cases*,<sup>9</sup> were quite restrictive, interpreting the privileges and immunities clause of the fourteenth amendment as protecting only rights of national citizenship.<sup>10</sup> This interpretation was expanded slightly in 1939 when the Court held, in *Hague v. C.I.O.*,<sup>11</sup> that certain personal liberties were within the scope of section 1983. Gradual recognition of the expanded scope of the fourteenth amendment protections<sup>12</sup> led to the Court's 1961 landmark decision in *Monroe v. Pape*<sup>13</sup> that a denial of fourteenth amendment protection against unreasonable searches and seizures by a state official was actionable as a section 1983 claim. Equally as important, *Monroe* also held that specific intent to violate a plaintiff's constitutional rights is not required under section 1983,<sup>14</sup> and that section 1983 is to be interpreted "against the background of tort liability that makes a man responsible for the natural consequences of his actions."<sup>15</sup>

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5. Note, *Section 1983 and Federalism: The Burger Court's New Direction*, 28 U. FLA. L. REV. 904, 905 (1976). The Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1. Section five of the fourteenth amendment further provides that, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

6. *McNeese v. Board of Educ.*, 373 U.S. 668, 671-72 (1963); *Monroe v. Pape*, 365 U.S. 167, 173 (1961); *overruled on the local government immunity issue alone*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

7. *McNeese*, 373 U.S. at 672; *Monroe*, 365 U.S. at 173-74.

8. *McNeese*, 373 U.S. at 672; *Monroe*, 365 U.S. at 174.

9. 83 U.S. (16 Wall.) 36 (1872).

10. Among the limited rights of federal citizenship is the right to travel. Under this interpretation, the fourteenth amendment did not reach the types of outrageous conduct by state officials that inspired the passage of the Civil Rights Act of 1871. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1330-37 (1952). See also Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1157-58 n.130 (1977) [hereinafter cited as Note, *Developments*].

11. 307 U.S. 496, 531-32 (1939) (opinion of Stone, J.) (limiting the scope of § 1983's jurisdictional counterpart to non-property rights).

12. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (eighth amendment protection against cruel and unusual punishment). See generally, S. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION 37-38 (1979); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 567-69 (1978); McClellan and Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 DUQ. L. REV. 409, 415-16 n.40 (1980) (rights incorporated by way of the due process clause of the fourteenth amendment).

13. 365 U.S. 167 (1961).

14. *Id.* at 187. The Court arrived at this conclusion by comparing § 1983 to its criminal counterpart, 18 U.S.C. § 242 (1982), which had been interpreted in *Screws v. United States*, 325 U.S. 91, 103 (1945) to require "a specific intent to deprive a person of a federal right." Although intent was not a primary issue, both the majority and dissent concluded that specific intent to deprive a person of a federally protected right is not necessary in a § 1983 action. *Monroe*, 365 U.S. at 206-07 (Frankfurter, J., dissenting in part).

15. *Monroe*, 365 U.S. at 187.

### B. *The Constitutional Tort*

There are several reasons why Justice Douglas may have suggested in *Monroe* that violations of constitutional guarantees be examined against the backdrop of tort common law. Professor Katz has suggested that tort law is used as a reference point because statements of causes of action in tort are simple, traditional, effective and commonly understood means of redressing harms to personal liberty interests.<sup>16</sup> In addition, Katz asserts that, especially in constitutional matters, a tort framework provides consistency in requirements for causes of action and remedies, and is an effective method of deterrence in that government officials may be held accountable for constitutional violations.<sup>17</sup>

In many instances, there is not a tort perfectly analogous to a constitutional violation. Even when the common law and constitutional tort are nearly identical,<sup>18</sup> the differences in the purposes underlying tort law as opposed to section 1983 must be examined.

A plaintiff alleging a section 1983 claim must establish that she has been deprived of a right secured by the federal Constitution and laws, by a defendant acting under color of state law.<sup>19</sup> Section 1983, however, is silent as to the basis of liability, i.e., whether liability results from intentional or negligent conduct, or even from conduct without fault.<sup>20</sup> Tort liability requires a determination of the duty owed the plaintiff, and the standard of conduct against which the tortious act is to be measured. Consequently, in every section 1983 case involving the deprivation of a constitutionally guaranteed right, the constitutional duty and standard of conduct must be identified and the constitutional policy considered.<sup>21</sup>

Likewise, civil rights law allows for affirmative defenses which will insulate a defendant from liability where a constitutional tort has been committed. Absolute immunity from prosecution, afforded judges,<sup>22</sup> legislators,<sup>23</sup>

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16. Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1, 17 (1968).

17. *Id.* at 17 (footnotes omitted).

18. For instance certain fourth amendment violations very closely parallel the common law torts of assault and battery, false arrest, and false imprisonment. *See, e.g.*, *Whirl v. Kern*, 407 F.2d 781 (5th Cir.) (false imprisonment), *cert. denied*, 396 U.S. 901 (1969).

19. *See generally*, Note, *Section 1983—A Change in the Meaning of Under Color of Law: Polk County v. Dodson*, 25 ARIZ. L. REV. 151 (1983); Note, *Section 1983 Liability of Private Actors Who Conspire With Immune State Officials*, 80 COLUM. L. REV. 802 (1980); Comment, *The Supreme Court Corral a Runaway Section 1983*, 34 MERCER L. REV. 1073 (1983) [hereinafter cited as *The Supreme Court Corral a Runaway*].

20. Section 1983 does indicate however, that the defendant's conduct must cause the "deprivation of any rights, privileges, or immunities secured by the Constitution." Thus, in *Kish v. County of Milwaukee*, 441 F.2d 901 (7th Cir. 1971), the court found that prison assaults resulted not from defendants' breach of their eighth amendment duty, but from the construction of, and overcrowding in, the jail.

21. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L. J. 5, 13 (1974). *Cf.* Cox, *Constitutional Duty and Section 1983: A Response*, 15 VAL. U.L. REV. 453 (1981) (duty analysis necessary, but relevant duty is not constitutional, but rather a statutory duty, albeit punctuated by constitutional values). *But see*, Note, *Section 1983 Liability for Negligence*, 58 NEB. L. REV. 271, 285 (1979) ("The constitutional duty approach does not, however, appear to provide a more definitive standard for determining liability under section 1983 than existing standards.")

22. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

and prosecutors,<sup>24</sup> will defeat a section 1983 action at the outset, provided the defendant official acted within the scope of her duties. Other government officials may avoid liability by pleading qualified immunity, the so-called "good-faith defense".<sup>25</sup>

The Supreme Court first recognized the availability of the good-faith defense in *Pierson v. Ray*.<sup>26</sup> The Court indicated that just as a police officer could defend against a common law action for false arrest by proving that she acted reasonably and in good faith, such a defense was also available in a section 1983 action.<sup>27</sup> *Wood v. Strickland*,<sup>28</sup> a case in which students alleged due process violations by a school official, further defined the particulars of a good-faith defense, holding that good faith must exist both objectively and subjectively. The objective test would impose liability where it could be shown that the defendants had not, under the circumstances, acted in good faith.<sup>29</sup> The subjective standard would require proof that the defendant had acted maliciously.<sup>30</sup> A further refinement of the qualified immunity defense occurred in *Harlow v. Fitzgerald*,<sup>31</sup> a case which held that presidential aides are entitled to qualified (but not absolute) immunity. While most commentators feel that *Harlow* eliminated the subjective prong of the qualified immunity test<sup>32</sup> as articulated in *Wood v. Strickland*,<sup>33</sup> it is unclear whether this is a thorough interpretation of the *Harlow*<sup>34</sup> language.

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However, if a judge acts "in the 'clear absence of all jurisdiction'" he will be subject to liability. *Stump*, 435 U.S. at 356-57 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)).

23. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

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

25. The terms "qualified immunity" and "good-faith defense" are interchangeable. See Laverne v. Corning, 522 F.2d 1144, 1147 (2d Cir. 1975). See generally, McClellan and Northcross, *supra* note 12, at 454-59; Nahmod, *supra* note 21, at 26-30; Rushing and Baxter, *Section 1983 Defenses*, 14 URB. LAW. 149, 154-56 (1982); Note, *Developments, supra* note 10, at 1210-13.

26. 386 U.S. 547 (1967).

27. *Id.* at 556-57.

28. 420 U.S. 308 (1975).

29. *Id.* at 314.

30. *Id.* at 322.

31. 102 S. Ct. 2727 (1982).

32. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 3 n.14, 7-8 n.53 (1982); Note, *Remedies—Immunity—President absolutely Liable From Civil Damages Liability For Official Acts—Nixon v. Fitzgerald*, 102 S.Ct. 2690 (1982); *Presidential Aides Entitled to Qualified Immunity From Civil Damages Liability For Official Acts—Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), 13 SETON HALL L. REV. 374, 391 (1983); Comment, *Immunity: Eliminating the Subjective Element from the Qualified Immunity Standard in Actions Brought Against Government Officials*, 22 WASHBURN L.J. 577, 587 (1983).

33. 420 U.S. 308, 321-22 (1975). The Court in *Harlow* states that: "[r]eferring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an 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 [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitution rights or other injury . . ." 102 S. Ct. at 2737, quoting *Wood*, 420 U.S. at 321-22 (emphasis added) (footnote omitted). After noting that the subjective element of the *Wood* qualified immunity test "frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial" (*Harlow*, 102 S.Ct. at 2737), and that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738 (citations omitted).

34. A plausible interpretation of the *Harlow* decision regarding the appropriate standard

### C. Cruel and Unusual Punishment—The Eighth Amendment

The eighth amendment<sup>35</sup> prohibition against cruel and unusual punishment is one of the constitutional guarantees without a direct counterpart in tort law. Claims of cruel and unusual punishment, most often made by prisoners of a correctional facility, often look to the law of negligence for guidance.<sup>36</sup> In a negligence case, the plaintiff must prove that the defendant foresaw or should have foreseen an unreasonable risk that his conduct would invade another's protected interest.<sup>37</sup> Negligence involves the departure from a standard of conduct determined by weighing the probability that harm will occur, the gravity of such harm, and the cost of avoiding the risk-creating conduct.<sup>38</sup> The constitutional duty that a defendant owes to the plaintiff, usually a prison inmate, is that the defendant not subject or cause the inmate to be subjected to a cruel and unusual punishment.<sup>39</sup> This duty can be violated by either an affirmative act on the part of the defendant, or by an omission on her part. In *Estelle v. Gamble*<sup>40</sup> the Supreme Court held that a violation of the standard of conduct prescribed by the eighth amendment occurs when one commits acts or omissions sufficiently harmful as to evidence deliberate indifference to the plaintiff's constitutional rights.<sup>41</sup> Thus, the plaintiff in *Estelle* was required to demonstrate deliberate or callous indifference to his serious medical needs, rather than mere substandard care.<sup>42</sup> While prison authorities are not guarantors of the inmates' safety, there exists a constitutional right to protection from attacks by fellow inmates.<sup>43</sup> Thus, where a prison official knows or should have known of the high likelihood of an assault on an inmate, and does nothing to prevent such an assault, the nonfeasance of the official constitutes an actionable violation of the prisoner's eighth amendment rights.<sup>44</sup>

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for qualified immunity is that *both* an objective and subjective test be applied; however, the objective test would be the "primary" or "threshold" (*Harlow*, 102 S.Ct. at 2739) requirement. Thus, only if the objective "knew or should have known" standard was met, would inquiry into the official's subjective state of mind be permitted. *See also id.* at 2740 (Brennan, Marshall, & Blackmun, J.J., concurring) preserving, in some instances, an inquiry into the subjective state of an official's level of knowledge; Nahmod, *supra* note 32 at 8 n.53.

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

36. *See, e.g.*, Clappier v. Flynn, 605 F.2d 519, 528 (10th Cir. 1979); Parker v. McKeithen, 488 F.2d 553 (5th Cir.), *cert. denied*, 419 U.S. 838 (1974).

37. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 145-49 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 289 (1965).

38. W. PROSSER, *supra* note 37, at 145-49.

39. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("incompatible with evolving standards of decency", *citing* Trop v. Dulles, 356 U.S. 86, 101 (1958)); Penn v. Oliver, 351 F. Supp. 1292, 1294 (E.D. Va. 1972) ("intolerable to accepted notions of decency"); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965) ("of such character or consequences as to shock general conscience or to be intolerable in fundamental fairness.").

40. 429 U.S. 97 (1976).

41. *Id.* at 104.

42. *Id.* at 106.

43. *See* Penn v. Oliver, 351 F. Supp. 1292, 1294; Holt v. Sarver, 442 F.2d 304, 308 (8th Cir. 1971); Parker v. McKeithen, 330 F. Supp. 435 (E.D. La. 1971); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841, 858 (1971).

44. *See* Bonner v. Coughlin, 545 F.2d 565, 568-69 (7th Cir. 1976); Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974); Parker v. McKeithen, 330 F. Supp. 435, 437 (E.D. La. 1971).

### D. Damages

Section 1983 gives no indication of what types of damages are to be awarded for constitutional violations, or how such damages are to be measured. Section 1988,<sup>45</sup> however, specifically authorizes the use of common law remedies in section 1983 actions. Common law tort rules of damages cannot always provide a complete solution to the damages issue in a section 1983 case.<sup>46</sup> The damages should reflect compensation for a deprivation of the protected interest,<sup>47</sup> and are meant to provide a consistent remedy, i.e., a remedy unaffected by differences in tort law from state to state.<sup>48</sup> Compensatory damages, meant to compensate the aggrieved party for the injury suffered, may be awarded in section 1983 actions.<sup>49</sup> In the absence of proof of actual injury, however, the courts have refused to allow more than nominal damages;<sup>50</sup> no recovery is allowed solely for the loss of a constitutional right.<sup>51</sup>

The availability of punitive damages in tort law has been justified historically as a means of "redressing affronts to personal feelings not susceptible of measurement, financing deserving litigation where only small compensatory damages can be expected, diverting [a] plaintiff[']s desire for revenge into peaceful channels, and serving as a punishment for and deterrence from socially disapproved conduct."<sup>52</sup> In *Carey v. Phiphus*,<sup>53</sup> the Supreme Court made it clear that the main purpose of damages in a section 1983 action was compensation for actual injuries suffered.<sup>54</sup> The Court also

45. The jurisdiction in civil matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object; or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States . . . .

42 U.S.C. § 1988 (1982).

46. *Carey v. Phiphus*, 435 U.S. 247, 258 (1978).

47. *Id.* at 258-59.

48. *Pierson v. Ray*, 386 U.S. 547, 555 ("prevailing view [of the common law] in this country.") See also Note, *Developments*, *supra* note 10, at 1211 n.126.

49. *E.g.*, *Carey v. Phiphus*, 435 U.S. at 259-64; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Clappier v. Flynn*, 605 F.2d 519, 528-31 (10th Cir. 1979).

50. *See, e.g.*, *Carey v. Phiphus*, 435 U.S. 247 (1978) (procedural due process); *Thompson v. Burke*, 556 F.2d 231, 240 (3d Cir. 1977) (parole revocation); *Magnett v. Pelletier*, 488 F.2d 33, 34 (1st Cir. 1973) (unreasonable search and assault).

51. Libel is an exception to this common law rule requiring proof of actual injury as are certain forms of slander. *See W. PROSSER, supra* note 37, at 751-77. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); RESTATEMENT (SECOND) OF TORTS 620-33 (1977). Damages have also been presumed where plaintiff has been deprived of the right to vote. *See Wayne v. Venable*, 260 F. 64 (8th Cir. 1919). Several commentators have taken the position that presumed damages should be allowed for plaintiff's loss of an inherently valuable constitutional right. *See generally Love, Damages: A Remedy for Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242 (1979); Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Phiphus*, 93 HARV. L. REV. 966 (1980).

52. *Riley, Punitive Damages: The Doctrine of Just Enrichment*, 27 DRAKE L. REV. 195, 199 (1978) (*citing Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967)).

53. 435 U.S. 247 (1978).

54. *Cf. Nahmod, supra* note 21, at 10. "The Supreme Court, however, emphasized in

noted in *Carey* that exemplary or punitive damages might be proper in a section 1983 action to deter or punish violations of constitutional rights,<sup>55</sup> without expressly approving or disapproving lower court decisions<sup>56</sup> awarding punitive damages. Another important purpose served by punitive damage awards is that of vindication;<sup>57</sup> in view of the fact that damages are generally not presumed for the deprivation of a constitutional right,<sup>58</sup> the importance of the vindicatory element of punitive damages is enhanced.

### III. FACTS

Daniel R. Wade was an inmate at the Algoa, Missouri State Reformatory for youthful first offenders. In the summer of 1976, Wade voluntarily checked into Algoa's protective custody unit, available to inmates who, for safety reasons, wish to be segregated from the general prison population.<sup>59</sup> During his stay in the protective custody unit, Wade violated some of the unit's rules, and was disciplined by being placed in punitive segregation. On October 27, 1976, Wade was transferred to the administrative segregation unit and initially placed in a cell with one other prisoner.

William H. Smith is a guard at the Algoa Reformatory, and was responsible for placing a third prisoner, Thompson, into the administrative segregation cell with Wade and his cellmate on October 27. The third inmate had been sent to administrative segregation for fighting, and it had been recommended that he be isolated for his own safety and that of the other prisoners. Shortly thereafter, both inmates began to harass Wade, and eventually beat and sexually assaulted him.

As a result of the assault, Wade brought suit under section 1983 against Smith and four other guards and correctional officials, alleging that his eighth amendment rights had been violated. Wade asserted that Smith and

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*Monroe* that even where the plaintiff has adequate resource against a state official under state law, the 1983 remedy is still available, indicating that compensation is not currently thought to be the major function of section 1983."

55. 435 U.S. at 257 n.11. Both the punishment and deterrent functions are strengthened by the ability of the court to take into account the defendant's financial circumstances. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, § 3.9 (1973). *See also* Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 809-14 (1979) (empirical study suggesting that § 1983 damages have very little deterrent effect). Punitive damages, however, are often deemed uninsurable. D. DOBBS, *supra* § 3.9; Comment, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L. J. 431 (1977); Burrell and Young, *Insurability of Punitive Damages*, 62 MARQ. L. REV. 1 (1978).

56. 435 U.S. at 265.

57. *See* *Cochetti v. Desmond*, 572 F.2d 102, 105 (3d Cir. 1978) ("Such awards may be particularly appropriate as a means of vindicating the public interest in preventing violations of civil rights by state officials."); *Basista v. Weir*, 340 F.2d 74, 86 (3d Cir. 1965) (punitive damages serve the congressional purpose of "vindicating civil rights in civil suits."). *See also* 42 U.S.C. § 1988 (1982), which explicitly recognizes the vindicatory function of § 1983, *supra* note 45.

58. *See supra* notes 50-51 and accompanying text. *Cf.* *Smith v. Wade*, 103 S. Ct. at 1639 n.21 ("Moreover after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury," *citing* *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980)).

59. *Wade v. Haynes*, 663 F.2d 778, 780 (8th Cir. 1981). At this time Wade was eighteen years old, five feet, eight inches tall, and weighed approximately 130 pounds. Due to his small stature, Wade would qualify, in prison parlance, as a "pretty boy". *See Punitive Damages in Section 1983 Actions: The Eighth Circuit's Requirement of Malicious Intent*, 16 CREIGHTON L. REV. 898, 917 (1983) [hereinafter cited as *Punitive Damages*].

the other defendants knew or should have known that under the circumstances an assault was likely to occur because: 1) Wade previously had placed himself in protective custody due to prior incidents of violence against him by other inmates; 2) although there was another cell in the administrative segregation unit available with only one other inmate, Wade was placed in a cell with two prisoners from the general prison population;<sup>60</sup> and 3) only a few weeks earlier, another inmate in the same unit had been beaten to death during Smith's shift.

The district court upheld the trial court's instruction that punitive damages could be assessed against Smith if he was found to have acted recklessly, with callous disregard of, or indifference to Wade's rights of safety.<sup>61</sup> Smith was found to harbor no ill will or spite (actual malice) toward Wade; the Eighth Circuit judge thus implied malicious intent from Smith's reckless and callous disregard of known dangers.<sup>62</sup>

In a five to four decision, the Supreme Court affirmed the Eighth Circuit's decision, holding that either actual malicious intent, or reckless indifference to the rights of others, would justify an award of punitive damages in a section 1983 action.<sup>63</sup> Additionally, the majority held that the standard for punitive damages need not be higher than the underlying standard of liability for compensatory damages.<sup>64</sup>

#### IV. *SMITH v. WADE*

The theoretical availability of punitive damages in a "proper" section 1983 action was never an issue in *Smith v. Wade*,<sup>65</sup> despite the absence of authority in the statute itself. The primary issue, and the reason for granting certiorari in this case, was to decide what standard of conduct would justify an award of punitive damages.<sup>66</sup>

The Supreme Court had indicated in *Carey v. Piphus*<sup>67</sup> that "malicious intent" on the part of the defendant would be required to justify an award of punitive damages. The majority in *Wade* found that a malicious intent could be manifested either as reckless indifference to or callous disregard of

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60. *Wade v. Haynes*, 663 F.2d at 781.

61. *Id.* at 784.

62. *Id.* at 786.

63. 103 S. Ct. at 1637. Justice Brennan wrote the majority opinion, joined by Justices White, Marshall, Blackmun and Stevens. Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice Powell joined. Justice O'Connor filed a separate dissenting opinion.

64. *Id.* at 1639. The Court noted further that the deterrent purpose of punitive damages was not harmed by the standard of liability being the same for both compensatory and punitive damages, and that the standards enunciated for awards of compensatory and punitive damages under § 1983 did not depart from the common law rules.

65. *Id.* at 1628-31, *citing*, inter alia, Brief for Petitioner at 8, *Smith v. Wade*, 103 S.Ct. 1625 (1983). *Cf. id.* at 1629-30 n.5, where Justice Brennan notes that Justice Rehnquist's dissent "without squarely denying that punitive damages are available under § 1983, does its best to cast doubt on the proposition."

66. *Id.* at 1627.

67. 435 U.S. at 265 (punitive damages not awarded because petitioners found not to have acted with "malicious intention").

the plaintiff's constitutional rights, as well as by actual malicious intent.<sup>68</sup> The dissent defined malicious intent in a more restrictive manner, requiring evidence of ill will or spite to prove the presence of actual malice.<sup>69</sup> The majority and dissent reached these separate conclusions often relying on the same cases for support.<sup>70</sup> This irony is largely due to the varying and often imprecise labels used to define damages standards.

A related issue decided in *Smith v. Wade* is whether the standard of liability for exemplary damages must be higher than the standard of liability for compensatory damages under section 1983. Again receiving no guidance from the statute, the Court looked to the common law of torts, noting that the common law has never required that the threshold for punitive damage liability must be higher than that for compensatory liability.<sup>71</sup> The majority cited with approval the purposes of punitive damages (punishment and deterrence) in relation to the violation of a plaintiff's constitutionally guaranteed rights.<sup>72</sup> While recognizing that the recklessness standard is somewhat ambiguous, Justice Brennan did not find it so vague as to be unfair or not useful.<sup>73</sup> The Court rejected Smith's argument that recklessness was too vague a standard to enable potential defendants to conform to the law and avoid the proposed sanctions,<sup>74</sup> finding such reasoning valid only assuming that prison officials would base their conduct on the punitive damage standard.

## V. ANALYSIS

### A. Traditional Tort Analysis

#### 1. Duty owed

Mindful of the "background of tort liability"<sup>75</sup> against which section 1983 actions should be examined, the analysis in a section 1983 case begins with constitutional right/duty considerations. Based on prior eighth amendment cases, it is clear that there are two ways in which the "accepted notions of decency"<sup>76</sup> standard of the eighth amendment can be violated. First, prison inmates collectively have the right to exist in a prison environment where violent assaults are the exception, rather than the rule; and second, the deprivation of an eighth amendment right happens when an egregious failure to provide for the security of a particular inmate occurs.<sup>77</sup> Implicit in the description of the second possible eighth amendment deprivation is the assumption of a certain level of knowledge by prison officials of the circum-

68. 103 S. Ct. at 1631-37.

69. *Id.* at 1642-54 (Rehnquist, J., dissenting).

70. *See, e.g.*, *Scott v. Donald*, 165 U.S. 58 (1897); *Milwaukee & St. P. R. Co. v. Arms*, 91 U.S. 489 (1875); *Philadelphia, W. & B. R. v. Quigley*, 62 U.S. (21 How.) 202 (1858); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).

71. 103 S. Ct. at 1638.

72. *Id.* at 1639.

73. *Id.* at 1637.

74. *Id.* at 1636.

75. *Monroe v. Pape*, 365 U.S. at 187.

76. *See supra* note 39 and accompanying text.

77. *Penn v. Oliver*, 351 F. Supp. 1292, 1294 (E.D. Va. 1972).

stances of a specific prisoner.<sup>78</sup> It would clearly be unfair to charge a prison official with an egregious failure to protect a particular inmate if the official had no knowledge, or reason to suspect that the prisoner was in danger. Once the requisite level of personal knowledge is (or should be) present, however, the constitutional duty to protect an inmate, wherever possible,<sup>79</sup> from violence is activated.

## 2. Standard of Conduct/Breach of Duty

In examining the appropriate standard of conduct to which prison officials should aspire, past eighth amendment decisions have attempted to account for the fact that a prison sentence is, in itself, a punishment.<sup>80</sup> The difference, then, between the punishment evidenced by a prison sentence, and the prohibited cruel and unusual punishment, is the requirement of proof by the plaintiff that the prison official intended<sup>81</sup> the violation of his eighth amendment rights.

This was the position taken by the circuit court in *Wade v. Haynes*,<sup>82</sup> the court cited as authority *Schaal v. Rowe*,<sup>83</sup> where the Seventh Circuit Court required an inmate to show that a prison official had deliberately deprived him of his constitutional rights in not preventing an attack by another inmate.<sup>84</sup> "Deliberate deprivation may result from actual intent to deprive him of rights or from recklessness in ignoring known threats."<sup>85</sup> This standard of conduct was also upheld in *Estelle v. Gamble*,<sup>86</sup> where "deliberate indifference" to a prisoner's serious medical needs was held to state a cause of action under section 1983.<sup>87</sup>

## B. Qualified Immunity

The Supreme Court addressed the meaning of malicious intention in the context of the qualified immunity defense in *Procunier v. Navarette*.<sup>88</sup> The

78. See *Punitive Damages*, *supra* note 59, at 918.

79. "In determining whether a given act or omission by prison authorities rises to the level of deprivation of the right to security, the Court takes notice of the violent nature of the men who inhabit . . . prisons." *Penn v. Oliver*, 351 F. Supp. at 1294.

80. *People v. Upchurch*, 76 Cal. App. 3d 721, 143 Cal. Rptr. 113, 114 (1978); *In re Baker*, 183 Misc. 113, 50 N.Y.S.2d 431, 433 (1944); *Sturtevant v. Commonwealth*, 158 Mass. 598, 33 N.E. 648, 649 (1893).

81. See, e.g., *Nahmod*, *supra* note 32, at 23. "[In *Roberts v. Williams*] [t]he Fifth Circuit may have been concerned with the possibility of numerous 1983 claims based on alleged eighth amendment violations if use of the eighth amendment were not limited to extreme situations involving intentional conduct. Thus it appears that, for § 1983 purposes, unintentional conduct may not constitute an eighth amendment violation . . ." *Cf. McClellan & Northcross*, *supra* note 12, at 440 n.163. "The eighth amendment's cruel and unusual punishment prohibition . . . [in] the prison context . . . [does] not depend on the state of mind of the actor." *Id.* at 451-52. "The defendant's state of mind should not control the determination of whether a right [secured by specific provisions of the Bill of Rights incorporated into the due process clause—such as eighth amendment rights] has been violated."

82. 663 F.2d 778 (8th Cir. 1981).

83. *Schaal v. Rowe*, 460 F. Supp. 155 (E.D. Ill. 1978).

84. *Id.* at 157.

85. *Id.*, citing *Little v. Walker*, 552 F.2d 193, 197 n.8 (7th Cir. 1977).

86. 429 U.S. 97 (1976). See *supra* notes 35-44 and accompanying text.

87. *Id.* at 105.

88. 434 U.S. 555 (1978).

Court, through its reliance on section 8A of the RESTATEMENT (SECOND) OF TORTS,<sup>89</sup> seems to require proof that an official either actually intended harm to the plaintiff, or took an action which, although not intended to harm, was so likely to produce injury that the harm was certain to result.<sup>90</sup> In other words, malicious intent is found by examining the defendant's intention in causing the act which resulted in the deprivation, rather than examining the act itself. The plaintiff therefore must prove that the prison official intended the act which violated the plaintiff's constitutional rights, or that the official acted with reckless disregard of whether she was violating such a right.

This analysis is necessary where an eighth amendment violation has been alleged, despite the Court's recent pronouncement in *Harlow v. Fitzgerald*.<sup>91</sup> In *Harlow* the Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>92</sup> Numerous cases,<sup>93</sup> including the 1976 Supreme Court decision, *Estelle v. Gamble*<sup>94</sup> have held that implied malicious intent, characterized as "deliberate indifference",<sup>95</sup> or "callous indifference"<sup>96</sup> would state a valid cause of action against prison officials under section 1983. Therefore, even if *Harlow* did eliminate the "subjective" prong<sup>97</sup> of the qualified immunity defense, proof that a prison guard had acted with malicious intent, either actual or implied,<sup>98</sup> would defeat the immunity defense "since a reasonably competent public official should know the law governing his conduct."<sup>99</sup> In summary, because the law regarding the standard of conduct necessary to state an eighth amendment deprivation is well-settled, failure to abide by that standard will defeat even the "objective"<sup>100</sup> prong of the good-faith immunity test.

### C. Standard of Liability

The question the Court addressed in *Smith v. Wade* examines the sufficiency of an implied malicious intent standard with regard to the imposition of punitive damages. The majority in *Smith v. Wade* determined that the standard of conduct required to defeat the immunity defense will also justify the imposition of punitive damages, where implied malicious intent was the basis for both compensatory and punitive damages in the lower court.<sup>101</sup>

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89. RESTATEMENT (SECOND) OF TORTS § 8A (1977).

90. 434 U.S. at 566.

91. 102 S. Ct. 2727 (1982).

92. *Id.* at 2738 (citations & footnotes omitted).

93. *See supra* footnotes 82-85 and accompanying text.

94. 429 U.S. 97 (1976).

95. *Id.* at 105.

96. *Fiedler v. Bosshard*, 590 F.2d 105, 109 (5th Cir. 1979).

97. *See supra* notes 30-34 and accompanying text.

98. *See Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979).

99. 102 S. Ct. at 2739.

100. *See supra* notes 28-29 and accompanying text.

101. 663 F.2d at 784-86.

As Justice Brennan initially points out, even though the standards which justify awards of compensatory or punitive damages are described by the same words, they are not identical. Once liability is established, imposition of compensatory damages against the defendant is mandatory. Punitive damages, on the other hand, "are never awarded as of right, no matter how egregious the defendant's conduct."<sup>102</sup> The decision in this case regarding the award of exemplary damages was an expression by the jury that Smith's conduct seemed to them outrageous.

The question remains, however, whether the standard articulated for an award of punitive damages should be higher than for compensatory damages. The dissent cites numerous reasons why the more stringent actual malice requirement is appropriate as a prerequisite to an award of punitive damages, among them that punitive damages have always been viewed with disfavor.<sup>103</sup> Justice Rehnquist also expressed fears that quasi-criminal punitive damages would be awarded without adequate safeguards in civil actions, and that punitive damages would be awarded capriciously by jurors, especially where the standards forming the basis of the award are vague.<sup>104</sup> Further, the dissent contends that, at least where the standards are ill-defined, the costs of punitive damages, such as the encouragement of unnecessary litigation and the chilling of desirable decisionmaking, outweigh the deterrent benefits.<sup>105</sup>

#### *D. Punitive Damages*

Although it is true that punitive damages are not a "favorite in the law",<sup>106</sup> it is equally true that punitive damages have been awarded in the past, and continue today to be assessed where the court feels that their deterrent or vindicatory purposes are served.<sup>107</sup> The dissent insists that a recklessness standard is too vague for a jury to base a quasi-criminal award of punitive damages, apparently overlooking the fact that the recklessness standard is also used to describe criminal violations, such as manslaughter.<sup>108</sup>

Concern is expressed that punitive damages will be awarded against unpopular defendants, producing a possible chilling effect on officials' devotion to duty. While it is certainly possible that punitive damages may be awarded by a jury prejudiced against a defendant official, an equally plausible theory is that the jury's sympathies will be with the prison official, who may be perceived as a hard working employee trying to make the best of a bad situation, and who will certainly have severe problems satisfying a large

102. 103 S. Ct. at 1638.

103. *Id.* at 1641 (Rehnquist, J., dissenting).

104. *Id.* (Rehnquist, J., dissenting).

105. *Id.* at 1641-42 (Rehnquist, J., dissenting).

106. *Id.* at 1641 n.1 (Rehnquist, J., dissenting).

107. Historically, punitive damages are thought to be as old as the right to trial by jury. 25 C.J.S. *Damages* § 117(1) (1966). Some courts have suggested they would be willing to award punitive damages whenever they would serve a deterrent function. *Keker v. Proconier*, 398 F. Supp. 756, 768 (E.D. Cal. 1975) (dictum); *Walker v. Fox*, 395 F. Supp. 1303, 1306 (S.D. Ohio 1975) ("where the conduct is found to be willful or wanton or where a deterrent effect will be accomplished.").

108. Brief of Respondent at 4, *Smith v. Wade*, 103 S.Ct. 1625 (1983).

damage judgment.<sup>109</sup> Further, the concern that the "Damoclean sword" of potential punitive damage awards may undermine the "ability of officials to take decisive, efficient action" would seem more than adequately protected by the Court's recent qualified immunity pronouncements. While it may appear at first glance that the majority requires only a showing of recklessness,<sup>110</sup> this contention is amply refuted by an examination of the objective portion of the qualified immunity test—that an official knew or reasonably should have known that his or her actions would violate a clearly established constitutional right.<sup>111</sup>

Viewed against the backdrop of other section 1983 cases, *Smith v. Wade* appears as a logical next-step in a continuing progression. In *Monroe v. Pape*, the Supreme Court explained that section 1983 actions should be viewed against the background of tort liability. *Wood* and *Navarette* provided an outline of the proper standard of conduct against which an official afforded a qualified immunity could measure her actions. Although sketchy, the *Carey v. Phipps* requirement of malicious intention transposed over Justice Brennan's views on punitive damages in *Adickes v. Kress*,<sup>112</sup> lead logically to the Court's statement in *Smith v. Wade* that the malicious intention required for punitive damages may be manifested as either actual malice or as reckless disregard of known dangers.

Prior decisions in common law tort cases regarding standards for imposition of punitive damages are not unequivocally supportive of the Court's holding. It seems safe to say, however, that the rule in the great majority of jurisdictions was that punitive damages could be awarded without actual ill will, spite, or intent to injure being shown.<sup>113</sup> Inquiries into the legislative intent of the 42d Congress regarding the propriety of punitive damages are even less definitive.<sup>114</sup>

109. Note, *Developments, supra* note 10, at 1225-26.

110. See Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IA. L. REV. 1, 6-7, 10 (1982). In a discussion of *Parratt v. Taylor*, 451 U.S. 527, 532-35 (1981), Nahmod states that ". . . the Court concluded that negligent conduct could be a proper basis of liability in section 1983 cases." Thus, in the absence of a qualified immunity, reckless conduct would clearly state a § 1983 cause of action, based on the *Parratt* holding. The cases are distinguishable because, in addition to the qualified immunity defense in *Wade* not plead in *Parratt*, another important difference between these two cases involving prison inmates exists; the 1983 claim in *Parratt* was based on a fourteenth amendment due process claim, while the alleged violation in *Wade* was of an eighth amendment right. The *Parratt* Court held for the defendant, finding that, although a deprivation under color of law had occurred, the plaintiff's due process rights had not been violated, as he was afforded a post-deprivation due process hearing.

111. See *supra* note 68 and accompanying text. The statement of the dissent that punitive damages could be awarded on the basis of mere negligence is not entirely accurate. 103 S. Ct. at 1657 n.16.

112. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 233 (1970) (Brennan, J., concurring in part and dissenting in part). "To recover punitive damages, I believe a plaintiff must show more than a bare violation of § 1983. It is sufficient for plaintiff to show . . . that the defendant acted with reckless disregard of whether he was violating such a right." *Id.*

113. 103 S. Ct. at 1632. *But cf. id.* at 1650 n.10 (Rehnquist J., dissenting).

114. One commentator has suggested that a strict or "historical" interpretation of the intent of the 42d Congress would limit § 1983 actions to "racial problems" alone, while a "functional" approach would recognize actions for violations of all constitutional rights. Neither interpretation expressly ratifies punitive damages, although a good case for the imposition of punitive damages can be made under either approach. See Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484-87 (1982). However, the purpose of § 1983

*E. Policy Considerations*

In her separate dissent, Justice O'Connor identifies the primary purposes of section 1983 actions as compensation and deterrence.<sup>115</sup> Balancing the chilling effect on the performance of duties by public officials, and the "ever-increasing flood of section 1983 claims"<sup>116</sup> as costs of punitive damages, against the deterrence of constitutional violations as a benefit, Justice O'Connor found the costs attendant prospective awards of punitive damages to be too high.

Admittedly, before punitive damages can be imposed in a section 1983 action under either the actual or implied malice standard, the qualified immunity of the defendant official must be overcome. As the majority notes,<sup>117</sup> the presence of the qualified immunity defense protects the need for discretion in making day-to-day decisions. This discretion would seem to go a long way toward dispelling the chilling effect the dissent fears. However, the fact that a prison official's immunity is qualified and not absolute indicates that the protected sphere of privilege can be exceeded. Given that public officials are capable of committing recurrent constitutional violations, there is no reason why the officials should not be liable for reckless misconduct on the same basis as private citizens.<sup>118</sup> Additionally, the presence of insurance to cover assessments of compensatory damages would seem to completely negate any possible deterrent effect, absent punitive damages. The final "cost" factor cited by both dissenting Justices is the overcrowding of the courts, a problem that would be further exacerbated unless a very high standard was imposed before punitive damages could be awarded.

While it is true that there have been an increasing number of civil rights cases filed in the court system recently,<sup>119</sup> the dissents' argument appears logically inconsistent. First, there exist numerous barricades to the maintenance of frivolous actions, such as dismissal on the pleadings for failure to state a claim,<sup>120</sup> and summary judgment,<sup>121</sup> and the cost to plaintiffs for initiating suits and pursuing their claims.<sup>122</sup> Where a section 1983 claim is presented, especially one alleging the deprivation of eighth amendment rights, the qualified immunity of the official must be overcome. Even when all these hurdles have been cleared, punitive damages are never awarded as

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clearly has been interpreted to provide a forum affording protection of constitutionally guaranteed rights, especially where violated by state officials. See *Wade*, 103 S. Ct. at 1640 n.23. Cf. 103 S. Ct. at 1658 (Rehnquist, J., dissenting).

115. 103 S. Ct. at 1659 (O'Connor, J., dissenting) (citing *City of Newport v. Fact Concerts*, 453 U.S. 247, 268 (1981)); *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978); *Carey v. Phipps*, 435 U.S. at 254-57.

116. 103 S. Ct. at 1659 (O'Connor, J., dissenting).

117. 103 S. Ct. at 1639-40.

118. *Love*, *supra* note 51, at 1276.

119. See Note, *The Supreme Court Corrals a Runaway*, *supra* note 19, at 1075 n.24; Note, *Section 1983 Liability for Negligence*, *supra* note 21, at 274 n.22. "Between 1961 and 1979, non-prisoner civil rights cases filed in federal district courts increased from 296 to 13,168; state prisoner filings in federal courts showed a similar jump, increasing from 218 in 1966 to 11,195 in 1979." (footnotes omitted) Eisenberg, *supra* note 114, at 523.

120. FED. R. CIV. P. 12(b)(6).

121. FED. R. CIV. P. 56.

122. Note, *Developments*, *supra* note 10, at 1222.

a matter of right.<sup>123</sup> Second, a survey<sup>124</sup> of the range of punitive damages allowed by lower federal courts in section 1983 actions indicates that the awards normally do not exceed \$10,000, and often consist of much smaller sums.<sup>125</sup> Given the various procedural obstacles a plaintiff must surmount, the uncertainty of any award of punitive damages, and the fact that punitive damages are awarded only for egregious deprivations of constitutional rights,<sup>126</sup> it would seem that cases where the potential for punitive damages exist are exactly the type of meritorious actions which should be encouraged (rather than denying awards of punitive damages to prevent an ever-increasing flood of section 1983 claims, which will threaten the ability of the federal courts to handle those that are meritorious).<sup>127</sup> Finally, an empirical study<sup>128</sup> of section 1983 cases filed in 1975 and 1976 in the Central District of California (Los Angeles)<sup>129</sup> concluded that the sheer volume of section 1983 cases pose no serious threat to the federal court system, noting that oft-quoted statistics<sup>130</sup> on the volume of cases in all likelihood are seriously overstated. The study also found evidence that courts generally view section 1983 actions with disfavor, despite the presence in the vast majority of cases of "classic rights of obvious importance."<sup>131</sup>

## VI. CONCLUSION

The decision in *Wade*, when placed in perspective, reaffirms the protections afforded valuable constitutional rights, privileges and immunities delineated in *Monroe*. When interests as important as constitutional rights are at stake, the argument for the punishment and deterrence of persons who engage in reckless conduct seems compelling. When integrated with the Court's standard of conduct decisions in *Wood*, *Navarette*, and *Harlow*, and past eighth amendment decisions, *Smith v. Wade*'s potentially vague recklessness standard crystallizes quite clearly to define the breach of duty necessary to merit an award of punitive damages.

The *Wade* outcome is troubling only as it reflects a continuing division on the Court as to the proper uses of section 1983 litigation. Although arguably based on a misperception<sup>132</sup> of the current burdens of section 1983 litigation on the federal courts, the fear that *Smith v. Wade* will open the

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123. See Riley, *supra* note 52, at 201 (generally, punitive damages are not given as a matter of right, but as a matter of grace or gratuity.). See also *Wade*, 103 S. Ct. at 1638.

124. See Love, *supra* note 51, at 1275 n.274.

125. See generally Annot., 14 A.L.R. FED. 608 (1973) (punitive damages in actions for violations of federal civil rights). *Wade* was awarded \$5,000 in punitive damages.

126. 103 S. Ct. at 1628. The trial court instructed the jury that *Wade* could only recover if the defendant was grossly negligent or guilty of "egregious failure to protect *Wade*." *Id.*

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

128. See Eisenberg, *supra* note 114.

129. Eisenberg's findings appear consistent with other empirical studies. *Id.* at 525 n.182.

130. *Id.* at 523 n.175, and 533-36. Statistics collected by the Administrative Office of the United States Courts do not distinguish between civil rights cases brought under § 1983 and cases brought under other civil rights statutes. Currently, employment claim cases constitute a huge fraction of all civil rights cases. *Id.* at 533 n.230.

131. *Id.* at 536-37.

132. See *supra* notes 128-31 and accompanying text.

floodgates leading to a torrent of frivolous actions appears the most likely explanation for the closeness of this decision.

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