

CASENOTES

Punitive Damages and the Use of Modern Common Law in Construing Section 1983: *Smith v. Wade*¹ — In 1871, Congress enacted 42 U.S.C. section 1983² to grant the federal courts control over states that did not enforce the rights of their citizens, particularly the newly freed slaves.³ The statute provided citizens with a right of action in federal court against local government officials who, while representing the state, either failed to enforce the law or treated citizens unfairly, and thereby violated their constitutional rights.⁴ Prior to the Supreme Court's 1961 decision in *Monroe v. Pape*,⁵ section 1983 was not available to plaintiffs who could seek a remedy in state court. *Monroe* changed this interpretation of section 1983 by holding that the federal remedy was supplementary to the state remedy.⁶ As a result, since 1961, a tremendous number of persons have filed suit under section 1983 claiming injury as a consequence of conduct by state and local officials.⁷ The increase in section 1983 cases has forced the Supreme Court to reconsider the purposes and policies behind section 1983 and to define the nature and scope of the statute. In reconsidering these issues, the Court has placed significant emphasis on common law tort principles, particularly in reference to the issue of damages.⁸ The Supreme Court considered whether the common law standard governing an award of punitive damages under tort law was applicable to an award of punitive damages under section 1983 in the recent case of *Smith v. Wade*.⁹

In 1976, the plaintiff in *Smith v. Wade*, Daniel Wade, was an inmate at a Missouri reformatory for youthful first offenders.¹⁰ After other prisoners had repeatedly assaulted him, the plaintiff admitted himself to the reformatory's protective custody unit.¹¹ Subsequently, prison officials transferred Wade to punitive segregation for disciplinary violations, and then to administrative segregation.¹² Although Wade was initially placed in a cell with one other inmate, the defendant, William Smith, a guard at the prison, placed a

¹ 461 U.S. 30 (1983).

² Section 1983, in part, provides that:

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.

42 U.S.C. § 1983 (1982).

³ See *Monroe v. Pape*, 365 U.S. 167, 172-74 (1961) (citing CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)).

⁴ *Monroe v. Pape*, 365 U.S. at 180.

⁵ 365 U.S. 167 (1961).

⁶ *Id.* at 183.

⁷ See McClellan and Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 DUQ. L. REV. 409, 412 (1980) [hereinafter cited as McClellan and Northcross]; Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 2 (1982); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 451-52 (1978) [hereinafter cited as Newman].

⁸ See Nahmod, *Section 1983 and the "Background of Tort Liability"*, 50 IND. L.J. 5, 12 (1974) [hereinafter cited as Nahmod].

⁹ 461 U.S. 30 (1983).

¹⁰ *Id.* at 32.

¹¹ *Id.*

¹² *Id.*

third inmate in the cell when he came on duty later that day.¹³ The defendant chose the plaintiff's cell despite the third inmate's known aggressive behavior, the plaintiff's recent susceptibility to assault, and the availability of other cells in the same dormitory with only one inmate.¹⁴ Shortly after the defendant placed the third inmate in the cell, the plaintiff's two cellmates beat and sexually assaulted him.¹⁵

The plaintiff filed suit in federal district court under section 1983 against the defendant¹⁶ alleging that the defendant had violated his eighth amendment rights.¹⁷ Claiming that the defendant knew or should have known of the likelihood of assault, the plaintiff sought both compensatory and punitive damages.¹⁸ At trial, the district judge instructed the jury that to establish a violation of his rights under the eighth amendment, Wade had to show "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities."¹⁹ In addition, the judge stated that due to the defendant's qualified immunity as a state prison guard, the jury could only award compensatory damages if the defendant's behavior constituted gross negligence.²⁰ The judge further instructed the jury that it could award punitive damages if the defendant's conduct were shown to be in "reckless or callous disregard of, or indifference to, the rights or safety of others. . . ."²¹ The jury found the defendant liable and awarded the plaintiff \$25,000 in compensatory damages and \$5,000 in punitive damages.²²

The Court of Appeals for the Eighth Circuit affirmed the district judge's instructions regarding punitive damages,²³ citing *Carey v. Piphus*.²⁴ In *Carey*, the Supreme Court suggested that plaintiffs were required to demonstrate malicious intent in order to recover punitive damages.²⁵ The Eighth Circuit in *Wade* interpreted malicious intent to include both actual intent and conduct so egregious and reckless as to imply the requisite intent.²⁶ Consequently, the court found the district judge's instruction, with its recklessness standard, to be an accurate statement of the law.²⁷

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Also named in the suit were four other correctional officers, including the Director of the Missouri Board of Corrections. The judge granted directed verdicts for two defendants and the jury acquitted the two others. *Wade v. Haynes*, 663 F.2d 778, 780 (8th Cir. 1981).

¹⁷ 461 U.S. at 32. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

¹⁸ *Wade*, 461 U.S. at 32-33.

¹⁹ *Id.* at 32.

²⁰ *Id.* at 32-33.

²¹ *Id.* at 33.

²² *Id.*

²³ *Wade v. Haynes*, 663 F.2d 778 (8th Cir. 1981).

²⁴ 435 U.S. 247 (1978).

²⁵ *Id.* at 257 n.11.

²⁶ *Wade v. Haynes*, 663 F.2d 778, 786 (8th Cir. 1981).

²⁷ *Id.* One judge dissented on the issue of punitive damages. *Id.* His dissent stated that an award of punitive damages should not be granted absent a showing of actual malice, and that a distinction should be recognized between compensatory and punitive awards against an official with qualified immunity. *Id.* at 787. For a discussion of the distinction between actual and implied malice, see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9 at 207-08 (1973) [hereinafter cited as DOBBS]; Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 33-37 (1982) [hereinafter cited as Ellis]; Note, *Punitive Damages in Section 1983 Actions: The Eighth Circuit's Requirement of Malicious Intent*, 16 CREIGHTON L. REV. 898, 898 n.6 (1983).

In addition to the award of punitive damages, the Court of Appeals affirmed the sufficiency of the evidence, the instruction regarding cruel and unusual punishment, the ruling of the district

Smith then filed a petition for certiorari with the United States Supreme Court, which the Court granted.²⁸ In a five-to-four decision, the Court affirmed the decision of the Eighth Circuit.²⁹ The Court held that a jury could award punitive damages in a section 1983 action where the defendant acted either with evil motive or intent, or in reckless or callous indifference, in violating the plaintiff's federally protected rights.³⁰ The Court adopted a recklessness standard even though the defendant's qualified immunity in *Wade* resulted in identical standards for both compensatory and punitive damages.³¹ In its holding, the Court used a two-step approach. First, the Court examined the common law and determined that the tort standard for awarding punitive damages, both in 1871 and today, was reckless indifference or intent.³² Second, the Court considered the policy behind section 1983 and concluded that application of the tort standard properly served those policy considerations.³³

The *Wade* holding not only represents the first instance in which the Supreme Court has specifically validated an award of punitive damages under section 1983, but it also establishes the standard for such an award.³⁴ By adopting a recklessness standard, as opposed to a stricter intent standard, the Court has increased the chances for plaintiffs to recover punitive damages and rendered section 1983 a potentially more effective device for plaintiffs in challenging constitutional violations.³⁵ The real significance of the *Wade* decision, however, might lie not in its particular holding, but in the approach to the issue employed by the Court.³⁶ As it had in past decisions, the *Wade* Court relied on a two-step analytical approach to section 1983.³⁷ Under the first prong, however, in addition to considering the common law as of 1871, the Court also relied on modern common law.³⁸ This reliance on modern common law represents a departure from the Court's traditional two-pronged analysis.³⁹

This casenote will begin by discussing the background and development of recoveries under section 1983 to establish the context in which the Court decided *Smith v. Wade*.⁴⁰ The discussion will focus on previous Supreme Court cases involving government immunities and plaintiffs' damages in which the Court has adopted a two-step analytical approach to section 1983 claims.⁴¹ Next, the casenote will present the *Wade* decision, describing the approach and the reasoning employed by the majority and the two dissenting opinions.⁴² The Supreme Court's reasoning will then be analyzed by discussing the likely ramifications of *Wade*. First, the decision's effect on future plaintiffs and

judge on both the cross examination and the closing argument of the plaintiff's counsel, the exclusion of documentary evidence and the use of expert testimony. *Wade v. Haynes*, 663 F.2d 778, 780, 786 (8th Cir. 1981).

²⁸ 456 U.S. 924 (1982).

²⁹ *Smith v. Wade*, 461 U.S. 30, 56 (1983).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 38-48.

³³ *Id.* at 48-51, 55.

³⁴ *Id.* at 56.

³⁵ See *infra* notes 279-90 and accompanying text.

³⁶ See *infra* notes 302-35 and accompanying text.

³⁷ 461 U.S. at 34.

³⁸ *Id.*

³⁹ See *infra* notes 302-35 and accompanying text.

⁴⁰ 461 U.S. 30 (1983).

⁴¹ See *infra* notes 52-130 and accompanying text.

⁴² See *infra* notes 173-266 and accompanying text.

defendants in section 1983 suits will be considered.⁴³ The presentation highlights the advantages to plaintiffs resulting from a recklessness standard for section 1983 punitive damages, and discusses this standard's broader impact on damages generally under section 1983. It will be submitted that the Court properly chose the recklessness standard. Second, the casenote will discuss the majority's determination that modern tort law should be considered in determining whether, and under what standard, courts may award punitive damages under section 1983.⁴⁴ It will be submitted that the *Wade* Court properly considered modern tort law. The discussion shows, however, that this consideration of modern tort law could have a significant impact on future section 1983 cases decided under the established two-step approach, particularly in areas where the common law has changed between 1871 and the present.

I. THE BACKGROUND OF *SMITH V. WADE*

In ruling on the availability of punitive damages under section 1983, the *Wade* Court placed significant weight on the status of punitive damages under the common law of torts.⁴⁵ As this casenote will demonstrate, the *Wade* Court's reliance on the common law was consistent with the Court's approach to prior cases under section 1983.⁴⁶ In earlier section 1983 cases, the Court had first looked to the statute's legislative history in an attempt to discern congressional intent.⁴⁷ Where the legislative history did not address the issue in question, the Court had then turned to the common law of torts for guidance.⁴⁸ This section of the casenote will examine two areas of section 1983, government immunities and damages, where the Court has looked to the common law of torts.⁴⁹ Through these cases, the section will set forth the Court's approach to interpreting section 1983. The section will then examine previous references to the availability of punitive damages by the Supreme Court.⁵⁰ Finally, this section will discuss how the lower courts have responded to these references and the standards under which they have awarded punitive damages in suits filed under section 1983.⁵¹

A. Looking to Common Law: A Two-Step Approach

1. The Immunity Cases

The Supreme Court's reliance on the common law of torts in addressing issues arising under section 1983 is exemplified by the Court's decisions in government immu-

⁴³ See *infra* notes 279-301 and accompanying text.

⁴⁴ See *infra* notes 302-35 and accompanying text.

⁴⁵ *Smith v. Wade*, 461 U.S. 30, 38-48 (1983). See *infra* notes 181-92, 223-36 and accompanying text.

⁴⁶ See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-59 (1981); *Carey v. Piphus*, 435 U.S. 247, 255 & n.9 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). For a discussion of these cases, see *infra* notes 60-130 and accompanying text.

⁴⁷ See *Carey v. Piphus*, 435 U.S. 247, 255 & n.9 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). For an extensive discussion of section 1983's legislative history, see *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 664-89 (1978).

⁴⁸ See cases cited *supra* note 46.

⁴⁹ See *infra* notes 52-130 and accompanying text.

⁵⁰ See *infra* notes 131-59 and accompanying text.

⁵¹ See *infra* notes 160-72 and accompanying text.

nity cases.⁵² The immunity cases involved the issue of whether particular classes of individuals are protected from section 1983 liability by either qualified or absolute immunity.⁵³ As the term indicates, a defendant granted absolute immunity is completely shielded from liability while acting within the scope of his or her official duties.⁵⁴ If the defendant is acting within the scope of his employment, absolute immunity serves to dismiss the suit even if his misconduct is malicious and corrupt.⁵⁵ A defendant with qualified immunity, on the other hand, is protected from liability only when carrying out his or her duties in good faith.⁵⁶ Qualified immunity, so understood, often shields a defendant from liability for negligent conduct, but offers no protection for reckless or intentional conduct.⁵⁷ Neither the language of section 1983 nor the statute's legislative history indicates which immunities, if any, apply to defendants in section 1983 suits.⁵⁸ Consequently the Court has looked to the common law of torts for guidance and considered whether a particular defendant would have been immune from liability had the suit been brought under tort law.⁵⁹

The first evidence of the Court's reliance on the common law in immunity cases was shown in 1961, in *Tenney v. Brandhove*.⁶⁰ In *Tenney*, the plaintiff filed suit under section 1983⁶¹ against members of the California Senate Fact-Finding Committee on Un-American Activities.⁶² The plaintiff claimed that members of the committee had violated his first and fourteenth amendment rights by bringing contempt proceedings against him

⁵² See *Briscoe v. LaHue*, 460 U.S. 325 (1983) (witnesses held to be absolutely immune under section 1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (municipality absolutely immune from punitive damages); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (prison officials granted qualified immunity); *Imbler v. Pachtman*, 424 U.S. 409, 424, 431 (1976) (state prosecutor granted absolute immunity); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (school official granted qualified immunity); *Pierson v. Ray*, 386 U.S. 547, 554-55 & n.9 (1967) (judges — absolute immunity); *Tenney v. Brandhove*, 341 U.S. 367, 376, 379 (1951) (legislators — absolute immunity). For a summary of the immunity cases decided before 1976, see Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941, 956-78 (1977).

⁵³ See cases cited *supra* note 52. The theory behind the granting of immunities is stated in *Scheuer v. Rhodes*, 416 U.S. 232 (1974):

Public officials, whether governors, mayors, or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity — absolute or qualified — for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Id. at 241-42.

⁵⁴ *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

⁵⁵ *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁵⁶ *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

⁵⁷ *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The defendant in *Smith v. Wade*, a state prison official, had qualified immunity. 461 U.S. at 32-33. At trial, the court instructed the jury that it could only find the defendant liable if his actions constituted "gross negligence" or "egregious" conduct. *Id.* at 33. The parties in *Wade* agreed that this standard was substantially the same as a recklessness or callous indifference standard. *Id.* at 51.

⁵⁸ See *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁵⁹ See, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 330-34 (1983); *Imbler v. Pachtman*, 424 U.S. 409, 421-24 (1976).

⁶⁰ 341 U.S. 367 (1951).

⁶¹ At the time the suit was filed, the statute was codified at 8 U.S.C. § 43.

⁶² *Tenney v. Brandhove*, 341 U.S. 367, 369 (1951).

for his refusal to testify at an investigatory hearing.⁶³ Further, the plaintiff alleged that the proceedings were designed solely to intimidate, and thus to silence him.⁶⁴ Holding that the legislators were absolutely immune from liability,⁶⁵ the *Tenney* Court examined the history of legislative immunity dating back to the sixteenth century.⁶⁶ The Court framed the issue before it as a question of whether Congress, through the language of section 1983, had meant to overturn the firmly entrenched tradition of legislative immunity.⁶⁷ Reasoning that Congress would not have chosen such general language if it had intended to make such a significant change, the Court concluded that the immunity available to legislators in suits filed under a tort theory was thus similarly available to legislators in suits filed under section 1983.⁶⁸

In relying on the common law of torts, the *Tenney* Court adopted an approach that would be used consistently in the Court's consideration of subsequent immunity cases brought under section 1983.⁶⁹ This approach was clearly articulated in *Imbler v. Pachtman*,⁷⁰ where the Court turned to common law in determining whether a prosecuting attorney was immune in an action under section 1983.⁷¹ In *Imbler*, an individual who had been convicted of murder obtained his release from prison due to the prosecuting attorney's knowing use of false testimony and intentional suppression of material evidence at trial.⁷² The released prisoner filed a section 1983 suit against the prosecuting attorney, seeking damages for his loss of liberty.⁷³ The Court held that a prosecuting attorney was absolutely immune from damages under section 1983 when acting within the scope of his duties.⁷⁴ In its decision, the Court undertook a two-step process in analyzing the immunities to section 1983.⁷⁵ First, the Court followed the *Tenney* decision⁷⁶ by examining the immunity offered in a common law tort action.⁷⁷ The *Imbler* Court found that the absolute immunity of a prosecutor was firmly established under the common law.⁷⁸ Second, the Court analyzed whether the purpose and policy behind section 1983 dictated a modification of the common law rule.⁷⁹ In *Imbler*, the Court found that the rationale for the immunity offered prosecutors under the common law was equally applicable to prosecutors in suits under section 1983.⁸⁰ According to the Court, it was equally important in suits under section 1983 as it was in suits under common law that

⁶³ *Id.* at 370-71.

⁶⁴ *Id.* at 371.

⁶⁵ *Id.* at 372-76.

⁶⁶ *Id.* at 372-73.

⁶⁷ *Id.* at 376.

⁶⁸ *Id.*

⁶⁹ See *supra* note 52 and accompanying text.

⁷⁰ 424 U.S. 409 (1976).

⁷¹ *Id.* at 421-24.

⁷² *Id.* at 412-15. After *Imbler's* conviction, the prosecuting attorney notified the Governor that new evidence had turned up after the trial which added support to the defendant's alibi. *Id.* at 412. Additionally, new evidence, according to the prosecutor, suggested that the state's principal witness was not as trustworthy as originally believed. *Id.*

⁷³ *Id.* at 415-16.

⁷⁴ *Id.* at 424, 431.

⁷⁵ *Id.* at 421-24.

⁷⁶ 341 U.S. 367, 372-73 (1951).

⁷⁷ *Imbler v. Pachtman*, 424 U.S. at 421-24.

⁷⁸ *Id.* at 424.

⁷⁹ *Id.* at 424-29.

⁸⁰ *Id.* at 424.

the performance of a prosecutor not be undermined by the threat of an action for malicious prosecution.⁸¹

The two-step approach articulated by the Supreme Court in *Imbler*, a determination of the common law rule and an examination of policy, was used by the Court in many subsequent immunity cases.⁸² In these cases, the absence of any clear congressional intent for section 1983 immunities necessitated the Court's reliance on the common law.⁸³ In cases where the common law immunity existed in 1871, the year in which section 1983 was enacted, the Court could assume that unless stated otherwise, Congress "intended" to adopt common law principles in section 1983.⁸⁴ The Court, in effect, justified its reliance on common law by reasoning that 1871 common law was the equivalent to a determination of congressional intent. Where the particular immunity did not exist in 1871, but was adopted after section 1983's enactment, it has been more difficult for the Court to justify its use of common law as evidence of congressional intent.⁸⁵ Despite this difficulty, the Court has looked to post-1871 common law for guidance in determining plaintiffs' rights under section 1983 and proceeded to use the two-step analytical approach.⁸⁶

2. The Damages Cases

In determining the availability of damages under section 1983, the Supreme Court, as it has in the immunity cases, has placed significant weight on the common law of torts.⁸⁷ The first indication of the Court's reliance on the common law occurred in 1961, in the landmark decision of *Monroe v. Pape*.⁸⁸ In *Monroe*, the Court held that potential plaintiffs did not have to exhaust state court remedies before filing suit under section 1983.⁸⁹ Additionally, the *Monroe* Court's reasoning in that case influenced the Court's approach to other issues arising under section 1983, particularly the availability of damages.⁹⁰ The Court determined that thirteen Chicago police officers acted "under color of state law"⁹¹

⁸¹ *Id.*

⁸² See *supra* note 52.

⁸³ See *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁸⁴ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

⁸⁵ See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (immunity for prosecutors first recognized in 1896 in *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896)); *Pierson v. Ray*, 386 U.S. 547 (1967) (immunity for judges first recognized in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872)).

⁸⁶ The Court has recognized two immunities under section 1983 which did not exist under the common law of torts in 1871, the year of section 1983's enactment. *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges). Both of these decisions cite modern tort law. In neither case, however, was the recognition of post-1871 common law an issue. The Court merely looked to tort law as it had in other section 1983 immunity cases and followed with an analysis of the purpose and policy behind section 1983. See *Imbler*, 424 U.S. at 420-24; *Pierson*, 386 U.S. at 554. For a more detailed examination of the Court's reliance on modern tort law, see *infra* notes 302-35 and accompanying text.

⁸⁷ See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-63 (1981); *Carey v. Piphus*, 435 U.S. 247, 255 & n.9 (1978).

⁸⁸ 365 U.S. 167 (1961), *overruled in part*, *Monell v. N.Y. City Dep't of Social Serv.*, 436 U.S. 658 (1978). *Monroe* held in part that a municipality was not a "person" under section 1983, and thus was absolutely immune from liability. 365 U.S. at 191. In *Monell*, the Court overruled this particular holding, ruling that a municipality was not shielded from liability where the execution of official government policy resulted in the infliction of an injury. 436 U.S. at 663.

⁸⁹ 365 U.S. at 183. See *supra* notes 2-8 and accompanying text.

⁹⁰ See *infra* notes 97-130 and accompanying text.

⁹¹ 365 U.S. 167, 184. The *Monroe* Court, quoting from *United States v. Classic*, 313 U.S. 299, 326 (1940), defined acting "under color of state law" as the "[m]isuse of power, possessed by virtue of

when, without benefit of a search or arrest warrant, the officers ransacked petitioner's home in the early morning and later detained petitioner at the police station for ten hours.⁹² In interpreting the phrase "under color of state law," Justice Douglas, writing for the Court, commented that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."⁹³ As a result of the analogy drawn by Justice Douglas, a doctrinal nexus developed between common law tort liability and liability under section 1983.⁹⁴ Courts began to approach actions under section 1983 in much the same fashion as they had approached suits under tort law.⁹⁵ The Court extended the nexus to section 1983 damage cases, and consequently, the Court's analysis of section 1983 damages became identical to the two-step analysis employed in the immunity cases. Under this analysis, the Court first determines how the particular issue was handled under tort law, and second, ascertains whether the policy and purpose behind section 1983 necessitated a change from the common law standard.⁹⁶

The reliance on the two-step analysis was evident in the Supreme Court's decision in *Carey v. Phipps*.⁹⁷ In *Carey*, the plaintiffs had been suspended from public school without the benefit of a hearing.⁹⁸ The students brought suit under section 1983, seeking damages for the denial of their right to procedural due process.⁹⁹ The Court held that plaintiffs suing under section 1983 were only entitled to compensation for their actual injuries.¹⁰⁰

state law and made possible only because the wrongdoer is clothed with the authority of state law. . . ." 365 U.S. at 184.

⁹² *Monroe v. Pape*, 365 U.S. 167, 169 (1961).

⁹³ *Id.* at 187.

⁹⁴ See generally Nahmod, *supra* note 8.

⁹⁵ See Nahmod, *supra* note 8. Professor Nahmod explores the influence of tort principles on the Court's handling of section 1983 cases. In particular, he focuses on the issues of duty, proximate cause, negligence, strict liability, and defenses. *Id.* at 13-32. For example, Professor Nahmod examines how the lower courts have handled the issue of whether a section 1983 action can be based on mere negligence, or whether gross negligence or intentional conduct is required. *Id.* at 16-22.

For cases only requiring ordinary negligence, see *Carter v. Estelle*, 519 F.2d 1136, 1136-37 (5th Cir. 1975); *Fitzke v. Shappell*, 468 F.2d 1072, 1077 n.7 (6th Cir. 1972); *McCray v. Maryland*, 456 F.2d 1, 5 (4th Cir. 1972). For cases requiring more than ordinary negligence, see *Hoitt v. Vitek*, 497 F.2d 598, 602 (1st Cir. 1974).

Professor Nahmod suggests, however, that Justice Douglas did not intend to create such a strong comparison between section 1983 and tort law. Nahmod, *supra* note 8, at 9. According to Nahmod, Justice Douglas was merely commenting that the common law definition of intent — liability where the conduct itself is intended, even absent the intent to produce the eventual result — should apply to section 1983. *Id.* at 6. Whatever Justice Douglas' intentions may have been, however, tort law has become a guiding principle for section 1983.

⁹⁶ *Carey v. Phipps*, 435 U.S. 247 (1978).

⁹⁷ *Id.*

⁹⁸ *Id.* at 248. The cases of two students were consolidated for trial. In one case, a sixth grade student had been suspended for wearing an earring. In the other, a ninth grade student had been suspended for smoking what the principal believed to be marijuana. *Id.* at 248-51.

⁹⁹ *Id.* at 248.

¹⁰⁰ *Id.* at 257. The Court's holding in *Carey* was narrowly drawn and controls only in cases involving violations of procedural due process. *Id.* at 264-65. Lower courts have, however, required proof of actual injury in cases involving other constitutional violations. See *infra* notes 280-90 and accompanying text. See, e.g., *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978) (illegal incarceration), *cert. denied*, 439 U.S. 1118 (1978); *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978) (first amendment); *Reyes v. Edmunds*, 472 F. Supp. 1218, 1230 (D. Minn. 1979) (fourth amendment); *O'Brien v. Leidinger*, 452 F. Supp. 720, 727 (E.D. Va. 1978) (first amendment and equal protection). But see *Herrera v. Valentine*, 653 F.2d 1220, 1228-29 (8th Cir. 1981) ("The holding in *Carey* was specifically limited to its facts."); *Halperin v. Kissinger*, 606 F.2d 1192, 1207 n.100 (D.C. Cir. 1979) (suggesting that *Carey* does not apply to fourth amendment violations).

Despite finding a due process violation, the Court held that where a due process deprivation is justified, plaintiffs, to recover, must show that the due process violation itself caused mental and emotional stress.¹⁰¹ In *Carey*, the plaintiffs had failed to prove a compensable injury.¹⁰² The Court based this holding on an acceptance of section 1983 as "a species of tort liability,"¹⁰³ where rights existed not "in a vacuum,"¹⁰⁴ but rather in the form of compensation for injuries incurred.¹⁰⁵ Having justified its decision to apply tort principles to a suit under section 1983, the Court looked to the common law in 1871, the year in which section 1983 was enacted.¹⁰⁶ The Court noted that in 1871 it was well-settled that tort law only enabled plaintiffs to recover for actual damages.¹⁰⁷ According to the Court, Congress, which was comprised of a substantial number of lawyers, must have been aware of this compensatory theory of damages when it enacted section 1983.¹⁰⁸ The *Carey* Court thus approached the issue of damages under section 1983 by assuming that Congress adopted this relatively straightforward concept into the statute.¹⁰⁹

The Court then undertook the second step in the two-step analysis and considered whether the policy and purpose behind section 1983 required a change from the common law standard of compensation. As part of its policy examination, the Court considered whether tort theories of compensation constituted a viable approach to cases under section 1983.¹¹⁰ Damages under the common law of torts, the Court acknowledged, would not always prove adequate for satisfying constitutional violations.¹¹¹ The Court claimed that in such cases, however, courts could adequately adopt the rules of common law damages to provide sufficient compensation for constitutional deprivations, if those deprivations had caused compensable injury.¹¹² Consequently, the *Carey* Court determined that a violation of procedural due process, in and of itself, did not entitle plaintiffs to the right to recover damages.¹¹³ In its decision, therefore, the Court extended the two-step analysis of section 1983 cases to the issue of damages and also solidified "the background of tort liability" concept articulated in *Monroe*.¹¹⁴

Two years after the *Carey* decision, the Court again relied on the common law of torts in *City of Newport v. Fact Concerts, Inc.*,¹¹⁵ holding that punitive damages were not available in a section 1983 suit against a municipality.¹¹⁶ While *Fact Concerts* could be characterized

¹⁰¹ 435 U.S. at 263.

¹⁰² *Id.* at 251-52.

¹⁰³ *Id.* at 253 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

¹⁰⁴ 435 U.S. at 254.

¹⁰⁵ *Id.* The lower federal courts had already applied principles of common law tort damages to constitutional violations. See *Zarcone v. Perry*, 572 F.2d 52, 55 (2d Cir. 1978); *Joseph v. Rowlen*, 425 F.2d 1010, 1013 (7th Cir. 1970). For articles criticizing section 1983's reliance on the common law, see Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Phipps*, 93 HARV. L. REV. 966, 967 (1979); Note, *Section 1983: An Analysis of Damage Awards*, 58 NEB. L. REV. 580, 580-81 (1979).

¹⁰⁶ *Carey*, 435 U.S. at 255.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 256-57.

¹¹⁰ *Id.* at 257-64.

¹¹¹ *Id.* at 258. See *Monroe v. Pape*, 365 U.S. 167, 196 & n.5 (1961) (Harlan, J., concurring).

¹¹² *Carey*, 435 U.S. at 258-59.

¹¹³ *Id.* at 264. Justice Powell, writing for the Court, did refer directly to the issue of punitive damages. For this portion of the *Carey* opinion, see *infra* notes 144-51 and accompanying text.

¹¹⁴ See *supra* notes 88-96 and accompanying text.

¹¹⁵ 453 U.S. 247 (1981).

¹¹⁶ *Id.* at 271.

as an immunity case, the decision's importance to the general issue of punitive damages under section 1983 is significant. In *Fact Concerts*, the plaintiff filed suit under section 1983 claiming that the City of Newport had violated its rights to free expression and due process by withdrawing a license it had previously issued for a concert.¹¹⁷ While the city eventually regranted the license, the plaintiff alleged injury based on low attendance at the concert.¹¹⁸ A jury found the City of Newport liable and awarded the plaintiff \$72,910 in compensatory damages and \$275,000 in punitive damages.¹¹⁹ The city appealed, claiming that punitive damages were not available against a municipality under section 1983.¹²⁰ The Supreme Court agreed with petitioner and, in a six-to-three decision, found the City of Newport immune from any finding of punitive damages.¹²¹

In *Fact Concerts* the Court once again adopted a two-part approach to analyzing section 1983.¹²² The Court began its analysis by looking to a municipality's liability for punitive damages under the common law.¹²³ The Court noted that in 1871, municipal corporations were immune from suits for punitive damages.¹²⁴ Due to this generally accepted state of 1871 common law, the Court reasoned that the members of the Forty-Second Congress, by failing to provide otherwise, intended to extend municipal immunity from punitive damages into section 1983.¹²⁵ The Court then moved directly to a consideration of the policy behind both section 1983 and punitive damages.¹²⁶

In discussing the public policy of both section 1983 and punitive damages, the Court concluded that the goals of punitive damages, both punishment and deterrence, were not met when punitive damages were awarded against a municipality.¹²⁷ Consequently the Court concluded that the common law immunity from punitive damages for municipalities should also apply to section 1983 actions.¹²⁸ In reaching this conclusion, the Court reasoned, in part, that deterrence was more effectively served through assessing punitive damages against the offending official, and thus his personal finances, rather than against the municipality.¹²⁹ Despite this reasoning, however, the Court did not explicitly hold that punitive damages were available against a state official in a suit filed under section 1983.¹³⁰

¹¹⁷ *Id.* at 251-52. The respondents had obtained a license from the city. Under the contract, the city retained the right to withdraw the license in the interest of public safety. *Id.* at 250. The city exercised that right when one week before the concert, the respondents replaced a scheduled jazz band with the rock group Blood, Sweat and Tears. *Id.* While the respondents successfully obtained a restraining order the morning of the concert, thus allowing the group to perform, attendance at the event was low. *Id.* at 252.

¹¹⁸ *Id.* at 252.

¹¹⁹ *Id.* at 253.

¹²⁰ *Id.*

¹²¹ *Id.* at 271. Justice Brennan filed a dissenting opinion stating that the petitioners had failed to file a timely objection, as required under Rule 51 of the Federal Rules of Civil Procedure. Restricting his argument to this procedural deficiency, he failed to reach the substantive issue of punitive damages. *Id.* at 271-79 (Brennan, J., dissenting).

¹²² *Id.* at 258-59. For a discussion of other cases in which the Court adopted a two-part approach, see *supra* notes 52-80, 97-114 and accompanying text.

¹²³ 453 U.S. at 259-63.

¹²⁴ *Id.* at 259-60.

¹²⁵ *Id.* at 263.

¹²⁶ *Id.* at 266-71.

¹²⁷ *Id.* at 269-70. The Court also expressed concern that a jury, given complete discretion in awarding punitive damages, might be prejudiced against a municipality, with its unlimited taxing power. *Id.* at 270-71.

¹²⁸ *Id.* at 271.

¹²⁹ *Id.* at 269.

¹³⁰ In *Smith v. Wade*, the Court cited *Fact Concerts* for its reliance on awarding punitive damages

B. *Supreme Court References to Punitive Damages under Section 1983 Against a State Official*

The *Fact Concerts* Court's reference to the possibility of punitive damages against a state official¹³¹ did not constitute the Court's only discussion of that issue before *Smith v. Wade*.¹³² In fact, several earlier opinions contained indications that punitive damages might be available under section 1983, and included suggestions as to the standard under which they should be awarded.¹³³ For example, in a concurring opinion in *S.H. Adickes v. Kress & Co.*,¹³⁴ Justice Brennan stated that punitive damages were available under section 1983.¹³⁵ In *Adickes*, the plaintiff alleged a violation of her equal protection rights.¹³⁶ She claimed that a restaurant refused to serve her because she was in the company of blacks and that the refusal of service and her arrest were pursuant to a conspiracy between the restaurant and the police.¹³⁷ The issue before the Court in *Adickes* was procedural; whether the moving party had proved the absence of any disputed material fact.¹³⁸ Determining that the moving party had not carried this burden, the Court reversed the lower court's order granting summary judgment.¹³⁹ The section 1983 case was reversed and remanded.¹⁴⁰ In his concurring opinion, Justice Brennan took the opportunity to discuss the issue of damages.¹⁴¹ He noted the potential for punitive damages to encourage effectively proprietors of public places to respect constitutional rights.¹⁴² Justice Brennan suggested that punitive damages could be awarded where the plaintiff had shown that the defendant acted "with actual knowledge that he was violating a right" or "with reckless disregard of whether he was thus violating such a right."¹⁴³

The Court also referred to the issue of punitive damages in *Carey v. Phipus*.¹⁴⁴ As was discussed previously the *Carey* Court held that the compensatory theories of tort law applied to suits filed under section 1983 for violations of procedural due process.¹⁴⁵ Justice Powell, writing for the majority in *Carey*, suggested that Congress may have intended compensatory damages to constitute the sole deterrent to constitutional violations.¹⁴⁶ In a footnote, however, the opinion indicated that punitive damages might be

against an offending criminal. 461 U.S. 30, 36 n.5 (1983). Using this reliance by the *Fact Concerts* Court, the *Wade* Court argued that the standard for punitive damages, not their availability, was the only issue to be resolved. *Id.* at 35-36.

¹³¹ 453 U.S. 247, 269 (1981). See *supra* notes 127-30 and accompanying text.

¹³² 461 U.S. 30 (1983).

¹³³ *Carlson v. Green*, 446 U.S. 14, 22 (1980); *id.* at 47-48 (Rehnquist, J., dissenting); *Carey v. Phipus*, 435 U.S. 247, 257 n.11 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 233-34 (1970) (Brennan, J., concurring).

¹³⁴ 398 U.S. 144 (1970).

¹³⁵ *Id.* at 233-34 (Brennan, J., concurring).

¹³⁶ *Id.* at 146.

¹³⁷ *Id.* at 147-48.

¹³⁸ *Id.* at 153.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 174.

¹⁴¹ *Id.* at 231-34 (Brennan, J., concurring).

¹⁴² *Id.* at 234 (Brennan, J., concurring).

¹⁴³ *Id.* at 233 (Brennan, J., concurring). Compare the standards proposed by Justice Brennan here and those established by the Court through Justice Brennan's majority opinion in *Wade*, 461 U.S. 30 (1983), *infra* notes 173-217 and accompanying text. While the lower standard ("reckless indifference") remained the same, the higher standard articulated in *Wade* changed from "actual knowledge" in *Adickes* to "evil motive or intent" in *Wade*. 461 U.S. 30, 56 (1983).

¹⁴⁴ 435 U.S. 247 (1978).

¹⁴⁵ *Id.* at 264. See *supra* notes 97-114 and accompanying text.

¹⁴⁶ *Id.* at 256-57.

awarded "in a proper case under [section] 1983."¹⁴⁷ Through this footnote, the Court expressly reserved judgment on the validity of several lower court decisions awarding punitive damages in actions under section 1983.¹⁴⁸ The Court concluded, however, that *Carey* did not constitute "a proper case" because the defendants, when they suspended the students without a hearing, had not acted "with a malicious intention to deprive [them] of their rights or to do them other injury."¹⁴⁹ Although the majority in *Carey* did not specifically articulate a standard for punitive damages under section 1983, it did note that the defendants had not acted with malicious intent.¹⁵⁰ By measuring the conduct of the defendants only against an intent standard, however, the Court impliedly rejected Justice Brennan's suggested standard articulated in *Adickes*¹⁵¹ of reckless disregard.

Finally, in *Carlson v. Green*,¹⁵² the Court, through Justice Brennan, and a dissenting opinion by Justice Rehnquist, debated the appropriateness of punitive damages in section 1983 actions. In *Carlson*, the plaintiff brought suit on behalf of the estate of her son claiming that federal prison officials, by violating her son's due process, equal protection and eighth amendment rights, were responsible for his personal injuries, from which he died.¹⁵³ Although *Carlson*, because it was an action against federal officials, did not involve section 1983 directly, its holding is nonetheless relevant to section 1983 analysis.¹⁵⁴ The Court held that a plaintiff could bring a suit against federal officers without proceeding under the Federal Tort Claims Act.¹⁵⁵ Writing for the majority in *Carlson*, Justice Brennan stated that punitive damages "are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights."¹⁵⁶ The Court then cited Justice Powell's footnote in *Carey v. Phipps* for the proposition that "punitive damages are available in a 'proper' [section] 1983 action."¹⁵⁷ Justice Rehnquist, in a dissenting opinion,

¹⁴⁷ *Id.* at 257 n.11.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Justice Powell would later join Justice Rehnquist's dissenting opinion in *Wade*, and thus adopt "actual malice" or "wrongful intent" as a standard for punitive damages. 461 U.S. at 56, 84. See *infra* notes 218-57 and accompanying text. The fact that Justice Powell later adopted a wrongful intent standard strengthens the argument that he was advocating that very standard in *Carey*.

¹⁵¹ 398 U.S. 144, 233 (1970) (Brennan, J., concurring). See *supra* notes 140-43 and accompanying text.

¹⁵² 446 U.S. 14 (1980).

¹⁵³ *Id.* at 16.

¹⁵⁴ 446 U.S. at 23. This type of suit has now become known as a "*Bivens* action." A *Bivens* action, established in *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), is a judicially created equivalent of a section 1983 action, applying, however, to those acting under color of federal law. Finding little reason to distinguish between state and federal officers, the *Bivens* Court found an implied remedy for the violation of fourth amendment rights. *Id.* at 397. In *Carlson*, the Court did the same for an eighth amendment violation. 446 U.S. at 17-19. Due to the virtual equivalence of proceeding under section 1983 or a *Bivens* action, the discussion of punitive damages in *Carlson* is appropriate for section 1983 analysis.

¹⁵⁵ 446 U.S. at 23. The Federal Tort Claims Act gives an individual a cause of action against the federal government. The suit may be based on negligence, or in some cases, intentional torts. 28 U.S.C. §§ 1346(b), 2680(h) (1982). For a discussion of the *Carlson* Court's consideration of the Federal Tort Claims Act, see Comment, *Carlson v. Green: The Inference of a Constitutional Cause of Action Despite the Availability of a Federal Tort Claims Act Remedy*, 22 WM. & MARY L. REV. 561 (1981).

¹⁵⁶ 446 U.S. at 22.

¹⁵⁷ *Id.* (quoting *Carey v. Phipps*, 435 U.S. 247, 257 n.11 (1978)). See *supra* notes 144-51 and accompanying text.

emphasized that the Court had yet to determine the availability of punitive damages in a section 1983 action, "despite the Court's assertion to the contrary."¹⁵⁸ The dissent faulted the Court for misreading *Carey* by neglecting to consider that *Carey* expressly reserved judgment on lower court cases that had awarded damages in suits brought under section 1983.¹⁵⁹

Before *Smith v. Wade*, therefore, although the issue of punitive damages had never been directly decided by the Court, a majority of the Justices appeared to have assumed that punitive damages were available against a defendant in a section 1983 suit.¹⁶⁰ Lower federal court decisions reflected this assumption. Those lower courts, often citing *Carey* and *Carlson*, were virtually unanimous in awarding punitive damages under section 1983.¹⁶¹ A more difficult issue, and one resulting in significant disagreement among members of the Supreme Court and among the lower federal courts was the application of a precise standard by which punitive damages could be awarded.¹⁶² As noted previously, Justice Brennan had suggested that the standard should be one of "actual knowledge" or "reckless disregard,"¹⁶³ while Justice Powell had implied that the standard should be malicious intent.¹⁶⁴ The split in the lower courts reflected the disagreement between Justices Brennan and Powell over the issue of intent.¹⁶⁵ Moreover, by using many different terms to describe the standard for awarding punitive damages, the lower courts tended to add confusion to the issue beyond the original intent-recklessness dispute. The terms "actual malice,"¹⁶⁶ "malicious intent,"¹⁶⁷ "ill will,"¹⁶⁸ "reckless disregard,"¹⁶⁹ "aggravated circumstances,"¹⁷⁰ "egregious conduct,"¹⁷¹ and "willful and malicious"¹⁷² have all been used by the lower courts in describing the standard for an award of punitive damages. The Supreme Court granted certiorari in *Smith v. Wade* to determine the proper legal standard for instructing a jury whether it may grant punitive damages under section 1983.

¹⁵⁸ *Id.* at 47 (Rehnquist, J., dissenting).

¹⁵⁹ *Id.* (Rehnquist, J., dissenting).

¹⁶⁰ Even in *Smith v. Wade*, the Court presumed that punitive damages were available under section 1983. 461 U.S. at 35-36. See *infra* notes 179-80 and accompanying text.

¹⁶¹ See *Bradley v. Coughlin*, 671 F.2d 686, 690 (2d Cir. 1982); *Zarcone v. Perry*, 572 F.2d 52, 54-55 (2d Cir. 1978); *Stengel v. Belcher*, 522 F.2d 438, 444 & n.4 (6th Cir. 1975); *Mansell v. Saunders*, 372 F.2d 573, 576 (5th Cir. 1967); *Basista v. Weir*, 340 F.2d 74, 87-88 (3d Cir. 1965). But see *Huntley v. Community School Bd. of Brooklyn*, 579 F.2d 738, 741 (2d Cir. 1978) (following *Carey v. Phipps*, 435 U.S. 247, 257 n.11 (1978), in reserving judgment on punitive damages while holding that under the facts of this particular case the plaintiffs had not proved "malicious intention").

¹⁶² See *supra* notes 131-59 and accompanying text.

¹⁶³ See *supra* notes 131-43 and accompanying text.

¹⁶⁴ See *supra* notes 144-51 and accompanying text.

¹⁶⁵ Compare *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978) (malicious intent) with *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978) (actual knowledge or reckless disregard).

¹⁶⁶ *Smith v. Losee*, 485 F.2d 334, 344 (10th Cir. 1973), cert. denied, 417 U.S. 908 (1974).

¹⁶⁷ *Morrow v. Igleburger*, 584 F.2d 767, 769 (6th Cir. 1978).

¹⁶⁸ *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976).

¹⁶⁹ *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978).

¹⁷⁰ *Konczak v. Tyrrell*, 603 F.2d 13, 18 (7th Cir. 1979), cert. denied, 444 U.S. 1016 (1980).

¹⁷¹ *Fielder v. Bosshard*, 590 F.2d 105, 111 (5th Cir. 1979).

¹⁷² *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975).

II. THE *SMITH V. WADE* DECISIONA. *The Majority Opinion*

In a five-to-four decision, in *Smith v. Wade*,¹⁷³ the Supreme Court affirmed the Court of Appeals' assessment of punitive damages against a state official in a section 1983 suit.¹⁷⁴ The Court held that punitive damages were available under section 1983 where the defendant's conduct depicted either an "evil motive or intent" or displayed a "reckless or callous indifference" in the violation of the plaintiff's constitutionally protected rights.¹⁷⁵ Written by Justice Brennan,¹⁷⁶ the majority opinion began by noting that, for guidance, it would look to the common law of torts in 1871, as well as modern common law.¹⁷⁷ The Court stated that it would then determine whether the purpose and policy behind section 1983 dictated a change from the common law rule.¹⁷⁸ The Court noted that the petitioner, the guard on duty at the prison, had conceded that punitive damages were available in a "proper" section 1983 action.¹⁷⁹ While the majority recognized that the Court had never specifically confronted the issue of the availability of punitive damages, it stated that prior decisions had revealed the Court's approval of section 1983 punitive damages.¹⁸⁰

Addressing the defendant's first contention, that the proper standard for punitive damages in all cases under section 1983 was actual intent, the Court began by analyzing 1871 common law.¹⁸¹ The Court noted the uncertainty in 1871 regarding the precise standard to be applied in awarding punitive damages.¹⁸² According to the Court, this uncertainty centered on the degree of negligence or culpable indifference required to justify punitive damages, and not whether actual intent was an essential element for recovery.¹⁸³ In fact, the Court continued, the rule in the majority of jurisdictions specifically recognized that punitive damages could be obtained without a showing of actual intent to injure.¹⁸⁴ In support of this reading, the Court cited to and quoted from several late nineteenth century Supreme Court opinions which held that the standard for recovering punitive damages was proof of negligence, recklessness, or other culpable conduct short of "actual ill will, spite, or intent to injure."¹⁸⁵ The Court found further support for

¹⁷³ 461 U.S. at 31.

¹⁷⁴ *Id.* at 56.

¹⁷⁵ *Id.*

¹⁷⁶ Justices White, Marshall, Blackmun, and Stevens joined Justice Brennan's opinion. 461 U.S. at 31. Chief Justice Burger and Justices Rehnquist and Powell dissented in an opinion written by Justice Rehnquist. *Id.* at 56. Justice O'Connor dissented separately. *Id.* at 92.

¹⁷⁷ *Id.* at 34.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 35-36.

¹⁸⁰ *Id.* at 36. See *supra* notes 131-59 and accompanying text. The *Wade* Court cited *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981), as a decision premised on the availability of punitive damages. See *supra* notes 127-30 and accompanying text.

¹⁸¹ *Id.* at 38-45.

¹⁸² *Id.* at 39.

¹⁸³ *Id.* at 40-41.

¹⁸⁴ *Id.* at 41.

¹⁸⁵ *Id.* at 41-44. The Court cited *Philadelphia, W. & B.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1858) (malice implies a "spirit of mischief" or "criminal indifference to civil obligations"); *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489, 495 (1875) (for punitive damages, there must be "that entire want of care which would raise the presumption of a conscious indifference to consequences"); *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885) (dicta suggesting the availability of punitive damages for gross negligence). 461 U.S. at 41-44.

Much of the argument as to the correct standard occurred in footnotes, where, in an effort to

a reckless indifference standard in a number of 19th century lower federal court and state court cases, citing many decisions which had adopted various standards of negligence and recklessness for an award of punitive damages.¹⁸⁶

The Court then stated that modern tort law also supported the conclusion that proof of actual evil intent was not necessary to recover punitive damages.¹⁸⁷ Refuting assertions by the dissent that recent common law was irrelevant to the issue of a standard under section 1983, the Court stated that, in considering modern law, it was merely following precedent exemplified in the section 1983 immunity cases.¹⁸⁸ For example, the Court noted that in *Imbler v. Pachtman*,¹⁸⁹ it had recognized a common law immunity which had not come into existence until twenty-five years after section 1983's enactment.¹⁹⁰ According to the Court, Congress "did not intend to freeze into permanent law whatever principles were current in 1871, rather than to incorporate applicable general legal principles as they evolve."¹⁹¹ The Court stated that it was firmly established under current tort law that the standard for punitive damages was "evil motive or . . . reckless indifference to the rights of others."¹⁹²

Having determined the intent of the Forty-Second Congress through 1871 common law, and having gained further support for a recklessness standard through the current standard for punitive damages in modern tort law, the Court considered whether the policies and purposes of section 1983 required a departure from the rules of tort common law.¹⁹³ The Court began by stating that, as a general matter, it could find no reason why a person whose rights under a federal statute have been violated should have a more limited remedy than an individual asserting an ordinary cause of action under tort law.¹⁹⁴ Although the Court agreed with the defendant's contention that the purpose of punitive damages was deterrence rather than compensation for the injured party, it rejected the defendant's argument that a recklessness standard was too vague to deter effectively.¹⁹⁵ Referring to a decision in the context of the first amendment where it had adopted a standard of recklessness for the award of punitive damages,¹⁹⁶ the Court noted that the need for certainty in the first amendment area, and the desire not to inhibit the freedom offered by it, was at least as pressing as the concerns expressed by the defendant in *Wade*.¹⁹⁷ Because the very same standard of recklessness served as the threshold for punitive damages in tort law, the Court questioned the necessity for applying a different

make understandable the cases it had cited, the Court defined terms such as "malice," "willful," and "wanton." *Id.* at 39-47 nn.8-12. The Court concluded that malice, as used in the last century, did not denote intent or ill will. Rather, it was a "hopelessly versatile and ambiguous term." *Id.* at 39 n.8. "Wanton" and "willful," according to the Court, were never taken to denote intent or ill will. *Id.* at 40 n.8. "Wanton" referred to reckless behavior and "willful" referred to the freedom and spontaneity by which a person acted. *Id.*

¹⁸⁶ *Id.* at 45-47 n.12.

¹⁸⁷ *Id.* at 46-48.

¹⁸⁸ *Id.* at 34 & n.2. See *supra* notes 52-86 and accompanying text.

¹⁸⁹ 424 U.S. 409 (1976).

¹⁹⁰ 461 U.S. at 35 n.2.

¹⁹¹ *Id.* at 34 n.2.

¹⁹² *Id.* at 46-47 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1977)) (emphasis supplied by the Court).

¹⁹³ *Id.* at 48.

¹⁹⁴ *Id.* at 48-49.

¹⁹⁵ *Id.* at 49.

¹⁹⁶ *Id.* at 50 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

¹⁹⁷ 461 U.S. at 50.

approach under section 1983.¹⁹⁸ Moreover, the Court stated that the defendant's contention that the recklessness standard was too vague to be administered fairly failed to recognize the distinction between a standard for punitive damages and the threshold standard for liability in the first instance.¹⁹⁹ According to the Court, state officials are concerned with the underlying standards for permissible conduct when carrying out their duties, rather than the standard for punitive damages.²⁰⁰ The Court explained that, in effect, the need for a perfectly clear standard for punitive damages only arises if the fear of having to pay compensatory damages will not deter state officials.²⁰¹ The presence of officials who seek to guide their conduct by the standard for punitive damages, the Court continued, establishes a strong argument against, rather than for, raising the threshold for punitive damages.²⁰² In concluding its rejection of the defendant's argument for a stricter, or actual intent, standard, the Court suggested that the defendant would more appropriately attack the vagueness of a recklessness standard on the issue of liability itself, rather than on the issue of punitive damages.²⁰³

After rejecting the defendant's argument that an intent standard should apply in all punitive damages cases under section 1983, the Court turned to the defendant's second argument; that such a standard should apply in the matter before it.²⁰⁴ At trial, the district court's instruction specified the same threshold of liability for both punitive and compensatory damages.²⁰⁵ The defendant claimed that his qualified immunity as a prison guard, and the resulting higher threshold for initial liability, also necessitated the higher standard of malicious intent for punitive damages.²⁰⁶ He argued that a stricter standard was necessary if punitive damages were to satisfactorily fulfill their deterrence function.²⁰⁷ Distinguishing between the threshold for, and the availability of, punitive damages, the majority rejected this argument.²⁰⁸ The Court noted that even though the standards of liability for compensatory and punitive damages were identical, a significant distinction between the two types of awards existed.²⁰⁹ Once liability is established, the Court explained, conduct satisfying the standard automatically resulted in an award of compensatory damages.²¹⁰ In contrast, the Court stated that the question whether to award punitive damages still remained subject to the discretion of the jury.²¹¹ Furthermore, the Court noted that the common law has never had a rule requiring that the standard for awarding punitive damages always be stricter than the standard for compensatory claims.²¹²

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 51.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 51-52.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 53. The Court offered examples of several torts for which a jury could find liability and award punitive damages based on the same standard of conduct. *Id.* at 53-54. According to the Court, these torts included malicious prosecution, intentional infliction of emotional distress, defamation of a public figure or public official and defamation covered by a common law qualified immunity. *Id.*

Finally, the Court concluded, as it had with the defendant's first argument, that the defendant had given "no good reason to depart from the common-law rule in the context of section 1983."²¹³ The Court rejected the defendant's argument that too low a threshold for punitive damages would undermine the policy which extends qualified immunity to prison guards.²¹⁴ According to the Court, the immunity covers an officer's discretion in the ordinary operations of a correctional institution.²¹⁵ The Court recognized that this discretion does not extend to conduct that amounts to reckless indifference to the rights and safety of prisoners.²¹⁶ Consequently, the Court affirmed the district court's instruction to the jury that punitive damages may be assessed where the defendant's conduct is reckless.²¹⁷

B. *The Dissenting Opinions*

Justice Rehnquist wrote a dissenting opinion in *Wade* and was joined by Chief Justice Burger and Justice Powell.²¹⁸ The dissent began by considering the purposes of punitive damages.²¹⁹ The dissent reasoned that three possible rationales for granting punitive damages existed: first, to punish the defendant; second, to deter individuals from violating the rights of others; and third, to provide a "bounty" which encourages private litigation seeking to assert legal rights.²²⁰ Despite these alleged justifications, the dissent continued, the doctrine of punitive damages has been severely criticized and consequently, should be applied in limited situations.²²¹ The dissent noted that jurors awarded punitive damages in unpredictable amounts, and that frequently the award resulted in a windfall for a plaintiff, since he had already been compensated.²²²

In this dissenting opinion Justice Rehnquist referred to the Court's consideration of modern tort law as "a novel approach"²²³ to section 1983. According to the dissent, the Court's role in interpreting section 1983 is to determine what the Forty-Second Congress intended in enacting the provision.²²⁴ Stating that the state court decisions from the 1970's used by the majority in its opinion were of no relevance to the issue before the Court, the dissent reasoned that it was "unprepared to attribute to the [Forty-Second] Congress the truly extraordinary foresight the Court seems to think it had."²²⁵ Many section 1983 decisions interpreted common law decisions, the dissent continued, because many members of the Forty-Second Congress, as lawyers, were familiar with legal principles and rules of that time.²²⁶ Courts thus relied on the common law during that period to determine congressional intent.²²⁷ The dissent then reasoned that recent state court decisions, relied on by the Court, were irrelevant for showing what the Forty-Second

²¹³ *Id.* at 55.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 56.

²¹⁸ *Id.* at 56 (Rehnquist, J., dissenting).

²¹⁹ *Id.* at 57 (Rehnquist, J., dissenting).

²²⁰ *Id.* at 58 (Rehnquist, J., dissenting).

²²¹ *Id.*

²²² *Id.* at 59 (Rehnquist, J., dissenting).

²²³ *Id.* at 66 (Rehnquist, J., dissenting).

²²⁴ *Id.* at 65 (Rehnquist, J., dissenting).

²²⁵ *Id.* at 65-66 (Rehnquist, J., dissenting).

²²⁶ *Id.* at 66 (Rehnquist, J., dissenting).

²²⁷ *Id.*

Congress intended for a punitive damages standard.²²⁸ Dismissing the Court's reliance on the immunity cases for its consideration of modern law, the dissent stated that the immunity cases only demonstrated an attempt to determine congressional intent, although in some cases indirectly.²²⁹

In addition to disagreeing with the Court's use of modern tort law, the dissent authored by Justice Rehnquist also disputed the majority's interpretation of 1871 common law.²³⁰ According to the dissent, the earlier decisions "unambiguously" supported an actual malice standard for awarding punitive damages.²³¹ Although the dissent cited many of the same cases as the Court had and quoted several of the same passages,²³² the dissent's conclusions differed from the Court's in the interpretation of key terms used in the cases.²³³ Just as the Court had, the dissent employed extensive footnotes to define the terms "malice," "willful," and "wanton."²³⁴ Unlike the Court, however, the Rehnquist dissent used those terms to show that 1871 common law provided an intent standard for an award of punitive damages.²³⁵ Additionally, according to the dissent, at the time Congress enacted section 1983, many of the thirty-seven states then in the Union required some showing of wrongful intent before punitive damages could be awarded.²³⁶

Having concluded that the common law in 1871 required a higher standard than mere recklessness, the dissent stated that a number of other factors indicated that the Forty-Second Congress intended a "wrongful intent" standard.²³⁷ Looking to the language of section 1983, the dissent concluded that the absence of any express provision allowing punitive damages impliedly disallowed them.²³⁸ The dissent emphasized that the provision allows plaintiffs who are deprived of any rights, privileges or immunities secured by federal law to seek redress.²³⁹ The dissent argued that the phrase "for redress" was the only reference to damages in the statute and consequently, indicated Congress' intent to limit the section 1983 remedy to compensatory damages.²⁴⁰ In addition, the dissent pointed to express references to punitive damages in other statutes which were roughly contemporaneous with section 1983 as signifying that if Congress had intended section 1983 to require punitive damages, it would have specifically provided for them in

²²⁸ *Id.*

²²⁹ *Id.* at 66-67 (Rehnquist, J., dissenting).

²³⁰ *Id.* at 68 (Rehnquist, J., dissenting).

²³¹ *Id.*

²³² *Id.* at 68-75 (Rehnquist, J., dissenting) (citing *Philadelphia, W. & B.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 214 (1858); *Milwaukee v. St. Paul R. Co. v. Arms*, 91 U.S. 489, 493 (1875); *Western Union Tel. Co. v. Eyser*, 91 U.S. 495, 496 (1875) (mem.); *Lake Shore & Mich. Southern Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893); *Scott v. Donald*, 165 U.S. 58, 86 (1897)). *Id.* See *supra* note 185 and accompanying text.

²³³ *Id.* at 60 n.3 (Rehnquist, J., dissenting).

²³⁴ *Id.* Malice, according to the dissent, required an examination of the defendant's mental state as to whether he foresaw, or willed, an evil result. *Id.* at 60-61 n.3. Contrary to the finding of the Court, the dissent interpreted the terms willful and wanton to have several meanings. *Id.* at 62 n.3. The dissent noted the connotations of evil motive and intent given to the terms in criminal law and concluded that given the punitive, and consequently criminal flavor of punitive damages, these terms evinced a minimum requirement of intent to harm. *Id.* at 62-63 n.3. Compare the definitions given by the majority, *supra* note 185.

²³⁵ 461 U.S. at 75 (Rehnquist, J., dissenting).

²³⁶ *Id.* at 77-78 (Rehnquist, J., dissenting).

²³⁷ *Id.* at 84 (Rehnquist, J., dissenting).

²³⁸ *Id.* at 85 (Rehnquist, J., dissenting). For the exact language of section 1983, see *supra* note 2.

²³⁹ 461 U.S. at 85 (Rehnquist, J., dissenting).

²⁴⁰ *Id.*

the statute.²⁴¹ The dissent, therefore, found little congressional intent in favor of punitive damages.²⁴² Given the ambiguity, the dissent argued that it was incorrect for the Court to adopt the most expansive standard for an award of punitive damages.²⁴³

In addition to finding that congressional intent dictated an intent standard, the dissent discussed five separate policy considerations which it argued also supported a stricter standard.²⁴⁴ First, the dissent emphasized that punitive damages were not a "favorite in the law."²⁴⁵ The dissent, therefore, stressed the importance of limiting, as opposed to expanding, such an unpopular doctrine.²⁴⁶ Second, the dissent found an especially compelling need for a strict punitive damages' standard where the volatile environment of prisons forces officials to take swift and decisive action.²⁴⁷ The dissent explained that one of the main reasons for granting qualified immunity is that the threat of liability must not impede that official's willingness to carry out his duties in a way which will benefit the public good.²⁴⁸ For the very same reason that the Court had previously granted qualified immunity to prison officials, the dissent urged an additional protection for those same officials against punitive damages.²⁴⁹ According to the dissent, the majority decision subjects government officials to the possibility of damage awards which bear no relation to any harm they actually caused and in spite of their having acted in good faith.²⁵⁰ Third, the dissent distinguished between remedies under section 1983 and remedies under state tort law.²⁵¹ The dissent stated that one of the most often used justifications for punitive damages is that they, in effect, are a response to the legal system's failure to provide financing for a plaintiff's litigation expenses.²⁵² This rationale does not apply to section 1983, the dissent contended, because the statute expressly provides for attorney's fees.²⁵³ Fourth, the dissent envisioned the availability of punitive damages as initiating a further barrage of section 1983 claims in an already overcrowded federal court system.²⁵⁴ Finally, the dissent distinguished between a state punishment against a state official and a federal punishment against a state official.²⁵⁵ The dissent noted that while states could choose the standards by which they punish their own officials, it was not necessary for the federal government to abide by those standards.²⁵⁶ In addition, the dissent reasoned that by granting incentives for plaintiffs to bring their claims in federal courts, the Court was infringing on sensitive areas between the state and federal governments.²⁵⁷

²⁴¹ *Id.* at 85-86 (Rehnquist, J., dissenting).

²⁴² *Id.* at 86 (Rehnquist, J., dissenting).

²⁴³ *Id.*

²⁴⁴ *Id.* at 87-92 (Rehnquist, J., dissenting).

²⁴⁵ *Id.* at 87 (Rehnquist, J., dissenting).

²⁴⁶ *Id.* at 88 (Rehnquist, J., dissenting).

²⁴⁷ *Id.* at 88-89 (Rehnquist, J., dissenting).

²⁴⁸ *Id.* at 88 (Rehnquist, J., dissenting).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 89-90 (Rehnquist, J., dissenting).

²⁵² *Id.* at 90 (Rehnquist, J., dissenting).

²⁵³ *Id.* 42 U.S.C. § 1988 (1982) states in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

²⁵⁴ 461 U.S. at 91 (Rehnquist, J., dissenting).

²⁵⁵ *Id.* at 92 (Rehnquist, J., dissenting).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

Justice O'Connor filed a separate dissenting opinion.²⁵⁸ Although agreeing with the result reached in Justice Rehnquist's dissent, Justice O'Connor voiced her disapproval of both the Court's and Justice Rehnquist's reliance on the common law of 1871.²⁵⁹ Justice O'Connor asserted that such a methodology was "ultimately unilluminating" in a situation where no generally prevailing view of common law in 1871 could be determined.²⁶⁰ According to Justice O'Connor, once it was established that the common law provided no guidance on the question of congressional intent, the inquiry should turn to the policies underlying section 1983 to determine which rule most satisfies those policies.²⁶¹ Justice O'Connor stated that the principal purpose of section 1983 is to compensate victims of constitutional violations and to deter future violations.²⁶² Compensatory damages, in her view, completely served that goal.²⁶³ Finding deterrence to be the essential goal of punitive damages, Justice O'Connor concluded that a recklessness standard would "chill public officials in the performance of their duties" more than it would deter violations of the Constitution.²⁶⁴ Justice O'Connor agreed with Justice Rehnquist's fears that a recklessness standard would result in an enormous number of section 1983 suits, a proliferation that would prohibit the courts from devoting the necessary time to valid causes of action.²⁶⁵ Consequently, the opinion determined that compensatory damages under section 1983, and attorney's fees under section 1988, offered an adequate deterrence.²⁶⁶

In arriving at a standard for punitive damages under section 1983, the majority and the two dissents in *Wade* all focused first on the common law of torts and then on the policies behind section 1983. The majority concluded that under common law the standard for punitive damages, both in 1871, the year of section 1983's enactment, and under modern tort law, was recklessness.²⁶⁷ After examining the purposes and policies behind section 1983, the majority could find no reason to depart from the common law rule, and thus the Court adopted a recklessness standard for section 1983 punitive damages.²⁶⁸ Justice Rehnquist, in his dissent, disagreed with the majority's interpretation of 1871 common law, finding that it expressed an actual malice or intent standard.²⁶⁹ Additionally, he viewed the majority's survey of modern tort law as irrelevant since, according to his dissent, the purpose of analyzing the common law was limited to determining what the Forty-Second Congress intended in enacting section 1983.²⁷⁰ After looking to the common law, the dissent turned, as had the majority, to the policies and purposes behind section 1983. Unlike the majority, however, the Rehnquist dissent argued that these considerations necessitated a stricter intent standard for awarding punitive damages.²⁷¹ Justice O'Connor, dissenting separately, disapproved of both the majority's and Justice Rehnquist's reliance on 1871 common law, arguing that no generally prevailing view

²⁵⁸ *Id.* (O'Connor, J., dissenting).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 92-93 (O'Connor, J., dissenting).

²⁶¹ *Id.* at 93 (O'Connor, J., dissenting).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 93-94 (O'Connor, J., dissenting).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 94 (O'Connor, J., dissenting).

²⁶⁷ See *supra* notes 181-92 and accompanying text.

²⁶⁸ See *supra* notes 193-217 and accompanying text.

²⁶⁹ See *supra* notes 230-36 and accompanying text.

²⁷⁰ See *supra* notes 223-29 and accompanying text.

²⁷¹ See *supra* notes 237-57 and accompanying text.

existed at that time.²⁷² Focusing solely on policy considerations, Justice O'Connor agreed with the Rehnquist dissent that courts would best carry out the purposes of section 1983 by establishing an intent standard for awarding punitive damages.²⁷³

III. THE IMPACT OF *SMITH V. WADE*

The Supreme Court's two-step approach to punitive damages in *Smith v. Wade* is consistent with its approach to earlier section 1983 cases.²⁷⁴ In its decision, the Court relied on both the common law of torts and the purpose and policy behind section 1983.²⁷⁵ Additionally, the Court's decision to adopt a reckless indifference standard for punitive damages under section 1983 is consistent with the Court's holdings in previous cases where the Court ultimately transferred the common law tort rule to section 1983.²⁷⁶ This section of the casenote will examine the significance of both the Court's holding and its reliance on the two-step approach. First, the section will analyze the potential ramifications of the *Wade* decision.²⁷⁷ The analysis will discuss *Wade's* impact on both plaintiffs and defendants in future section 1983 suits. It will be submitted that the added protection offered plaintiffs through the application of a lower standard for punitive damages outweighs the added burdens placed on defendants. Second, this section will address the Court's reliance on the two-step approach and, more particularly, the Court's consideration of modern tort law.²⁷⁸ The discussion will conclude that the Court's consideration of modern tort law was proper. It will be suggested, however, that the Court's use of modern tort law could have a significant effect on the two-step approach in future Supreme Court decisions.

A. *The Impact of Wade on Section 1983 Litigation*

In *Wade*, the Supreme Court held that a jury could assess punitive damages in a section 1983 suit where the defendant's conduct evidences either an evil motive or intent, or a reckless indifference, to the plaintiff's federally protected rights.²⁷⁹ The effect of this holding in section 1983 suits is significant for both plaintiffs and defendants. For plaintiffs, section 1983 becomes a more effective device for remedying constitutional violations due to the Court's application of a relatively lenient standard for awarding punitive damages. The plaintiff's burden of proof under a reckless indifference standard is, of course, not nearly as demanding as it would have been under an actual intent standard.

Moreover, the Court's adoption of a lower standard for punitive damages is important when considered in conjunction with the Court's earlier holding in *Carey v. Piphus*.²⁸⁰ In *Carey*, the Court held that plaintiffs deprived of their right to procedural due process could recover damages only in compensation for their actual injuries.²⁸¹ With this ruling, the Court rejected the plaintiffs' two arguments. First, the Court disagreed with the

²⁷² See *supra* notes 258-61 and accompanying text.

²⁷³ See *supra* notes 262-66 and accompanying text.

²⁷⁴ For cases taking a similar approach, see *supra* notes 52-86 & 97-130 and accompanying text.

²⁷⁵ 461 U.S. at 34.

²⁷⁶ See, e.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *Carey v. Piphus*, 435 U.S. 247, 257 (1978); *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

²⁷⁷ See *infra* notes 279-301 and accompanying text.

²⁷⁸ See *infra* notes 302-35 and accompanying text.

²⁷⁹ 461 U.S. at 56.

²⁸⁰ 435 U.S. 247 (1978). See *supra* notes 97-114.

²⁸¹ *Id.* at 254.

assertion that courts should presume, without proof by plaintiffs, that some injury results from procedural due process violations. Second, the Court rejected the plaintiffs' contention that courts should award substantial damages given the violation of constitutional rights, whether or not the violation causes actual injury.²⁸² Instead, the Court ruled that tort theories of compensation apply to section 1983. The *Carey* Court noted the plaintiffs' failure to show actual injury and limited their recovery to nominal damages.²⁸³

While the Court restricted the application of its holding in *Carey* to violations of procedural due process,²⁸⁴ some lower courts applied the *Carey* rule to other constitutional violations as well, and thus limited recovery in those cases to compensable injuries.²⁸⁵ The combination of the Supreme Court's decision in *Carey* and the lower courts' expansion of *Carey* added support to the view that all section 1983 actions should be interpreted under tort principles of compensation. According to this theory, plaintiffs bringing actions under section 1983 could recover only for their actual injuries. The possibility that some constitutional violations would remain completely unpunished, however, spurred commentators to suggest the existence of fundamental differences between the compensation goals of tort law and the deterrent goals of section 1983. For example, one commentator suggested that due to the importance of constitutional interests, deterrence served a more critical role in section 1983 cases than it did in tort law.²⁸⁶ He thus found that being "sensitive to the possible differences in function of tort law and 1983 liability" was important.²⁸⁷

Many commentators, therefore, urged that courts abandon theories of compensation when considering section 1983 claims. They argued that section 1983 should give rise to liquidated damages.²⁸⁸ Under this approach, section 1983 plaintiffs would be entitled to damages merely upon proof that the defendant violated their rights, whether or not they suffered an injury. Liquidated damages, according to this approach, would effectively deter local officials from violating an individual's rights. Absent liquidated damages, however, commentators emphasized that courts could use punitive damages as effective deterrence. These commentators stressed the critical importance of establishing a standard for punitive damages low enough to provide that deterrence.²⁸⁹

In *Smith v. Wade*, the Supreme Court's decision to allow punitive damages for reckless conduct comports with the suggestions of the commentators. In cases such as *Carey*,²⁹⁰ where a constitutional violation does not result in a compensable injury, punitive damages might constitute the only damage remedy available to the plaintiff. By allowing that plaintiff to collect punitive damages upon proof that the defendant acted recklessly,

²⁸² *Id.*

²⁸³ *Id.* at 256-57, 267.

²⁸⁴ *Id.* at 264-65.

²⁸⁵ For a list of cases expanding the *Carey* holding, see *supra* note 100.

²⁸⁶ Nahmod, *supra* note 8, at 10-11.

²⁸⁷ *Id.* at 11. See also Note, *Section 1983: An Analysis of Damage Awards*, 58 NEB. L. REV. 580, 580-81 (1979) (distinguishes between the private right protected in tort law and the public right protected under section 1983); Comment, *Civil Actions for Damages under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1026 (1967) (author argues that tort law damages do not provide the positive, punitive remedy necessary for punishment and deterrence).

²⁸⁸ See Newman, *supra* note 7, at 465; Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Phipps*, 93 HARV. L. REV. 966, 989 (1979); Note, *Measuring Damages for Violations of Constitutional Rights*, 8 VAL. U. L. REV. 357, 363-65 (1974).

²⁸⁹ See McClellan and Northcross, *supra* note 7, at 466-67; Note, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 CALIF. L. REV. 191, 219 (1972).

²⁹⁰ 435 U.S. 247 (1978).

rather than requiring the more difficult burden of proving intent, the Court in *Smith v. Wade* has recognized both the importance of constitutional rights, irrespective of actual injury, and the need to provide deterrence against officials violating those rights.

Conversely, for section 1983 defendants, many of whom enjoy a qualified immunity, the *Wade* decision means that the existence of a qualified immunity has no effect on the standard by which punitive damages are awarded.²⁹¹ Qualified immunity protects a defendant from liability when he performs his duties in good faith,²⁹² and, therefore, raises the standard of liability for compensatory damages from negligence to the higher standard of gross negligence or recklessness.²⁹³ The *Wade* Court rejected the defendant's argument that the existence of qualified immunity should likewise raise the standard of liability for punitive damages from recklessness to intent.²⁹⁴ As a result of the Court's holding, the standards for liability and punitive damages are identical for a defendant with qualified immunity. After *Wade*, a jury is justified in assessing punitive damages against that defendant any time it finds the defendant liable for compensatory damages.²⁹⁵ Jury awards for a defendant's reckless conduct, therefore, could become significantly more burdensome on section 1983 defendants.

Based on the policy behind section 1983, the result reached by the Court was proper. Congress enacted section 1983 to offer citizens increased protection from encroachment by state officials.²⁹⁶ The statute, along with the Supreme Court's decision in *Monroe v. Pape*,²⁹⁷ accomplished this goal by giving citizens who have been deprived of their constitutional rights by state officials the option to file suit in a federal forum.²⁹⁸ By allowing a plaintiff to collect punitive damages where a state official's conduct constitutes reckless or intentional behavior,²⁹⁹ the *Wade* Court has attempted to deter such conduct. The Court has reasoned convincingly that a reckless standard for punitive damages will further the policies behind section 1983. In *Wade*, the Court centered its analysis on the belief that a person bringing a cause of action for the violation of his federally protected rights should not have a more restrictive remedy than one bringing an ordinary tort action.³⁰⁰ The dissent, in suggesting a stricter intent standard, failed to refute that contention. Justice Rehnquist, in his dissent, insisted that punitive damages are not "a favorite in the law."³⁰¹ Beyond that broad pronouncement, however, the dissent did not explain why a reckless state official is more deserving of protection than a reckless tortfeasor. Indeed, given the

²⁹¹ 461 U.S. at 55.

²⁹² See *supra* notes 56-57 and accompanying text.

²⁹³ 461 U.S. at 51. See *supra* note 57.

²⁹⁴ *Id.* at 51-55.

²⁹⁵ *Id.* at 52. The defendant in *Wade* pointed to the identical standards and argued that to serve the punitive and deterrent purposes of punitive damages adequately, the standard for punitive damages would have to be higher. *Id.* The Court, in rejecting this argument, distinguished between a threshold for, and an award of, punitive damages. *Id.* See also *supra* notes 204-12 and accompanying text. The Court stated that given behavior by the defendant that satisfies the recklessness standard, the jury still retains discretion whether or not to award punitive damages. *Id.* at 51-52. Despite the Court's distinction, however, the recklessness standard is used for awards of both compensatory and punitive damages.

²⁹⁶ For a discussion of the legislative history behind section 1983, see *Monroe v. Pape*, 365 U.S. 165, 172-83 (1961).

²⁹⁷ 365 U.S. 165 (1961). See *supra* notes 5-6, 88-96 and accompanying text.

²⁹⁸ See *id.* at 183.

²⁹⁹ 461 U.S. at 56.

³⁰⁰ *Id.* at 48-49.

³⁰¹ *Id.* at 58 (Rehnquist, J., dissenting).

high value that this society places on constitutional rights, the majority's contention appears almost impossible to refute. From this perspective, the *Wade* decision appears to be well-founded.

B. *The Impact on the Court's Two-Step Approach*

While *Wade's* expansion of punitive damages under section 1983 will greatly affect both plaintiffs and defendants, *Wade's* impact on the Court's general approach to section 1983 will be equally, if not more, significant to future litigation. *Wade* represents another instance, in a growing line of section 1983 cases, where the Court has employed a two-step analysis in its approach.³⁰² The *Wade* Court relied first on the common law of torts and second on the purpose and policy behind section 1983 in adopting a standard for punitive damages under section 1983.³⁰³ In employing the two-step analysis, however, the *Wade* Court confronted two issues which it had not considered in earlier cases using this approach. First, the Court was faced with an area of the common law that was unsettled, particularly in 1871.³⁰⁴ Second, and perhaps relatedly, the Court extended its analysis beyond 1871 into the modern common law of torts.³⁰⁵ Although the Court had relied on post 1871 common law in earlier section 1983 immunity decisions,³⁰⁶ its use of modern law had never been an issue in the case. In effect, *Wade* was the first case in which the Court has confronted the legitimacy of its consideration of modern law in determining the scope and applicability of section 1983. Additionally, *Wade* was the first case in which the Court relied on modern common law where it had many cases to consult under 1871 common law. To measure *Wade's* impact on the Court's two-step approach to section 1983, an examination of the Court's reliance on both an unsettled area of 1871 common law and modern common law is necessary.

Both Justice Brennan, writing for the Court, and Justice Rehnquist, in the dissent, devoted a considerable amount of attention to 1871 common law in an effort to determine the accepted standard for punitive damages in 1871, and correspondingly, the congressional intent behind section 1983.³⁰⁷ While the Court's reliance on 1871 common law is consistent with its analysis in earlier section 1983 cases, these earlier cases differ from *Wade* in that their analyses of 1871 common law produced clear and generally accepted principles. In *Carey v. Piphus*, for example, the Court considered whether plaintiffs alleging violations of procedural due process needed to show actual injury to recover damages.³⁰⁸ The Court looked to the common law in 1871 and determined that the compensatory theory of damages "could hardly have been foreign" to the Forty-Second Congress.³⁰⁹ Similarly, in *City of Newport v. Fact Concerts, Inc.*³¹⁰ and *Tenney v.*

³⁰² For a description of cases employing the two-step analysis, see *supra* notes 60-80, 96-130 and accompanying text.

³⁰³ 461 U.S. at 34.

³⁰⁴ Compare the Court's analysis of 1871 common law, 461 U.S. at 38-45, with Justice Rehnquist's analysis of 1871 common law. *Id.* at 68-84 (Rehnquist, J., dissenting).

³⁰⁵ 461 U.S. at 46-49 & n.13.

³⁰⁶ See *supra* notes 85-86 and accompanying text.

³⁰⁷ For a description of the opinions by Justice Brennan and Justice Rehnquist, see *supra* notes 173-257 and accompanying text. The majority and dissent agreed on the importance of interpreting 19th century common law. Interestingly, neither brief submitted to the Court developed the 1871 common law and congressional intent argument. See generally Brief for Petitioner, *Smith v. Wade*, 461 U.S. 30 (1983); Brief for Respondent, *id.*

³⁰⁸ 435 U.S. 247 (1978). See *supra* notes 97-114 and accompanying text.

³⁰⁹ *Id.* at 255.

³¹⁰ 453 U.S. 247 (1981). See *supra* notes 115-30 and accompanying text.

Brandhove,³¹¹ both immunity cases, the Court experienced little difficulty in determining that the immunities in question existed under the common law in 1871.³¹²

No generally accepted standard existed, however, for an award of punitive damages under 1871 common law.³¹³ An examination of the differences between the issue of immunities and the issue of standards for punitive damages reveals the reason for the dispute over the law in 1871. In sharp contrast to the limited number of immunities available to a particular defendant,³¹⁴ many descriptions of culpable conduct are used.³¹⁵ Furthermore, while definitions of the immunities are relatively straightforward, interpretations of the descriptions of culpable conduct are confusing.³¹⁶ Absolute immunity carries only one definition.³¹⁷ "Malice," "willful," "wanton," "reckless," and "gross negligence," on the other hand, are vague terms, defined in equally vague language.³¹⁸ Additionally, while their meanings today are difficult to grasp, their accepted meanings over 100 years ago are that much more elusive.³¹⁹ The Court acknowledged and attempted to avoid the difficulty over definitions of culpable conduct by specifically choosing not to use "malice" in its enunciated standard for punitive damages, due to the "confusion and ambiguity" surrounding the term.³²⁰

Due to this confusion, the Court's reliance on 1871 common law was not as convincing in *Wade* as it had been in earlier section 1983 cases. The citing of the same cases by both the Court and Justice Rehnquist demonstrated that no single standard for punitive damages existed in 1871.³²¹ These cases, as Justice O'Connor's separate dissent aptly observed, were "ultimately unilluminating."³²² Had the Court considered only 1871

³¹¹ 341 U.S. 367 (1951). See *supra* notes 60-68 and accompanying text.

³¹² *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 (1981); *Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951). In early section 1983 immunity cases, some members of the Court argued that the language "every person" in the statute expressly abolished immunities. *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting). Now, however, this argument has been rejected and the Court merely considers the immunity granted under the common law. The Court seldom disagrees on this particular issue. But see *Briscoe v. LaHue*, 460 U.S. 325, 346 (1983) (Marshall, J., dissenting) ("[A]bsolute immunity for witnesses was by no means a settled legal proposition in 1871.").

³¹³ *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting).

³¹⁴ See *supra* notes 53-57 and accompanying text.

³¹⁵ See D. Dobbs, *supra* note 27, at 205; Ellis, *supra* note 27, at 20.

³¹⁶ See D. Dobbs, *supra* note 27, at 206.

³¹⁷ See *supra* notes 54-55 and accompanying text.

³¹⁸ See *supra* notes 174, 234.

³¹⁹ *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting).

³²⁰ *Id.* at 37 n.6.

³²¹ An example of the opposite conclusions reached by the Court and Justice Rehnquist is found in their interpretations of *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 493 (1875) (court cannot award punitive damages unless conduct "was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. . . . The tort is aggravated by the evil motive. . . ."). Justice Brennan read this excerpt as stating that "recklessness is 'equivalent' to intent, meaning that the two are equally culpable and deserving of punishment and deterrence." *Id.* at 43 n.10. Justice Rehnquist, on the other hand, emphasized that the rule of punitive damages "rests on a defendant's 'evil motive'." *Id.* at 71 (Rehnquist, J., dissenting). He also argued that his interpretation was the only possible interpretation, given the holding of the case. *Id.* The *Arms* Court held that "gross negligence" was not sufficient conduct to warrant punitive damages. 91 U.S. at 495. Justice Rehnquist noted the lack of distinction between "gross negligence" and "recklessness," and suggested that the Court would not have rejected one standard and adopted the other. 461 U.S. at 72 (Rehnquist, J., dissenting).

³²² 461 U.S. at 92 (O'Connor, J., dissenting).

common law, rather than both 1871 and modern common law, in determining that the common law standard was reckless indifference, and then conducted its examination of policy considerations, serious questions may have arisen concerning the effectiveness of the *Wade* Court's use of the two-step approach. According to precedent, considerations of policy in a section 1983 case are undertaken solely to determine whether such policy dictates a change from the common law.³²³ In a situation where the common law provides a definitive answer, analysis of public policy serves only a secondary function to the more critical determination of the common law status. If that common law status is undefined, however, or at least unconvincing, the two-step analysis becomes merely a one-step analysis, namely, a consideration of public policy.³²⁴

The Court, however, did not limit its analysis of the common law to the confusing pre-1871 case law. The Court strengthened its argument concerning the common law standard by claiming that the modern common law of torts also established a recklessness standard for an award of punitive damages.³²⁵ The Court was correct in considering modern tort law. First, some of the immunity cases, which the Court cited, had relied on modern tort law in applying immunities under section 1983.³²⁶ For example, in *Imbler v. Pachtman*,³²⁷ the Court granted an immunity to prosecutors even though the common law did not recognize an equivalent immunity until 1896, twenty-five years after the enactment of section 1983.³²⁸ Second, and perhaps more importantly, the Court's suggestion that Congress did not intend to "freeze into permanent law whatever principles were current in 1871"³²⁹ is highly persuasive. In interpreting congressional intent, the Court has labeled section 1983 "a species of tort liability."³³⁰ A guiding principle behind tort law is its adaptability to meet the needs of a changing society.³³¹ It would seem inconsistent to structure section 1983 around tort principles, but to analyze cases only in light of tort principles in 1871.

Despite the affirmative use of the modern common law of torts, the *Wade* Court attempted to minimize its reliance on modern law by claiming that the standard for punitive damages had not changed between 1871 and the present.³³² The Court, therefore, implied that the use of modern law was not critical to its holding.³³³ The Court's use of modern law was important, however, for two reasons. First, in the *Wade* case, it represented an additional argument to support the Court's claim that the 1871 standard for punitive damages was reckless indifference. As a result, the Court was less dependent on an outright acceptance of its analysis of 1871 common law. The Court was able to discuss the state of the law in 1871 with the knowledge that even if its analysis merely

³²³ *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976).

³²⁴ This one-step analysis is the approach Justice O'Connor advocated in *Smith v. Wade*, 461 U.S. 30, 92 (1983) (O'Connor, J., dissenting). She suggested that due to the unsettled nature of punitive damages in 1871, the Court should examine only policy considerations. *Id.* at 93. By choosing not to consider the modern tort law when analyzing section 1983 actions, Justice O'Connor impliedly acknowledged her belief that the Court should not look to modern tort law, even when the common law in 1871 is unclear.

³²⁵ 461 U.S. at 46-49 & n.13.

³²⁶ See cases discussed *supra* note 86.

³²⁷ 424 U.S. 409 (1976).

³²⁸ *Id.* at 421.

³²⁹ 461 U.S. at 34 n.2.

³³⁰ *Carey v. Piphus*, 435 U.S. 247, 253 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

³³¹ See W. PROSSER, *LAW OF TORTS*, § 4, at 19-20 (4th ed. 1971).

³³² 461 U.S. at 34-35 n.2.

³³³ See *id.*

demonstrated the unsettled state of the law, its conclusion, in light of the current common law standard, remained strong. Second, from a broader perspective, other litigants may now rely on *Wade* in arguing that the modern law of torts is relevant to the two-step analytical approach under section 1983.³³⁴ According to the *Wade* Court, this reliance on modern law was not important because the law had not changed.³³⁵ The *Wade* Court's reliance on modern common law could become important, however, in a section 1983 case where the common law of torts has changed significantly between 1871 and the present. While in *Wade*, the Court's use of modern law merely buttressed its argument about earlier common law, in a future case, a court's consideration of modern law could yield two different tort rules, one from 1871 common law and the other from present law. Conflicts between the old and the present would raise new issues. A court would then have to determine whether to interpret section 1983 according to principles prevalent in 1871 common law, and thus in line with congressional intent, or whether to allow section 1983 to change with the common law, and thus adjust to the changing times. While *Wade* does not answer this question definitively, it proceeds further than other section 1983 cases in establishing the relevancy of modern law to a section 1983 analysis.

CONCLUSION

The Supreme Court's decision in *Smith v. Wade* not only confirmed the existence of punitive damages in a section 1983 action, but it also established the standard by which they are awarded. The Court's holding renders section 1983 a more effective tool for plaintiffs by allowing a jury to assess punitive damages against a defendant for mere reckless conduct. By adopting the more lenient standard of recklessness, the Court increases the likelihood that state officials will be subject to substantial judgments, even, in some cases, where their constitutional violations do not cause otherwise compensable injuries. The Court approached *Wade* by using the traditional two-step analysis it applies to section 1983 cases. It examined the standard for punitive damages under the common law and considered whether that standard satisfied the policy behind section 1983. In so doing, the Court properly expanded the first step in this analysis by relying not only on the common law as of 1871, but also on the modern law of torts.

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³³⁴ Earlier courts could have cited the immunity cases for support in using modern tort law, as the *Wade* Court did. *Wade*, however, now represents much stronger precedent for the proposition that modern common law is relevant to the section 1983 analysis. First, the Court in *Wade* specifically confronted this issue and approved the use of modern tort law in analyzing section 1983 actions. 461 U.S. at 46-48, 34-35 n.2. Second, the *Wade* Court relied on modern common law despite the existence of pre-1871 common law which analyzed standards for punitive damages. *Id.* at 38-45. In earlier cases, the Court had only relied on modern law when the particular issue had not been discussed prior to 1871. See *supra* note 86.

The extent to which Separation of Powers concerns would restrain the Court from fashioning new common law in the absence of at least implicit Congressional authorization is not within the scope of this article.

³³⁵ 461 U.S. at 34 n.2.