Louisiana Law Review

Volume 56 | Number 4
Punitive Damages Symposium
Summer 1996

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I. INTRODUCTION

Critics complain that punitive damages often serve no good purpose.[1] Whatever the merit of this charge as a general proposition, it is not universally valid across the range of tort suits. This article examines the issues raised by punitive damages for constitutional torts[2] and takes issue with the general failure of commentators on punitive damages to recognize differences between constitutional tort and common law torts. I shall argue that constitutional tort is one area where punitive damage awards are essential to the effective enforcement of our rights. Constitutional tort is a special domain, in which the policy issues that bear on ordinary tort liability have little importance. Here punitive damages play a role that is significantly different from their functions in general tort law. Far from heeding the cries of those who seek restrictions on punitive damages, the Supreme Court should take steps to make them more readily available in constitutional tort suits.

While the Court has allowed the award of punitive damages for constitutional torts, it has set unwarranted limits on their recovery. Two Supreme Court cases address the availability of punitive damages for constitutional torts. *City of Newport v. Fact Concerts, Inc.*[3] barred the grant of punitives against cities and

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1. *See, e.g.*, Peter Huber, *No-Fault Punishment*, 40 Ala. L. Rev. 1037 (1989); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984).

2. By "constitutional tort" I mean civil actions brought under 42 U.S.C. § 1983 seeking damages for constitutional violations committed by state officers and other persons acting "under color of" state law. 42 U.S.C. § 1983 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

There is no parallel statute generally authorizing such suits against federal officers. The Supreme Court has held, as a matter of federal common law, that a cause of action may be implied from the provisions of the Bill of Rights, *see* Bivens v. Six Unknown Named Federal Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971), unless special factors counsel otherwise. *See, e.g.*, Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460 (1988).

The term "constitutional tort" was coined by Marshall Shapo. *See* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277 (1965).

3. 453 U.S. 247, 101 S. Ct. 2748 (1981).

counties, holding that juries may grant them only against individual defendants. In *Smith v. Wade*,[4] the Court approved a jury instruction that punitive damages may be based either on intentional wrongdoing by an individual defendant or on the defendant's reckless disregard for the plaintiff's constitutional rights. But the Court evidently foreclosed punitives for anything less egregious than reckless misconduct. Part II describes the Court's reasoning in *Newport* and *Smith*.

My thesis is that in these cases the Court erects unjustified impediments to the recovery of punitive damages. One problem with the decisions is that the opinions defend the Court's rules in terms of the intent and purposes of the framers of Section 1983. Identifying and implementing the intent and purpose of the enacting legislature is an appropriate method of interpreting some statutes, but not Section 1983. The statute was enacted by the 42d Congress in 1871, and was aimed at protecting the constitutional rights of former slaves in the southern states. It cannot be applied to modern problems without a substantial infusion of modern ideas as to the appropriate scope of constitutional remedies. In Part III, I show that the Court is not sincere in its resort to intent and purpose. I also argue that, even if the Court were sincere, it would be unwise to try to answer constitutional tort questions by examining the intent and purpose of the Congress that enacted the statute.

If the Court's discussion of intent and purpose is a smokescreen, what is the real core of the opinions? Part IV takes up this question. Besides intent and purpose analysis, the Court invokes the principles and policies of the common law of tort in order to justify its punitive damages rulings as well as other aspects of constitutional tort doctrine. I maintain that the Court has chosen the wrong model. Instead of borrowing from tort law, it should have focused on the role of constitutional tort in general, and punitive damages in particular, as part of a comprehensive approach to the problem of devising an effective arsenal of constitutional remedies.

Part V argues that, once punitive damages are severed from the limitations placed on their scope by tort concepts, and are viewed instead as a vital weapon in the arsenal of constitutional remedies, they can and should serve as a powerful deterrent to constitutional violations. For that role to be fully realized, however, the Court must lift the restrictions it placed on their availability in *Newport* and *Smith*.

II. THE SUPREME COURT CASES

Commentators pay close attention to some aspects of constitutional tort law, such as official immunity and governmental liability. Other doctrinal developments are largely neglected, perhaps because they seem to raise no interesting issues. The punitive damages cases fall into the latter category. Since readers may be unfamiliar with them, it will be useful to begin by examining the Court's opinions.

4. 461 U.S. 30, 103 S. Ct. 1625 (1983).

A. City of Newport v. Fact Concerts, Inc.

Fact Concerts had obtained an entertainment license from the city to present a concert at a municipal park. Fearing that one of the groups scheduled to appear would attract a rowdy crowd, the mayor and city council cancelled the license and tried to stop the concert. The effort failed but had the effect of cutting ticket sales. Fact Concerts brought a Section 1983 suit against the city, the mayor, and the six other city council members, charging that the cancellation "amounted to content-based censorship, and that its constitutional rights to free expression and due process had been violated."[5] The jury found for Fact Concerts and awarded compensatory as well as punitive damages against all defendants, including a $200,000 punitive award against the city. The Supreme Court granted certiorari only on "the question of the availability of punitive damages against a municipality under [S]ection 1983."[6]

The Court began its analysis of this issue by setting forth a "two-part approach" for determining immunity issues in Section 1983 cases.[7] The Court would first determine whether the common law of tort recognized the immunity in the nineteenth century; it would next consider whether the policies underlying the common law rule are compatible with the purposes of Section 1983. Thus, "[o]ne important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation."[8] This prong of the Court's test represents an effort to determine and implement the intent of the framers of the legislation, who, it reasons, "likely intended these common-law principles to obtain, absent specific provisions to the contrary."[9]

This effort, in turn, is evidently based on the widely-held premise that statutory interpretation is a matter of identifying the intent of the framers.[10] While the language of the statute and legislative history may ordinarily be the best measure of their intent, the text and legislative history of Section 1983 are unhelpful in determining the rules governing awards of punitive damages, as they are to nearly all other tort issues arising in constitutional tort cases. The statute merely provides for "an action at law" to remedy violations of constitutional rights,[11] without detailing the rules of tort law that apply in the lawsuit. The legislative history documents the conditions giving rise to the need for legislation

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5. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 252, 101 S. Ct. 2748, 2752 (1981). Fact Concerts also brought a state law claim for tortious interference with contractual relationships.

6. *Id.* at 253, 101 S. Ct. at 2752.

7. *Id.* at 259, 101 S. Ct. at 2755. *See also* Michael Wells, *The Past and the Future of Constitutional Tort*, 19 Conn. L. Rev. 53, 57-58 (1986).

8. *Newport*, 453 U.S. at 258, 101 S. Ct. at 2755.

9. *Id.*

10. *See* William Eskridge, Dynamic Statutory Interpretation 14 (1994) ("Anglo-American scholars from early modern times to the present have argued that original intent is and should be the cornerstone of statutory interpretation.").

11. See *supra* note 2 for the statutory language.

and contains debates over some other sections of the bill. There is little discussion of the provision that became Section 1983.[12] Lacking specific guidance, the Court assumes that Congress meant to incorporate by reference the common law tort doctrine normally applicable to suits for damages.

Though the Court insists that nineteenth-century tort law is its baseline, it does not mechanically apply ordinary tort immunity rules. Under the second part of the two-part approach, it determines the purpose served by a given tort immunity "and its compatibility with the purposes of [S]ection 1983."[13] This latter inquiry is necessary "because the 1871 Act was designed to expose state and local officials to a new form of liability."[14] Accordingly, "it would defeat the purpose of the statute to recognize any preexisting immunity without determining both the policies it serves and its compatibility with the purposes of [Section] 1983."[15] Those purposes include deterring wrongdoing, avoiding the overdeterrence of beneficial government action, vindicating of constitutional rights, compensating persons injured by unconstitutional actions,[16] and, perhaps, "punishing violations of constitutional rights."[17]

Applying its two-part approach, the Court first examined nineteenth-century tort law, and found that by 1871 "courts were virtually unanimous in denying [punitive] damages against a municipal corporation."[18] Moreover, "[j]udicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions."[19] The Court then turned to the second part of its test, which inquires into the purposes of the common law rule and its compatibility with the purposes of Section 1983. Common law courts viewed punitive damages as a form of punishment and believed that "punishment properly applied only to the actual wrongdoers,"[20] not the

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12. *See* Monell v. Dept. of Social Services, 436 U.S. 658, 665, 98 S. Ct. 2018, 2023 (1978).

13. *Newport*, 453 U.S. at 259, 101 S. Ct. at 2755. Inquiring into statutory purpose reflects "a robust legal tradition that crystallized during the New Deal," an approach that is "an attractive alternative to intentionalism because it allows a statute to evolve to meet new problems while ensuring legitimacy by tying interpretation to original legislative expectations." Eskridge, *supra* note 10, at 25-26.

14. *Newport*, 453 U.S. at 259, 101 S. Ct. at 2755.

15. *Id.*

16. *See* Owen v. City of Independence, 445 U.S. 622, 650-56, 100 S. Ct. 1398, 1415-18 (1980); Robertson v. Wegmann, 436 U.S. 584, 591, 98 S. Ct. 1991, 1995 (1978).

17. Carey v. Piphus, 435 U.S. 247, 257 n.11, 98 S. Ct. 1042, 1049 n.11 (1978).

18. *Newport*, 453 U.S. at 260, 101 S. Ct. at 2756.

19. *Id.* The Court bolstered its conclusion that Congress did not intend to change the common law rule by noting one aspect of the legislative history. Senator Sherman had proposed an amendment to the legislation, under which cities would be liable for compensatory damages, but not punitive damages, for injuries inflicted by mob violence. The amendment was defeated. The Court in *City of Newport* "doubt[ed] that a Congress having no intention of permitting punitive awards in the explicit context of the Sherman amendment would have meant to expose municipal bodies to such novel liability *sub silentio* under § 1 of the Act." *Id.* at 265, 101 S. Ct. at 2759.

20. 453 U.S. at 263, 101 S. Ct. at 2757.

municipalities for whom they worked.[21] This rationale is compatible with the purposes of Section 1983 because, even if punishment is one of the purposes of Section 1983, "the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages."[22]

Though deterrence of misconduct is a purpose of both punitives and Section 1983, the Court concluded "that the deterrence rationale of [Section] 1983 does not justify making punitive damages available against municipalities."[23] This form of liability would only marginally promote deterrence. For one thing, "it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality."[24] In addition, "there is no reason to suppose that corrective action, such as the discharge of offending officials who were appointed and the public excoriation of those who were elected, will not occur unless punitive damages are awarded against the municipality."[25] Further, "a more effective means of deterrence" is already available, in that "juries and courts [may] assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources."[26]

Besides these meager benefits, the Court also noted significant "costs" associated with municipal liability for punitives. One arises from the fact that Section 1983 liability may extend to federal statutory as well as constitutional wrongs. Exposure to liability for punitive damages for such a broad range of cases "may create a serious risk to the financial integrity of these governmental entities."[27] And "[b]ecause evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury."[28]

B. Smith v. Wade

A prison guard violated an inmate's Eighth Amendment rights by putting him in a cell with other prisoners who beat and sexually assaulted him. The judge instructed the jury that they may award punitive damages if the guard showed "a reckless or callous disregard of, or indifference to, the rights or safety of [the plaintiff]."[29] The jury awarded $5000 punitive damages. The issue

21. *Id.* at 267, 101 S. Ct. at 2760.
22. *Id.* at 268, 101 S. Ct. at 2760.
23. *Id.*
24. *Id.*
25. *Id.* at 269, 101 S. Ct. at 2761.
26. *Id.*
27. *Id.* at 270, 101 S. Ct. at 2761.
28. *Id.*
29. Smith v. Wade, 461 U.S. 30, 33, 103 S. Ct. 1625, 1628 (1983).

before the Supreme Court was the propriety of this instruction: Are punitives available against an official only on a showing that he intended to violate the plaintiff's rights, or may they be imposed on a showing of recklessness as well?

The Court applied the two-part test it had laid down in *Newport*. Looking first at nineteenth-century tort law, the Court found that "the punitive damages doctrine . . . was accepted as settled law by nearly all state and federal courts, including this Court."[30] While "there was significant variation . . . among American jurisdictions in the latter 19th century on the precise standard to be applied in awarding punitive damages,"[31] the confusion related mainly to "the degree of negligence, recklessness, carelessness, or culpable indifference that should be required—not over whether actual intent was essential."[32] The instruction given in *Smith* was proper, because "the rule in a large majority of jurisdictions was that punitive damages . . . could be awarded without a showing of actual ill will, spite, or intent to injure,"[33] and "[t]he same rule applies today."[34]

The Court then proceeded to the second part of the two-part test, asking "whether the policies and purposes of [Section] 1983 itself require a departure from the rules of tort common law."[35] According to the defendant, "an actual-intent standard is preferable to a recklessness standard because it is less vague."[36] Conceding that "deterrence of future egregious conduct is a primary purpose of both [Section] 1983 and of punitive damages,"[37] the guard insisted that "deterrence . . . cannot be achieved unless the standard of conduct sought to be deterred is stated with sufficient clarity to enable potential defendants to conform to the law."[38] Recklessness, the defendant argued, was too uncertain a standard to achieve deterrence rationally and fairly. *Smith* rejected these suggestions that recklessness would be too vague to be fair or useful. "More fundamentally,"[39] said the Court, the main influence on the conduct of officers should be the standard of liability, not the standard for punitive damages. Since officers are never liable unless they violate clearly established law, only the few who are *not* deterred by that standard will be influenced by the punitive damages rule. "The presence of such officers constitutes a powerful argument *against* raising the threshold for punitive damages."[40]

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30. *Id.* at 35, 103 S. Ct. at 1629.
31. *Id.* at 39, 103 S. Ct. at 1631.
32. *Id.* at 40-41, 103 S. Ct. at 1631-32.
33. *Id.* at 41, 103 S. Ct. at 1632.
34. *Id.* at 46, 103 S. Ct. at 1635.
35. *Id.* at 48, 103 S. Ct. at 1636.
36. *Id.* at 49, 103 S. Ct. at 1636.
37. *Id.*
38. *Id.*
39. *Id.* at 50, 103 S. Ct. at 1637.
40. *Id.* (emphasis added). Since *Smith*, the court has not spoken more specifically to the *content* of the recklessness standard. The most prominent lower court case is Soderbeck v. Burnett County, 752 F.2d 285, 291 (7th Cir. 1985) (punitives are available only where the officer knows or "circumstanced as he was should certainly have known, that he was violating [plaintiff's] rights.").

III. INTERPRETING SECTION 1983: FIDELITY TO THE 42D CONGRESS

One objection to the Court reexamining its punitive damages holdings is that doing so would take the Court beyond its proper role in interpreting statutes. According to some theories of statutory interpretation, the Court's sole or principal function in statutory cases is to identify and implement the will of the enacting legislature, as manifested either in their specific intentions or in the purposes they sought to achieve by the legislation.[41] The rulings in *Smith* and *Newport* are the results of inquiries into the intent and purposes of the 42d Congress. Unless the Court has committed some error in its historical analysis there is, under this view, no legitimate basis for overturning its holdings. If the Court has erred, the correct response is simply to return to the intent and purposes of the 1871 legislature.

I have two complementary responses to this objection to reopening the punitive damages issue. First, it rests on a false premise in assuming that the Court means what it says in *Smith* and *Newport* on fidelity to legislative intent and purpose. Despite the reasoning in the opinions, I will argue in Part III.A that the Court's discussion of nineteenth-century tort law is window dressing for results reached on other grounds and that the purposes of which the opinions speak are goals the *Court* has chosen to pursue rather than those of the 42d Congress. Whatever the merits of the Court's rules, their purported legislative provenance does not shield them from attack. They are not creations of Congress, but of Supreme Court policy making, and must be defended in terms of policy alone rather than arguments based on the judicial role in statutory cases.

Second, even if the Court is sincere, Part III.B argues that the decision to respect legislative intent and purpose itself represents a choice of one policy over others, and an unwise one in the Section 1983 context. As with any policy choice, there are costs and benefits to fidelity to legislative intent and purpose. Here the costs of remaining faithful to the enacting legislature are especially great and the benefits are small. If the Court really does mean to rest its decisions on the intent and purposes of the 42d Congress, it has taken a wrong turn and should reconsider its choice.[42]

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41. *See* Eskridge, *supra* note 10, at 13.

42. In what follows, I maintain that a significantly changed reading of Section 1983 cannot be justified in terms of fidelity to the enacting legislature. In so doing, I do not mean to deny that there may be cases where "in the face of changes in context, the proper act of fidelity is a changed reading of the . . . text." Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395, 400 (1994). (Though Lessig focuses mainly on constitutional issues, his thesis seems equally applicable to statutory interpretation. *See* Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1247-50 (1993) [hereinafter Lessig, *Fidelity in Translation*] (discussing the Sherman Antitrust Act).)

My argument will be that, while fidelity may in the proper circumstances justify a "changed reading" of a given enactment, the bulk of the Supreme Court's Section 1983 decisions nonetheless cannot be justified in such terms.

A. Section 1983 in the Supreme Court

My skepticism about the Court's "intent-and-purpose" reasoning in *Newport* and *Smith* is based on its treatment of other constitutional tort issues. In cases where fidelity to legislative intent and purpose would produce results that the contemporary Court finds unacceptable, the Court abandons the "intent and purpose" inquiry in favor of straightforward policy analysis.[43] For this reason, it is doubtful that intent and purpose actually determine outcomes in the cases like *Newport* and *Smith*, where the Court *does* employ these methods in rationalizing its results.[44] More likely, the results in these cases are based on policy analysis, but the Court finds it convenient to explain them in historical terms.

The plainest example of an important constitutional tort doctrine that cannot be explained in terms of intent-and-purpose is the rule that officials are immune from suits to recover damages in a variety of situations.[45] Legislators,[46] judges,[47] witnesses,[48] and prosecutors[49] are absolutely immune from civil suits for damages, no matter how egregious their conduct. Other officials are entitled to "qualified" immunity, which protects them from liability unless the constitutional right they violated was "clearly established" at the time of the violation, such that a reasonable official would have known that he was acting in violation of the constitution.[50] A brief examination of the statute's background will show why this doctrine cannot be squared with the intent and purposes of the 42d Congress.

Section 1983 was enacted shortly after the Civil War, as one section of the Civil Rights Act of 1871, a statute also known as the Ku Klux Klan Act.[51] The statute was aimed at remedying conditions in the South after the war. Testimony before Congressional committees showed that blacks and their white supporters were beaten and intimidated by terrorist groups like the Ku Klux Klan and that

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43. In addition to the examples discussed below, see Wells, *supra* note 7, at 60-65. *See also* Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Same Old Light on Section 1983*, 133 U. Pa. L. Rev. 601, 611 (1985).

44. I do not mean to endorse the Court's historical arguments in these cases. Professor William Eskridge maintains that fidelity to original intent may have produced a different result in *Smith*, since in 1871 a prisoner probably would not have been allowed to sue for compensatory, much less punitive, damages. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1486 (1987).

45. For a more detailed argument in support of this point, see Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741 (1987).

46. Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783 (1951).

47. Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213 (1967).

48. Briscoe v. LaHue, 460 U.S. 325, 103 S. Ct. 1108 (1983).

49. Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984 (1976).

50. *See* Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982).

51. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871).

local authorities did little to stop them.[52] As one supporter of the legislation put it, "the whole South . . . [was] rapidly drifting into a state of anarchy and bloodshed," where there was "no security for life, liberty, person, or property," and "state authorities and local courts [were] unwilling or unable to check the evil or punish the criminals."[53] The aim of the legislation was to enforce the newly enacted Fourteenth Amendment, which for the first time imposed broad restrictions on the power of state government. The primary purpose of the Fourteenth Amendment was to extend citizenship to the freed slaves and assure them equal protection of the laws and due process of law.[54] Congress was determined to provide an effective remedy for violations of these Fourteenth Amendment rights.[55] The statute's "history suggests a firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations."[56] The few references to tort law in the debates warn that common law immunity rules would be unavailable to defendants charged with violating those rights.[57]

Some of the Court's immunity cases refer to nineteenth-century tort law, but none of them explain why tort law ought to govern Section 1983 immunity, given that the statute includes no explicit immunity and that the legislative history manifests an intention to forge a broad and effective remedy. Indeed, the most recent important immunity cases flatly ignore the whole "intent and purpose" theme in justifying their rulings. The cases are *Harlow v. Fitzgerald*[58] and *Anderson v. Creighton*.[59] These were suits against federal officers and were not brought under Section 1983, which only applies to acts committed "under color of" state law. *Harlow* and *Anderson* are, instead, authorized by a federal common law rule that constitutional tort suits may be implied from the provisions of the Bill of Rights. That rule originated in a 1971 case, *Bivens v. Six Unknown Named Agents*.[60]

What is most important about these cases for present purposes is that in them the Court justified its holdings in terms of tort policy and rejected any distinction

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52. *See* Wells, *supra* note 7, at 66 & n.90.

53. Cong. Globe, 42d Cong., 1st Sess. 321 (1871) (Rep. Stoughton).

54. *See* Wells, *supra* note 7, at 67 & n.93. *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

55. *See* Wells, *supra* note 7, at 67.

56. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982).

57. *See* Wells, *supra* note 7, at 65 n.82. These comments were made by opponents of the legislation, perhaps in an effort to exaggerate its impact. Significantly, however, they were not rebutted by the bill's partisans, as such attempts often are.

For an originalist argument against the current broad immunity doctrine, see David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497 (1992).

58. 457 U.S. 800, 102 S. Ct. 2727 (1982).

59. 483 U.S. 635, 107 S. Ct. 3034 (1987).

60. 403 U.S. 388, 91 S. Ct. 1999 (1971).

between *Bivens* cases and Section 1983 cases.[61] *Harlow* disposed of the possibility of different treatment of Section 1983 cases in a footnote: "[I]t would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [Section] 1983 and suits brought directly under the Constitution against federal officials.'"[62] The Court's elucidation of the immunity doctrine treats the issue exclusively as one of tort policy. The discussion begins with the observation that "[t]he resolution of immunity questions inherently requires a balance between the evils inherent in any available alternative."[63] On the one hand, any immunity may stand in the way of the vindication of constitutional rights. On the other, "claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole."[64] Among these "social costs" are "the expenses of litigation, the diversion of official energy from pressing public issues, ... the deterrence of able citizens from acceptance of public office" and the danger that officials afraid of being sued will be too cautious in carrying out their duties.[65] *Harlow*'s "clearly established law" rule is an effort to arrive at the proper "balance of competing interests."[66]

Immunity is hardly the only example of a departure from fidelity to intent and purpose in constitutional tort law. *Monroe v. Pape*,[67] the case that revived Section 1983 and put it to use in a modern setting,[68] is also hard to square with an intent-and-purpose approach to statutory interpretation.[69] The statute applies only to unconstitutional actions taken "under color of" state law.[70] Before *Monroe*, courts had required plaintiffs to show that state law authorized the official's action. *Monroe* expanded the scope of liability by holding that officials act under color of state law whenever they use the pretence of state authority, even if state law forbids their conduct. For that reason, the plaintiff in *Monroe* was permitted to sue under Section 1983 even though Illinois provided a tort remedy for the illegal search and seizure alleged in that case.

The relevant legislative history, much of which is recounted in *Monroe* itself, indicates that the legislation "had three main aims."[71] These included

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61. *See* Sheldon H. Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 Wash. U. L.Q. 221, 244-45 (1984).

62. *Harlow*, 457 U.S. at 818 n.30, 102 S. Ct. at 2738 n.30 (quoting Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909 (1978)). *See also* United States v. Gillock, 445 U.S. 360, 372 n.10, 100 S. Ct. 1185, 1193 n.10 (1980).

63. *Harlow*, 457 U.S. at 813-14, 102 S. Ct. at 2735. *See also* Anderson v. Creighton, 483 U.S. 635, 645, 107 S. Ct. 3034, 3042 (1987) (describing *Harlow* as a case where the Court "completely reformulated qualified immunity along principles not at all embodied in the common law").

64. *Harlow*, 457 U.S. at 814, 102 S. Ct. at 2736.

65. *Id.*

66. *Id.*

67. 365 U.S. 167, 81 S. Ct. 473 (1961).

68. *See* Shapo, *supra* note 2.

69. *See* Eisenberg, *supra* note 56, at 504-12 (discussing both of the points made in the text below).

70. See *supra* note 2 for the statutory language.

71. *Monroe*, 365 U.S. at 173, 81 S. Ct. at 477.

"overrid[ing] certain kinds of state laws," "provid[ing] a remedy where state law was inadequate," and "[p]roviding a federal remedy where the state remedy, though adequate in theory, was not available in practice."[72] After documenting these aims with citations from the debates on the legislation, the Court seems to have forgotten them. Justice Douglas's opinion for the Court suddenly reverts to a "plain meaning" approach[73] to interpretation:

> Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and over again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.[74]

Do not suppose that the Court is any more faithful to plain meaning than to intent-and-purpose.[75] Immunity has no more foundation in the text than in the legislative history, yet we have seen that the Court has crafted an extensive immunity doctrine.

Monroe departs from intent-and-purpose in a more fundamental way. Recall that the goal of the legislation was to address the breakdown of protection of civil rights in the South after the Civil War. While its broad aim was to enforce the Fourteenth Amendment, the purpose of the Fourteenth Amendment was understood, in 1871, to be guaranteeing the civil rights of newly freed blacks. Section 1983 was enacted long before the Supreme Court had interpreted the Fourteenth Amendment as including the panoply of rights it covers today. Indeed, that process did not begin until the 1950's and 1960's, at about the time *Monroe* was decided.[76] No one would argue that the specific intent of the framers of Section 1983 was to create the modern cause of action for constitutional tort.

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72. *Id.* at 173-74, 81 S. Ct. at 476-77. *See also id.* at 211-58, 81 S. Ct. at 497-522 (Frankfurter, J., dissenting); Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 Va. L. Rev. 499, 525-60 (1985); Wells, supra note 7, at 60-62. For a historically based defense of *Monroe*, see Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 Mich. L. Rev. 323 (1992).

73. For a largely critical discussion of the "plain meaning" approach, and its recent revival, see William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. Rev. 621 (1990). For a more sympathetic view, see Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Alienikoff and Shaw*, 45 Vand. L. Rev. 715 (1992).

74. *Monroe*, 365 U.S. at 183, 81 S. Ct. at 473.

75. Given the lack of specifics in the statute, *see supra* note 2, even champions of adherence to plain meaning in statutory interpretation would likely agree that Section 1983 is not a good candidate for that approach. *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 S. Ct. Rev. 231, 236-37.

76. *See* Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. Rev. 737, 744-57.

Nor can a credible claim be made that the "purpose" of the 42d Congress was to create such a remedy. It is true that a purpose analysis differs from the search for legislative intent in that it is more easily applied to changed conditions. "Because an inquiry into legislative purpose is set at a higher level of generality than an inquiry into specific intentions, statutory interpretation becomes more flexible and is better able to update statutes over time."[77] Under this approach to statutory interpretation, "the judge should try to put himself in the shoes of the enacting legislators and figure out how they would have wanted the statute applied to the case before him."[78]

Unless the Court is to abandon the effort to adapt Section 1983 to the contemporary world, purpose inquiry and the "imaginative reconstruction"[79] that it entails are of little use in handling constitutional tort issues. Views of the appropriate scope of constitutional rights have changed too greatly since 1871 to warrant the conclusion that the framers' purposes are relevant to most modern problems. In particular, one cannot fairly infer from the framers' purpose to protect the civil rights of former slaves that their purposes included instituting a damages remedy for the whole spectrum of modern constitutional rights. The problem of how to balance state interests in autonomy against effective protection of individual rights presents quite different issues in modern society than in 1871, so much so that we can reach no confident judgments as to how a majority of the 42d Congress would define the scope of modern constitutional tort. No doubt some members of that legislature would be ardent supporters of vigorous remedies for the whole panoply of modern constitutional rights. At the same time, it would be entirely plausible for a member of the 42d Congress to share the dominant purpose of the statute—to guarantee the civil rights of freed slaves—and at the same time to have doubts about the wisdom of using it as a general remedy for late-twentieth-century constitutional claims.

Put another way, the background of Section 1983 vastly "underdetermines" its application to the modern constitutional landscape, leaving plenty of room for judges to fill the void with their own notions of good policy. Fidelity, in any useful sense of the term,[80] would oblige the Court to limit itself to aims of the general sort addressed by the Reconstruction Congress, by identifying the modern equivalent of state-condoned Ku Klux Klan terror and taking the steps needed to put a stop to it.[81] I do not mean to disparage the broad remedy Section 1983 has become, only to stress that the modern cause of action is the Court's

77. Eskridge, *supra* note 10, at 26.

78. Richard A. Posner, The Federal Courts: Crisis and Reform 286-87 (1985).

79. *Id.* at 287.

80. Professor Lessig seems to think that one can "translate" any old enactment into modern terms, even where the presuppositions of the enacting legislature have changed greatly. Even so, he admits that the institutional constraints of the judicial role counsel against the practice of replacing the political values underlying an old enactment with other values currently favored by the court. *See* Lessig, *Fidelity in Translation*, *supra* note 42, at 1251-61.

81. *See* Shapo, *supra* note 2; Eisenberg, *supra* note 56.

creation, not the product of an inquiry into the purposes of the 42d Congress and their implications for current issues.

Other aspects of constitutional tort doctrine indicate that the Supreme Court ignores intent-and-purpose analysis when it suits the Court's modern policy goals to do so. *Mount Healthy City School District Board of Education v. Doyle*,[82] for example, is an important cause-in-fact case. The Court held that where the defendant acts with mixed motives, one of which is unconstitutional and one of which is valid, the plaintiff wins unless the defendant can show that he would have taken the challenged action on account of the valid motive, even if the invalid one were not present.[83] The opinion contains no discussion of the intent-and-purpose of the 42nd Congress. Proximate cause was the issue in *Martinez v. California*,[84] which held that parole board members cannot be held liable for a murder committed by a parolee six months after his release because the crime was "too remote a consequence" of the defendants' action.[85] Again, intent-and-purpose analysis makes no appearance in the opinion. *Allen v. McCurry*[86] ignored the broad remedial purposes of Section 1983 when it held that the statute creates no exception to the general rules of issue preclusion. Nor did the *Allen* Court examine the 1871 rules of collateral estoppel. *Town of Newton v. Rumery*,[87] upholding the validity of release-dismissal agreements, pays no attention to nineteenth-century contract law. These opinions do not rely on nineteenth-century tort law but justify their rulings in terms of principles and policies drawn from the modern common law of torts, contracts, and civil procedure.

If intent-and-purpose were the Court's true interpretive methodology, one would expect to see an extensive discussion of it *throughout* the case law on Section 1983 issues. In view of the Court's lack of commitment to intent-and-purpose in other areas of constitutional tort litigation, one is entitled to be skeptical of the opinions in *Newport* and *Smith*. These two opinions, with their excavations of nineteenth-century tort law as a means of answering late twentieth-century questions, do not seem to represent a genuine effort to respect intent-and-purpose. More likely, the historical inquiry is designed to afford an easy justification for results that may be more vulnerable to attack if they were placed squarely and exclusively on the tort policy grounds that in fact account for them.

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82. 429 U.S. 274, 97 S. Ct. 568 (1976).

83. Otherwise, the Court reasoned, the plaintiff could be placed "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285, 97 S. Ct. at 575.

84. 444 U.S. 277, 100 S. Ct. 553 (1980).

85. For more extensive discussions of *Mt. Healthy* and *Martinez*, see Thomas A. Eaton, *Causation in Constitutional Torts*, 67 Iowa L. Rev. 443, 453-61, 472-75 (1982).

86. 449 U.S. 90, 101 S. Ct. 411 (1980).

87. 480 U.S. 386, 107 S. Ct. 1187 (1987).

B. The Case Against Fidelity to the 42d Congress

The point of the foregoing discussion is not to criticize the Court for failing to decide cases based on intent-and-purpose. On the contrary, I believe the Court should be applauded rather than condemned for minimizing intent-and-purpose methodology. Conversely, if I am wrong about the Court's practice, and *Newport* and *Smith* really do rest on intent-and-purpose, then I think the cases are wrongly decided. This section explains why intent-and-purpose methodology should be avoided in Section 1983 litigation. In general terms, the reason for rejecting that methodology in this context is that its benefits are not worth its costs.

A useful starting point is to identify the *values* served by intent-and-purpose inquiries. Against my thesis one might argue that the Court *must* use intent-and-purpose, or else forfeit the legitimacy of its statutory rulings, because the values of majority rule and separation of powers are of paramount importance. In a system like our own, majority rule is the norm except for constitutional questions.[88] The principle of separation of powers requires that policy making be reserved generally for the legislature.[89] These principles imply that the Court's role in statutory cases is limited to implementing the legislative will and that some version of intent-and-purpose is the best way of doing so. Any deviation is an illegitimate grab for power by the Court.[90]

In my view, however, the question of how courts should deal with issues of statutory interpretation is more complex. Rather than giving priority to majority rule and separation of powers, I take a pragmatic view of the role of courts in statutory cases. From a pragmatic perspective, majority rule and the separation of powers are important policies, but they are not foundational principles that must be respected at all costs. Rather, "pragmatists will ask which of the possible resolutions has the best consequences, all things . . . considered, including the importance . . . of preserving the separation of powers by generally deferring to the legislature's policy choices."[91]

The cost of giving those policies determinative weight in deciding a statutory case is that the court may have to forego the opportunity to use the statute to achieve some valuable goal that cannot fairly be found among the purposes or intentions of the statute's framers. At the same time, the benefits of respecting majority rule and the separation of powers may be greater or lesser from one context to another. Whether to follow legislative intentions or purposes depends

88. *See, e.g.*, Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 24-27 (1985).

89. *See, e.g.*, Tennessee Valley Authority v. Hill, 437 U.S. 153, 194, 98 S. Ct. 2279, 2301-02 (1978). *See also* Merrill, supra note 88, at 19-24.

90. *See, e.g.*, S. Burton, An Introduction to Legal Reasoning 41-42 (1985); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 Harv. J.L. & Pub. Pol'y 87, 94-99 (1984); Merrill, *supra* note 88. For more examples, see Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281, 281-82 n.3 (1989).

91. Richard Posner, Overcoming Law 400 (1995).

on the costs and benefits of doing so in the case at hand. In a given set of circumstances, the values of majority rule and the separation of powers may have little weight, while countervailing goals are strong.

In deciding questions arising in Section 1983 litigation, the benefits of fidelity to legislative intent and purpose are small and the costs are large. The benefits are small because the statute dates from 1871 and the intentions and purposes of the 42nd Congress have little relevance to modern conditions. In situations where there is clear evidence of legislative intent with regard to the issue facing the court, the intent-and-purpose approach to statutory interpretation produces laudable results.[92] This may be so, for example, where the statute is recent and the issue before the court is just the one the legislature sought to address. But the value of fidelity grows weaker where the statute is old and was originally enacted with a different set of problems in mind.[93]

If modern constitutional tort were squarely at odds with the framers' intent, the fidelity objection may have more force.[94] But there is no such conflict. Indeed, our world is so different from that of the Reconstruction Congress that, with regard to modern constitutional tort problems, "the statute is fairly characterized as impervious to determinate historical analysis."[95] Instead of supplanting the 42d Congress's aims with its own agenda, the Court over the past thirty years has merely supplemented those aims. Putting an 1871 statute to uses not contemplated by its framers does not significantly undermine respect for majority rule or violate the separation of powers.

While the case for fidelity is weak, its costs are great in the Section 1983 context. Constitutional developments since 1871, and especially the growth of individual rights in the 1960's and afterward, furnish powerful reasons for giving the statute a broader scope than that envisioned by its framers. If constitutional rights are to have real force, there must be effective remedies for their abrogation. Sometimes a suit for damages is the only feasible remedy for a constitutional wrong, as is the case where the illegal act is in the past and will not likely be repeated. Since there is no current or threatened future violation of the victim's rights, he will not have standing to seek an injunction in such a case.[96] For such a plaintiff, "it is damages or nothing."[97]

Genuine fidelity to legislative purpose and intent in interpreting Section 1983 would require the Court to give up the opportunity to implement a broadly available damages remedy. That is too heavy a price to pay for the value of deference to the

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92. *See* Farber, *supra* note 90, at 284-87, 292.

93. *See* Eskridge, *supra* note 10, at 14.

94. *See* Farber, *supra* note 90, at 287-88.

95. Harold S. Lewis & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. Pa. L. Rev. 755, 763 (1992). *See also id.* at n.27.

96. City of Los Angeles v. Lyons, 461 U.S. 95, 105-06, 103 S. Ct. 1660, 1667 (1983).

97. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410, 91 S. Ct. 1999, 2012 (1971) (Harlan, J., concurring in the judgment). This paragraph is a summary of an argument that is presented at greater length in Part III.B *infra*.

policy choices made by the 42d Congress. In interpreting Section 1983, the Court is right to refuse to limit itself to the intent-and-purposes of the framers.

IV. FROM COMMON LAW PRINCIPLES TO CONSTITUTIONAL REMEDIES

If I am right so far, the Court's discussion of nineteenth-century tort law in *Newport* and *Smith*, and its professions of fidelity to the purposes of the 42nd Congress, serve little more than a decorative function, embellishing opinions whose holdings actually (and rightly) rest on other grounds. Nineteenth-century tort law is a convenient pretext, since the Court's desired outcomes coincide with those of nineteenth-century tort law. The function of the explorations of nineteenth-century tort law in the opinions is to conceal the Court's law making role in these cases behind a facade of legislative intent-and-purpose reasoning.[98] Similarly, when the Court identifies as statutory purposes the vindication of rights, compensation, deterrence, and avoiding overdeterrence, it is really choosing purposes of its own, borrowed largely from the common law, rather than implementing the aims of the 42d Congress. The sections of the opinions that actually account for the outcomes are those passages in which the Court addresses the policy issues bearing on punitive damages, such as *Newport*'s discussion of the unfairness and doubtful utility of allowing punitives against municipal governments[99] and *Smith*'s refutation of the defendant's argument that using punitives for deterrence requires that the standard for awarding punitives be different from the standard for liability on the merits of the claim.[100]

When the opinions are understood in this way, it becomes possible to state squarely the issue they present: What kinds of principles and policies should form the core of constitutional tort law? The Court has chosen to build constitutional tort on a common law model, without identifying, considering, and explicitly rejecting any alternative.[101] In this part of the article, I argue that the Court would do better to focus on the law of constitutional remedies, rather than tort law, as a source of guidance for the resolution of constitutional tort issues.

A. The Court's Private Law Model of Constitutional Tort

The policy arguments advanced in *Newport* and *Smith* are part of a larger pattern in which the Court, echoing the common law, has declared that the

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98. *See* Wells, *supra* note 7, at 68-69.

99. *See supra* text accompanying notes 20-28.

100. *See supra* text accompanying notes 36-40.

101. Professor Nahmod made this point many years ago. *See* Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L. J. 5, 7-13 (1974). In a later article, Nahmod argued that "the Court, by using tort rhetoric, is attempting to marginalize [Section] 1983 and to make it less protective of our [F]ourteenth [A]mendment rights." Sheldon H. Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 Geo. L. J. 1719, 1720 (1989). *See also* Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L. J. 1441 (1989).

primary functions of constitutional tort are to vindicate the plaintiff's rights and deter violations. Starting from that premise, these cases hold that compensatory damages are limited to losses the plaintiff can prove were caused by the constitutional violation. Their sole function is to make the plaintiff whole for the harm done to the plaintiff by the defendant's violation.[102] Nothing should be awarded for the abstract value of constitutional rights.[103] Nor should a plaintiff recover where his rights were violated but the violation caused no injury. Immunity law is aimed at the utilitarian goal of achieving a balance between deterring wrongdoing and avoiding the overdeterrence of constructive government action.[104] The plaintiff must meet causation and proximate cause requirements that are as strict or stricter than those of the common law.[105] Given this group of holdings, it is hardly surprising that the Court would track the common law doctrine by limiting punitive damages as it did in *Newport* and by borrowing common law principles to justify its holding in *Smith*.

These rulings reflect a "private law" model of constitutional tort, wrapped in the rhetoric of intent-and-purpose. I borrow the term from an influential article by Professor Abram Chayes, in which he usefully contrasts the features of the traditional private law model of adjudication with the newer "public law" litigation.[106] The implicit premises underlying the Court's doctrine, and its damages rules in particular, fit the characteristics Chayes identifies with the private law model. In particular, the compensatory damages rules, permitting recovery only for harm caused by the violation and then only to the extent necessary to make the plaintiff whole, assure that: (a) the litigation is "bipolar," concerning mainly the interests of the plaintiff and the defendant;[107] (b) it is "retrospective," focusing on "an identified set of completed events";[108] (c) "right and remedy are interdependent" in that "[t]he scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty";[109] (d) the suit is a "self-contained episode," in which the "impact of the judgment is confined to the parties;[110] and (e) "[t]he process is party-initiated and party-controlled."[111]

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102. Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042 (1978).

103. Memphis Comm. School Dist. v. Stachura, 477 U.S. 299, 106 S. Ct. 2537 (1986).

104. Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982).

105. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1976); Martinez v. California, 444 U.S. 277, 100 S. Ct. 553 (1980). *See* Eaton, *supra* note 85, at 454-55, 472-75.

106. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1282-84 (1976).

107. *Id.* at 1282.

108. *Id.*

109. *Id.*

110. *Id.* at 1283.

111. *Id.*

B. Constitutional Remedies and Constitutional Tort

This private law model reflects a choice made by the Supreme Court, albeit one that the Court has never acknowledged, much less justified.[112] The alternative is to base constitutional tort law on a "public law" model, with the focus on "the vindication of constitutional . . . policies."[113] With that goal as the premise, the decisions would put more emphasis on using constitutional tort as a tool for the effective enforcement of constitutional rights than they have so far. The focus of the litigation would be on the future rather than the past, and the scope of the remedies available would turn on how best to deter constitutional violations, not solely on how best to compensate the plaintiff for his injury. Most important, the common law of torts would not have the status accorded it by *Newport* and *Smith*, as the presumptive source of rules in the area, from which deviations require special justification. Instead, the central question in dealing with constitutional tort issues, including the proper scope of punitive damages, would be how suits for damages should be used as part of an effective system of constitutional remedies.

In opting for the private law model the Court has, in my view, chosen unwisely. To be sure, the common law model is not without its merits, including its familiarity and the inherent limits it places on judges and juries. The Court seemed to find the latter of these especially telling in *Newport*, for the opinion stressed that common law damages rules restrain the jury from making huge and unjust awards. Permitting punitive awards against municipalities may be unfair because the real wrongdoer is the official, and "[u]nder ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct."[114] The city "can have no malice independent of the malice of its officials."[115] Awards may be too large because "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded."[116] As a result, "the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award."[117] But these dangers may not be so great as the Court seems to think they are. Juries often sympathize with the defendant more than the plaintiff in constitutional tort cases.[118] When juries do go too

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112. *Cf.* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan. L. Rev. 51, 52-53 (1989) (suggesting that the "indeterminacy of legalistic analysis of [S]ection 1983 should send us back to political discussion over the function and consequences of federal civil rights enforcement").

113. Chayes, *supra* note 106, at 1284.

114. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267, 101 S. Ct. 2748, 2760 (1981).

115. *Id.*

116. *Id.* at 270, 101 S. Ct. at 2761.

117. *Id.*

118. *See* Lant B. Davis et al., *Suing the Police in Federal Court*, 88 Yale L.J. 781, 783, 788-809 (1979).

far, extreme awards can be dealt with, as they are in the common law, by judicial review.[119]

Before choosing common law tort as its model, the Court ought to have considered the public law model, in which constitutional tort would be viewed not merely as a way of vindicating the plaintiff's claim but as an important part of the arsenal of constitutional remedies. The general aim of constitutional remedies is to see to it that constitutional rights are not merely abstract propositions but real barriers to government overreaching. The value and force of constitutional rights largely depends on the availability of potent remedies for their violation. Otherwise, they may exist only on paper, as officials will fear no sanctions for ignoring them.[120] Damage remedies are "a vital component of any scheme for vindicating cherished constitutional guarantees"[121] because some constitutional rights cannot be defended, and some constitutional wrongs cannot be deterred, without them.

In this regard, consider the variety of contexts in which constitutional claims arise. When a constitutional violation occurs in the course of a criminal proceeding against the holder of the right, as where a publisher is prosecuted for obscenity and the book is actually protected by the First Amendment, the enforcement proceeding itself may be the appropriate forum for vindicating the constitutional right, which may be raised as a defense and in a habeas corpus proceeding following conviction. Other constitutional claims arise out of ongoing or future official conduct. Suppose, for example, the state seeks to require prayer in the public schools. In such a case, an injunctive or declaratory remedy will be appropriate. But an important class of constitutional claims cannot be remedied in either of these ways. Where someone is not the target of criminal proceedings, and complains not of current or future illegality, but of a constitutional wrong that took place in the past, neither habeas nor an injunction will be of any use.[122] Only a damages remedy will work.[123]

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119. *See, e.g.*, Auster Oil & Gas Co. v. Stream, 835 F.2d 597, 603 (5th Cir. 1988) (overturning a $5 million punitive award for an unconstitutional search and seizure of plaintiff's property). *See generally* 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 333-34 (3d ed. 1991).

120. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803). *See, e.g.*, Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race discrimination: The Lost Promise of* Strauder v. West Virginia, 61 Tex. L. Rev. 1401, 1413 (1983); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247, 282 (1988).

121. Owen v. City of Independence, Mo., 445 U.S. 622, 651, 100 S. Ct. 1398, 1415 (1980).

122. The victim of a constitutional tort may not seek injunctive relief unless he can show that he is likely to suffer future injury from the illegal conduct. Compare City of Los Angeles v. Lyons, 461 U.S. 95, 105-06, 103 S. Ct. 1660, 1666-67 (1983) (someone subjected on one occasion to police chokehold has no standing to seek equitable relief) with Kolender v. Lawson, 461 U.S. 352, 355 n.3, 103 S. Ct. 1855, 1857 (1983) (someone stopped 15 times has standing to challenge the state law under which he was stopped). Habeas, of course, is only available to challenge the legality of confinement. Preiser v. Rodriguez, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841 (1973).

123. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 409-10, 91 S. Ct. 1999, 2011-12 (1971) (Harlan, J., concurring in the judgment).

Sometimes the Court seems to recognize the importance of damages to a comprehensive scheme of constitutional remedies, notably in the *Bivens* decision that recognizes a federal common law damages action for constitutional torts committed by federal officers; in *Owen v. City of Independence, Missouri*,[124] where it denied municipal immunity for compensatory damages; and in the opinions that refuse to grant sweeping immunity to executive officers.[125] But the Court seems blind to the inadequacies of the tort model as a means of effectively deterring constitutional violations. Conversely, it fails to appreciate the merits of an approach to damages issues, including punitive damages, that is not modeled on the common law and therefore avoids the inherent limitations of the private law model as a solution to public law problems.

C. *How the Tort Model Fails*

The tort model falls short for three reasons.[126] First, the immunity doctrine forecloses liability for, and hence deterrence of, a substantial fraction of constitutional torts. Judges, prosecutors and legislators may violate constitutional rights with little fear of adverse consequences to themselves, secure in the knowledge that they may not be held liable for damages.[127] Other officials are subject to liability for depriving others of constitutional rights only if the constitutional right at issue was "clearly established" at the time they acted.[128] Under this standard, a defendant who acts with malice, intentionally taking the plaintiff's constitutional rights, still prevails, so long as a reasonable officer in his position could have believed the conduct was valid.[129] Besides this substantive shield against liability, the Court has erected a formidable procedural hurdle for the plaintiff. It treats the immunity doctrine not as a defense but as

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124. 445 U.S. 622, 100 S. Ct. 1398 (1980).

125. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 808-09, 102 S. Ct. 2727, 2733 (1982).

126. Quite apart from the general inadequacies of the tort model discussed in the text, specific categories of constitutional tort litigation may be more or less effective deterrents for reasons peculiar to the category. For example, Professor Meltzer believes that "the conditions of constitutional tort litigation for harm caused by law enforcement officials are ones in which the deterrent effect is likely to be on the low side," in part for reasons discussed in the text, and in part because "[t]he potential plaintiffs . . . are individuals who are in contact with the criminal justice system, generally as suspects or defendants. Many are unlikely to bring suit for harm suffered, whether because of ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration." Meltzer, *supra* note 120, at 284. If victims of constitutional torts are unlikely to bring suit, that is another reason why punitive damages are necessary for the sake of deterrence. *See* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much*, 40 Ala. L. Rev. 1143, 1148 (1989).

127. *See supra* notes 46-49 and accompanying text. These officers may be subject to criminal prosecution in egregious cases and would probably have no immunity in such a case. There are, however, other obstacles to imposing criminal sanctions. *See, e.g.*, United States v. Lanier, 73 F.3d 1380 (6th Cir. 1996) (en banc) (finding it inappropriate on notice grounds to allow a criminal prosecution based on a substantive due process violation).

128. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

129. Anderson v. Creighton, 483 U.S. 635, 641, 645, 107 S. Ct. 3034, 3040 (1987).

a right not to be subjected to trial. When a district court denies immunity, the defendant has a right to an interlocutory appeal.[130] As a result, the plaintiff must fight the immunity issue at trial and on appeal *before* being allowed to try the case on the merits.

Perhaps the immunity doctrine is necessary to avoid overdeterrence of bold official action.[131] Government officers do face a different incentive structure than private actors and may need special protection. For that reason, common law courts generally recognized immunities long before the Supreme Court addressed the issue in the Section 1983 context. But this difference between government and private defendants only emphasizes that the common law model is inappropriate for effective deterrence of constitutional violations, for the avoidance of overdeterrence comes at a high cost. By foreclosing damages for many constitutional violations, these rules weaken officials' disincentives to misbehave. Notice that the general common law of torts for private actors may actually provide *better* deterrence, for no immunity is available to individuals who breach their ordinary tort duties to others. Departing from general common law principles for the sake of avoiding overdeterrence, and thereby weakening the incentives on officers to respect constitutional rights, implies that we must be prepared to depart from those principles in other respects as well to make up for the diminished incentives.[132]

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130. Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985). *See also* Behrens v. Pelletier, 116 S. Ct. 834 (1996) (defendant may take an interlocutory appeal of denial of summary judgment on immunity grounds even though he has previously taken an unsuccessful interlocutory appeal of a denial of a motion to dismiss the complaint on immunity grounds).

131. *Compare* Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 Wash. L. Rev. 635, 640 (1982) (so arguing) *with* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110, 1140 (1981) (police officers' incentives are skewed in favor of committing constitutional violations).

132. This conclusion would not hold if the immunity rules merely offset the incentives for excessive caution that officials would otherwise face. In practice, however, official immunity may tip the balance in favor of overly aggressive official conduct. An empirical study concluded that "constitutional tort plaintiffs do significantly worse than non-civil rights litigants in every measurable way." Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 677 (1987). A broader study of civil rights and prisoner cases found "a uniformly low success rate at trial across all categories of civil rights and prisoner cases," except in voting rights and accommodations cases. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Geo. L.J. 1567, 1578 (1989). These findings suggest that the threat of constitutional tort liability has little deterrent effect.

Even when officers are held liable, their governmental employers often reimburse them for the damages awarded. *See* Eisenberg & Schwab, *supra*, at 686; Davis et al., *supra* note 118, at 809-12. One investigation found that in the cases studied "[t]here were few changes in police department practices as a result of the [S]ection 1983 suits in the Project sample." *Id.* at 812. *But cf.* William B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 624, 639 (1979) (finding that though prisoners rarely win, "[n]early everyone we interviewed believed that the cases have had great impact"), *id.* at 639. Before the 1970s, prisoners were rarely permitted to sue for anything. Turner's study was conducted just after the first wave of prisoner litigation. It may well be that the mere threat of litigation was sufficient

Second, the compensatory damages rules ignore or undervalue the nonmonetary nature of most constitutional rights. *Carey v. Piphus*,[133] and *Memphis Community School District v. Stachura*,[134] the Court's leading compensatory damages cases, recognize no difference between constitutional rights and common law rights. Damages are "ordinarily determined according to principles derived from the common law of torts."[135] In holding that the damages rules for constitutional tort should follow the common law model, the Court in *Carey* relied on its general understanding of the nature of legal rights:

> Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect. Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." 2 F. Harper & F. James, Law of Torts section 25.1. . . .[136]

Accordingly, "the basic purpose of a [S]ection 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights."[137] Damages may not be based on "the abstract 'value' or 'importance' of constitutional rights."[138] Nor may they be "wholly divorced from any compensatory purpose."[139]

The Court's common law damages model fails to recognize that constitutional law and the common law of torts protect different interests. Private tort rules, though perfectly adequate for the context in which they were made, may fall

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to induce prison authorities to correct egregious abuses to which they had earlier been indifferent.

133. 435 U.S. 247, 98 S. Ct. 1042 (1978).

134. 477 U.S. 299, 106 S. Ct. 2537.

135. *Id.* at 306, 106 S. Ct. at 2542.

136. *Carey*, 435 U.S. at 254-55, 98 S. Ct. 1042, 1047 (paragraphing removed).

137. *Id.* at 254, 98 S. Ct. at 1047. The Court made a historical argument as well, finding "no evidence that [the 42d Congress] meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Id.* at 256-57, 98 S. Ct. at 1048-49. But the Court conceded that the Congress "did not address directly the question of damages." *Id.* at 255, 98 S. Ct. at 1047. Nor did the court consider the many statements in the legislative history indicating that the Congress sought an effective remedy. In any event, for reasons discussed in Part II, I do not think the Court really cares about the intent or purposes of the 42d Congress, and I do not think it wise to look for answers to modern constitutional tort issues in 1871 tort law.

The leading article on *Carey* and its implications is Jean Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 Cal. L. Rev. 1242 (1979). *See also* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 Harv. L. Rev. 966 (1980).

138. *Stachura*, 477 U.S. at 310, 106 S. Ct. at 2545.

139. *Id.* at 311, 106 S. Ct. at 2545. It remains unclear whether *presumed* compensatory damages are recoverable. *See, e.g.*, Jean Love, *Presumed General Damages in Constitutional Tort Litigation*, 49 Wash. & Lee L. Rev. 67, 80 (1992) (arguing that they should be). *See also* Sheldon H. Nahmod et al., Constitutional Torts 301 (1995) (discussing lower court decisions).

short in the constitutional setting.[140] The point of common law rights is that a person's body or emotional tranquillity or reputation or privacy deserves protection against invasion by others. The monetary injury produced by an invasion is ordinarily the best evidence of the seriousness of the violation and a sufficient deterrent to future misconduct. By contrast, constitutional rights protect us from government overreaching. Their aim is not only to protect bodily integrity or emotional tranquillity or other common law interests, though such interests often do receive constitutional protection.[141] But the more general aims of constitutional rights are to limit the power of government and to promote democratic decision making by government. These are systemic and abstract values rather than personal interests. As a result, the gravity of a constitutional violation is often not adequately measured by the personal damages its victim can prove.[142] Whenever the government suppresses speech or ignores process or makes invidious distinctions, its conduct deserves censure, and the extent of the censure warranted may have nothing to do with the amount of tangible damages caused.[143] The tort model leads to underenforcement of constitutional rights.[144]

A third objection to the tort model stresses a difference between the structure of common law tort litigation and constitutional tort. Broadly speaking, common law tort is aimed at determining, on a case by case basis, whether a given injury should be compensated by the person who caused it. Juries play an important evaluative role, and liability often turns on a subtle calculation of the costs and benefits of precautions or a finely-tuned moral judgment as to whether the defendant's justification or excuse is "reasonable," all things considered. As a general matter, punitive damages are inappropriate in such cases, not only because compensatory damages will normally be sufficient for deterrence and justice, but also because the trier of fact may err on the basic issue of liability. Punitive damages would risk sending perverse signals as to the need for more precautions or the unworthiness of the defendant's behavior and therefore should

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140. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 394, 91 S. Ct. 1999, 2003 (1971). *See also id.* at 409, 91 S. Ct. at 2011 (Harlan, J., concurring in the judgment).

141. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 673-74, 97 S. Ct. 1401, 1413-14 (1977).

142. *See* Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 116-17 (1983).

143. *Cf.* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 28-30 (1982) (arguing that punitive damages would be appropriate without a showing of malice in common law tort cases where losses fall on persons other than the victim or the loss cannot be translated into monetary terms).

144. In addition to the specific failings of compensatory damages suits under Section 1983 discussed in the text, there are other, more general objections to tort liability as an adequate deterrent: "Injurors may not understand liability rules, and the message of even clear rules is muddied by the vagaries of settlement practices and jury verdicts. Individual actors may lack the capacity easily to conform to legal norms, and may believe . . . that individual liability is unlikely. At the same time, it is often difficult for organizations to implement effective personnel policies and organizational incentives to induce compliance. Sometimes . . . firms may focus on short term advantage rather than longer term liability." Meltzer, *supra* note 120, at 283 (citations omitted).

generally be awarded only where we are confident that the behavior is unacceptable, as where someone acts out of malice.[145]

In constitutional tort, these judgments as to what is or is not forbidden are made by courts under the Supreme Court's leadership. The jury's role is to determine the facts and to impose sanctions that will deter unconstitutional conduct in the future. It is, of course, possible that the jury will err as to the need for punitives, either because it gets the facts wrong or because the Court changes its mind as to what conduct is constitutionally unacceptable. But the risk of these potential errors would counsel against *ever* awarding punitives, even under an "intentional wrongdoing" standard. After all, the defendant mistakenly found to have acted maliciously, and the defendant who deliberately or recklessly violates a right later found to be nonexistent are no more reprehensible than one who violates rights while acting in good faith.

V. PUNITIVE DAMAGES AS A DETERRENT REMEDY

Under current Section 1983 doctrine, constitutional tort does not serve as an adequate deterrent to constitutional violations. From a "public law" perspective, the best solution is to jettison immunity law and reconsider the damages holdings in *Carey* and *Stachura*. But it is unlikely the current Court would take such steps. The Court may be too wedded to the private law model to abandon it completely. A less ambitious alternative, and therefore one that some members of the Court may find more appealing, would be to revisit punitive damages doctrine. Even in the common law, punitive damages have more in common with public law than private law.[146] They "address a social interest,"[147] and their avowed aim is to punish and deter rather than to compensate the victim.[148] In recent years, some states have recognized the public law nature of punitive damages by providing that a portion of any punitive award go to the state rather than the victorious plaintiff.[149] Given their public law overtones, punitive damages may be the appropriate vehicle for pursuing the public law goal of vigorously deterring constitutional violations.

A. Deterrent Remedies

Even under current doctrine, the avowedly non-compensatory nature of punitive damages brings them comfortably within the arsenal of what Professor

145. *See* Ellis, *supra* note 143, at 32, 52; Cooter, *supra* note 126, at 1160; Richard A. Posner, Economic Analysis of Law 191-92, 209 (4th ed. 1992).

146. *See* Angela P. Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 Ala. L. Rev. 1079 (1989).

147. *Id.* at 1102.

148. *See* Prosser and Keeton on Torts 9-12 (5th ed. 1984).

149. *See, e.g.*, Fla. Stat. ch. 768.73 (1991); O.C.G.A. section 51-12-5.1 (Michie Supp. 1995); Iowa Code section 668A.1 (1991).

Daniel Meltzer calls constitutional "deterrent remedies."[150] He uses the term to identify "those [remedies] in which the litigant obtains more than he is entitled to, when measured against the harm to his rights that he has suffered or is likely to suffer in the future."[151] Unlike traditional common law remedies, which are "shaped primarily by [such] concerns . . . [as] compensation and corrective justice," the dominant aim of deterrent remedies "is to benefit the public at large . . . by deterring government conduct that threatens to violate the constitutional rights of others."[152] Besides punitive damages (which Meltzer does not discuss), examples of deterrent remedies include the Fourth Amendment's exclusionary rule[153] and the right to challenge a conviction on the ground of racial discrimination in the selection of the grand jury.[154]

Professor Meltzer maintains that the fashioning of these constitutional deterrent remedies is an appropriate task for courts to undertake, even though they cannot be justified within traditional remedial principles. One "enormously important" role of the Supreme Court is "checking unconstitutional conduct by the political branches to safeguard rights held generally by the public."[155] But, as I have shown with respect to the impact of the immunity and compensatory damages doctrines in diluting the deterrent force of Section 1983 suits,[156] traditional remedies are inadequate to the task.[157] The project of devising deterrent remedies cannot safely be left exclusively to legislatures because, among other reasons, legislators are dependent on majorities for their reelection and therefore may be insufficiently sensitive to the anti-majoritarian values that underlie constitutional rights and remedies. By contrast, the federal judiciary is well-suited to constructing these remedies, on account of "its independence, its authority to declare the scope and implications of rights, and its obligation to address claims for relief presented by the parties."[158] For these reasons, making deterrent remedies to enforce constitutional rights may be constitutionally required and is surely an appropriate exercise of the courts' power to make constitutional common law.[159]

B. Reconsidering Section 1983 Punitive Damages Doctrine

If punitive damages are to serve the deterrence goal well, the Court's torts-based limits on the availability of punitives must be abandoned. However

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150. Meltzer, *supra* note 120, at 249.
151. *See* Meltzer, *supra* note 120, at 249.
152. *Id.*
153. *See id.* at 267-78.
154. *See id.* at 253-67.
155. *Id.* at 282.
156. *See supra* text at notes 126-145.
157. *See* Meltzer, *supra* note 120, at 283-86.
158. *Id.* at 287. Since most state judges are elected, it seems inappropriate to leave the task of constructing constitutional remedies exclusively to them. *See generally* Steven Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689 (1995).
159. Meltzer, *supra* note 120, at 294-95.

sensible those restrictions may be in ordinary tort law, they merely impede the deterrence of constitutional wrongs. Toward that end, the decision in *Newport v. Fact Concerts, Inc.* should be reexamined. Immunizing cities from punitive damages can only exacerbate the perverse impact on deterrence caused by individual immunity and by the common law model of damages erected in *Carey* and *Stachura*.

The Court in *Newport* asserts, unconvincingly, that "the deterrence rationale of [Section] 1983 does not justify making punitive damages available against municipalities."[160] According to *Newport*, "it is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of the municipality"[161] because the official himself may not have to pay them.[162] But a year earlier *Owen v. City of Independence, Missouri*[163] rejected this logic. Denying cities any immunity for compensatory damages, the Court explained that municipal vulnerability to damage awards "should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights" and "may encourage those in a policy-making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[164] *Newport* fails to explain why these incentives are any less powerful when the award consists of punitive, rather than compensatory, damages.[165]

Newport also cited the unfairness of holding the city liable for punitive damages. "Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct."[166] A city should not be

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160. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268, 101 S. Ct. 2748, 2760 (1981). The Court also warned that there are costs associated with the award of punitives against cities, in that juries, aware that cities possess the power to tax, may show little restraint in granting punitive damages. Here the Court ignores the propensity of jurors to side with the government in Section 1983 cases and the power of trial and appellate judges to overturn awards that are out of line. *See supra* text accompanying notes 118-119.

161. *Newport*, 453 U.S. at 268, 101 S. Ct. at 2760.

162. The Court also found "no reason to suppose that corrective action, such as the discharge of offending officials . . . will not occur unless punitive damages are awarded against the municipality." *Id.* at 269, 101 S. Ct. at 2761. And it viewed punitive damages against the offending official as "a more effective means of deterrence," *id.*, than punitives against the city. While these considerations indicate that punitive damages against the city are not the only means of deterrence, they hardly undermine the case for punitives against the city. It stands to reason that the city will be more cautious if it is vulnerable to punitives than if it is not.

163. 455 U.S. 622, 100 S. Ct. 1398 (1980).

164. *Id.* at 651-52, 100 S. Ct. at 1416.

165. The Court also asserted that "corrective action, such as the discharge of offending officials" may well occur in the absence of punitives against the city. It added that awarding punitives against officials is "a more effective means of deterrence" than allowing juries to hold cities liable for them. *Newport*, 453 U.S. at 269, 101 S. Ct. at 2761. Even if these observations are correct, and there is to my knowledge no empirical data bearing on the issue one way or the other, they do not refute the proposition that allowing punitives against cities would *further* the deterrence goal.

166. *Id.* at 267, 101 S. Ct. at 2759-60.

required to pay punitive damages because it "can have no malice independent of the malice of its officials."[167] But the Court ignores another aspect of its Section 1983 doctrine. Cities may not be held vicariously liable for their officers' constitutional torts in any event.[168] Only where the action is taken by policymaking officials may cities be held even for compensatory damages.[169] It does not seem unfair to hold the municipality (and its taxpayers) liable for acts taken by officials to whom the voters have entrusted responsibility for making policy judgments for the city.[170]

In addition to rethinking *Newport*, *Smith v. Wade* should be recast as an interim step toward a broader doctrine. Recall that the plaintiff prevailed in *Smith*. The defendant had argued that punitives should only be available for intentional misconduct, but the Court disagreed, approving a jury instruction that punitives may "be awarded on a finding of reckless or callous disregard of or indifference to [the victim]'s rights or safety."[171] Though the Court does not say so explicitly, it probably meant this to be the last word on the standard for punitive damages, and lower courts have universally read the opinion in that way.[172]

Smith is too narrow in its conception of the role of punitive damages. Like *Newport*, it reflects the Court's ill-considered alliance with the common law of torts.[173] Limiting punitives to situations where the defendant has behaved egregiously makes sense in the common law, where compensatory damages will ordinarily provide appropriate incentives for greater care, and punitives fulfill the narrow function of signaling society's strong disapproval of certain kinds of conduct. Constitutional tort is different. Since compensatory damages do not ordinarily measure the seriousness of a constitutional violation, the common law restrictions on the availability of punitives should not be carried over to the Section 1983 context. Keep in mind that, from the point of view of deterrence,

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167. *Id.*

168. Monell v. Department of Social Servs., 436 U.S. 658, 98 S. Ct. 2018 (1978).

169. The Court has had difficulty drawing coherent distinctions between acts attributable to the municipality and those that are solely the responsibility of the offending official. For one effort to sort out the confusion, see Barbara Kritchevsky, *"Or Causes to be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 U.C.L.A. L. Rev. 1187 (1988).

170. Though one might object that the voters and the taxpayers are two different groups, they seem to me to be sufficiently congruent to justify holding the taxpayers responsible for the voters' decisions. At any rate, that seems to be the premise of *Monell* and of Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398 (1980) (holding that cities have no immunity from compensatory damage awards).

171. Smith v. Wade, 461 U.S. 30, 37, 103 S. Ct. 1625, 1630 (1983).

172. *See, e.g.*, Brown v. Bryan County, 67 F.3d 1174, 1181 (5th Cir. 1995); Mitchell v. Dupnik, 67 F.3d 216, 224 n.5 (9th Cir. 1995).

173. Professor Love also fell under the spell of the common law when, years before the Court faced the issue, she recommended the rule ultimately adopted in *Smith*: "This is the preferable standard because it maximizes the deterrent impact of punitive damages awards in constitutional tort litigation without departing from established common law principles." Love, *supra* note 137, at 1281.

punitives must make up for the gaps created by the immunity doctrine and the compensatory damages rules. Limiting them to their common law domain, as *Smith* seems to do, simply fails to take full advantage of their potential to serve this role. The more broadly available they are, the more effective will be the deterrence of constitutional wrongdoing. If punitive damages are to serve as a vigorous deterrent to constitutional violations, *Smith* should not be taken as stating the outer bounds of punitive damages. They should be available whenever a jury decides that they are appropriate to that end, whether the defendants have acted maliciously or recklessly.[174]

Judge Richard Posner has argued, in *Soderbeck v. Burnett County*, that the deterrent effect of punitive damages is too weak to justify their award in cases where the defendant does not know, or subjectively appreciate the high probability, that his conduct is forbidden.[175] If this is so, then it would do little for deterrence to expand their scope beyond the instruction approved in *Smith*. But Judge Posner's argument is puzzling, in that it seemingly fails to come to terms with his own view, expressed elsewhere, that all of negligence law is based on deterrence of inefficient behavior by holding the defendant liable where the burden of a precaution is less than its benefits.[176] It is axiomatic that liability for negligence entails no intentional or reckless misconduct by the defendant. Nor does Judge Posner take account of the rules on liability for compensatory damages for constitutional torts. Like punitive damages, one of the purposes of compensatory damages is to deter misconduct, yet they are available against an official whenever he has violated someone's rights, subject to an immunity judged by an *objective* standard. The official who acts in perfect good faith, but who should have known that the act was illegal, has no immunity,[177] yet he is presumably deterred. For that matter, in the course of the *Soderbeck* opinion Judge Posner admits that "knowledge is to some extent a function of the penalties for ignorance; the heavier the sanctions for an unknowing violation of someone's rights, the more will be invested in finding out what rights people have."[178]

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174. When there is no jury, the question arises whether the trial judge's decision to deny punitives is reviewable on appeal. I think the better reasoned view is that it should be, on account of the importance of the deterrence function of punitives in constitutional tort cases. *See* Wright v. Shepard, 919 F.2d 665, 671 (11th Cir. 1990) (so holding).

175. Soderbeck v. Burnett County, 752 F.2d 285 (7th Cir. 1985).

176. *See* Richard Posner, A Theory of Negligence, 1 J. Leg. Stud. 29 (1972).

177. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 2738-39 (1982); Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987).

178. 752 F.2d at 291. *See also* Pacific Mutual Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991) (awarding punitives against an insurance company for failure to detect and prevent the fraudulent actions of its agent comports with due process, since "[i]mposing liability without independent fault deters fraud more than a less stringent rule"). Judge Posner also supports his view by drawing an analogy to the exclusionary rule, which is justified on deterrence grounds and which is subject to a good faith exception. *Id.* at 290. But the analogy is a bit facile because the contexts are too dissimilar. Determining the scope of the exclusionary rule is a matter of weighing its benefits in

Punitive damages are not appropriate in every constitutional tort case. Under the regime I propose, judges would need to instruct juries carefully on the deterrent purpose of punitives and must stand ready to reduce or eliminate punitive awards that cannot be plausibly defended on deterrence grounds. It would be helpful to give juries concrete guidance by crafting instructions that identify situations where deterrence is especially important, on account of the gaps created by the law on compensatory damages, immunity, and limits on injunctive relief.

Under *Memphis Community School District v. Stachura*, for example, compensatory damages may not be based on the value of constitutional rights in our system of government.[179] Many exercises of the right of free speech have no monetary component, yet they are vital to democratic self rule. Current doctrine offers little deterrent to authorities who, annoyed by demonstrations in public places and having colorable but constitutionally insufficient grounds for action, send in the police to break up the gatherings. It would be hard for any participant in such a manifestation to show harm of the sort tort law would compensate. The threat of punitive damages would make government officers more circumspect about suppressing such events.

In other cases, the shortcomings of the current doctrine are more complex. Consider *City of Los Angeles v. Lyons*.[180] The police had stopped the plaintiff and applied a chokehold that injured his larynx. He sought to obtain an injunction against the use of such chokeholds, but the Court denied him standing, on the ground that there was no "actual controversy" between the parties with respect to prospective relief. While some persons would surely be subjected to chokeholds, Lyons himself could not establish that he was likely to be a victim in the future. Assuming this is a correct ruling on the standing-to-seek-injunctive-relief issue[181] and assuming that some plaintiffs in Lyons' position can establish a constitutional violation, it is possible that individual suits for compensatory damages will fail to generate sufficient deterrence. Most victims may suffer too little compensatory damages to justify the expense of a lawsuit, and the police department may find the damages it must pay a small price for the benefits it receives from the use of chokeholds, in terms of intimidation or effective control of suspects. At the same time, the police may rarely be vulnerable to punitive damages under *Smith*. Since chokeholds *will* be justified in some circumstances, the police may be able to convince a jury that they thought they faced such a fact pattern, even where the facts as proven are against

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terms of deterrence against its costs in terms of letting guilty persons go free. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 485-88, 96 S. Ct. 3037, 3048-50 (1976). The calculus is different in a Section 1983 suit. Permitting punitive damages does not result in letting criminals loose on the streets.

179. 477 U.S. 299, 106 S. Ct. 2537 (1986). *See supra* text accompanying notes 138-139.

180. 461 U.S. 95, 103 S. Ct. 1625 (1983).

181. The Court's reasoning has been severely criticized. *See, e.g.*, Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. Rev. 1, 72-74 (1984).

the officers' claims. As a result, it may be hard to show that the police acted in reckless disregard of a particular plaintiff's constitutional rights, even where it can be shown that they violated that plaintiff's rights.

Besides casting doubt on *Smith* and *Newport*, viewing punitive damages from the perspective of constitutional remedies rather than common law torts has consequences for a punitive damages issue that has not yet reached the Supreme Court. Sometimes juries award substantial punitive damages even though no compensatory damages were found.[182] But recent Supreme Court decisions reviewing punitive damage awards in ordinary tort cases suggest that punitives that are far out of proportion to compensatory damages may violate due process.[183] At least one case, *Morgan v. Woessner*, has found this principle applicable to Section 1983 cases.[184]

Should proportionality constraints, imposed on common law punitive damage awards in the name of due process, apply equally to constitutional tort? In deciding this issue, it is important to take account of the differences between common law tort and constitutional tort. In constitutional tort, punitive damages fill a special role of strengthening deterrence of constitutional violations. Their effectiveness would be unduly compromised if juries were held to the proportionality standards that common law courts presumably must meet. Defendants have as yet won only one of these due process suits in the Supreme Court, even in the common law context. The standard for success should be even higher for them in constitutional tort. Only where the punitive award is plainly irrational should it be overturned.

My view on this issue may be at odds with the Supreme Court's recent ruling in *BMW of North America v. Gore*.[185] There the Court struck down a $2,000,000 punitive award as violative of due process, where the compensatory award was $4,000. Though the Court rejected "a categorical approach" that would nullify punitives beyond some punitive/compensatory ratio,[186] it declared that a "breathtaking 500 to 1 [ratio] must surely 'raise a suspicious judicial

182. *See, e.g.*, Caban-Wheeler v. Elsea, 71 F.3d 837, 840-842 (11th Cir. 1996) (upholding $100,000 punitive damages award where no actual damages were found); Davis v. Locke, 936 F.2d 1208 (11th Cir. 1991) (affirming $1750 punitive awards against two prison guards who dropped plaintiff on his head, even though no compensatory award was made); Glover v. Alabama Dept. of Corrections, 734 F.2d 691, 694 (11th Cir. 1984) (affirming jury award of $1 nominal damages and $25,000 punitive damages).

183. *See, e.g.*, BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996) ($2,000,000 punitive award was grossly excessive when compensatory damages were $4,000); TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) upholding a $10 million punitive award where compensatory damages were $19,000, but indicating that "the Fourteenth Amendment imposes a substantive limit on the amount of a punitive damages award," *id.* at 2719 (plurality opinion). *See also* Pulla v. Amoco Oil Co., 72 F.3d 648, 658-69 (8th Cir. 1995) ($500,000 punitive damages award offends due process where compensatory damages were only $2).

184. *See* Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993).

185. 116 S. Ct. 1589 (1996).

186. *Id.* at 1602.

eyebrow.'"[187] *Gore* was a common law case for fraud. BMW had, without the plaintiff's knowledge, repainted his new car before he bought it. After *BMW* defendants seeking to challenge punitive awards for the first time have available to them a Supreme Court ruling that an award may be unconstitutional on account of disproportion.

It would be wrong, however, to jump to the conclusion that *BMW* will make disproportion a strong constraint on punitives in the constitutional tort context. First, courts that wish to distinguish *BMW* from constitutional tort cases should have no difficulty in doing so. *BMW* does not speak directly to the constitutional tort context and the deterrent function of punitives in that context. The special role of punitive damages in constitutional torts remains a viable basis for permitting a punitive award that is highly disproportionate to the compensatory award.

Second, *BMW* does not establish a principle that any degree of disproportion, standing alone, is sufficient ground for finding that punitives violate due process. Disproportion between compensatory and punitive damages was only one of several factors cited by the Court in overturning the punitives.[188] The Court also stressed the lack of reprehensibility of BMW's conduct,[189] which produced "purely economic" harm,[190] the Alabama jury's effort to punish conduct occurring in other states where BMW's practice might not even be illegal,[191] and the disparity between the punitives awarded by this jury and the comparatively minor sanctions typically imposed for comparable misconduct.[192] Extraterritoriality and comparable misconduct seem to have little relevance to most constitutional torts. In terms of reprehensibility, the plaintiff who proves a violation of his constitutional rights is in a far stronger position than one who complains about the paint job on his car.

Quite apart from the due process issue, many common law courts preclude punitive damages in cases where the plaintiff recovers only nominal damages.[193] Here again, it would be unwise for constitutional tort to follow the common law path. A large part of the point of punitive awards in constitutional tort cases is that the compensatory damages will often be small or nonexistent, so that adequate deterrence of constitutional wrongs calls for punitive award. For example, it may be perfectly appropriate for a jury to award $100,000 in punitive damages though no actual damages were found, as was done in the

187. *Id.* at 1603 (quoting TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2732 (1993) (O'Connor, J., dissenting)).

188. *See* 116 S. Ct. at 1603.

189. *See id.* at 1599-1601.

190. *Id.* at 1599.

191. *See id.* at 1597-98.

192. *Id.* at 1603-04.

193. *See* Prosser and Keeton, *supra* note 148, at 14 (noting that "[t]he greater number of courts" take this view, but arguing that the deterrent purpose of punitives "very much" favors allowing punitives in such circumstances).

recent Eleventh Circuit case *Caban-Wheeler v. Elsea*.[194] Only where a punitive award cannot be defended in terms of its deterrent impact should a court overturn it.

VI. CONCLUSION

Rather than basing its constitutional tort doctrine on intent-and-purpose analysis, what the Court actually does in most constitutional tort cases, and especially those that address damages issues, is to borrow principles and policies from the modern common law of torts. But the role of punitive damages in Section 1983 cases ought to be to deter constitutional violations, and tort principles were not designed for and are not well-suited to that goal. The Court should abandon the tort model reflected in *Newport* and *Smith* and rebuild punitive damages law, starting from the proposition that designing effective remedies for constitutional violations is a paramount goal. Punitive damages can be an especially useful deterrent in situations where more conventional constitutional remedies fall short, as where immunity and traditional limits on the scope of compensatory damages weaken the deterrent effect of compensatory damages and where restrictions on standing to seek prospective relief foreclose an injunction.

194. 71 F.3d 837, 840-842 (11th Cir. 1996).