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# Punitive Damages in Constitutional Tort Actions

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## NOTES

### **Punitive Damages in Constitutional Tort Actions**

Private damage actions for the vindication of violated constitutional rights are available against state and federal officials.<sup>1</sup> The measure of damages in such actions, however, is not clear. Although a plaintiff can recover compensatory damages, it is uncertain whether a plaintiff can recover punitive damages. Three recent decisions of the Supreme Court of the United States<sup>2</sup> addressed whether the Court should allow punitive damages in constitutional tort actions, but none definitively resolved the issue.

This note examines the current and potential state of the law on punitive damages in constitutional tort actions. Part I discusses the three recent Supreme Court decisions strongly suggesting that plaintiffs can recover punitive damages in appropriate constitutional tort actions; part II determines whether history and policy considerations support these Supreme Court decisions; and part III determines the probable requirements for the recovery of punitive damages in constitutional tort actions.

In the Civil Rights Act of 1871,<sup>3</sup> Congress created a federal remedy for a person who is deprived of constitutional rights by another acting under color of state law.<sup>4</sup> Recent Supreme Court decisions

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1 42 U.S.C. § 1983 (1979) allows a cause of action against state officials. The Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), inferred a similar cause of action directly under the Constitution against federal officials. *See* notes 3-12 and accompanying text *infra*.

2 *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981); *Carlson v. Green*, 100 S. Ct. 1468 (1981); *Carey v. Phipps*, 435 U.S. 247 (1978).

3 The Civil Rights Act of 1871, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1979)). The statute provides:

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.

42 U.S.C. § 1983 (1979).

4 *See generally* Clabo, 42 U.S.C. § 1983, 9-10 COLUM. HUMAN RIGHTS L. REV. 65 (1977-1978); McCormick, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250 (1974); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974); *Special Symposium: Section 1983*, 12 URBAN LAW 227 (1980).

have established that local governments are subject to suit as persons within section 1983,<sup>5</sup> and that the section 1983 damages remedy may be available for violations of federal as well as constitutional law.<sup>6</sup>

A section 1983 remedy is unavailable, however, where federal officers violate constitutional rights, since they do not act under color of state law. But the Supreme Court in *Bivens v. Six Unknown Named Agents*<sup>7</sup> established an implied cause of action for money damages against federal officers for violations of constitutional rights.<sup>8</sup> A *Bivens* remedy is a judicially created version of section 1983, except that it applies to persons acting under color of federal law as opposed to state law.<sup>9</sup>

*Bivens* inferred a constitutional damage remedy from the fourth amendment. The Supreme Court subsequently held that such a remedy could also be inferred from the eighth amendment<sup>10</sup> as well as the due process clause of the fifth amendment.<sup>11</sup> Lower federal courts have extended *Bivens* to other constitutional guarantees as

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The legislative background of § 1983 is exhaustively addressed in *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 664-95 (1978).

5 *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978). See Carlisle, *Owen v. City of Independence: Toward Constructing a Model for Municipal Liability after Monell*, 12 URBAN LAW 292 (1980); Kramer, *Section 1983 and Municipal Liability: Selected Issues Two Years After Monell v. Department of Social Services*, 12 URBAN LAW 232 (1980); Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979).

6 *Maine v. Thiboutot*, 448 U.S. 1 (1980). See Comment, *Section 1983: Carte Blanche Remedy for Federal Statutory Violations?*, 10 STETSON L. REV. 506 (1980).

7 403 U.S. 388 (1971).

8 In *Bivens*, agents of the Federal Bureau of Narcotics entered *Bivens*' apartment, manacled him in front of his family, and thoroughly searched the premises without probable cause. 403 U.S. at 389. *Bivens* sought substantial damages from each of the agents, but since federal officers rather than state officers committed the alleged constitutional violations, a section 1983 remedy was unavailable. The Supreme Court, however, invoked its traditional remedial powers to allow money damages directly under the fourth amendment. *Id.* at 397.

9 *Paton v. LaPrade*, 524 F. 2d 862, 871 (3d Cir. 1975). See also Kirkpatrick, *Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. CIN. L. REV. 46 (1977). The author contended that "[t]he *Bivens* remedy is essentially a judicially created equivalent of section 1983. There is no statutory counterpart to section 1983 creating a cause of action against federal officers or other persons violating constitutional rights under color of federal law." *Id.* at 49 n. 24. The willingness of appellate courts to incorporate section 1983 law into *Bivens* suits also reflects the similarity between section 1983 and *Bivens* actions. See note 19 and accompanying text *infra*.

10 *Carlson v. Green*, 100 S. Ct. 1468 (1980). The Court allowed the administratrix of a deceased federal prisoner's estate to sue federal prison officials for violating the prisoner's eighth amendment rights by failing to give him proper medical treatment. See notes 45-59 and accompanying text *infra*.

11 *Davis v. Passman*, 442 U.S. 228 (1979). The Court allowed a former congressional staff member to sue a United States Congressman who allegedly terminated the staff member's employment on the basis of her sex, in violation of the fifth amendment.

well.<sup>12</sup>

Section 1983 creates a federal cause of action without expressly providing for the appropriate measure of recovery. Section 1983 merely states that the defendant "shall be liable to the party injured in an action at law."<sup>13</sup> The measure of recovery in a *Bivens* case is similarly vague. In *Bivens*, the Court said Bivens was entitled to recover "money damages for any injuries . . . suffered as a result of the agents' violation . . ."<sup>14</sup>

In *Monroe v. Pape*,<sup>15</sup> the Court implied that all forms of monetary relief traditionally available at common law were available in section 1983 actions.<sup>16</sup> Sixteen years later, in *Carey v. Piphus*,<sup>17</sup> the Court expressly held that the common law of torts was an appropriate starting point for determining damages in section 1983 actions.<sup>18</sup> The Supreme Court's decision in *Carey* also sheds light upon the relief available in *Bivens* actions, since the courts usually apply the rules developed under section 1983 in *Bivens* cases.<sup>19</sup>

*Carey's* incorporation of common law tort remedies into constitutional tort actions merits a brief summary of these common law prin-

12 See, e.g., *Gentile v. Wallen*, 562 F. 2d 193, 196 (2d Cir. 1977) (fourteenth amendment due process clause); *Cox v. Stanton*, 529 F. 2d 47, 50 (4th Cir. 1975) (thirteenth and fourteenth amendments); *Paton v. LaPrade*, 524 F. 2d 862 (3d Cir. 1975) (first amendment); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (sixth amendment); *Howard v. Warden, Petersburg Reformatory*, 348 F. Supp. 1204 (E.D. Va. 1972) (ninth amendment), *appeal dismissed*, 474 F. 2d 1341 (4th Cir. 1973). See generally Lehman, *Bivens and Its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977).

13 42 U.S.C. § 1983 (1979).

14 *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).

15 365 U.S. 167 (1961), *overruled in part*, *Monell v. Dept. of Social Servs.*, 436 U.S. 658 (1978).

16 Justice Douglas stated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. See generally Nahmod, *supra* note 4.

17 435 U.S. 247 (1978).

18 *Id.* at 257-58. Earlier in the opinion the Court stated: "[Section 1983] was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Id.* at 254.

19 *Ellis v. Blum*, 643 F. 2d 68, 84 (3d Cir. 1981) (citing general trend to incorporate section 1983 law into *Bivens* suits); *Paton v. LaPrade*, 524 F. 2d 871 (3d Cir. 1975) (§ 1983 standards for determining injuries applicable in *Bivens* suits). The Supreme Court seems to have adopted this view as well. See, e.g., *Carlson v. Green*, 100 S. Ct. 1468 (1980), where the Court strongly suggested that identical rules should govern the availability of punitive damages in § 1983 and *Bivens* actions; and *Butz v. Economou*, 438 U.S. 478 (1978), a *Bivens* action where the Court adopted the qualified immunity standard it had developed in § 1983 cases. See also Note, "Damages or Nothing" — *The Efficacy of the Bivens-Type Remedy*, 64 CORNELL L. REV. 667, 680 n. 65 (1979) (§ 1983 caselaw used in federal constitutional tort cases); note 9 *supra*.

principles. Under the common law, damage awards are available for medical expenses, lost earnings, impairment of future earning capacity, property damage, and mental and physical suffering.<sup>20</sup> These damages attempt to put the plaintiff in the position he would have been but for the defendant's breach of a legal duty.<sup>21</sup> Punitive damages are also available upon a showing of a highly culpable state of mind, malice or ill will usually being necessary.<sup>22</sup>

An overwhelming number of lower federal courts allow compensatory and punitive damages in section 1983<sup>23</sup> and *Bivens* actions.<sup>24</sup> However, the Supreme Court's indirect handling of the issue has created doubts about the availability of punitive damages in a constitutional tort action. Yet a fair reading of three recent Supreme Court decisions establishes that punitive damages are an appropriate and integral component of the relief available in constitutional tort actions.

### I. Recovery of Punitive Damages in Constitutional Tort Actions: The Supreme Court Decisions

The Supreme Court's reluctance to directly address the availa-

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20 D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* §§ 3.1, 7.3 (1973); *RESTATEMENT (SECOND) OF TORTS* §§ 905-06 (1977).

21 D. DOBBS, *supra* note 20, § 3.1.

22 C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 81 (1935). Only four states — Louisiana, Massachusetts, Nebraska, and Washington — do not allow punitive damages in tort actions. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2, at 9 n. 61 (4th ed. 1971). For discussions of punitive damages, *see generally* Ghiardi, *The Case Against Punitive Damages*, 8 *FORUM* 411 (1972); Note, *In Defense of Punitive Damages*, 55 *N.Y.U. L. REV.* 303 (1980) [hereinafter cited as *In Defense of Punitive Damages*].

23 *See, e.g.*, *Green Bay & W.R. Co. v. United States*, 644 F. 2d 1217 (7th Cir. 1981); *Whiting v. Jackson State Univ.*, 616 F. 2d 116 (5th Cir. 1980); *Morrow v. Igleburger*, 584 F. 2d 767 (6th Cir. 1978); *Silver v. Cormier*, 529 F. 2d 161 (10th Cir. 1976); *Paton v. LaPrade*, 524 F. 2d 862 (3d Cir. 1975); *Caperci v. Huntoon*, 397 F. 2d 799 (1st Cir. 1968), *cert denied*, 393 U.S. 940 (1968). *But see* *Huntley v. Community School Bd. of Brooklyn*, 579 F. 2d. 738 (2d Cir. 1978); *Soto v. Chardon*, 514 F. Supp. 339 (D.P.R. 1981) (both courts reserved judgment on the issue).

24 *See, e.g.*, *Brady v. Smith*, 656 F. 2d 466, 469 (9th Cir. 1981); *Paton v. La Prade*, 524 F. 2d 862, 872 (3d Cir. 1975); *Hanna v. Drobnick*, 514 F. 2d 393, 398 (6th Cir. 1975). Several courts hold that the punitive damages sought in *Bivens* suits may be considered in determining jurisdictional amount. *See, e.g.*, *Pitrone v. Merchandante*, 420 F. Supp. 1384, 1387 n. 6 (E.D. Pa. 1976); *Shifrin v. Wilson*, 412 F. Supp. 1282, 1287 n. 1 (D.D.C. 1976); *Gardels v. Murphy*, 377 F. Supp. 1389, 1398 (N.D. Ill. 1974). Some courts have not permitted punitive damages in *Bivens* suits. *See, e.g.*, *Dellums v. Powell*, 566 F. 2d 167, 195-96 (D.C. Cir. 1977), *cert denied*, 438 U.S. 916 (1978); *Zweibon v. Mitchell*, 516 F. 2d 594, 659 (D.C. Cir. 1975). Other courts have expressed uncertainty about whether punitive damages are available in *Bivens* actions. *See, e.g.*, *Love v. Budai*, No. 79-1551 (D.C. Cir. filed Mar. 16, 1981); *Ricca v. United States*, 488 F. Supp. 1317, 1327 (E.D.N.Y. 1980); *Hernandez v. Lattimore*, 454 F. Supp. 763, 766 (S.D.N.Y. 1978).

bility of punitive damages in constitutional tort actions reflects the serious misgivings of both courts and commentators about the place of punitive damages in our legal system.<sup>25</sup> There are primarily three arguments against allowing punitive damages. First, the retribution aspect of punitive damages is an anomaly in tort law, since tort law purports merely to compensate the aggrieved plaintiff. Second, some critics of punitive damages challenge the constitutionality of "punishing" a defendant in a civil forum through the imposition of punitive damages. Third, punitive damages result in a windfall to the plaintiff, are difficult to compute, and can result in repetitive or excess sanctioning.<sup>26</sup>

The Supreme Court's recent decisions concerning punitive damages in constitutional tort actions must be read against this backdrop. The Court treaded carefully into this area in *Carey v. Piphus*,<sup>27</sup> made bold strides in *Carlson v. Green*,<sup>28</sup> and effectively sanctioned the recovery of punitive damages in appropriate constitutional tort actions in *City of Newport v. Fact Concerts, Inc.*<sup>29</sup>

In *Carey*, an elementary and a secondary student filed section 1983 actions against school officials, alleging they had been suspended from school without procedural due process. The district court consolidated the cases for trial and found for the students, asserting that the school officials should have known that a lengthy suspension without an adjudicative hearing would violate procedural due process.<sup>30</sup>

The Court of Appeals for the Seventh Circuit remanded the case to the district court to reconsider the measure of damages, since the district judge had improperly excluded evidence at trial.<sup>31</sup> The Seventh Circuit concluded that even if the district court found that the students' actions justified the suspensions, the students were entitled to recover substantial "nonpunitive" damages because the school of-

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25 One commentator stated that many courts preface an award of punitive damages with the caveat that punitive damages are not a favorite of the law of torts. *In Defense of Punitive Damages*, *supra* note 22 at 304 n. 5. *See, e.g.*, *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 188, 364 N.E. 2d 353, 360 (1978); *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602, 607 (1976). Other leading commentators are not supportive of punitive damages, caveat or not. *See, e.g.*, W. PROSSER, *supra* note 22, § 2; D. DOBBS, *supra* note 20, § 3.9, at 19-21.

26 *See generally* Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 7, 8 (1980); *In Defense of Punitive Damages*, *supra* note 22, at 304-05.

27 435 U.S. 247 (1978).

28 100 S. Ct. 1468 (1980).

29 101 S. Ct. 2748 (1981).

30 435 U.S. at 251.

31 *Id.* at 252.

ficials denied them procedural due process.<sup>32</sup> The Supreme Court granted certiorari “to consider whether, in an action under section 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial ‘nonpunitive’ damages.”<sup>33</sup>

Justice Powell, writing for a unanimous Court, broke new ground by holding compensation to be the primary purpose of a section 1983<sup>34</sup> damage award. Citing several section 1983 cases, as well as *Bivens*, the Court concluded damages were available under section 1983 for actions “found . . . to have been violative of . . . constitutional rights *and to have caused compensable injury*.”<sup>35</sup>

*Carey* also established the common law of torts as the “appropriate starting point” for the fashioning of damages in a section 1983 action, although the common law would not always provide the complete solution.<sup>36</sup> The Court reasoned that in some cases courts should tailor the rules governing compensation for the deprivation of constitutional rights to the particular right in question.<sup>37</sup> Addressing the constitutional deprivation at issue, the denial of procedural due process, the Court held that absent a showing of actual injury, the schools’ denial of procedural due process entitled the students only to nominal damages.<sup>38</sup>

The Court offered contradictory language about punitive damages. First, the Court maintained that “to the extent that Congress intended that awards under section 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.”<sup>39</sup> While this language seems to foreclose the recovery of punitive damages, the Court also stated that punitive damages might be awarded in a “proper case” under section

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32 *Id.*

33 *Id.* at 253.

34 Many courts apply § 1983 case law to *Bivens* actions. See note 19 and accompanying text *supra*. Thus, *Carey*’s reasoning is relevant to *Bivens* actions as well as § 1983 actions.

35 435 U.S. at 255.

36 *Id.* at 258.

37 *Id.* at 265.

38 *Id.* at 264. Many courts have applied *Carey*’s “actual injury” requirement to other constitutional violations. See, e.g., *Davis v. Village Park II Realty Co.*, 578 F. 2d 461, 463 (2d Cir. 1978) (first amendment); *Reyes v. Edmunds*, 472 F. Supp. 1218, 1230 (D. Minn. 1979) (fourth amendment). *But see Halperin v. Kissinger*, 606 F. 2d 1192 (D.C. Cir. 1979) (holding that *Carey*’s proof of actual damages did not apply to fourth amendment violations). See generally Note, *Damage Awards for Constitutional Torts: A Reconsideration after Carey v. Phipus*, 93 HARV. L. REV. 966 (1980) [hereinafter cited as *Damage Awards*].

39 435 U.S. at 256-57.

1983 with the specific purpose of deterring or punishing violations of constitutional rights.<sup>40</sup> The Court recognized that six different circuits allowed punitive damages in section 1983 actions,<sup>41</sup> but did not approve or disapprove of these cases. The Court held that because the district court specifically found that the school officials did not act with a malicious intent to deprive the students of their rights, no basis for a punitive damage award existed in this case.<sup>42</sup>

Several lower federal courts have cited *Carey* for the proposition that punitive damages are recoverable in section 1983 actions.<sup>43</sup> Other lower federal courts and some commentators read *Carey* as leaving the issue open.<sup>44</sup> Thus, *Carey*'s language is far from conclusive on the issue of punitive damages.

In the second case in the progression, *Carlson v. Green*,<sup>45</sup> the administratrix of a deceased federal prisoner's estate sued federal prison officials alleging they violated the prisoner's due process, equal protection, and eighth amendment rights by failing to give him proper medical treatment.<sup>46</sup> The complaint sought compensatory and punitive damages.<sup>47</sup> The Supreme Court considered whether a remedy was available directly under the Constitution (i.e., a *Bivens* action) when the plaintiff's allegations could also support a claim under the Federal Torts Claim Act (FTCA).<sup>48</sup>

Justice Brennan, writing for the majority, maintained that *Bivens* established that victims of constitutional violations by federal agents have a right to recover damages against those officials except

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40 *Id.* at 257 n. 11.

41 *Id.* (see cases cited therein: *Silver v. Cormier*, 529 F. 2d 161, 163-164 (10th Cir. 1976); *Stengel v. Belcher*, 522 F. 2d 438, 444 n. 4 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976); *Spence v. Staras*, 507 F. 2d 554, 558 (7th Cir. 1974); *Caperci v. Huntoon*, 397 F. 2d 799, 801 (1st Cir. 1968), *cert. denied*, 393 U.S. 940 (1968); *Mansell v. Saunders*, 372 F. 2d 573, 576 (5th Cir. 1967); *Basista v. Weir*, 340 F. 2d 74, 84-88 (3d Cir. 1965)). See also note 23 *supra* for other courts allowing punitive damages in section 1983 actions.

42 435 U.S. at 257 n. 11. Later in the opinion the Court further expounded upon common law compensatory and punitive damages: "[s]ubstantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights. *Id.* at 266.

43 *See, e.g.*, *Busche v. Burkee*, 649 F. 2d 509, 520 (7th Cir. 1981); *Shillingford v. Holmes*, 634 F. 2d 263, 266 (5th Cir. 1981); *Konczak v. Tyrell*, 603 F. 2d 13, 18 (7th Cir. 1979).

44 *See, e.g.*, *Huntley v. Comm. School Bd. of Brooklyn*, 579 F. 2d 738, 741 (2d Cir. 1978). Some commentators have interpreted *Carey* in a similar way. *See, e.g.*, *Love, Damages, a Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1274 (1979); *Damage Awards*, *supra* note 38, at 983 n.102.

45 100 S. Ct. 1468 (1980).

46 *Id.* at 1470.

47 *Id.* at 1471.

48 *Id.* Federal Torts Claim Act, ch. 753, title IV, 60 Stat. 842 (1946).



in two situations. The first situation is when the defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress."<sup>49</sup> The second situation is when "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective."<sup>50</sup>

After determining no special factors counselling hesitation existed,<sup>51</sup> Justice Brennan compared the *Bivens* remedy to the FTCA and concluded that the *Bivens* remedy was more effective. Justice Brennan cited four factors leading to this conclusion, only two of which are important for this note's purpose. First, he noted that the *Bivens* remedy served a two-fold purpose, *compensation and deterrence*.<sup>52</sup> This downplays *Carey*'s focus on compensation as the basis of section 1983 remedies.<sup>53</sup> Because the *Bivens* remedy is recoverable against individuals, Justice Brennan posited that it was a more effective deterrent than the FTCA remedy against the United States.<sup>54</sup> In a footnote, the Court stated that section 1983 actions also served the same compensation and deterrence goals as *Bivens* actions.<sup>55</sup> Accepting deterrence as a section 1983 goal strengthens the case for punitive damages since deterrence is a goal of punitive damages.<sup>56</sup>

The second factor establishing a *Bivens* remedy's superiority over a FTCA remedy concerned punitive damages:

[O]ur decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are 'a particular remedial mechanism normally available in the federal courts,' . . . and are especially appropriate to redress the violation by a government official of a citi-

49 *Carlson v. Green*, 100 S. Ct. 1468, 1472 (1980).

50 *Id.*

51 *Id.* The Court stated that "[p]etitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate."

52 *Id.* at 1473.

53 See notes 34-39 and accompanying text *supra*.

54 100 S. Ct. at 1473.

55 *Id.* at 1473 n. 6. The third factor supporting the conclusion that Congress did not intend to limit the respondent to a FTCA remedy was that a plaintiff cannot opt for a jury trial in a FTCA suit as he may in a *Bivens* suit. Finally, the Court noted that an FTCA action exists only if the state in which the alleged misconduct occurred would permit a cause of action to go forward. In the Court's view, federal officials' liability for violations of citizens' rights should be governed by uniform rules. *Id.* at 1468.

56 *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981). The Court noted that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Id.* at 2759 (emphasis added).

zen's constitutional rights. Moreover, punitive damages are available in a 'proper' section 1983 action. . .<sup>57</sup>

In the Court's view, punitive damages in *Bivens* actions deter unconstitutional acts better than the FTCA, which expressly prohibits punitive damages.<sup>58</sup>

In his dissent, Justice Rehnquist stated that the Court had never decided whether punitive damages may be awarded in a *Bivens* suit. Justice Rehnquist also maintained that despite the Court's assertion to the contrary, it had also never decided whether punitive damages were available in section 1983 actions.<sup>59</sup>

In the wake of *Carlson*, lower courts and commentators were still unclear as to whether the Supreme Court allowed punitive damages in constitutional tort actions. In *Love v. Budai*,<sup>60</sup> for example, the Court of Appeals for the District of Columbia Circuit noted the conflict in the circuit over the issue and chose not to resolve it. Judge Tamm's opinion in *Payne v. District of Columbia*,<sup>61</sup> cited in *Love*, illustrates the judicial uncertainty about the issue:

It is not clear to me, however, that punitive damages are available [in a *Bivens* action]. . . . There was no mention whatsoever in *Bivens* of the possible availability of punitive damages . . .

. . . Justice Harlan in his concurring opinion, for instance, fairly characterized the essential question facing the Court concerning damages as "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted". . . . Whether or not "vindication" is limited to compensation must remain for now an open question.<sup>62</sup>

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57 100 S. Ct. at 1473.

58 *Id.* at 1474.

59 *Id.* at 1486-87 (Rehnquist, J., dissenting).

60 No. 79-1551 (D.C. Cir. filed Mar. 16, 1981).

61 559 F. 2d 809 (D.C. Cir. 1977).

62 *Id.* at 827. Other post-*Carlson* cases reflect the judicial uncertainty about the recovery of punitive damages in constitutional tort actions. *See, e.g.*, *Fact Concerts, Inc. v. City of Newport*, 626 F. 2d 1060 (1st Cir. 1980), *rev'd*, 101 S. Ct. 2748 (1981). The First Circuit said that it had twice held that punitive damages are available against section 1983 defendants when there are aggravating circumstances. Citing *Carlson* and *Carey*, the court noted that "[a]lthough the Supreme Court has never fully addressed the question, it has edged toward a similar conclusion." *Id.* at 1067. *See also*, *Soto v. Chardin*, 514 F. Supp. 339, 342-43 (D.P.R. 1981) (asserting that the Supreme Court has not definitively ruled on availability of punitive damages in § 1983 actions); *Ricca v. United States*, 488 F. Supp. 1317, 1327 (E.D.N.Y. 1980) (reserving judgment on the availability of punitive damages in *Bivens* actions until the resolution of the issue becomes necessary). One commentator's remarks further illustrate the confusion *Carlson* wrought: "The [*Carlson*] Court does not appear to actually hold that punitive damages may be recovered in a *Bivens* suit. The language is curiously tentative, and the placement of the punitive damages in the opinion (merely as an additional supporting factor)

In the third case in the progression, *City of Newport v. Fact Concerts, Inc.*,<sup>63</sup> an organization licensed by Newport, Rhode Island to present musical concerts and a concert promoter sued the city and its officials under section 1983 alleging that the license's cancellation was a violation of constitutional rights under color of state law. The plaintiffs sought compensatory and punitive damages against the city of Newport and certain named officials.<sup>64</sup>

At the district court level, the defendants challenged as error the court's instructions allowing the jury to award punitive damages against Newport. On appeal, the First Circuit stated that although the recovery of punitive damages in section 1983 actions was in a "state of flux,"<sup>65</sup> in two earlier First Circuit cases the court awarded punitive damages against section 1983 defendants.<sup>66</sup> The court cited *Carey* and *Carlson* for the proposition that the Supreme Court "has edged toward" validating punitive damages in section 1983 actions.<sup>67</sup> Second, the court viewed this in conjunction with the Supreme Court's determination that municipalities are persons within the meaning of section 1983,<sup>68</sup> and held that the trial judge's punitive damages instruction was not plain error.<sup>69</sup>

The Supreme Court granted certiorari and held that a municipality may not be held liable for punitive damages under section 1983.<sup>70</sup> The Court's opinion in *Newport*, written by Justice Blackmun, analyzed the role of punitive damages in constitutional tort actions. The Court first looked to the Civil Rights Act of 1871, because "tort liability created by section 1983 cannot be understood in a historical vacuum."<sup>71</sup> Although the language of section 1983 does not speak of any immunities,<sup>72</sup> the Court upheld a long line of cases de-

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implies that the Court has not addressed the issue squarely as a holding." Comment, *Constitutional Law, Bivens Again*, 10 STETSON L. REV. 333 n. 32 (1981).

63 101 S. Ct. 2748 (1981).

64 *Id.* at 2749.

65 *Fact Concerts, Inc., v. City of Newport*, 626 F. 2d 1060, 1067 (1st Cir. 1980), *rev'd* 101 S. Ct. 2748 (1981).

66 *Alicea Rosado v. Garcia Santiago*, 562 F. 2d 114, 121 (1st Cir. 1977); *Caperici v. Huntoon*, 397 F. 2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968).

67 *Fact Concerts, Inc., v. City of Newport*, 626 F. 2d 1060, 1067 (1st Cir. 1980), *rev'd*, 101 S. Ct. 2748 (1981). The Court viewed *Carlson's* language regarding punitive damages as dictum.

68 See note 5 and accompanying text *supra*.

69 *Fact Concerts, Inc., v. City of Newport*, 626 F. 2d 1060, 1067 (1st Cir. 1980), *rev'd*, 101 S. Ct. 2748 (1981).

70 101 S. Ct. at 2762.

71 *Id.* at 2755.

72 See note 3 *supra* for a complete text of section 1983.

clining to construe section 1983 as automatically abolishing the immunities traditionally afforded state officials. On the other hand, the Court held that only after careful consideration of history and policy would a particular immunity defense be incorporated into section 1983. "Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies it serves and its compatibility with the purposes of section 1983."<sup>73</sup>

The Court concluded that at the time Congress enacted what is now section 1983, municipal corporations were immune from punitive damages at common law.<sup>74</sup> Having thus determined that Congress did not intend to disturb this common law immunity, the Court pondered policy considerations to decide whether section 1983's objectives mandated a result contrary to the common law immunity of municipalities from punitive damages.

In beginning this examination, the Court stated that the purposes of punitive damages were retribution and deterrence, not compensation. Regarding retribution, the Court concluded that awarding punitive damages against a municipality would only "punish" innocent taxpayers and that "neither reason nor justice" dictated such a result.<sup>75</sup> Justice Blackmun noted that the Court "never has suggested that punishment is as prominent a purpose under the statute as are compensation and deterrence."<sup>76</sup>

Having determined that punishment was not a proper reason for allowing punitive damages against a municipality, the Court turned to the other major objective of punitive damages - deterrence. Asserting that deterrence of future abuses of power by persons acting under color of state law is an important purpose of section 1983, the Court said that "it is in this context that the Court's prior statements contemplating punitive damages in a 'proper' section 1983 action should be understood."<sup>77</sup> It thus appears that punitive damages are

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<sup>73</sup> 101 S. Ct. at 2755.

<sup>74</sup> *Id.* at 2756.

<sup>75</sup> *Id.* at 2759-60. But the Court went on to say that "if a *government official* acts knowingly and maliciously to deprive others of their civil rights, *he* may become the appropriate object of their vindictive sentiments." 101 S. Ct. at 2760 (emphasis added). This suggests that damages may be assessed against a government official for purely *punitive* purposes. But see notes 76-78 and accompanying text *infra* suggesting punishment is not an appropriate function of punitive damages.

<sup>76</sup> *Id.* at 2760.

<sup>77</sup> *Id.*

appropriate only when used to deter rather than to punish.<sup>78</sup>

After questioning whether punitive damages against the municipality would deter public officials from wrongdoing, the Court noted a more effective means of deterrence: "By allowing juries and courts to assess punitive damages in appropriate circumstances *against the offending official*, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations."<sup>79</sup> The Court then expressly affirmed *Carlson* to the extent that "a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer."<sup>80</sup>

## II. History and Policy Considerations Support Punitive Damages in Constitutional Tort Actions

In *Newport*, the Supreme Court refused to grant municipalities immunity from punitive damages until it had inquired into the history and policies underlying such an immunity.<sup>81</sup> Likewise, an examination of history and policy considerations supports the Supreme Court's recent decisions denying government officials immunity from punitive damages in constitutional tort actions.<sup>82</sup>

In *Newport*, Justice Blackmun examined the common law in determining whether history supported the immunity of municipal corporations from punitive damages.<sup>83</sup> Unlike the case with municipal corporations, common law history does not dictate a finding that government officials are immune from punitive damages in constitutional tort actions. The numerous lower federal court decisions allowing the recovery of punitive damages in section 1983 and *Bivens* actions even prior to the recent Supreme Court decisions indicate that the common law did not exempt from punitive damages govern-

78 One might conclude that punitive damages can *never* be recovered in a § 1983 action from reading *Carey's* statement that Congress did not intend to establish a more formidable deterrent than compensatory damages in § 1983 actions. See note 39 and accompanying text *supra*. But the Court's later language in *Newport* indicates this is not the case.

79 101 S. Ct. at 2761 (emphasis added).

80 *Id.* at 2761.

81 See note 73 and accompanying text *supra*.

82 These decisions are *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. 2748 (1981); *Carlson v. Green*, 100 S. Ct. 1468 (1980); *Carey v. Phipps*, 435 U.S. 247 (1978).

83 101 S. Ct. at 2756-59. In his analysis, Justice Blackmun cited several cases denying punitive damages against municipal corporations. *E.g.*, *Wilson v. City of Wheeling*, 19 W. Va. 323, 350 (1882); *Hunt v. City of Boonville*, 65 Mo. 620 (1877); *Woodham v. Nottingham*, 49 N.H. 387 (1870); *City of Chicago v. Langlass*, 52 Ill. 256 (1869).

ment agents guilty of violating a citizen's constitutional rights.<sup>84</sup>

Policy considerations also strongly support punitive damages in appropriate constitutional tort actions. Deterrence of future constitutional torts is a central purpose of both section 1983 and *Bivens* actions.<sup>85</sup> As the Supreme Court stated in *Bivens*, "[a]n agent acting — albeit unconstitutionally — in the name of the U.S. possesses a far greater capacity for harm than an individual . . . exercising no authority other than his own."<sup>86</sup> Therefore, both state and federal officials contemplating illegal activity face the prospect of a constitutional tort action.<sup>87</sup> Holding a government official personally liable for punitive damages is an effective deterrent.<sup>88</sup> Thus, a central purpose of constitutional tort actions is furthered through punitive damages.

Punitive damages in constitutional tort actions effectively deter constitutional violations, yet the qualified immunity afforded public officials under *Butz v. Economou*<sup>89</sup> guards against deterring legitimate government functions.<sup>90</sup> The qualified immunity protects public officials who act with a reasonable belief that they are not violating anyone's constitutional rights. If the government official knew he was violating the Constitution (subjective bad faith) or should have known he was violating the Constitution (objective bad faith), he loses the qualified immunity defense.<sup>91</sup> Thus, punitive damages will not deter government agents from performing their legitimate government functions since the courts restrict punitive damages to cases involving bad faith actions.

Punitive damages in constitutional tort actions are especially appropriate to vindicate constitutional rights in light of the Supreme Court's holding in *Carey*. *Carey* stands for the proposition that a violation of constitutional rights may not be compensable absent a showing of actual injury, at least in procedural due process cases.<sup>92</sup> The *Carey* holding may have been motivated in part by the Supreme

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84 See note 41 and accompanying text *supra*.

85 See notes 76-80 and accompanying text *supra*.

86 *Bivens v. Six Unknown Named Agents*, 403 U.S. at 392.

87 *Carlson v. Green*, 100 S. Ct. at 1475.

88 See note 80 and accompanying text *supra*.

89 438 U.S. 478 (1978).

90 As the Supreme Court stated in *Carlson*, a case where a federal agent was subject to a suit claiming punitive damages, "even if requiring [federal agents] to defend [the plaintiff's suit] might inhibit their official duties, the qualified immunity afforded them under *Butz v. Economou* . . . provides adequate protection." 100 S. Ct. at 1472.

91 See generally *Love*, *supra* note 44, at 1253.

92 See note 38 and accompanying text *supra*.

Court's concern about the federal caseload.<sup>93</sup> The number of section 1983 actions filed annually has skyrocketed since 1960.<sup>94</sup> A holding that presumed damages flowed from constitutional violations would have further added to the federal backlog. Many commentators have criticized the *Carey* Court for not adopting such a holding, arguing that the Court "minimized" the value of constitutional guarantees.<sup>95</sup>

But allowing punitive damages in constitutional tort actions softens the impact of these criticisms. While *Carey* may deter persons who are not actually injured from bringing a constitutional tort action, those who have suffered constitutional wrongs at the hands of a government official acting in bad faith will not hesitate to bring suit, since they can recover punitive damages even in the absence of actual harm.<sup>96</sup> Thus, history and policies underlying constitutional tort actions justify punitive damages in such actions.

### III. Requirements for the Recovery of Punitive Damages In Constitutional Tort Actions

It appears the Supreme Court favors punitive damages against offending officials in constitutional tort actions, and the history and policies underlying these actions support this position. However, courts will still need to consider two issues relating to the imposition of punitive damages: first, whether compensatory damages are a prerequisite to punitive damages, and second, the requisite state of mind of the government official.

Some state courts have ruled that compensatory damages are a prerequisite to the recovery of punitive damages.<sup>97</sup> But under the

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93 See, e.g., McClellan & Northcross, *Remedies and Damages for Violations of Constitutional Rights*, 18 DUQUESNE L. REV. 409 (1980). The authors contend that as a result of the flood of § 1983 claims, "it is perhaps, not surprising that recently the Supreme Court has undertaken a reconsideration of the basic nature and scope of section 1983." *Id.* at 412. The authors cite *Carey*'s requirement of actual injury as an illustration of the Court's narrowing of section 1983. *Id.* at 463.

94 The nationwide total of § 1983 lawsuits filed was 260 in 1960, 3,985 in 1970, and 12,313 in 1977. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 452 (1978).

95 The editors of the New Jersey Law Journal argued that "[t]he Constitution and the public it protects appear to be the losers in *Carey*. One dollar for a constitutional wrong . . . seems a poor price to put on rights that are priceless." Editorial, *Pricing the Constitution*, 102 N.J.L.J. 468 (1978). See generally *Damage Awards*, *supra* note 38 (advocates awarding damages without proof of actual injury).

96 *Carlson v. Green*, 100 S. Ct. at 1473 n. 9.

97 See, e.g., *Stacy v. Portland Pub. Co.*, 68 Me. 279 (1878) (questioning punishment if injury is merely technical and theoretical). D. DOBBS, *supra* note 20, § 3.9, at 32 n.32.

federal common law — and hence, in constitutional tort actions — nominal damages will support a punitive damages award.<sup>98</sup> This is particularly important in constitutional tort actions because “after *Carey* punitive damages may be the only significant remedy available in some section 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.”<sup>99</sup>

The Supreme Court has never directly addressed the state of mind necessary for a recovery of punitive damages in a constitutional tort action. Dicta from recent Supreme Court decisions, however, indicate that punitive damages are appropriate when a government official *knowingly or maliciously* deprives an individual of his constitutional rights.

In *Adickes v. Kress*,<sup>100</sup> Justice Brennan, in a concurring opinion, concluded that punitive damages were appropriate in a section 1983 action whenever the defendant “acted with actual knowledge that he was violating a [constitutional] right” or acted with “reckless disregard” of whether he was violating such a right.<sup>101</sup> Several lower federal courts have adopted this actual knowledge or reckless disregard standard as the state of mind requirement for the recovery of punitive damages in constitutional tort actions.<sup>102</sup> Several commentators approve of this standard instead of a standard requiring a greater degree of intent.<sup>103</sup> Several lower federal courts have adopted a malice standard requiring a higher degree of culpability than the knowledge or reckless disregard standard.<sup>104</sup> These latter courts seem to be in accord with the Supreme Court’s view of the state of mind necessary for the recovery of punitive damages in a constitutional tort action.

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98 See, e.g., *Brady v. Smith*, 656 F. 2d 466, 469 (9th Cir. 1981); *Silver v. Cormier*, 529 F. 2d 161 (10th Cir. 1976).

99 *Carlson v. Green*, 100 S. Ct. at 1478 n. 9. See also *Cochetti v. Desmond*, 572 F. 2d 102 (3d Cir. 1978), and *McClellan & Northcross*, *supra* note 93 at 466. In *Cochetti*, the court noted that “the availability of punitive damages as a deterrent may be more significant than ever today, in view of the apparent trend of decisions curtailing the powers of federal courts to impose equitable remedies to terminate [constitutional] violations.” 572 F. 2d at 105-06.

100 398 U.S. 144 (1970).

101 *Id.* at 233.

102 See, e.g., *Haywood v. Ball*, 634 F. 2d 740, 742 (4th Cir. 1980); *Cochetti v. Desmond*, 572 F. 2d 102, 105 (3d Cir. 1978); *Silver v. Cormier*, 529 F. 2d 161, 163 (10th Cir. 1976); *Stengel v. Belcher*, 522 F. 2d 438, 444 n. 4 (6th Cir. 1975).

103 See, e.g., *Love*, *supra* note 44, at 1281; *McClellan & Northcross*, *supra* note 93, at 467.

104 *Konczak v. Tyrell*, 603 F. 2d 131 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980); *Crowe v. Lucas*, 595 F. 2d 985 (5th Cir. 1979); *Huntley v. Community School Bd.*, 579 F. 2d 738 (2d Cir. 1978); *Skinner v. Spellman*, 480 F. 2d 539, 540 (4th Cir. 1973) (*per curiam*); *Caperci v. Huntoon*, 397 F. 2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968).



In *Carey* and *Carlson*, the Supreme Court implied that a "malicious intention" was necessary for the imposition of punitive damages in a constitutional tort action.<sup>105</sup> In *Newport*, the Court's language strongly supported the necessity of a malicious intent in awarding punitive damages: "If a government official acts *knowingly and maliciously* he may become the appropriate object of the community's vindictive sentiments."<sup>106</sup> The Court also noted that "several state statutes requiring municipal corporations to indemnify their employees for adverse judgments rendered as a result of performance of governmental duties specifically exclude indemnification for malicious or willful misconduct by the employees."<sup>107</sup>

Since government officials enjoy a qualified immunity they can be held liable for damages in constitutional tort actions only if they knew or should have known that they were violating the Constitution. Given the state of mind requirement for punitive damages that the Supreme Court would apparently adopt in the proper case, a government official who should have known he was violating the Constitution or who acted in reckless disregard of the Constitution would not be liable for punitive damages although he would not be immune from suit.

#### IV. Conclusion

The Supreme Court has not yet definitively held in what constitutional tort actions punitive damages are proper. Three recent Supreme Court decisions, however, when read together, indicate that the Court would sanction punitive damages in constitutional tort actions against government officials responsible for constitutional violations.

In *Carey*, the Supreme Court held that compensation of the aggrieved party was the primary purpose of a section 1983 award. The Court left open the possibility that punitive damages might be recoverable in a proper section 1983 action, although there they held the plaintiff had to establish an actual injury before the Court would award more than nominal damages. In *Carlson*, the Court stated that *Bivens* actions serve a two-fold purpose: compensation and deterrence. There the Court stressed the increased deterrence punitive

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<sup>105</sup> *Carey v. Phipps*, 435 U.S. 247, 257 n. 11 (1978); *Carlson v. Green*, 101 S. Ct. at 1473 n. 9 (punitive damages only significant remedy where constitutional rights are "maliciously" violated).

<sup>106</sup> *City of Newport v. Fact Concerts, Inc.*, 101 S. Ct. at 2760 (emphasis added).

<sup>107</sup> *Id.* at 2761 n. 30 (emphasis added).

damages provide. Finally, in *Newport*, the Supreme Court held a municipality may not be held liable for punitive damages under section 1983, although punitive damages were proper where such an award deterred future constitutional violations.

History and policy considerations support the recovery of punitive damages in constitutional tort actions against offending officials. The law entitles such officials to a qualified immunity and thus punitive damages would effectively deter conduct resulting in constitutional violations without deterring legitimate government functions.

Consistent with current federal law, plaintiffs would not have to show compensatory damages to recover punitive damages in constitutional tort actions; a mere showing of nominal damages would be sufficient. To recover punitive damages, however, recent Supreme Court decisions indicate that the plaintiff will have to prove the government official knowingly or maliciously deprived him of constitutional rights. The Supreme Court, when presented with the proper case, should explicitly affirm the availability of punitive damages against offending government officials in constitutional tort actions.

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