

Supreme Court of the United States

WILLIAM H. SMITH,

Petitioner

v.

DANIEL R. WADE

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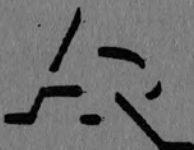
No. 81-1196

Washington, D. C.

Wednesday, November 10, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM H. SMITH, :
Petitioner :
v. : No. 81-1196
DANIEL R. WADE :
- - - - -x

Washington, D.C.
Wednesday, November 10, 1982

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
2:02 p.m.

APPEARANCES:
ROBERT PRESSON, ESQ., Jefferson City, Mo.; on behalf of
the Petitioner.
BRADLEY H. LOCKENVITZ, ESQ., Linn, Mo.; on behalf of the
Respondent.

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C-O-N-T-E-N-T-S

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1 P_R_O_C_E_E_D_I_N_G_S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Smith against Wade.

4 Mr. Presson, I think you may proceed whenever
5 you are ready.

6 ORAL ARGUMENT OF ROBERT PRESSON, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. KOPPE: Mr. Chief Justice and may it
9 please the Court:

10 This case arises under 42 U.S.C. Section
11 1983. On the basis of an allegation by the Plaintiff to
12 his rights under the Eighth Amendment, made applicable
13 through the Fourteenth, to be free from cruel and
14 unusual punishment, this case then presents the issue of
15 what is the proper standard for the award of punitive
16 damages in an action under 42 U.S.C. Section 1983.

17 Last year in the case of City of Newport
18 versus Fact Concerts, Incorporated, this Court stated
19 that in a proper case under 42 U.S.C. Section 1983
20 punitive damages were available. The question now is
21 what is a proper case. This had not been reached before
22 because in the Newport case it was found that
23 municipalities were actually immune.

24 Although the issue was not directly reached
25 and did not have to be reached, there was a very strong

1 indication by this Court as to what the appropriate
2 standard for punitive damages was. In the course of the
3 opinion in that case this Court stated that a public
4 official who knowingly and maliciously acts to deprive
5 one of his civil rights is a proper subject for punitive
6 damages.

7 This in turn echoes what this Court had said
8 in the earlier opinion, about three years earlier, in
9 Carey versus Piphus. Again, it was dicta. The issue of
10 punitive damages was not strictly speaking before the
11 Court. The Court did state that punitive damages would
12 not have been an appropriate award under the
13 circumstances in Carey because there was no evidence of
14 a malicious intent to deprive of rights or to do
15 injury.

16 QUESTION: Mr. Presson, what have you been
17 able to discover in the way of legislative history at
18 the time of the enactment of Section 1983 that would
19 indicate Congress was concerned about, if it so
20 indicated, about damages, and if you didn't find
21 anything specifically in the legislative history, what
22 was the law generally at that time as far as punitive
23 damages were concerned?

24 MR. PRESSON: I'm not aware of anything in
25 particular in the legislative history about punitive

1 damages, and in fact I believe this Court stated, I
2 believe, in the Carey case that Congress in enacting
3 1983 had never really discussed the issue of damages
4 much at all.

5 QUESTION: Would you agree that punitive
6 damages were generally awarded in tort cases at that
7 time?

8 MR. PRESSON: I believe they were available,
9 yes, as early as 1851.

10 QUESTION: In all tort cases?

11 MR. PRESSON: Pardon?

12 QUESTION: In all tort cases were they
13 available at common law?

14 MR. PRESSON: Not in all tort cases, no, Your
15 Honor. Again, I still think --

16 QUESTION: Well, a minority or a majority or
17 what?

18 MR. PRESSON: Well, I think again it becomes
19 the standard to be applied, whether the facts of any
20 particular case --

21 QUESTION: Was there any burden to show
22 intent, for example, as a predicate for punitive
23 damages?

24 MR. PRESSON: In some jurisdictions there may
25 have been. I'm not aware. Mostly I believe it was

1 terms in phrased -- phrased in terms, excuse me -- of a
2 reckless disregard. This is what this Court has stated,
3 I believe, 100 years ago in the St. Paul case.

4 QUESTION: Didn't the Philadelphia, Wilmington
5 and Baltimore Railroad case, which had been decided by
6 this Court in 1858, talk about punitive damages in terms
7 that the injury complained of has been inflicted
8 maliciously or wantonly?

9 MR. PRESSON: I'm not specifically familiar
10 with that particular case. The Milwaukee and St. Paul
11 case cited in the brief indicates a reckless disregard
12 or whatever that is the equivalent of malicious intent,
13 is the way this Court phrased it at that time. That
14 case I believe was rendered in 1875. So about that same
15 time I believe that's the indication this Court had
16 given as to what the appropriate standard was.

17 I think, though, that whatever it might have
18 been immediately preceding the enactment of 1983 or
19 perhaps even for the short time thereafter, it is not
20 necessarily a static consideration. Because there is so
21 very little, in fact nothing much, said about the issue
22 of damages pertaining to 1983, I think it is a rather
23 fluid concept, and this Court -

24 QUESTION: What do you mean by "fluid
25 concept"?

1 MR. PRESSON: Well, in the Milwaukee and St.
2 Paul Railway case this Court rejected what had evidently
3 earlier been the appropriate standard of gross
4 negligence as the standard, and said attempts to
5 adequately define gross negligence have been
6 ineffective, that is no longer the proper standard, and
7 redefined the standard in terms of reckless conduct,
8 which this Court said is of such a degree that it is the
9 equivalent of a malicious intent.

10 So in that sense, as early as 1875 there was
11 an attempt to redefine what an appropriate case for
12 punitive damages was.

13 QUESTION: For 1983 purposes?

14 MR. PRESSON: That was not specifically a 1983
15 case, no, Your Honor.

16 QUESTION: Well, do you think the standard
17 should be any stricter in 1983 cases than in other
18 types, tort cases for example?

19 MR. PRESSON: I believe so, Your Honor.

20 QUESTION: It should be?

21 MR. PRESSON: I believe so.

22 QUESTION: Why?

23 MR. PRESSON: Well --

24 QUESTION: For example, an ordinary tort suit
25 against a drunken driver who strikes you in the street.

1 Do you suppose you could get punitive damages in such a
2 case?

3 MR. PRESSON: It would be a possibility,
4 depending again upon --

5 QUESTION: By what standard?

6 MR. PRESSON: -- whatever the state standards
7 for punitive damages were.

8 QUESTION: I know, but what do you think it
9 ought to be?

10 MR. PRESSON: Pardon me?

11 QUESTION: What do you think it ought to be?

12 MR. PRESSON: For state cases?

13 QUESTION: For the kind of case I've given
14 you, the hypothetical I've given you. Should it be
15 recklessness, intentional, malice, something like that?

16 MR. PRESSON: In state personal injury cases?
17 I would say that if I were standing before the Missouri
18 Supreme Court today I'd be arguing essentially the same
19 thing.

20 QUESTION: That it has to be malicious
21 intent?

22 MR. PRESSON: Yes.

23 QUESTION: And so you would apply that
24 standard to 1983 and to torts generally, would you?

25 MR. PRESSON: I believe so, Your Honor.

1 QUESTION: Are there Missouri cases allowing
2 punitive damages in garden variety tort cases, and if so
3 on the basis of what standard?

4 MR. PRESSON: The basic standard is one of
5 recklessness, Your Honor. In fact, if you look at the
6 instruction which was actually given in this case, that
7 pretty much is the Missouri-approved form instruction.
8 That was what the judge wanted to give, so he pulled out
9 the MAI form book and used that. So that is the
10 standard in Missouri.

11 QUESTION: In ordinary tort cases?

12 MR. PRESSON: Right.

13 QUESTION: I'm still waiting for your answer
14 -- maybe I missed it -- to Justice Brennan's question of
15 why there should be a different standard for officers.

16 MR. PRESSON: Well, I think particularly in
17 this situation, the role of the correctional officer or
18 any state official, who are the ones that are being
19 subject to 1983 -- the qualified immunity which this
20 Court has recognized I think would be undermined by
21 application of any lesser standard.

22 QUESTION: Well, doesn't that in itself afford
23 a substantial protection?

24 MR. PRESSON: It affords a substantial
25 protection. What it was designed to do, I believe, was

1 to afford the protection from compensatory damages. But
2 it would appear to me that if on the basis of that same
3 standard you're going to allow virtually unlimited
4 punitive damages, then you are essentially undermining
5 the protection which has been afforded by the qualified
6 immunity to begin with.

7 As this Court has pointed out in other
8 contexts, punitive damages are essentially
9 unreviewable. Jury discretion is virtually unlimited.

10 QUESTION: Doesn't the trial judge normally
11 have jurisdiction to reduce the amount of punitive
12 damages if the judge determines it's appropriate?

13 MR. PRESSON: That is a possibility. But as
14 this Court I believe stated in either the Foust or the
15 Gertz case, this is limited by only, to quote the Court,
16 "the gentle rule that it not be excessive." Essentially
17 I think, as this Court has pointed out on numerous
18 occasions, they are virtually unlimited and courts
19 appear to be very reluctant to interfere with the jury
20 discretion.

21 I know of a recent case out of the Court of
22 Appeals for the Eighth Circuit, again the court
23 indicating that it would probably not have made the same
24 determination on the appropriateness of punitive damages
25 in that case, but again on the other hand they didn't

1 think it was an appropriate case for them to interfere
2 with the jury's discretion in that regard.

3 I believe the question of the appropriate
4 standard -- quite apart from the Court's previous
5 indications in Carey and Newport, I believe the
6 rationale behind punitive damages can only be served by
7 a more explicit standard, and that explicit standard I
8 believe was best defined as what this Court has
9 indicated in terms of actual malice.

10 The primary purpose as I see it of 1983 is not
11 particularly punishment, as this Court noted in --

12 QUESTION: Actual malice, define that.

13 MR. PRESSON: Pardon?

14 QUESTION: Actual malice; how do you define
15 actual malice?

16 MR. PRESSON: In terms of what this Court has
17 said in Carey and Newport: a malicious intent to
18 deprive one of one's civil rights or to do specific
19 injury to that individual.

20 QUESTION: It requires an intent?

21 MR. PRESSON: As I read what this Court said
22 in those cases, yes, it would, Your Honor.

23 QUESTION: It isn't just a passive factor?

24 MR. PRESSON: I don't believe it could be
25 passive.

1 QUESTION: Not even recklessness would satisfy
2 that, would it?

3 MR. PRESSON: No, not as the standard, because
4 recklessness -- this Court has indicated in the sense of
5 qualified immunity that one knew or should have known
6 that your actions were going to deprive someone of his
7 constitutional rights. And although in the context of
8 that the Court has never specifically used the term
9 "reckless" that I'm aware of, it seems to me that if one
10 knew or should have known, that approaches being
11 reckless if it isn't in fact.

12 I think the Court then -- the basic standard
13 of liability is a reckless standard, and it was
14 established at that level for a very particular reason.
15 In other words, it is not enough to say, well, the level
16 is already high, you don't need to go any higher for
17 punitive damages, because I think the level has been set
18 high for a very specific reason, that reason being that
19 for state officials who do exercise discretion and who
20 are therefore entitled to the protection of qualified
21 immunity, that the dangers of not acting or being
22 inhibited in their actions can often be as great or
23 greater than their actions themselves.

24 The Court pointed out the dangers of punitive
25 damages and their excessiveness and unpredictability in

1 the Foust and Gertz cases cited in the Petitioner's
2 brief. In those cases, the Court indicated that even if
3 confident that punitive damages may not be available,
4 that say the labor union in the Foust case could still
5 feel compelled to pass up fair settlement offers or to
6 pursue frivolous claims, actions which this Court
7 described as not being in the best interests of the
8 union members.

9 Similarly for state officials, their actions
10 often affect many other people other than the Plaintiff
11 who eventually sues them in a 1983 action. In
12 particular here, the Defendant was responsible not just
13 for the safety of the Plaintiff; he was responsible for
14 the safety of anywhere from 110 to 120 inmates in that
15 particular unit. And the decision he makes at any
16 particular time regarding any one of them can affect the
17 safety and well-being of all of them, and I think he
18 needs to have the protection afforded by the qualified
19 immunity to make that informed discretion decision
20 without, as this Court has said, undue timidity.

21 QUESTION: Mr. Presson, may I interrupt you
22 for just a second. You mentioned earlier that the
23 instruction was much like the Missouri instruction, the
24 instruction generally used in Missouri in a tort case.
25 Was there an objection made to the instruction in this

1 case?

2 MR. PRESSON: To the punitive damage, yes,
3 Your Honor.

4 QUESTION: Yes, there was. Thank you.

5 MR. PRESSON: I believe that as far as
6 furthering what this Court has indicated was the primary
7 purpose of 1983 apart from compensation, and that being
8 deterrence, it is best served by an explicit standard,
9 as explicit as is humanly possible. Because if one
10 cannot predict what is being prohibited or one does not
11 know what is being prohibited, then it is very unlikely
12 that one could be deterred. Or if one does happen to
13 avoid what is subsequently construed to be prohibited,
14 then it is sheer happenstance, rather than the exercise
15 of an informed decisionmaking.

16 On the other hand, to raise the level of
17 punitive damages in this case, to make it more explicit,
18 and I believe in fact to enhance the deterrence
19 rationale of 1983, does not really do any damage to that
20 deterrence rationale.

21 QUESTION: I thought, Mr. Presson, that the
22 old notion of punitive damages was that punitive damages
23 were smart money. In other words, a punishment for the
24 offender by requiring him to pay this extra amount in
25 order that he be deterred from doing that again in the

1 future. Now, 1983 suits, at least this one I gather is
2 one for constitutional rights, isn't it?

3 MR. PRESSON: That's correct.

4 QUESTION: Well, if one has been guilty of
5 denying someone his constitutional rights, wouldn't it
6 deter future constitutional violations if he had to pay
7 some smart money?

8 MR. PRESSON: It can deter only if you can
9 come up with a common principle such that you know what
10 --

11 QUESTION: Well, the common principle I'm
12 suggesting is, he violated the Plaintiff's
13 constitutional rights.

14 MR. PRESSON: That is not always in practice
15 that easy a determination to make, particularly --

16 QUESTION: Whether it's easy or not, we start
17 with the premise that there's been the violation, he's
18 had a verdict in a 1983 suit because he's been denied
19 his constitutional rights.

20 MR. PRESSON: True.

21 QUESTION: All right. Well, why in that
22 situation should not he then be subject to the payment
23 of smart money in the form of punitive damages?

24 MR. PRESSON: Well, again I get back to the
25 reason for punitive damages, and that is in my mind

1 primarily deterrence. The process of getting from a
2 particular judgment to deterring in the future is an
3 inductive process. In other words, from one specific
4 instance try to reach a general proposition. And I
5 think by examining the cases which have dealt with Eight
6 Amendment issues in terms of failure to protect you can
7 come up with common language, but very few what I would
8 call common principles such that you could predict what
9 the result would be with any reasonable degree of
10 certainty.

11 Some of the cases cited by the Plaintiff in
12 his brief indicate the inconsistencies which abound in
13 this field. One of the cases, Schaal versus Rowe,
14 indicated that if you turn down a request for a transfer
15 specifically when the inmate identified why he wanted to
16 be transferred, and that was that he had been
17 threatened, they decided it is not an appropriate case
18 for a transfer and he subsequently then is assaulted,
19 that that didn't even present a case for liability.
20 They said they were not indifferent. Perhaps they made
21 the wrong decision, perhaps they made a negligent
22 decision. But that wasn't even a case appropriate for
23 liability, much less punitive damages.

24 And as I view it, we really have nothing too
25 much more than that. I think this was a marginal case

1 as far as a reckless standard to begin with. But I
2 think when you look at the cases -- and some of them
3 cited in the briefs do involve decisions of correctional
4 officers and officials dealing with custody status or
5 transfers of inmates, which is essentially what we have
6 here -- that quite often you are presented with, in the
7 words of one court, alternative Eighth Amendment
8 claims.

9 In other words, someone makes a threat, the
10 person against whom it is made comes to complain. So
11 what do you do? Do you put him in protective status on
12 the basis of the mere threat? Do you lock up the person
13 who made it?

14 It is a difficult decision, and while in
15 hindsight a court and a jury might say, well, you were
16 reckless in that, I don't think that provides much
17 guidance in the way of deterrence to the officers and
18 officials who have to make that decision on a day to day
19 basis. And as I say, they don't have -- they have to
20 deal with it in terms of many situations and not simply
21 one.

22 QUESTION: Mr. Presson, do you have any
23 statistics gathered as to how many 1983 actions which
24 have resulted in plaintiff's verdicts have also included
25 punitive damages?

1 MR. PRESSON: No, I did not do such a
2 compilation. I'm sorry.

3 QUESTION: Do you know how often it's happened
4 in your state?

5 MR. PRESSON: As far as 1983, I'm not aware of
6 any until this one, although I suppose there could have
7 been some actions against municipalities or other
8 governmental units that I might not be aware of.

9 I think the need for a more explicit standard
10 is not only to enhance the deterrence aspect of 1983,
11 but it is even more important to limit what this Court
12 has indicated is the possible abuse of punitive damages,
13 which as this Court has indicated are not designed to
14 compensate for any actual injury. They are intended as
15 a quasi-criminal fine of sorts and are often subject to
16 abuse.

17 This Court has indicated that they are subject
18 to being used against unpopular views or against
19 unpopular defendants. Unfortunately, in this day and
20 age perhaps state defendants are unpopular. But I think
21 the Court has indicated that they are subject to severe
22 abuse, and I think in a way a higher standard of
23 conduct, one more readily understandable, I think, and
24 perhaps more consistently understandable, might
25 eliminate or at least reduce the possibility for abuse.

1 An alternative argument is that if 1983 in all
2 instances does not require an actual malice showing, I
3 think it does in this instance, simply because as a
4 general procedural or philosophical matter the courts
5 always talk in terms of punitive damages being available
6 for aggravating circumstances. I think the very use of
7 the term "aggravating" implies a comparative analysis,
8 two different levels of conduct, one being higher than
9 the other.

10 As I stated earlier, the level of conduct in
11 this case and applied as it is by qualified immunity was
12 placed there for a very specific societal reason, and it
13 was placed there because often the risks of not doing
14 something are just as great as actually acting, and that
15 the risk of error under those circumstances deserves
16 some protection in making an informed decision.

17 I think it would undermine that policy if
18 anything less than actual malice were to be implied. I
19 also believe it would be inconsistent with this Court's
20 opinion in Carey. In Carey this Court indicated that
21 you could not presume damages, even assuming proof of a
22 constitutional violation. That being true, it seems to
23 me we would simply be reaching the same result here by
24 simply saying, well, they're punitive damages and not
25 presumed damages.

1 But in either instance, Plaintiff is saying
2 they should both -- or the punitive damages should be on
3 the same level or the same standard of liability as the
4 actual damages. And yet, presumed damages or punitive
5 damages is neither one tied to the theory of
6 compensation or to the extent of any actual injury.

7 It would seem to be that to award punitive
8 damages on the same standard of conduct as that for the
9 basic liability gets around and reaches the same result
10 which was closed off in this Court's opinion in Carey.
11 I believe, therefore, that both the policy of deterrence
12 would neither be inhibited -- because compensatory and
13 the threat of attorney's fees in themselves carry with
14 it a deterrent effect, as this Court has noted on
15 previous occasions.

16 To the extent that any further deterrence is
17 appropriate under 1983, I think it is best served by as
18 explicit a standard as possible, and I say that because,
19 unlike either the attorney's fees or the compensatory
20 damages, which are inherently limited by actual costs or
21 actual damages, as this Court has noted on many
22 occasions, punitive damages have no such inherent
23 restriction and are essentially unlimited.

24 QUESTION: Mr. Attorney General, if you lose
25 this case who will pay the judgment?

1 MR. PRESSON: Well, that's a good question,
2 Your Honor. Certainly insofar as the actual damages are
3 concerned, I think it would clearly be the state under
4 the tort defense fund.

5 QUESTION: Under what?

6 MR. PRESSON: Missouri has established what it
7 calls the tort defense fund for certain state officers
8 and officials.

9 QUESTION: The individual man was sued in his
10 individual and official capacities.

11 MR. PRESSON: Well, it wouldn't make any
12 difference.

13 QUESTION: It wouldn't make any difference if
14 he was sued only in the individual capacity?

15 MR. PRESSON: If he was one of the named
16 parties covered by the tort defense fund, even named
17 individually, I think he would be covered.

18 The question becomes --

19 QUESTION: The existence of that fund -- to
20 what extent would the state be deterred by a punitive
21 judgment?

22 QUESTION: Well, that fund doesn't cover
23 punitive damages, does it?

24 MR. PRESSON: Well, that's what I said was a
25 good question. It's never really been decided because

1 as far as I know this was the first punitive damage
2 award against the state. What it says in its own terms
3 is that it will pay a judgment rendered against certain
4 specified officers.

5 QUESTION: Well, the judgment wasn't against
6 the state, was it?

7 MR. PRESSON: Not in this instance, no, no.
8 But the way the statute reads, it says out of the tort
9 defense fund you'll pay judgments rendered against
10 various officials. Included among them are employees of
11 the Department of Corrections, as the Petitioner here.

12 QUESTION: Are these people bonded?

13 MR. PRESSON: In some instances yes, but it's
14 my opinion not specifically for these. In other words,
15 for instance, wardens and superintendents are required
16 to have bonds. Generally they have a blanket sort of
17 bond. But what that generally covers is use or misuse
18 of state property and damages actually suffered by the
19 state for which the person bonded was being covered. In
20 other words, I don't think it's sort of -- it's not an
21 insurance policy as I view it.

22 The only protection they really have insofar
23 as suits of this nature would be the tort defense fund,
24 and as to that I can't give you a definite answer as to
25 whether it would cover punitives. But it might very

1 well.

2 QUESTION: Who will decide whether it does?
3 Who will decide whether it covers it? I'm sure the
4 gentleman will make the claim.

5 MR. PRESSON: Well, it could go to the Supreme
6 Court. There are two officials that have roles in the
7 administration of the tort defense fund, the attorney
8 general and the commissioner of administration.

9 QUESTION: In other words, your office has a
10 voice in it.

11 MR. PRESSON: We are involved in it. I think
12 ultimately we make recommendations, as I understand it,
13 but the commissioner of administration, as I remember
14 the wording of the statute, has discretion on paying a
15 judgment.

16 QUESTION: But if the state attorney general
17 should construe the statute as requiring the
18 reimbursement in this situation, at least that opinion
19 would have some weight, I suppose?

20 MR. PRESSON: It would have some weight,
21 although state officers are not specifically required to
22 follow opinions issued by our office.

23 QUESTION: Who provides the legal defense in
24 the lawsuit? Is that provided by your office?

25 MR. PRESSON: Yes, and it was in this instance

1 as well.

2 QUESTION: Generally is that the case? Is
3 that a matter of state law or just practice and policy?

4 MR. PRESSON: Well, I suppose it arose
5 primarily to begin with as a matter of practice and
6 policy. Now specifically under the tort defense fund we
7 have a role in investigating and making recommendations
8 even as far as settlement.

9 QUESTION: Is that the attorney general's
10 office or is it in the county? Is it your office?

11 MR. PRESSON: It's the state attorney
12 general's office. I think both as a matter of common
13 understanding and practice as well as what our role is
14 delineated in the tort defense fund statute, we
15 undertake generally to represent state defendants,
16 although in certain instances perhaps involving
17 conflicts of interest we have not done that. But as a
18 general rule we do.

19 I'd like to reserve the remainder of my time
20 if I may.

21 CHIEF JUSTICE BURGER: Very well.

22 Mr. Lockenvitz.

23 ORAL ARGUMENT OF BRADLEY H. LOCKENVITZ, ESQ.

24 ON BEHALF OF RESPONDENT

25 MR. LOCKENVITZ: Mr. Chief Justice and may it

1 please the Court;

2 Recklessness implies malice. A reckless or
3 callous disregard of constitutional rights under color
4 of law resulting in physical injury justifies an award
5 of punitive damages under Section 1983.

6 QUESTION: Are you asserting that,
7 representing that to be a universal doctrine of law?

8 MR. LOCKENVITZ: I'm asserting that, yes, Your
9 Honor. And I believe the availability of punitive
10 damages in cases such as this is necessary to preserve
11 the policy of deterrence inherent in the Civil Rights
12 Act.

13 The standard is the same as that found in the
14 common law in many jurisdictions in this country at the
15 time this Act was initiated. Coincidentally enough, it
16 is the same standard required to find liability for
17 actual damages against prison officials in this case.

18 I have found four states where the common law
19 of punitive damages included some element of
20 recklessness or gross negligence at the time the Act
21 enacted, the states of Wisconsin, California, Alabama,
22 Maine, and there may be others that I did not find. But
23 a consistent theme throughout these cases is one where,
24 in talking of malice or reckless disregard, the courts
25 referred to it in the disjunctive. For example, in the

1 state of California.

2 QUESTION: Excuse me. Are you conceding,
3 then, that at least to the extent of recklessness and
4 callous disregard, there is that much has to be proved
5 before there may be an award of punitive damages in a
6 1983 suit?

7 MR. LOCKENVITZ: Yes, Your Honor.

8 QUESTION: I see.

9 MR. LOCKENVITZ: But I am saying that the
10 standard that was given to the jury --

11 QUESTION: I mean, that falls short, does it,
12 of actual intent, malicious intent?

13 MR. LOCKENVITZ: As far as --

14 QUESTION: How does callous disregard -- how
15 different is that from malicious intent?

16 MR. LOCKENVITZ: I believe malicious intent
17 can be implied by a callous disregard of known threats
18 to health and safety, as this Court said in Estelle.

19 The common law I was referring to refers to a
20 malicious motive or a reckless disregard in several
21 cases. I might add that the Milwaukee case of this
22 United States Supreme Court, cited by the Petitioner, of
23 1975, shortly after the enactment of the Civil Rights
24 Act, referred to reckless indifference, and again it was
25 in the disjunctive. It said if the act was done

1 willfully or was the result of that reckless
2 indifference to the rights of others, punitive damages
3 would be awarded.

4 QUESTION: Well, I'm not quite clear how much
5 of an issue we have, in light of your concession.

6 MR. LOCKENVITZ: It is my position, Your
7 Honor, that --

8 QUESTION: Well, how do you differ from the
9 state?

10 MR. LOCKENVITZ: I believe we have shown the
11 reckless --

12 QUESTION: What do you think is the standard
13 that you have to satisfy in order to get a punitive
14 damage award?

15 MR. LOCKENVITZ: Egregious conduct, reckless
16 disregard.

17 QUESTION: Well, now I'm asking you, how does
18 that differ from what the state's insisted?

19 MR. LOCKENVITZ: I believe the state is asking
20 for us to bear an impossible burden. I think they're
21 asking us to look into the head of William Henry Smith
22 to determine what he really wanted to do in this case.

23 QUESTION: You're not objecting to the
24 judgment below.

25 MR. LOCKENVITZ: That's right.

1 QUESTION: You think the standard was quite
2 proper. It's the state that thinks that there should be
3 that standard that they insist on as different from the
4 one applied below.

5 MR. LOCKENVITZ: Yes.

6 QUESTION: They're the one that wants a
7 different standard from what was applied below.

8 MR. LOCKENVITZ: That's correct, Your Honor.
9 And I'm asking this Court not to initiate a new
10 standard, but to maintain what I argue is the standard
11 that has been here all along.

12 QUESTION: Whether it's the same, whether the
13 standard the state suggests is the same or different,
14 you don't really care. You just say that the one that
15 you've got is satisfactory, and that it's authorized by
16 1983.

17 MR. LOCKENVITZ: I say it is authorized, and
18 perhaps I'm not making myself clear. I believe the
19 state is asking for us to show something along the lines
20 of, William Henry Smith said, Danny Wade, I'm going to
21 put you in the cell so you can be -- have your
22 constitutional rights violated. We cannot prove that.
23 We did not prove that.

24 But I don't see that as any different from an
25 example that you brought up with drunken driving. We

1 put people in jail in Missouri all the time for reckless
2 disregard when driving while drunk, or manslaughter.
3 And I believe that's the same standard that you apply in
4 1983 cases for punitive damages.

5 QUESTION: How many people would you say are
6 confined in Missouri under the reckless disregard, that
7 is not an affirmative intent?

8 MR. LOCKENVITZ: For manslaughter?

9 QUESTION: For anything.

10 MR. LOCKENVITZ: It would be difficult for me
11 to say, Your Honor, but the number is substantial.

12 QUESTION: How many judgments have you with
13 additional damages on 1983 actions in Missouri?

14 MR. LOCKENVITZ: To my knowledge, this is the
15 only one.

16 Your Honors, I think when looking at the
17 standard to determine whether or not there's malice
18 there, whether or not there's aggravating circumstances
19 -- when I speak of malice, I'm speaking of the implied
20 malice that comes with the careless disregard -- you
21 also have to look at the risk.

22 QUESTION: Mr. Lockenvitz, you may not have
23 had occasion to look at our case of Sandstrom versus
24 Montana, where -- which is of course in a quite
25 different field. There's no reason why you should

1 have. But I think that case goes into the problems of
2 telling a factfinder that he can find intent simply on
3 the basis of the presumption that everybody intended the
4 normal consequences of their acts and that sort of
5 thing.

6 You used the term "implied malice" just now.
7 Could you elaborate on how you would define that?

8 MR. LOCKENVITZ: Well, Your Honor, I just go
9 back to the common law cases where this Court and others
10 have said that you must show malice or reckless
11 disregard, and there are instances where reckless
12 disregard leads the court to believe that there was
13 malice and to find malice.

14 QUESTION: Do you think the common law cases
15 from this Court or elsewhere generally require a higher
16 standard for recovery of punitive damages than they do
17 for the recovery for the tort itself?

18 MR. LOCKENVITZ: Yes, Your Honor. But this is
19 an extraordinary case in that the standard that we had
20 to meet to reach actual damages at all, because of the
21 qualified immunity, because of the prison officials
22 being involved, is the same standard as that required in
23 the common law for punitive damages.

24 QUESTION: But if you have to reach a higher
25 standard to impose liability at all and the common law

1 cases suggest that there should be a difference in
2 standards for actual and punitive damages, wouldn't it
3 make sense here to say that you should have had to prove
4 a still higher standard to get punitive?

5 MR. LOCKENVITZ: I see the gist of your
6 statement, Your Honor. However, again I refer back.
7 You're talking about some element of punishment and here
8 we're really talking about deterrence. If you go back
9 to our drunken driving cases and our manslaughter cases,
10 we put people in jail for those same standards with the
11 hope that they'll be deterred, and the deterrence -- and
12 punished. The deterrence and punishment policies are in
13 both cases.

14 And we don't have to prove any higher standard
15 to find people guilty of drunken driving or manslaughter
16 in Missouri. Once we meet that burden we've got it, and
17 I believe the same thing would apply here in this
18 extraordinary case.

19 You see, Your Honor, I don't see this as
20 opening the floodgates for prison litigation. First of
21 all, because as I mentioned the facts are extraordinary
22 in the case in that we were able to meet the burden at
23 all. But at the same time, punitive damages under 1983
24 are limited to individuals. There's no deep pocket
25 there. We could not have gotten punitive damages

1 against a municipality under City of Newport.

2 There is a good question about whether or not
3 the tort defense fund will cover punitive damages in
4 this case.

5 QUESTION: Could I ask you a question,
6 counsel, due to the remark you just dropped. I thought
7 I read Chief Judge Lay's opinion for the majority below
8 as saying that the standard for punitive damages equates
9 with that for ordinary tort liability. Did you read it
10 that way?

11 MR. LOCKENVITZ: Yes, for ordinary tort
12 liability in cases of this nature, is the way I read
13 that.

14 QUESTION: And I thought in one of your
15 responses to Justice Rehnquist you rather conceded that
16 maybe there is a higher standard here.

17 MR. LOCKENVITZ: There's a higher standard for
18 finding the basic liability to get compensatory
19 damages. We have that higher standard because of the
20 prison official being involved. We can't find -- a
21 court cannot find a prison official liable on mere
22 negligence. We had to reach that higher standard, the
23 standard that is there for punitive damages in this
24 case, in order to find actual damages at all.

25 QUESTION: So you are in agreement with Chief

1 Judge Lay's remark?

2 MR. LOCKENVITZ: Yes, insofar as it applies to
3 cases of this nature, where you have to find this higher
4 standard.

5 QUESTION: Well, if you're correct, counsel,
6 then the imposition of a higher standard in some torts,
7 such as the one you are involved in here, some
8 constitutional tort, offers somewhat minimal protection
9 to the Defendants, because if that higher standard is
10 once met you can recover, a plaintiff can recover, not
11 only actual damages but punitive damages against them,
12 whereas if a lower standard is required presumably under
13 your reasoning actual damages could be recovered, but
14 not punitive damages.

15 MR. LOCKENVITZ: Your Honor, I believe the
16 protection given to public officials and in this case
17 prison officials with the qualified immunity is adequate
18 with the standard for actual damages. They are
19 protected. They are allowed to make these discretionary
20 decisions because of the qualified immunity.

21 QUESTION: Of course, I wonder why you make
22 this concession. Even without making the concession,
23 you still would take the position that you should
24 prevail here?

25 MR. LOCKENVITZ: Yes, Your Honor. And again,

1 perhaps I'm not being -- perhaps my use of the word
2 "malice" is not appropriate here. I'm talking about
3 implied malice from the reckless conduct. I'm not
4 talking about looking into the man's head to determine
5 what he intended to do.

6 QUESTION: Well, your concession --

7 QUESTION: I have trouble with -- you say that
8 you have to have a higher proof for actual damages in a
9 case where a corrections officer is entitled to
10 qualified immunity, right?

11 MR. LOCKENVITZ: Yes.

12 QUESTION: And that automatically gets you
13 punitive damages. You lost me right there.

14 MR. LOCKENVITZ: Okay. I say that, Mr.
15 Justice Marshall, because by coincidence or whatever the
16 standard we must reach in order to obtain actual damages
17 happens to be the same standard for punitive damages
18 under the common law.

19 QUESTION: Do you know any other instance
20 under the sun?

21 MR. LOCKENVITZ: No, Your Honor, I do not.

22 QUESTION: But isn't it true, you only make
23 that concession in Eighth Amendment cases? It's a
24 deliberate indifference standard that you say is the
25 same as the reckless disregard standard.

1 MR. LOCKENVITZ: Yes, Your Honor, exactly.

2 QUESTION: You wouldn't necessarily make the
3 same claim if it was an improperly executed search
4 warrant or something like that?

5 MR. LOCKENVITZ: No, Your Honor. And again, I
6 think when you look at this to determine whether or not
7 punitive damages should be awarded, you must look at the
8 -- you can't eliminate the possibility of -- you can't
9 eliminate the theory of risk. You must look at the risk
10 involved.

11 For example, in Carey the risk of real damages
12 to these students in Carey was not very great. They
13 were going to leave school for a while, but there was no
14 risk, for example, of physical injury or rape, the
15 things that we have here. In this case you have a
16 situation where a guard with plenty of objective facts
17 behind him made a decision with deliberate indifference,
18 callous disregard, of what was known to him about these
19 individuals.

20 It was similar or could be compared to putting
21 two hungry lions in a small cage with a lamb. Now, if
22 the man turns his head on that we can't really say that
23 he intended for the lions to eat the lamb, but by merely
24 turning his head with these facts in front of him you
25 must presume that he deliberately did not care what

1 happened. And that is what we have here.

2 I think what we're also talking about is what
3 one of the colleagues of the Defendant below referred to
4 as a common sense standard. He testified that it was
5 just common sense that you don't place special treatment
6 unit inmates in a 65 square foot cell with inmates from
7 the general population. Just common sense.

8 We're not talking about a higher plane. We're
9 not asking for this guard to review all of the
10 constitutional law on the spot. We're asking him not to
11 be careless. We're asking him not to show a deliberate
12 disregard for the health and safety of this particulate
13 inmate.

14 Your Honors, to overturn the decision below I
15 believe this Court would in effect be taking away the
16 admonition function of punitive damages. And I want to
17 draw the Court's attention to a hypothetical. If the
18 facts of this case show that Elijah Smith, with the same
19 guard on duty in the same dormitory, with somewhat
20 similar circumstances, was beaten to death only a few
21 months before this happened, if on the night that Danny
22 Wade was raped and beaten he would have been killed, his
23 actual damages under Missouri law or the actual damages
24 for his family would have been very small, because they
25 would have been limited to what he could have provided

1 for them in support. And it's unrealistic to suppose an
2 18 year old in prison with a felony record is going to
3 provide much in the way of support for his family
4 outside the prison.

5 But without actual damages there would be no
6 real deterrence for these guards. In other words, there
7 comes a time -- or I mean, substantial actual damages.
8 There comes a time when actual damages can be so low,
9 the possibility of them can be so low, that a guard or
10 someone else in that position may decide to take the
11 risk.

12 In other words, it would be cheaper for him to
13 pay the actual damages and violate the constitutional
14 rights than it would be for him to apply some new policy
15 or make a more careful decision, or in this case place
16 Danny Wade in a cell downstairs with only one other
17 inmate who is from the special treatment unit rather
18 than in a cell with two inmates who had come from the
19 general population.

20 QUESTION: Don't you think as a practical
21 matter all of these officials expect the state to pay
22 any judgment against them anyway?

23 MR. LOCKENVITZ: I suppose these individuals
24 expect that. However, I agree with Mr. Presson that
25 there's a real question as to the punitive damage aspect

1 of this case.

2 QUESTION: You wouldn't expect to collect
3 punitive damages in any substantial amount from a prison
4 guard, would you really?

5 MR. LOCKENVITZ: No, Your Honor. And you
6 know, it's interesting in this case, the fact that the
7 tort defense fund was available was brought out in trial
8 in a remark made by the defense counsel. And yet, this
9 jury, knowing that there's some type of insurance back
10 there, realized the role of punitive damages and these
11 good Missouri folks decided that \$5,000 was adequate to
12 punish or deter this guard from similar conduct in the
13 future.

14 QUESTION: Would the court have permitted you
15 to bring that fact out?

16 MR. LOCKENVITZ: The court would have. I did
17 not -- well, they would have permitted me to do that
18 after the remark by the defense counsel.

19 QUESTION: Prior to that, would the court --

20 MR. LOCKENVITZ: Prior to that, no, the court
21 would not have.

22 Your Honor -- Your Honors, ordinarily actual
23 damages would be enough. But with the hypothetical that
24 I've just presented to you and the deterrence policy
25 that we're talking about here, I believe in 1983 cases

1 the door should be left open.

2 When you take a look at the legislative
3 history -- and again, as this Court has pointed out,
4 there is no indication that -- damages were not
5 discussed in the debates. But I saw time and time again
6 in the debates before the Act of 1871 and its
7 predecessor in 1866 the problem of state officials
8 turning their backs on the rights of innocent citizens.
9 And it is my belief that this concern, along with the
10 common law that existed at the time, must be read in
11 such a way that they intended for punitive damages to be
12 available.

13 And again, the damages were not actually
14 discussed, at least where I could find it, in the
15 legislative debates, but the policy of deterrence
16 certainly was, and the policy of deterrence in civil
17 rights actions, of course, has been mentioned by this
18 Court time and time again.

19 Your Honors, again I want to perhaps clarify
20 something and distinguish this case from Carey. In
21 Carey the Plaintiff had to show that he was deprived of
22 a right under color of law. He had to show negligence,
23 that they knew or should have known that his right was
24 being violated. And then to reach punitive damages,
25 because he had no actuals, he had to show some sort of

1 actual malice, which has been defined as ill will, spite
2 or reckless disregard.

3 Here, instead of a three-step process, because
4 of the particular qualified immunity for prison
5 officials we had to show a deprivation of a
6 constitutional right. But because of the qualified
7 immunity we had to show that this deprivation occurred
8 because of a callous indifference, an egregious failure,
9 if you will, a deliberate indifference to known threats
10 to health and safety, recklessness.

11 In other words, we met that punitive damage
12 standard as soon as we met the standard for actual
13 damages. And then we showed that he knew or should have
14 known that these rights were being violated.

15 Your Honors, we're talking about balancing the
16 interests here in this particular case and cases like
17 it. In this interest -- in this case, what can be more
18 important to this prison official than the health and
19 safety of Danny Wade, as well as the overall atmosphere
20 in this prison cell. We're not -- in this prison
21 dormitory.

22 We're not talking about balancing the
23 interests of free speech, as in the Gertz case. We're
24 not talking about reaching into the deep pockets of
25 innocent taxpayers by going against the state or

1 municipality. We're not talking about going into the
2 deep pockets of the labor union --

3 QUESTION: Well, where do you suppose this
4 tort defense fund comes from? The taxpayers.

5 MR. LOCKENVITZ: The tort defense fund is
6 here, Mr. Justice, because the state chose to impose
7 that burden on itself.

8 QUESTION: Where did the state get the money?

9 MR. LOCKENVITZ: Practically speaking, Mr.
10 Chief Justice, that fund is a nullity. It is not
11 there. The legislature must appropriate the money each
12 time a judgment is paid.

13 QUESTION: Well, that means what Justice
14 Rehnquist and I were both striving to --

15 MR. LOCKENVITZ: From the taxpayers.

16 QUESTION: The taxpayers pay it.

17 MR. LOCKENVITZ: But again, I must point out
18 that the state imposed this burden on itself. It didn't
19 have to. It's there because of a statute, not because
20 they are required by the constitutional law to pay these
21 judgments.

22 QUESTION: Who was the trial judge?

23 MR. LOCKENVITZ: The Honorable Scott Wright.

24 Your Honors, the policy of deterrence must be
25 maintained with punitive damages, must be maintained

1 with punitive damages in cases such as this, because to
2 deprive Danny Wade and others like him of punitive
3 damages leaves the door open for prison guards and other
4 prison officials to take the easy way out, and if the
5 actual damages happen to be low -- obviously, they can't
6 be zero, but if they happen to be low -- they may choose
7 to take the easy way out and pay rather than face the
8 possibility of deterrence.

9 QUESTION: The instruction of the trial judge
10 on this subject, were they instructions given at your
11 request?

12 MR. LOCKENVITZ: In part, Your Honor. The
13 trial judge surprised both counsel in applying the
14 Missouri-approved instructions in this case.

15 QUESTION: Missouri state court?

16 MR. LOCKENVITZ: The Missouri state court.

17 QUESTION: For punitive damages?

18 MR. LOCKENVITZ: Both for the verdict direct
19 -- well, he modified them, obviously.

20 QUESTION: Is that instruction 5 in Missouri
21 Forms?

22 MR. LOCKENVITZ: Instruction 5 is -- not
23 verbatim, obviously, but he turned to the MAI, the
24 Missouri Approved Instructions, for his guide and
25 modified it according to federal law, rather than using

1 the federal law form books that counsel had been
2 accustomed to using.

3 I might add, though, that he did not, as you
4 can see in instruction 5 on page 13 of the appendix, he
5 did not leave the definitions of such things as gross
6 negligence and egregious failure to the imagination of
7 the jury. He defined them, I believe, with the
8 appropriate federal standard.

9 The same way with instruction number 7, which
10 appears on page 14, which is the punitive damage
11 instruction, where he refers to a callous or reckless
12 disregard or indifference to the rights and safety of
13 others.

14 Thank you.

15 CHIEF JUSTICE BURGER: Do you have anything
16 further, Mr. Presson?

17 MR. PRESSON: Just a couple of comments, sir.

18 CHIEF JUSTICE BURGER: You have three minutes
19 remaining.

20 MR. PRESSON: Thank you.

21 REBUTTAL ARGUMENT OF ROBERT PRESSON, ESQ.

22 ON BEHALF OF PETITIONER

23 MR. PRESSON: The Respondent has gotten a
24 little bit into the facts of the case, and I don't want
25 to dwell on them too much, but I do feel that a brief

1 response on my part would be appropriate. First of all,
2 the Respondent's characterization of placing a lamb in
3 with two lions, his reference to what one guard called a
4 common sense rule about not putting a protective custody
5 inmate in with those from general population, are not
6 the sole -- are not the complete picture in this case.

7 The Plaintiff was in the administrative
8 segregation unit because of conduct violations in the
9 protective custody unit to begin with. In other words,
10 once he had requested to get into protective custody he
11 was then charged himself with harassing and threatening
12 inmates in that unit, and that was the disciplinary
13 charge that got him into administrative segregation.

14 As far as the death of the other inmate a few
15 months previous, on which this same guard did happen to
16 be on duty at the time, again there is nothing in the
17 record to indicate that was a result of any personal
18 fault of that guard. It took place at a time when there
19 were only two inmates in the cell. It took place during
20 shower period, when there were two guards but both of
21 them happened to be supervising the inmates during their
22 shower period because the inmates were obviously out of
23 the cell at that time.

24 In other words, there was no indication that
25 this had any rational connection between the later

1 events involving the Plaintiff here.

2 It seems to me, Your Honor, that the
3 Plaintiff's then argument that low damages would
4 encourage someone to take a chance is really
5 unsupportable. In Robertson versus Wegmann this Court
6 dealt with a Louisiana statute on survivorship under
7 which certain actions might abate, and the argument was
8 made, well, this would undermine deterrence. In other
9 words, they could say, well, this might abate, I'll take
10 the chance.

11 This Court rejected that as an unlikely
12 possibility and I think it's equally unlikely that a
13 state official would sit around and say, well, I
14 consider damages unlikely here in any great amount, I'll
15 take a chance. That is just too iffy a proposition and
16 I don't believe that this Court can indulge the
17 assumption that that would happen.

18 It appears to me in the final analysis that
19 what we want to ensure is a most appropriate imposition
20 of punitive damages, and I think a higher standard is
21 conducive with that. And I think it is analogous to
22 what this Court said in Santosky versus Kramer, that a
23 higher standard of proof ensures or places the
24 fact-finder on notice that this is an important decision
25 and helps to limit the possibility of an inappropriate

1 decision. For that reason I believe an actual malice
2 standard is necessary.

3 Thank you.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.

5 The case is submitted.

6 (Whereupon, at 2:55 p.m., the case in the
7 above-entitled matter was submitted.)

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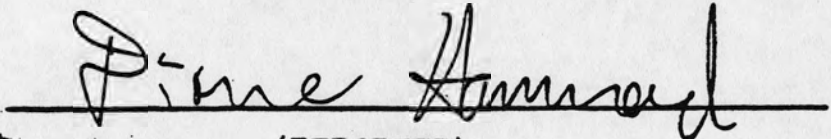
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William H. Smith, Petitioner v. Daniel R. Wade - No. 81--1196

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