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## Punitive Damages--Developments in Section 1983 Cases

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# PUNITIVE DAMAGES -- DEVELOPMENTS IN SECTION 1983 CASES

Martin A. Schwartz & Eileen Kaufman\*

## INTRODUCTION

This article examines recent developments concerning punitive damages in section 1983 civil rights cases.<sup>1</sup> We will focus upon three major issues: first, the due process requirements for punitive damages claims in federal court section 1983 actions; second, issues relating to evidence of the defendant's net worth; and third, the propriety of summation references to the Rodney King case. Before tackling these specific issues, some background is in order.

In *Smith v. Wade*,<sup>2</sup> the Supreme Court held that punitive damages may be awarded in a section 1983 action against an

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1. 42 U.S.C. § 1983 (1986). Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

*Id.*

2. 461 U.S. 30 (1983).

3. *Id.* at 56. Under *Wade*, in order to demonstrate that the defendant acted with "reckless or callous indifference," there must be a showing that either (1) "defendant actually derive[d] satisfaction from hurting the plaintiff" or (2) that defendant, while not particularly desiring to harm plaintiff, "trample[d] on the plaintiff's rights in a fashion that can clearly be called reckless, to accomplish his own aims." 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES

official in his or her personal capacity “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”<sup>3</sup> The Supreme Court’s decision in *City of Newport v. Fact Concerts, Inc.*<sup>4</sup> immunizes municipal entities from awards of punitive damages under section 1983.<sup>5</sup>

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§ 16.7, at 885 (2d ed. 1991) (quoting *Soderbeck v. Burnett County*, 752 F.2d 285, 289 (7th Cir.), *cert. denied*, 471 U.S. 117 (1985)). A defendant is said to “trample” on the rights of a plaintiff when it is demonstrated that defendant “engaged in plainly unlawful conduct.” SCHWARTZ & KIRKLIN, § 16.7, at 885 (quoting *Soderbeck*, 752 F.2d at 292). Regarding application of the “reckless and callous indifference” standard, see for example *Tosker v. Moore*, 738 F. Supp. 1005, 1015-16 (S.D. W.Va. 1990) (employing a reckless and callous indifference standard to assess punitive damages on governor who refused to obey a court order to release prisoners due to unconstitutional overcrowding of prison); *Cornelius v. La Croix*, 631 F. Supp. 610, 621 (E.D. Wis. 1986) (removing corporation’s minority business enterprise status without affording it an opportunity to be heard did not rise to the level of reckless and callous indifference warranting punitive damages), *aff’d*, 838 F.2d 207 (1988)..

4. 453 U.S. 247 (1981).

5. *Id.* at 271. Plaintiffs brought suit against the City of Newport and its officials claiming that their Constitutional rights to due process and free expression were violated when the city canceled plaintiffs’ entertainment license and interfered with their contractual relationship. *Id.* at 252. Pursuant to 42 U.S.C. § 1983, the plaintiffs sought punitive and compensatory damages against the defendants. *Id.* The Supreme Court held that, in accordance with public policy, common law immunity and the intent of Congress, the defendant municipality was immune from punitive damages. *Id.* at 271.

And, completing the picture, punitive damages may not be awarded against a state or state agency in a federal court section 1983 action, principally because of the Eleventh Amendment.<sup>6</sup> It

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6. U.S. CONST. amend. XI. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or the Subjects of any Foreign State." *Id.*

The Eleventh Amendment acts as a bar to suits in federal court seeking retrospective relief against a state or state entity. *See Edelman v. Jordan*, 415 U.S. 651, 678 (1974). It forecloses suits by private parties seeking to recover damages from funds in a state treasury if the state does not consent to the suit. *Id.* at 662-63. However, the Eleventh Amendment does not bar suits against state officials in their individual capacity. *See, e.g., Hafer v. Melo*, 112 S. Ct. 358, 360 (1991) (holding that state official sued in individual capacity is a section 1983 "person"); *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974) ("[T]he Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law . . ."). Under the fiction of *Ex parte Young*, 209 U.S. 123 (1908), a state official sued in an official capacity may be subjected to suits seeking prospective relief for violations of federal law. *Id.* at 154-60. This is because the state official can never be given the authority to violate the Federal Constitution. *Id.* at 159-60. If a state official violates the Federal Constitution, he or she is not acting for the state and is thus stripped of his official authority. *Id.* Accordingly, the state official may be sued in an official capacity. *Id.* This doctrine is often described as a "fiction" since an injunction against the state official in substance operates against the state government. Furthermore, an injunction may require payment from the state treasury. *Young* thus allows an individual to force a state government to comply with the Federal Constitution. With respect to state officials, the Supreme Court in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), held that an action brought against a state official acting in his official capacity is an action against the official's office and is no different than an action brought against the State, neither of which are section 1983 "persons." *Id.* at 71. *Will's* "bifurcated" definition of "person" reflects the same retrospective/prospective dichotomy found under the Eleventh Amendment. *See id.* Footnote 10 in *Will*, an exception to the Court's holding, points out that suits for prospective relief, against a state official in an official capacity, are not treated as suits against the state. *Id.* at 71 n.10. Therefore, the application of section 1983 is "bifurcated" depending upon whether the plaintiff seeks prospective or injunctive relief. *Id.* n.10. The Eleventh Amendment does not apply in state court. *See Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). The Supreme Court stated in *Thiboutot* that "no Eleventh Amendment question is present . . . when an action is brought in a

is the defendant official, then, who may be asked to answer personally in punitive damages.<sup>7</sup>

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state court since the Amendment, by its terms, restrains only "[t]he Judicial power of the United States." *Id.*

A municipality is a section 1983 "person." In *Monnell v. Dep't of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that "the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690. However, "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691. The municipality can only be held liable if the constitutional violation occurred due to enforcement of a "policy or custom." *Id.* at 700-01. Lastly, a political subdivision which is not provided immunity under the Eleventh Amendment is not considered to be an arm of the state, and is thus a section 1983 "person." See *Rawlings v. Iowa Dep't of Human Servs.*, 820 F. Supp. 423 (S.D. Iowa 1993). *Rawlings* provides a detailed history of the controversy surrounding the question of whether a state is a person for purposes of section 1983. *Id.* at 425-26 n.2-3. Subsequent to *Will*, several courts have held that state agencies are not persons under section 1983. See, e.g., *Cronen v. Texas Dep't of Human Servs.*, 977 F.2d 934, 936-37 (5th Cir. 1990) (dismissing suit for damages and injunctive relief against Texas Department of Human Services brought by beneficiary of food stamp program).

7. A state or municipality may choose to indemnify officials for section 1983 punitive damages liability. See 1 & 2 SCHWARTZ & KIRKLIN, *supra* note 3 § 16.20, at 908-09 (2d ed. Supp. 1993). To determine whether an employee or state officer will avoid section 1983 liability under a state indemnification statute, it is necessary to examine and interpret the specific statute. *Id.* In order for a state officer or employee to be indemnified from section 1983 liability, it typically must be determined that conduct complained of was within the scope of his or her employment; see also *Burke v. Beene*, 948 F.2d 489, 493-94 (8th Cir. 1991) (finding that Arkansas law which provided for indemnification by state for actual damages assessed against state employees or officials did not constitute waiver of Eleventh Amendment immunity); *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085 (7th Cir. 1990) The *Graham* court found that even though a public employee acted under color of law for purposes of section 1983, it did not automatically follow that the employee acted within scope of employment under state indemnity statute because color of law category was broader than scope of employment category. *Id.* at 1093-96; *Cornwall v. City of Riverside*, 896 F.2d 398, 399-400 (9th Cir.) (holding that it is not against federal law for a city to indemnify officers acting in good faith, in the course of their employment to pay for section 1983 damages levied against them), *cert. denied*, 497 U.S. 1026 (1990); *Blaylock v. Schwinder*, 862 F.2d 1352, 1354 (9th Cir. 1988). The court in *Blaylock* determined that

A wide range of issues may arise on a section 1983 punitive damages claim. The Ninth Circuit's decision in *Larez v. City of Los Angeles*<sup>8</sup> provides a useful example. In that excessive force case, the jury awarded the plaintiffs punitive damages against the individual police officers and against Police Commissioner Gates in his personal capacity.<sup>9</sup> The circuit court made the following rulings concerning punitive damages:

1. *Instructions*: "The district court properly instructed the jury that punitive damages must be fixed with calm discretion and sound reason, and must never be . . . awarded . . . because of sympathy, or bias, or prejudice . . . .";<sup>10</sup>

2. *Excessiveness and Appellate Review*: The punitive damages awarded against the police officers were not grossly or monstrously excessive. "That damages were specifically tailored to the degree of harm each plaintiff withstood indicates to us that the jury was operating lawfully and was not inflamed."<sup>11</sup> As to Commissioner Gates, the circuit court stated that once the *Smith v. Wade* reckless or callous disregard standard is satisfied, the circuit court "cannot review the jury's decision to award punitive damages, which represents its discretionary moral judgment

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Montana's indemnification statute "[did] not automatically extend immunity to state officials . . . ." *Id.*; *Demery v. Kuperman*, 735 F.2d 1139, 1146-49 (9th Cir. 1984) (holding that California law which mandated that the state pay damages for section 1983 violations brought against state officers if their acts were within the course of employment did not violate Eleventh Amendment), *cert. denied*, 469 U.S. 1127 (1985).

8. 946 F.2d 630 (9th Cir. 1991).

9. *Id.* at 636. The jury awarded \$170,000 in punitive damages against Police Commissioner Gates in his personal capacity. *Id.*

10. *Id.* at 639. The defendants appealed the district court's jury instructions on punitive damages and claimed the damages were "grossly excessive." *Id.* However, the Ninth Circuit stated that the defendants' objections to the jury instructions could not be considered, because they did not make an objection to the jury instructions in the district court. *Id.*

11. *Id.* at 636. The court instructed the jury that punitive damages should be awarded only if the officers' acts were "oppressively, wantonly or maliciously committed." *Id.*

about Gates' culpability . . . other than for gross excessiveness;"<sup>12</sup>

3. *Purposes of Punitive Damages*: Although deterrence is a "primary" purpose of section 1983 punitive damages, punishment is an equally permissible goal;<sup>13</sup>

4. *Standard of Conduct*: *Smith v. Wade* held that the same reckless or callous indifference that gives rise to a constitutional violation may support an award of punitive damages.<sup>14</sup> The circuit court in *Larez* ruled that it is not unconstitutional for punitive damages to be awarded in the absence of a finding of actual malice.<sup>15</sup> The court in *Larez* also found sufficient evidence of the Commissioner's recklessness or callous indifference to support the punitive damages award.<sup>16</sup>

With this background, we will now focus on specific punitive developments in section 1983 cases.

## DUE PROCESS

Increasingly, in section 1983 cases, as well as in other contexts, defendants have challenged punitive damages awards on constitutional grounds.<sup>17</sup> In its last two Terms, the Supreme

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12. *Id.* at 649. As discussed, *infra* notes 43-50 and accompanying text, the Ninth Circuit subsequently reformulated its standard of appellate review. See *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993). The court in *Morgan* also developed a three-stage analysis to be applied when reviewing punitive damages. *Id.* at 1256.

13. *Larez*, 946 F.2d at 648.

14. 461 U.S. at 56.

15. *Larez*, 946 F.2d at 639.

16. *Id.* at 649. However, the circuit court reversed and remanded on other grounds, thus finding it unnecessary to decide whether the punitive damages awarded against Gates were grossly excessive. *Id.*

17. See, e.g., *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). The *Browning-Ferris* Court rejected the argument that the Excessive Fines Clause of the Eighth Amendment applies to awards of punitive damages in civil suits where the government has neither prosecuted the action nor has any right to receive a share of the damages awarded. *Id.* at 260; see also *Angarita v. St. Louis County*, 981 F.2d 1537, 1546 (8th Cir. 1992) (holding that assessment of punitive damages against police officers did not violate defendants' due process rights protected by the Fifth and Fourteenth

Court addressed the constitutionality of state court punitive damages awards under the Due Process Clause.<sup>18</sup> While upholding the punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*<sup>19</sup> and *TXO Production Corp., v. Alliance Resources Corp.*,<sup>20</sup> the Supreme Court stated that in addition to requiring procedural fairness, the Due Process Clause imposes some substantive limits on punitive damages awards.<sup>21</sup> In *Haslip*, the Court rejected both procedural and substantive due process objections to an Alabama state court award of punitive damages that was four times the compensatory damages awarded.<sup>22</sup> The Court reviewed the common law method used in Alabama for assessing punitive damages and concluded that it was not per se unconstitutional.<sup>23</sup> The Court focused on three aspects of the Alabama procedures: the jury charge, the trial

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Amendments where conduct involved "evil motive or intent" or "reckless or callous indifference to federally-protected rights"); Elizabeth Dale, *A Civil Rights Attorney's Guide to Punitive Damages*, 3 Police Misconduct and Civil Rights Law Report 1 (1990).

18. Additionally, the Supreme Court recently agreed to review Oregon's unusual position which effectively disallows judicial review of punitive damages awards. See *Honda Motor Co. v. Oberg*, 814 P.2d 517 (Or. Ct. App. 1991), *aff'd*, 851 P.2d 1084 (Or. 1993), *cert. granted*, 114 S. Ct. 751 (1994). In *Oberg*, the Court of Appeals of Oregon interpreted the state Constitution to prohibit review of punitive damage awards unless the appellate court finds that no evidence supports the verdict. 814 P.2d at 525. The Supreme Court of Oregon affirmed, holding that so long as the criteria used by the trial court were constitutionally sufficient, the restrictions on appellate review were permissible. 851 P.2d at 1096. Furthermore, appellate review was available to test the sufficiency of jury instructions. *Id.* at 1097. Therefore, the punitive damages award did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 1099. The United States Supreme Court will decide whether defendants have a due process right to review of punitive damages awards. See Claudia MacLachlan, *High Court Takes Another Look at Punitive Damages*, NAT'L L.J., January 31, 1994 at 17.

19. 499 U.S. 1 (1991) (non section 1983 action).

20. 113 S. Ct. 2711 (1993) (non section 1983 action).

21. *Haslip*, 499 U.S. at 21-23.

22. *Id.* at 23-24.

23. *Id.* at 17.

court's post-verdict review, and the standard of appellate review.<sup>24</sup>

After carefully reviewing the jury instructions, which advised the jury of the deterrent and punishment purposes of a punitive damages award, of the need to consider the character and the degree of the wrong, and of the fact that the award was discretionary, the Supreme Court in *Haslip* concluded that the instructions accommodated the defendant's "interest in rational decision making" and the state's "interest in meaningful individualized assessment of appropriate deterrence and retribution."<sup>25</sup>

The Court also reviewed and approved the post-verdict review procedures which, in Alabama, are quite refined and operate at two levels. First, the trial court considers a number of substantive factors and justifies its review of the award on the record.<sup>26</sup> Second, the appellate court conducts a comparative review and applies detailed substantive standards for evaluating the award and determining whether the punitive damages award is reasonable in amount and reasonably related to the goals of deterrence and punishment.<sup>27</sup>

While approving Alabama's common law scheme, the Supreme Court in *Haslip* declined to fashion a "mathematical bright line between the constitutionally acceptable and the constitutionally

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24. *Id.* at 19-21.

25. *Id.* at 20.

26. *Id.* The factors to be considered include the "culpability of the defendant's conduct;" the "desirability of discouraging others from similar conduct;" the "impact upon the parties" and "other factors, such as the impact on innocent third parties." *Id.* (quoting *Hammond v. Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)). The *Hammond* court held that a trial court may order a new trial to reconsider an excessive jury verdict only after application of the above enumerated factors. 493 So. 2d at 1378. The *Hammond* court also cautioned that:

only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption, or other improper motive may a trial court order a new trial or remittitur.

*Id.*

27. *Haslip*, 499 U.S. at 21.

unacceptable,” relying instead on a “constitutional calculus” based generally on reasonableness.<sup>28</sup>

The *Haslip* approach was reaffirmed last Term in *TXO Production Corp. v. Alliance Resources Corp.*,<sup>29</sup> where the Court upheld a punitive damages award that was more than 526 times greater than the compensatory damages award.<sup>30</sup> While the defendant urged that the test for assessing the constitutionality of the award requires a comparison to other awards made in similar circumstances,<sup>31</sup> the plurality rejected a strict comparative approach.<sup>32</sup> Further, the plurality stated that in reviewing for excessiveness, the relationship between the punitive damages and compensatory damages is only one of the pertinent factors, and that “[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm that might have resulted if similar future behavior were not deterred.”<sup>33</sup> Ultimately, according to the plurality, the only substantive due process limitation is one of “reasonableness.”<sup>34</sup>

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28. *Id.* at 18.

29. 113 S. Ct. 2711 (1993).

30. *Id.* at 2714. The trial court awarded \$10 million dollars in punitive damages and \$19,000 in actual damages. *Id.*

31. *Id.* at 2719.

32. *Id.* at 2720. The Court held:

while we do not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner’s comparative approach in a ‘test’ for assessing the constitutionality of punitive damages awards.

*Id.*

33. *Id.* at 2721-22.

34. *Id.* at 2720-21. Yet, the plurality in *TXO* did not intend to “suggest that a defendant has a substantive due process right to a correct determination of the ‘reasonableness’ of a punitive damages award.” *Id.* n.24. Justice Stevens further stated: “Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity.” *Id.* at 2720. Regarding the constitutional guarantee against irrational or arbitrary deprivations of property, Justice Kennedy added: “When a punitive damage award reflects bias, passion, or prejudice on the part of the jury, rather than a

With respect to the procedural due process claim, the *TXO* Court declined to reach the issue of whether it is permissible to allow the jury to take account of defendant's wealth, because the issue had not been preserved for appeal.<sup>35</sup> Turning to the post-verdict review of the award, the Court ruled that the trial judge's failure to articulate the reasons for upholding the award was not a constitutional violation and that the system of appellate review was in accordance with the principles expressed in *Haslip*.<sup>36</sup>

Neither *Haslip* nor *TXO* are section 1983 cases. This raises the question of whether the due process limitations articulated in *Haslip* and *TXO* apply in federal court section 1983 actions. In *Morgan v. Woessner*,<sup>37</sup> the Ninth Circuit was confronted with this issue in a section 1983 action for unconstitutional arrest brought by former baseball star Joe Morgan arising out of an encounter with the Los Angeles police.<sup>38</sup> (*Morgan* was decided by the circuit court post-*Haslip* but pre-*TXO*.)<sup>39</sup> In its initial opinion in the case, the circuit court held that *Haslip* did not alter the *Smith v. Wade* principles of federal court section 1983 punitive damages.<sup>40</sup> However, in a subsequent opinion superseding its original opinion, the circuit court completely reversed course and ruled that the principles of *Haslip* are fully applicable to federal court section 1983 punitive damages

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rational concern for deterrence and retribution, the Constitution has been violated." *Id.* at 2725. (Kennedy, J., concurring). In all, seven Justices in *TXO* recognized the existence of some substantive due process restraints on state court punitive damage awards.

35. *Id.* at 2723-24.

36. *Id.* at 2724.

37. 975 F.2d 629 (9th Cir. 1992), *superseded by*, 997 F.2d 1244 (9th Cir. 1993).

38. *Id.* at 631-32.

39. *Morgan v. Woessner*, 975 F.2d 629 (9th Cir. 1992) (decided on September 25, 1992); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (decided on March 4, 1991); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (decided on June 25, 1993). *Morgan* was later superseded in 1993, fifteen days before *TXO* was decided. *See* 997 F.2d 1244 (9th Cir. 1993).

40. *Morgan*, 975 F.2d at 640.

claims.<sup>41</sup> The circuit court reasoned that “[i]t would be incongruous for the Due Process Clause of the Fourteenth Amendment to apply to state law punitive damages and the Due Process Clause of the Fifth Amendment not apply to federal punitive damages.”<sup>42</sup>

The circuit court in *Morgan* then went on to apply the *Haslip* approach by subjecting the federal court procedures to due process scrutiny at three stages: jury instructions, post-verdict review by the trial court, and appellate review.<sup>43</sup> The circuit court found the district court’s instructions adequate in that they advised the jury of the purposes of punitive damages, of the need to consider the reprehensibility of defendant’s conduct, and that punitive damages awards are discretionary.<sup>44</sup> However, the *Morgan* Court ruled that the trial court’s failure to record its reasons for upholding the award warranted a remand to the district court on the punitive damages issue.<sup>45</sup> Significantly, just two weeks later, the Supreme Court held in *TXO* that while it is “always helpful for trial judges to explain the basis for their rulings . . . we are certainly not prepared to characterize the trial judge’s failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and remittitur as a constitutional violation.”<sup>46</sup>

With respect to the procedures utilized on appellate review, the *Morgan* court indicated that an appellate court’s function is twofold.<sup>47</sup> First, the appellate court must satisfy itself that the jury charges were proper and that the trial court recorded its reasons for upholding or altering the award.<sup>48</sup> Second, the appellate court must conduct a “substantive review of the amount

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41. 997 F.2d at 1255.

42. *Id.* at 1255 n.8.

43. *Id.* at 1256-58.

44. *Id.* at 1256-57. The jury charge should make clear that the purpose of punitive damages is to deter the defendant and possibly other individuals from similar conduct in the future, and to punish the defendant. *Id.* at 1256.

45. *Id.* at 1257.

46. *TXO*, 113 S. Ct. at 2724.

47. *Morgan*, 997 F.2d at 1257.

48. *Id.*

of the award.”<sup>49</sup> Because *Haslip* suggested that the “manifestly and grossly excessive” standard which had been previously utilized in the Ninth Circuit might not comport with due process, the circuit court “refashioned” the standard into one requiring the appellate court to determine whether the award “exceeds the amount necessary to accomplish the goals of punishment and deterrence.”<sup>50</sup>

The Second Circuit, in *Vasbinder v. Scott*,<sup>51</sup> applied *Haslip* to the question of whether a punitive damages award assessed in a whistle blowing case was excessive under the Due Process Clause.<sup>52</sup> The Second Circuit utilizes a “shocks the conscience” standard when reviewing punitive damage awards for excessiveness.<sup>53</sup> In applying this standard, the Second Circuit

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49. *Id.* at 1257-58.

50. *Id.* at 1258. Judge Nelson, dissenting in *Morgan*, read *Haslip* as imposing a two (rather than three) step due process approach: “(1) what safeguards are in place at the trial court level . . . ?; and (2) what post-verdict review procedures are there, at the trial court and/or appellate levels, and how meaningful are they?” *Id.* at 1263 (Nelson, J., dissenting). Interestingly, in *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, No. 91-3717, 1993 WL 532709 (8th Cir. 1993) the Eighth Circuit held in a decision rendered after both *Haslip* and *Morgan* that a “shock the conscience” test, as applied and supplemented by Arkansas courts, did not violate due process. *Id.* at \*3-\*5. The *Robertson* court reasoned that the factors considered by the district court, while not identical to those spelled out in *Haslip*, coincided closely enough to comport with due process. *Id.* at \*5.

51. 976 F.2d 118 (2d Cir. 1992). The Second Circuit’s prior decision in *Vasbinder v. Ambach*, 926 F.2d 1333 (2d Cir. 1991), also discussed important issues of section 1983 punitive damages. In *Ambach*, the court held that once a jury decides to award punitive damages, those claims should normally not be dismissed without allowing the jury to determine the dollar amount of punitive damages. *Id.* at 1344. Proceeding in this manner enables the court of appeals, in the case of a judgment n.o.v., to reinstate the jury’s award instead of remanding for further presentation of evidence. *Id.*; see also Martin A. Schwartz, *Damages for Constitutional Violations*, N.Y. L.J., September 17, 1991 at 3, 6.

52. *Scott*, 976 F.2d at 121.

53. Awards of punitive damages should be reversed only if they are “so high as to shock the judicial conscience and constitute a denial of justice.” *Id.* (quoting *Hughes v. Patrolmen’s Benevolent Ass’n*, 850 F.2d 876, 883 (2d Cir.), cert. denied, 488 U.S. 967 (1988)). See also *O’Neill v. Krzeminski*, 839

noted *Haslip*'s admonition that the appellate court's function is to insure that the "punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition."<sup>54</sup>

Applying this standard, the circuit court in *Scott* determined that the award was excessive when considered in light of the defendants' net worth.<sup>55</sup> The punitive damages constituted more than 50% of one defendant's net worth and 30% of the other defendant's net worth, a disproportionately large percentage of each defendant's net worth.<sup>56</sup> The punitive damages award substantially exceeded the amount necessary to punish and deter, and constituted an unjustifiable windfall to the plaintiff.<sup>57</sup>

### NET WORTH

As the decision in *Scott* demonstrates, the defendant official's finances play a vital role in determining the amount of punitive damages that should be awarded.<sup>58</sup> Three important procedural issues arise in connection with the defendant's net worth: (1) who bears the burden of introducing evidence regarding defendant's

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F.2d 9, 13-14 (2d Cir. 1988) (finding punitive damage award of \$185,000 not excessive in light of fact that handcuffed arrestee had been repeatedly hit on head by officers); *but see* *King v. Macri*, 993 F.2d 294, 299 (2d Cir. 1993) (reducing punitive damage awards of \$175,000 against one defendant and \$100,000 against another to \$100,000 and \$50,000 respectively); *see also* *Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 566-67 (2d Cir. 1988) (utilizing "shock the conscience" test to determine whether trial court's refusal to reduce jury award constituted abuse of discretion).

54. *Scott*, 976 F.2d at 121 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 121 (1991)).

55. *Id.*

56. *Id.*

57. *Id.* at 122.

58. *Id.* (citing *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 373 (2d Cir. 1988)) (holding that the district court may consider evidence of defendant's financial circumstances when reviewing punitive damage award on remand); *see also* *Robertson Oil Co. v. Phillips Petroleum Co.*, No. 91-3717, 1993 WL 532709, \*7 (8th Cir. Dec. 28, 1993) (permitting jury to consider defendant's financial worth for purposes of punitive damages award does not violate due process).

net worth?; (2) at what stage may that evidence be considered?; and (3) what role does the Seventh Amendment right to trial by jury play when punitive damages are determined to be excessive in light of the defendant's financial status?

Most federal courts have concluded that the defendant bears the burden of demonstrating his or her financial circumstances.<sup>59</sup> We believe that this makes sense since the defendant has ready access to this evidence.<sup>60</sup> In *Keenan v. City of Philadelphia*<sup>61</sup> the Third Circuit majority found that the defendants, by failing to present the issue to the district court, waived their "argument that evidence of their financial condition is a prerequisite to a punitive damages award."<sup>62</sup> Judge Higginbotham, dissenting, took the position that where municipal indemnification is involved, the plaintiff has the burden of producing evidence of the defendant's net worth in order to insure that the amount awarded is appropriate.<sup>63</sup> In his view, when there is municipal indemnification, treating the issue as having been waived and allowing punitive damages to be assessed in the absence of evidence of the defendant official's net worth "sanctions a raid on the City's treasury—a raid by which only the plaintiffs and their

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59. See, e.g., *King v. Macri*, 993 F.2d 294 (2d Cir. 1993) see also *infra* notes 67-75 and accompanying text; *Hutchinson v. Stuckey*, 952 F.2d 1418, 1422 n.4 ("the weight of authority places on the defendant the burden of producing evidence of his own financial condition if he wishes it considered by the jury."); *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978). The *Zarcone* court found that "a defendant [carries] the burden of showing his modest means - facts peculiarly within his power - if he wants this considered in mitigation of damages." *Id.*; *Littlefield v. Mack*, 750 F. Supp. 1395, 1402 (N.D. Ill. 1990) (finding that defendant must suffer the consequences of choosing not to introduce evidence of his ability to pay punitive damages), *aff'd*, 954 F.2d 1337 (7th Cir. 1992).

60. See e.g., *ITSI TV Prods., Inc. v. Agricultural Ass'ns*, 3 F.3d 1289, 1293 (9th Cir. 1993) ("[W]hen the true facts relating to [a] disputed issue lie peculiarly within the knowledge of one party, the burden of proof may properly be assigned to that party in the 'interest of fairness.'" (quoting *United States v. Hayes*, 639 F.2d 671, 676 (9th Cir. 1966))).

61. 983 F.2d 459 (3d Cir. 1992).

62. *Id.* at 471.

63. *Id.* at 484 (Higginbotham, J., dissenting).

lawyers unnecessarily benefit and from which the taxpayers needlessly suffer.”<sup>64</sup>

In our view Judge Higginbotham’s reference to a raid on the public treasury is unwarranted. After all, governmental indemnification of punitive damages, like any other governmental indemnification, comes about only as a result of a voluntary policy choice of government.<sup>65</sup> It is neither compelled by federal law nor the federal court decree.

An issue that has divided the circuits is whether the trial judge may consider evidence of the defendant’s financial circumstances in reviewing a jury verdict of punitive damages on a post-verdict motion to reduce the award.<sup>66</sup> In *King v. Macri*<sup>67</sup> the Second Circuit stated that while ordinarily the defendant’s showing regarding financial worth should be made to the jury, the trial judge has the discretion to receive that evidence when considering a motion to reduce the award.<sup>68</sup> Other courts, however, have held that defendants are not entitled to a new trial or to have the verdict set aside in order to introduce evidence

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64. *Id.* at 477 (Higginbotham, J., dissenting).

65. *See, e.g.,* *Cornwell v. City of Riverside*, 896 F.2d 398, 399-400 (9th Cir.) (finding that it is up to the municipality to decide whether to indemnify municipal employees from punitive damages), *cert. denied*, 497 U.S. 1026 (1990); *Gordon v. Norman*, 788 F.2d 1194, 1196 n.1 (6th Cir. 1986) (finding that Tennessee law allows indemnification of judgments against government employees but not for punitive damages); *Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986). The *Duckworth* court stated that “[T]he purpose of the Eleventh Amendment is only to protect the state against involuntary liability. If the state chooses to pick up the tab for its errant officers, its liability for their torts is voluntary.” *Id.* at 650-51.

66. *See, e.g.,* *Dunn v. Hovic*, 1 F. 3d 1371, 1384 (3d Cir. 1993) (holding that two million dollar punitive damages award was well within defendant’s ability to pay); *King v. Macri*, 993 F.2d 294 (2d Cir. 1993), *see also infra* notes 67-75 and accompanying text discussing case; *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992) *see also supra* notes 61-64 and accompanying text discussing case; *Waltemeyer v. Park*, No. 92-00008A, 1992 WL 245665, \*2 (D. Guam App. Div. 1992) (concluding that sufficient evidence of defendant’s financial worth was produced at trial to permit the jury to assess punitive damages).

67. 993 F.2d 294 (2d Cir. 1993).

68. *Id.* at 298.

regarding net worth when the defendant failed to introduce that evidence at trial.<sup>69</sup>

There is some question whether the Seventh Amendment right to trial by jury is implicated when evidence of a defendant's financial condition is considered post-verdict.<sup>70</sup> Similarly, there is disagreement in the circuits as to whether the Seventh Amendment permits an appellate court, reviewing for excessiveness, to reduce the award without offering the plaintiff the option of a new trial.<sup>71</sup> In the Second Circuit's view, the Seventh Amendment's guarantee of a jury trial requires that when the jury award of punitive damages is set aside as excessive, the plaintiff must be offered the option of a new trial or acceptance of a remittitur.<sup>72</sup>

*King v. Macri* also contains a discussion of other important punitive damages issues. First, the court ruled that punitive damages may be awarded under section 1983 even in the absence of a compensatory award.<sup>73</sup> Furthermore, the court stated that where the plaintiff presents two or more related claims, (e.g.,

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69. See, e.g., *Keenan v. City of Philadelphia*, 983 F.2d 459, 471-72 (3d Cir. 1992) (finding that the argument that evidence of financial worth was prerequisite to punitive damage award was waived by failure to present evidence with "sufficient specificity"); *Albert v. DePinto*, 638 F. Supp. 1307, 1310 n.3 (D. Conn. 1986) (holding that it was impermissible to allow defendants to introduce evidence of financial worth not introduced at trial).

70. See *Keenan*, 983 F.2d at 483 n.11 (Higginbotham, J. dissenting), (citing *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 107-10 (4th Cir. 1991) (stating that there might be a Seventh Amendment controversy if the financial condition of the defendant was introduced as new evidence during a post-trial review).

71. See *Vasbinder v. Scott*, 976 F.2d at 122-23 (holding that a court must offer plaintiff the option of having a new trial before reducing an award of punitive damages); *Defender Indus. Inc., v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991) (holding that the right to a jury determination of the amount of punitive damages is guaranteed by the Seventh Amendment), *aff'd*, 989 F.2d 492 (1993), *cert. denied*, 113 S. Ct. 3038.

72. See *Scott*, 976 F.2d at 122.

73. *King*, 993 F.2d at 298. The court ruled that under these specific circumstances it was not an error by the jury to only award punitive damages, because the jury was explicitly told that it could award punitive damages without finding any compensatory damages. *Id.*

false arrest and excessive force), the jury should normally be instructed to make one aggregate award of punitive damages with respect to each defendant, "except in cases involving significantly distinct forms of misconduct."<sup>74</sup> Allowing separate awards for related claims growing out of the same conduct creates a real danger of a grossly excessive award.<sup>75</sup>

### COMMENTING ON THE RODNEY KING CASE

Is it prejudicial error, in excessive force cases, to impliedly or explicitly refer to the Rodney King case when urging a jury to assess punitive damages? This issue, too, was presented in *King v. Macri*.<sup>76</sup> The trial in *King* on excessive force, false arrest, and malicious prosecution claims occurred soon after the state court trial of the police officers accused of beating Rodney King. Plaintiff's counsel in summation in *King v. Macri* urged the jury to assess punitive damages so that defendants and others "'will no longer think they're above the law, so that they won't be arrogant and think they can do whatever they want, so that they won't think that because they have a badge and they have a uniform they can violate people's rights.'"<sup>77</sup> Punitive damages, he argued, would also send "'that same message to others in a position to abuse their authority.'"<sup>78</sup>

The district court found nothing improper in these remarks: "[T]o the extent that the Los Angeles riots may have altered community perceptions of the proper response to allegations of police misconduct, the shift in societal attitudes is just one facet

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74. *Id.* at 299.

75. *See id.*; *see also* *Dunn v. Hovic*, 1 F.3d 1371 (3d Cir. 1993). In a non section 1983 product liability action, the Third Circuit reduced a punitive damages award against a manufacturer of asbestos products because "the district court gave insufficient consideration to the effect of successive punitive damages awards in asbestos litigation." *Id.* at 1391. The circuit court suggested that district courts "should . . . consider whether the financial status of the defendant is such that future claimants will be unable to collect even compensatory damages because of the limited pool of resources available." *Id.*

76. *King*, 993 F.2d at 298.

77. *Id.* at 298.

78. *Id.*

of the 'conscience of the community' . . . that the jury represents."<sup>79</sup>

The Second Circuit, too, found nothing unlawful in the summation. "Similar remarks are made in summations in most police misconduct trials, and are entirely appropriate. The temporal proximity of this trial to the state court Rodney King verdict is not a basis for limiting the normal scope of advocacy."<sup>80</sup>

The Eleventh Circuit, in the context of an explicit reference to the Rodney King case, took a more cautious approach in *Vineyard v. County of Murray*.<sup>81</sup> In that case, the plaintiff's attorney began his summation by stating:

If there is anything good or positive that came out of the horrible Rodney King beating that most of you witnessed on television, [it] is that the issue of police brutality was brought to the forefront of the news across the country and it gave a lot of people the opportunity to realize that police brutality does occur.<sup>82</sup>

Even after the district court's cautionary instruction that the King incident had nothing to do with the case at hand, plaintiff's attorney again referred to Rodney King, stating that "there is no video tape in this case."<sup>83</sup> The circuit court majority found that the district court's curative instruction avoided any unfair prejudice to the defendants.<sup>84</sup> However, Judge Godbold,

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79. 800 F. Supp. 1157, 1164 (S.D.N.Y. 1992), *aff'd in part, vacated and remanded in part*, 993 F.2d 294 (2d Cir. 1993).

80. *King*, 993 F.2d at 298.

81. 990 F.2d 1207 (11th Cir.), *cert. denied*, 114 S. Ct. 636 (1993).

82. *Id.* at 1213.

83. *Id.*

84. *Id.* After the initial statements of the plaintiff's attorney's closing argument, the court gave these instructions to the jury: "What happened in California, and even though he didn't mention California, that's where it happened, really doesn't have anything to do with this case. This case is to be tried upon the evidence in this case." *Id.* At the end of plaintiff's closing argument, the judge denied defendant's motion for a mistrial and followed with these instructions for the jury:

Ladies and gentlemen, let me interrupt just a moment to point out to you that the purpose of a verdict is not really to send messages out generally

dissenting, considered counsel's summation "egregiously improper" and warranting reversal since, "[f]ew matters in modern times have rubbed raw the emotions of individual citizens . . . as have the Rodney King events."<sup>85</sup> Thus, what was considered ordinary advocacy to the Second Circuit in *King* was viewed with caution in *Vineyard* and as egregiously wrong by Judge Godbold.<sup>86</sup>

## CONCLUSION

The continued vitality of punitive damages awards is particularly significant in section 1983 litigation. As the Supreme Court recognized in *Carlson v. Green*,<sup>87</sup> "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>88</sup> The Supreme Court's recent decisions in *Haslip* and *TXO* upholding punitive damages awards against due process attacks insure that punitive

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to people. The purpose of a jury verdict, if it is awarding damages, is to compensate a plaintiff if he's entitled to an award of damages, and in some instances it may be appropriate to award punitive damages, if it is appropriate to award punitive damages, then that is done to punish a defendant or defendants, and that's the real purpose of damages, if it's appropriate to award them.

*Id.* at 1214.

85. *Id.* (Godbold, J., dissenting).

86. *Id.* The Seventh Circuit also dealt with the Rodney King issue in the context of Fourth Amendment challenge to a strip search of an arrestee brought pursuant to section 1983; *Doe v. Burnham*, 6 F.3d 476 (7th Cir. 1993). Plaintiff's counsel stated during summation: "We do not like to believe that witnesses get on the stand and lie, let alone police officers who are sworn to uphold and protect the law and serve and protect us, but we know it happens. We've seen it in the news, we've seen it on videotape." *Id.* at 478. The Seventh Circuit thought it "logical to assume that he was making a not-so-veiled reference to the videotaped beating of Rodney King." *Id.* at 481. However, the officers in this case had nothing to do with Rodney King and "should be judged according to the facts of [the instant] case. At least a limiting instruction would have been appropriate here. But we need not assess the effect of this error since we have reversed on other grounds." *Id.* at 481.

87. 446 U.S. 14 (1980).

88. *Id.* at 22 n.9.

damages can continue to be assessed in section 1983 cases so long as the award is rationally related to the twin goals of punishment and deterrence, and is accompanied by fair procedures.