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Damages and Injunctive Relief Under Section 1983

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I. Introduction

SECTION 1983[1] PROVIDES THAT any person acting under color of law who violates the fourteenth amendment rights of another may be "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The Supreme Court recently decided two important cases dealing with remedies under section 1983. *Smith v. Wade*[2] involved punitive damages, while *Los Angeles v. Lyons*[3] concerned injunctive relief. Both cases, like others before them,[4] highlight the continuing split on the Court as to the proper scope of section 1983 liability. In this article I will discuss section 1983 remedies in general, with particular attention to these two cases.

II. Compensatory Damages

Once a plaintiff has proved a constitutional violation,[5] and the defendant, either an individual or local government, is unsuccess-

1. 42 U.S.C. §1983 (Supp. IV 1980) reads as follows:

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. . . .

2. 103 S. Ct. 1625 (1983).

3. 103 S. Ct. 1660 (1983).

4. E.g., the various opinions in Monell v. Dept. of Social Services, 436 U.S. 658 (1978) (local governments may be liable for compensatory damages) and in Owen v. City of Independence, 445 U.S. 622 (1980) (local governments are not protected by any immunity from liability for compensatory damages). *See generally* on local government liability, NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983 (1979) and annual cumulative supplement, ch. 6 [hereinafter referred to as CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION].

5. Section 1983 was intended primarily to enforce the fourteenth amendment, although it also created a so-called laws action. *See* Maine v. Thiboutot, 448 U.S. 1 (1980), as limited by Middlesex County Sewerage Auth. v. National Sea

ful in asserting any defense,[6] the question is what damages are available. The general rule in section 1983 cases is that compensatory damages are recoverable where they are proved.[7] Compensatory damages include both special damages—property damage, medical expenses, and lost income—and general damages—pain, suffering, emotional distress, and possibly reputation damages,[8] depending on the circumstances.

In *Carey v. Piphus*,[9] the leading case on compensatory damages, the Court held that, even where a plaintiff has successfully proved a procedural due process violation, damages may not be presumed. The plaintiff must prove actual damages stemming from the procedural due process violation in order to recover more than one dollar in nominal charges. Because the Court in *Carey* considered compensation to be a primary function of section 1983, it was thought appropriate for the plaintiff to prove that some actual damage had occurred. The Court also observed that there was no common law presumed damages analogue of procedural due process. However, as a practical matter, a plaintiff will ordinarily encounter no significant difficulty in showing some emotional or mental distress. In many cases the plaintiff's own testimony will be available to support an award of compensatory damages.[10]

Carey left open an important damages question which the Supreme Court might have dealt with in *Corriz v. Naranjo*.[11] There a plaintiff charged that the police had interfered with his right to be free from illegal detention, that he had been imprisoned illegally, that he had been physically abused, and that he had been unlawfully arrested without evidence to support any charges against him. As a constitutional matter, the plaintiff seemed to be speaking in terms of due process because he claimed that his liberty interest in

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Clammers Ass'n, 453 U.S. 1 (1981) and Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981). *See* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 2.10.

6. Individuals are protected from liability for compensatory damages by the affirmative defense of qualified immunity, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308 (1975), but local governments are not, Owen v. City of Independence, 445 U.S. at 637-44. *See generally* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION ch. 8.

7. Carey v. Piphus, 435 U.S. 247 (1978).

8. *See infra* text accompanying notes 24–26.

9. 435 U.S. 247 (1978).

10. *See*, however, the illustrative compensatory damages cases discussed in the text *infra*.

11. 667 F.2d 892 (10th Cir. 1981), *cert. granted*, 456 U.S. 971 (1982), *dismissed*, 458 U.S. 1123 (1982).

bodily integrity had been interfered with. He also alleged a fourth amendment violation. The jury in *Corriz* had been charged by the court that for damages purposes it could give "great value" to the constitutional rights allegedly violated by the police officers, *independent of actual damages*.[12]

Thus, the question in *Corriz* was whether compensatory damages could be awarded for constitutional deprivations *per se*. *Carey v. Piphus* had answered that question in the negative for procedural due process violations. But the Court was careful to point out that it limited its decision to procedural due process. Although *Corriz* was not heard by the Court, it is likely that the answer to the broad question posed by *Corriz* will turn out to be no. The reasoning of *Carey v. Piphus* will probably extend to other constitutional violations because the Supreme Court is concerned with the difficulty of valuing constitutional rights. It is also concerned with the need for judicial control of damages awards because the standard of judicial review of a jury's compensatory damages award is rather vague. That standard—does the jury award shock the conscience?[13]—does not, on its face at least, give a federal court very much principled control over what a jury does.[14]

If there is any potential at all with respect to presumed damages in a section 1983 setting, it would arise in a first amendment setting.[15] At common law the right to vote was given a value by

12. The instruction given read in relevant part as follows:

If you find that the plaintiff has been deprived of a constitutional right, or several constitutional rights, you may award him damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or an injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. *The value of such rights, while difficult to assess, must be considered great.* The precise value you place upon any and each constitutional right which you find was denied to plaintiff *is within your discretion.* You may wish to consider the importance of the right or rights in our system of government, the role which this right or these rights have played in the history of our republic, the significance which this particular issue had for the plaintiff, and the significance of the right in the context of the activities which plaintiff was engaged in at the time of the violation of the rights. *Id.* at 897 (emphasis added).

13. *See, e.g.*, Zarcone v. Perry, 572 F.2d 56 (2d Cir. 1978).

14. On the other hand, this vagueness in the applicable standard might give a reviewing court virtually unfettered discretion to overturn a jury's compensatory damages award.

15. There is apparently a split in the circuits on presuming damages for first amendment violations. *Compare* Familias Unidas v. Briscoe, 619 F.2d 391, 402 (5th Cir. 1980) (actual damages required) *with* Villanueva v. George, 659 F.2d 851, 855 (8th Cir. 1981) (damages may be presumed).

juries in cases involving claims of denial of that right. The first amendment seems analogous to the right to vote at common law. Nevertheless, this should make no real difference to most litigants. Any plaintiff's lawyer seeking compensatory damages should obviously do his or her best to introduce evidence of actual damages. It makes little sense to rely on presumed damages except where there is a very weak case indeed for actual damages, or where the damages issue is secondary to obtaining injunctive relief.

With respect to compensatory damages, federal courts are concerned about the prospect of double recovery.[16] They are very sensitive to the possibility that a successful section 1983 plaintiff will get more than one recovery for the same injury, especially in connection with general damages. This possibility arises most often in situations where the plaintiff has alleged more than one constitutional violation or has joined to his or her constitutional claim one or more pendent state claims. This, incidentally, might have been an issue in the *Corriz* case.[17] As a practical matter, though, double recovery may be prevented for the most part through careful instructions to the jury and through special verdicts and special interrogatories.[18] The goal is to segregate the different constitutional claims and the different pendent claims and to ask the jury what it is doing and why.

In addition, there is a duty to mitigate damages in section 1983 cases just as there is at common law.[19] This duty usually arises in employment cases where the question is whether the discharged party seeking damages and reinstatement has done what he or she could to mitigate damages. In racial discrimination cases, though, federal courts seem to insist that the defendant prove that the plaintiff could have mitigated damages.[20]

III. Causation-in-Fact

It is important in section 1983 cases to distinguish between the existence of a constitutional violation and the causation-in-fact

16. An early example is Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). *See also* Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).

17. *See* note 11, *supra*.

18. Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979).

19. For a common law discussion, see DOBBS, LAW OF REMEDIES 186–188 (1973).

20. *E.g.*, Jackson v. Wheatley School Dist., 464 F.2d 411 (8th Cir. 1972).

rule for compensatory damages.[21] This rule may be put as follows: Even where a plaintiff proves a constitutional violation, a defendant may avoid damages and more if he or she can show that, even without the constitutional violation, the plaintiff would have been harmed anyway. Suppose, for example, an employee is discharged in violation of procedural due process. That employee is not automatically entitled to damages and reinstatement even if a procedural due process violation is proved. The defendant is given the opportunity to show that the employee would have been discharged anyway even if there had been a fair hearing complying with procedural due process. A comparable situation may arise in the first amendment area. Suppose an employee is successful in proving that he or she was discharged in part for a constitutionally impermissible reason in violation of the first amendment. Here, too, the plaintiff is not thereby automatically entitled either to damages stemming from loss of the job or reinstatement. The defendant has the opportunity to prove that that plaintiff would have been discharged anyway.

There has been, as might be expected, some confusion in the circuits as to just how this approach to causation-in-fact and damages works. It should apply only to so-called mixed motive cases, where there is more than one motive for discharging an employee. If it turns out, however, that a plaintiff has proved by a preponderance of the evidence that an unconstitutional motivation was the *only* reason for the discharge, then there is no need to shift the burden of proof to the defendant.[22] Moreover, a defendant should not be permitted to go back and dredge up data to show that the employee would have been discharged anyway where the defendant did not know about the data at the time of discharge. This end run has been tried and rejected on the ground that the reasons on which a defendant can rely in order to avoid damages and reinstatement must have been among the factors in the initial decision.[23] This result is sound. Otherwise, there is the potential for very serious abuse in all employee discharge cases.

As mentioned earlier, one possible element of compensatory

21. This cause-in-fact rule is set out in Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (first amendment) and Carey v. Piphus, 435 U.S. 247 (1978) (procedural due process); *see also* the text immediately following. The distinction referred to in the text is significant for both injunctive relief and attorney's fees awards under 42 U.S.C. § 1988 to prevailing plaintiffs.

22. Allen v. Autauga County Bd. of Educ., 685 F.2d 1302 (11th Cir. 1982).

23. Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982).

damages is injury to reputation, an element that has caused some confusion because of *Paul v. Davis*.[24] *Paul* held that when the only damage caused by government employees is to reputation, there is no liberty or property interest implicated. Therefore, there is no procedural due process violation, and the only remedy is the state tort remedy of defamation. Some federal courts have read this case as holding that a section 1983 plaintiff can never recover damages for injury to reputation.[25] However, that is incorrect; a plaintiff can recover for damages to reputation in a situation where such damage is an element of general damages. For example, where there is a fourth amendment violation through wrongful arrest and imprisonment, the plaintiff should be able to recover damages for injury to reputation.[26] This is not a *Paul v. Davis* issue.

IV. Three Compensatory Damages Cases

The following cases illustrate the ways in which federal courts have dealt with general and special damages. In *Keyes v. Lauga*,[27] the plaintiff had obtained a jury verdict of $75,000 in compensatory damages against two deputy sheriffs after alleging an unconstitutional search and arrest, the use of excessive force, and the beating of the plaintiff after the arrest. The Fifth Circuit overturned the verdict as excessive and ordered a conditional remittitur. The factors that the Fifth Circuit used in the *Keyes* case were the following: (1) there was no physical damage to the plaintiff's home; (2) what the defendant did to the plaintiff (arresting her unconstitutionally and imprisoning her) lasted "only two hours" and caused embarrassment and mental anguish; and (3) the excessive force used caused the plaintiff personal injuries, including a low-grade concussion, numbness, bruises, nightmares, and nervousness, but "the residual effect of the ill treatment apparently [did] not limit her activities." A fourth factor, perhaps the most important of all, was that past medical expenses totaled only $329 and there was no evidence of future medical costs introduced. Of this $75,000 verdict, $74,000 was attributable to general dam-

24. 424 U.S. 693 (1976).

25. *E.g.*, Cox v. Northern Virginia Transp. Comm., 551 F.2d 555 (4th Cir. 1976).

26. Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980).

27. 635 F.2d 330 (5th Cir. 1981). *Compare* Whitley v. Seibel, 676 F.2d 245 (7th Cir. 1982) where a $60,000 compensatory damages award was upheld despite the absence of medical or psychiatric testimony.

ages—"speculative" items of recovery such as pain, suffering, mental anguish, and embarrassment—and that was just too much for the Fifth Circuit.

A Seventh Circuit case, *Nekolny v. Painter*,[28] involved three employees who were terminated because they had refused to get involved in political activities. There were compensatory damage awards of $5,000, $2,500, and $2,500, respectively, for each of these three plaintiffs for emotional and mental distress. There were also special damage awards of $40,000, $12,000, and $17,000, respectively. What is important is that the general damages awards of $5,000, $2,500, and $2,500 were overturned because of the evidence the court had before it. One plaintiff testified that he was "very depressed" on learning of his termination; another plaintiff testified that she became "a little despondent and lacked motivation"; and the third testified that he did not work for six weeks because he was completely humiliated and stayed close to home. The Seventh Circuit ruled that such testimony was not sufficient to sustain these compensatory awards.

Finally, in *Herrara v. Valentine*,[29] the Eighth Circuit affirmed a jury's compensatory damages award of $300,000 because of what the defendant police officers had done to the plaintiff. She was an Indian woman in late pregnancy who was kicked in a life-threatening manner and thrown to the ground; she was in extreme physical pain and lost her unborn child; her pain and suffering continued until the time of trial, three years later; the emotional trauma accompanying the stillbirth was devastating; the mental anguish she suffered by being driven away from a nearby hospital, combined with a police officer's threat at the time to kill her, added to her emotional injury; and finally, and almost in passing, she suffered "great indignity" by being denied her civil rights. In *Herrara* the court was obviously confronted with a tragically credible combination of special and general damages.

V. Punitive Damages

The burdens of pleading and proving an entitlement on the part of a section 1983 plaintiff to punitive damages are on the plaintiff, including the requirement that the plaintiff prove the wrongful state of mind necessary for the recovery of punitive damages. Until

28. 653 F.2d 1164 (7th Cir. 1981).
29. 653 F.2d 1220 (8th Cir. 1981).

recently there was no express holding by the Supreme Court that punitive damages are recoverable in section 1983 cases, although there was dictum in *Carey v. Piphus*[30] that punitive damages are recoverable against individuals. Also, in *City of Newport v. Fact Concerts*,[31] where the Court held that local governments are immune from liability for punitive damages, it emphasized in its reasoning that individuals could be held liable for punitive damages.[32] However, in *Smith v. Wade*,[33] the Court squarely held in an eighth amendment punitive damages case that section 1983 plaintiffs are entitled to recover punitive damages in certain circumstances. Thus, if it was ever an open question, it has now been put to rest.

In deciding whether to award punitive damages, juries may take account of the following factors: (1) the conduct of the defendant; (2) the wisdom of some sort of pecuniary punishment for the defendant; and (3) the advisability of deterring the defendant and others like him or her from engaging in this kind of conduct.[34] The trier of fact obviously has a great deal of discretion in deciding whether to award punitive damages. The standard of judicial review of punitive damages awards is similar to that for compensatory damages: whether the punitive damages award shocks the conscience or is grossly excessive or monstrous.[35]

What kind of conduct allows a plaintiff to get to the jury for a possible punitive damages award? In *Smith v. Wade*,[36] the Court held that it is enough for a punitive damages award in an eighth amendment setting that a defendant acted with reckless or careless disregard for, or deliberate indifference to, a plaintiff's rights. A plaintiff does not have to show that the defendant acted with malicious intent to injure the plaintiff, a more demanding standard. The Court rejected the argument that entitlement to punitive damages in section 1983 cases should be more restrictive than it is for common law torts. An irony of the argument made by the defendant in *Wade* is that after *Harlow v. Fitzgerald*[37] the subjec-

30. *See* note 7, *supra*.
31. 453 U.S. 247 (1981).
32. *Id* at 2761.
33. 103 S. Ct. 1625 (1983).
34. Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970).
35. Zarcone v. Perry, 572 F.2d 52 (2nd Cir. 1978); Fountila v. Carter, 571 F.2d 487 (9th Cir. 1978).
36. *See* note 32, *supra*.
37. 457 U.S. 800 (1982).

tive part of the qualified immunity test with its malice component cannot be used in favor of a plaintiff seeking compensatory damages. Only the objective part remains.[38] Nonetheless, the defendant unsuccessfully attempted to make matters even worse for section 1983 plaintiffs by using the now-rejected subjective part of the qualified immunity test *against* the plaintiff in connection with punitive damages.

Reading *Smith v. Wade*, one is struck by several aspects. There are two very long opinions, a majority opinion by Justice Brennan and a dissenting opinion by Justice Rehnquist.[39] Citing literally hundreds of old cases dealing with punitive damages, both Justices seem to be engaged in combat. One possible reason—admittedly speculative—is that when the Supreme Court granted certiorari, Justice Rehnquist may have had a majority either on the issue of no punitive damages at all in section 1983 cases, or on the narrower issue of malicious intent. However, he may have lost his majority. Thus, his original opinion may have started out as the majority opinion, but he lost at least one justice along the way.

A related aspect of *Smith v. Wade* is Justice O'Connor's short dissenting opinion in which she concurred with Justice Rehnquist.[40] In effect, she asserted that she did not know why Justices Brennan and Rehnquist cited so many nineteenth century cases. It was her view that, as a matter of policy, not of ambiguous legislative history, the Court ought to be more restrictive of punitive damages in section 1983 cases than at common law. Justice O'Connor was correct that section 1983 policy ought to be determinative here, but her conclusion on the merits is questionable. There is no persuasive policy reason for section 1983 punitive damages to be more restrictive than the common law rule. To the contrary, the regulation of official conduct function of section 1983 might even cut in favor of a broader punitive damages rule.[41]

Punitive damages will be more readily awarded by juries in connection with certain constitutional violations than with others, even though as a theoretical matter there could be an entitlement to such damages in almost every case involving any constitutional violation. Examples of the former include: fourth amendment

38. *See* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 8.02 (1983 Supp.).
39. 103 S. Ct. at 1625.
40. *Id* at 1658.
41. Section 1983 is designed to encourage official compliance with the fourteenth amendment. Indeed, its title is: "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution. . . ."

violations, especially excessive force claims; eighth amendment violations which by definition require deliberate indifference;[42] and racial discrimination cases which require purposeful discrimination for equal protection violations.[43] In all these cases there is present the state of mind which permits a jury to award punitive damages.

VI. Injunctive Relief

Several preliminary observations should be made about injunctive relief. While qualified immunity is relevant to damages liability, it is irrelevant for injunctive relief. Injunctive relief, when granted, is often effective for a plaintiff because its violation subjects the offending defendant to the possibility of contempt. Also, declaratory relief should at least be mentioned here because a plaintiff will often couple a request for injunctive relief with a request for declaratory relief under the Declaratory Judgment Act.[44] This act provides that where there is an actual case or controversy federal courts have the authority to grant declaratory relief. There is no need for a declaratory relief plaintiff to seek damages or injunctive relief. Also, declaratory relief is available even if an adequate remedy exists. Finally, the Declaratory Judgment Act is not jurisdictional; that is, it does not provide subject matter jurisdiction.

Local governments may be sued directly for injunctive relief in their own names as persons,[45] and local or state officials may be sued in their official capacities for injunctive relief. When state officials are sued in federal court, they can be successfully sued for injunctive relief when that injunctive relief is *prospective.*[46] However, where a state official is sued in federal court for retrospective injunctive relief involving the payment of money, there is ordinarily an eleventh amendment prohibition.[47] In contrast, there is no eleventh amendment prohibition whatever where local officials (and their government employers) are sued for injunctive relief in federal court.[48] A plaintiff can get retrospective relief, including back pay, as well as prospective relief.

42. Estelle v. Gamble, 429 U.S. 97, 104 (1976).
43. Washington v. Davis, 426 U.S. 229 (1976).
44. 28 U.S.C. §§ 2201–2202 (1976 & Supp. V 1981).
45. *See* note 4, *supra.*
46. *Ex parte* Young, 209 U.S. 123 (1908). *But cf.* Pennhurst State School and Hospital v. Halderman, 52 U.S.L.W. 4155 (U.S. Jan. 23, 1984) (eleventh amendment bars injunctive relief against state officials based on pendent state claim).
47. Edelman v. Jordan, 415 U.S. 651 (1974).
48. The eleventh amendment does not apply to political subdivisions of a state. County of Lincoln v. Luning, 133 U.S. 529 (1890); Moor v. County of Alameda, 411 U.S. 693 (1973).

VII. Statutory Bars

There are several statutory bars to injunctive relief. It was once thought that the Anti-Injunction Act[49] was such a bar preventing plaintiffs from enjoining pending state proceedings. However, the Supreme Court held clearly in *Mitchum v. Foster*[50] that the Anti-Injunction Act does not apply to section 1983 actions. This, of course, is very different from *Younger v. Harris*,[51] which for different reasons prohibits the enjoining of pending state criminal proceedings.[52]

The first statutory bar of any substance is the Johnson Act of 1934,[53] which prohibits federal courts from enjoining a state agency order regarding public utility rate making where the order does not interfere with interstate commerce and is made after reasonable notice and hearing, and where the state provides a plain, efficient, and speedy remedy.

A second statutory bar is the Tax Injunction Act,[54] which prohibits injunctive relief against the levy, assessment, or collection of state taxes where the state provides a speedy, efficient, and plain remedy. Interestingly, in *Fair Assessment in Real Estate v. McNary*,[55] the Supreme Court applied the policy underlying the Tax Injunction Act to a section 1983 damages suit that challenged the constitutionality of the administration of a state's taxing system. The precise claim was that the state had violated due process and equal protection in connection with allegedly unequal taxation. However, the Court held that the plaintiff could not successfully assert a damages action challenging the administration of a taxing system. Justice Rehnquist's opinion for the Court emphasized that a federal court should respect state taxing schemes and should not interfere with state taxation. The Court predicted that there would be a significant disruptive effect on state taxing schemes if state officials were subject to suit for damages in their individual capacities. But it left open the question of the applicability of the text or policies of the Tax Injunction Act where there is a

49. 28 U.S.C. § 2283.
50. 407 U.S. 225 (1972).
51. 401 U.S. 37 (1971).
52. These reasons include: (1) an adequate remedy at law and no irreparable injury; (2) comity, a proper respect for state functions; and (3) "Our Federalism." This complex doctrine is set out in CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 5.12–5.15. On the "*Pullman*" abstention obstacle, *see id.* at § 5.16.
53. 28 U.S.C. § 1342 (1970).
54. 28 U.S.C. § 1341 (1970).
55. 454 U.S. 100 (1981).

facial attack on state laws which, for example, allegedly discriminate on the basis of race.[56]

VIII. Standing and Ripeness

There are additional obstacles for a section 1983 plaintiff seeking injunctive relief. Such a plaintiff must meet Article III's case or controversy requirements of standing and ripeness. Standing and ripeness issues theoretically can arise in section 1983 damages actions also. They typically do not, though, since in damages actions a plaintiff is ordinarily suing for injuries that have already occurred. However, in injunctive relief cases a plaintiff is asking the court to do something in the future on the basis of a predictive judgment. Sometimes this judgment can slide over into speculation about what will happen, and such speculation may run afoul of standing and ripeness requirements.

The standing issue[57] is whether the particular plaintiff is a proper plaintiff. There must be actual or threatened injury, and the plaintiff must have a personal stake in the litigation. This injury-in-fact requirement appears to be an Article III constitutional requirement. There is also, however, what is called a *prudential* aspect of standing, dealing with the relationship between the plaintiff and the particular claim asserted. This is a judge-made aspect of standing, not an Article III requirement. For example, a plaintiff, even one who has suffered injury, may ordinarily assert only his or her own constitutional claims and not those of another, although there are some situations in which such a plaintiff may be permitted to assert the constitutional claims of others.[58]

Another very important aspect of standing is related to injury in fact. In *Warth v. Seldin*[59] the Court held that a plaintiff must show not only injury in fact to himself or herself, but must also show that if the requested injunctive relief were given it would make a practical difference. For example, in *Ledford v. Delaney*,[60] a Fourth Circuit case, there was a challenge to the plaintiff's termination on first amendment grounds. However, it later turned out that the plaintiff was ineligible for the job anyway. Thus, there

56. *Id.* at 107 n.4.
57. *See* Warth v. Seldin, 422 U.S. 490 (1975).
58. *See* Singleton v. Wulff, 428 U.S. 106, 114–16 (1976).
59. *See* note 57, *supra*.
60. 612 F.2d 883 (4th Cir. 1980).

was no standing. This is reminiscent of the Supreme Court's use of but-for causation for damages purposes.[61]

Ripeness, like standing, is an Article III hurdle for the section 1983 plaintiff. The ripeness question concerns timing of litigation: When can the plaintiff sue? There must be an actual concrete dispute between the parties, and the challenged governmental conduct must have had some practical effect on the plaintiff. To put it another way, the litigation must not be hypothetical. The leading case on ripeness is *United Public Workers v. Mitchell*.[62] Here, federal employees who asserted that they wanted to violate a provision of the Hatch Act prohibiting certain political activities were unsuccessful in seeking injunctive relief against the enforcement of that provision. The Court referred to the proposed future conduct of the plaintiffs as speculative.

There is also an interesting decision in which the Fifth Circuit found no ripeness.[63] The plaintiff sought federal injunctive relief against the enforcement of a five-year-old unsatisfied state judgment. However, no effort had ever been made to collect it, execution was not threatened, and plaintiff was judgment-proof.

The Supreme Court's recent decision in *City of Los Angeles v. Lyons*,[64] which dealt with standing and equitable relief in general, merits analysis here. *Lyons* was a challenge to the police use of a chokehold brought by a section 1983 plaintiff who had himself been injured as a result of the use of such a chokehold. The plaintiff sued the city and relevant police officers for both damages and injunctive relief. His suit for damages against the city alleged an official policy or custom[65] that violated his constitutional rights. His suit for injunctive relief alleged that the chokehold used by the police department was deadly, that sixteen people had died prior to his lawsuit as a result of the chokehold, and that it could not constitutionally be used in nonthreatening situations.

In an opinion by Justice White, the Court held that even where a plaintiff has personally suffered harm, that plaintiff does not have standing to seek injunctive relief where it is speculative that he or she will be similarly injured in the future. One would have thought,

61. *See supra* text accompanying notes 20–22.
62. 330 U.S. 75 (1947).
63. Carter v. Heard, 593 F.2d 10 (5th Cir. 1979).
64. 103 S. Ct. 1660 (1983).
65. *See* Monell v. Department of Social Serv., 436 U.S. 658 (1978). On official policy or custom generally, *see* CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 6.05–6.07.

as the four dissenters argued,[66] that the fact that plaintiff had had the chokehold used on him sufficed to confer standing, at least in the Article III injury-in-fact sense, both for the damages claim *and* for the injunctive relief claim. Yet, the majority held that a separate standing inquiry must be made for injunctive relief.

Standing was not the only hurdle that the *Lyons* plaintiff could not surmount, for he lost on an alternative ground as well. Section 1983 injunctive relief cases have generally been thought to be subject to the same equity requirements—substantial likelihood of irreparable harm and inadequacy of legal remedy—as apply to injunctive relief generally.[67] But in *Lyons* the Supreme Court majority seems to have cut back on the scope of entitlement to injunctive relief because of its concern with federalism and comity. In this regard, the Court made two assertions in *Lyons* that may turn out to be useful for defendants. As to the irreparable harm aspect of equitable relief, the Court stated that there was no indication that this plaintiff was going to be subject in the future to another chokehold. Thus, irreparable harm would not result from the denial of injunctive relief. Second, as to inadequacy of legal remedy, the Court noted that this plaintiff sued the city not only for injunctive relief but for damages. Thus, there was an adequate section 1983 damages remedy available which precluded injunctive relief.

In my view, each of the two grounds for the Court's decision is questionable. Nevertheless, Lyons demonstrates the court's desire to rule against the plaintiff in *Lyons* and, more generally, its preference for a restrictive approach to equitable relief in section 1983 cases.

IX. The Scope of Injunctive Relief

Many section 1983 injunctive relief suits in the last decade or two have become transformed from what might be called bipolar litigation—where one plaintiff sues one defendant—into litigation challenging institutional practices.[68] Very wide-ranging injunctive relief has been requested against prisons, schools, and police departments through these so-called public law actions.

66. 103 S. Ct. at 1671.

67. *See* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc). *But cf.* Rizzo v. Goode, 423 U.S. 362 (1976). *See generally* on equitable relief, DOBBS, LAW OF REMEDIES, 108–11 (1973).

68. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

The general rule as to the scope of injunctive relief comes from the famous school desegregation case, *Swann v. Charlotte-Mecklenburg Board of Education.*[69] There were two competing considerations set out in *Swann*. First, once a constitutional violation is found, the scope of a district court's equitable powers to remedy that violation is broad, because "breadth and flexibility" are inherent in an equitable remedy. Second, and more narrowly, the Court indicated that a remedy imposed by a court of equity should be commensurate with the violation ascertained. Because much depends on the emphasis placed on each consideration, their application has led to apparently inconsistent results in different cases involving school desegregation and housing discrimination.[70]

Nevertheless, it is possible to generalize and identify three factors relied on by the Court in later cases. The scope of the remedy depends upon the nature and scope of the constitutional violation itself. Also, the decree must be remedial, designed to restore the victims to the position they would have had in the absence of the unconstitutional conduct. Finally, in issuing injunctive relief decrees a federal court must take account of the interest of state and local authorities in managing their own affairs.

This last factor was relevant in the important case of *Rizzo v. Goode.*[71] Here, there were a fair number of alleged violations of constitutional rights by Philadelphia police officers. As a result, the police superintendent was sued for injunctive relief in a section 1983 action. The Supreme Court held in *Rizzo* that the police superintendent could not be successfully sued for injunctive relief in the absence of his own personal participation in the constitutional violations. The Court was clearly concerned with the effect of injunctive relief upon the police department's everyday activities.

X. Conclusion

Section 1983, enacted in 1871, has become a potent weapon for the vindication of fourteenth amendment rights in the twentieth century. An entire body of complex case law has developed around

69. 402 U.S. 1 (1971).

70. Dayton Bd. of Educ. v. Brinkman (Dayton I), 433 U.S. 406 (1977) (school desegregation; second consideration dominant); Milliken v. Bradley, 433 U.S. 267 (1977) (school desegregation; first consideration dominant); Hills v. Gautreaux, 425 U.S. 284 (1976) (public housing desegregation; first consideration dominant).

71. 423 U.S. 362 (1976).

this statute, including its available remedies. For the most part the major ground rules for section 1983 liability have been determined by the Supreme Court.[72] However, the dispute among the Justices as to the proper scope of section 1983 liability continues to simmer. Indeed, the Court's recent remedies cases discussed in this article make this apparent. *Smith v. Wade*, which ruled in favor of section 1983 *plaintiffs* on the issue of entitlement to punitive damages, was a 5–4 decision. So, too, was *City of Los Angeles v. Lyons*, which ruled in favor of section 1983 *defendants* on the issue of entitlement to equitable relief. There is, though, a difference in the potential impact of these two cases. *Smith v. Wade* was not a surprising decision and, moreover, did not change the status quo regarding punitive damages. In contrast, *City of Los Angeles v. Lyons* was a clear signal to the federal courts to cut back on section 1983 equitable relief through a restrictive application of both Article III requirements and traditional equitable considerations.

72. Thus: (1) Section 1983 has no independent state of mind requirement for the *prima facie* case. Parratt v. Taylor, 451 U.S. 527 (1981). (2) State and regional legislators, judges, and prosecutors are absolutely immune from damages liability for certain acts. Tenney v. Brandhove, 341 U.S. 367 (1951), Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), Stump v. Sparkman, 435 U.S. 349 (1978), and Imbler v. Pachtman, 424 U.S. 409 (1976). (3) Local governments may be liable for compensatory damages only for their unconstitutional official policies or customs; *respondeat superior* does not apply. Monell v. Department of Social Services, 436 U.S. 658 (1978). (4) Local governments are not protected by any immunity from *compensatory* damages liability, but are absolutely immune from *punitive* damages liability. Owen v. City of Independence, 445 U.S. 622 (1980), City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). (5) Most individuals are protected by the affirmative defense of qualified immunity. Wood v. Strickland, 420 U.S. 308 (1975), Harlow v. Fitzgerald, 457 U.S. 800 (1982).