80-396

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE CITY OF NEWPORT,
MAYOR HUMPHREY J. DONNELLY III,
Individually and in His Official Capacity
as Mayor,
THE CITY COUNCIL for the City of Newport and
LAWRENCE NEWSOME, JOHN H. WEST,
ROBERT O. BEATTIE, RAYMOND H. CARR,
EDWARD K. CORISTINE, JAMES F. RING,
All Individually and in Their Official Capacity
as Members of the City Council for the
City of Newport, Rhode Island,
PETITIONERS,

v.

FACT CONCERTS, INC. AND MARVIN LERMAN,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GUY J. WELLS
GUNNING, LAFAZIA & GNYS, INC.
410 Turks Head Building
Providence, Rhode Island

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QUESTIONS PRESENTED

I. Is a Municipality Liable for Punitive Damages in a Section 1983 Case?

II. Did the Cross-examination of Councilman West Exceed the Permissible Limits of the Federal Evidentiary Rules?

III. Did the Alleged Acts of the Petitioners Violate the Respondents' First and Fourteenth Amendment Rights So As To Give Rise to a Claim Pursuant to 42 U.S.C. 1983?

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The petitioners, The City of Newport, Mayor Humphrey J. Donnelly III, Individually and in his official capacity as Mayor, The City Council for the City of Newport and Lawrence Newsome, John H. West, Robert O. Beattie, Raymond H. Carr, Edward K. Coristine, James F. Ring all individually and in their official capacity as members of the City

Council for the City of Newport, Rhode Island, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on July 8, 1980.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, as yet unreported, appears at Appendix A, *infra*, pp. A-1 to A-15. The opinion of the United States District Court for the District of Rhode Island on Petitioners' Motion for Judgment N.O.V. and a New Trial is unreported and appears at Appendix B, *infra*, pp. B-1 to B-15.

Jurisdiction

The opinion of the United States Court of Appeals for the First Circuit was rendered on June 17, 1980 (See Appendix A, *infra*, p. A-2) and this Court's mandate was issued on July 8, 1980. This petition for a Writ of Certiorari was filed less than 90 days from either of the aforesaid dates. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. Sec. 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any 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."

Statement of Facts

The United States District Court for the District of Rhode Island had jurisdiction of this matter by virtue of 28 U.S.C Secs. 1331 and 1343(3).

On August 22, 1975, the plaintiff, Fact Concerts, Inc. and the City of Newport entered into a contract in consideration for which the City granted to the plaintiff an entertainment license for the purpose of conducting a music concert at Fort Adams, a State owned reservation in the City of Newport, on August 30, and August 31st.

The contract provided in paragraph 2 that:

"It is expressly agreed by the parties hereto that the entertainment license herein granted is held solely at the discretion of the City, and if at any time in the opinion of the City the interest of the public safety demand, said entertainment license may be cancelled at any time by the City, and the City shall incur no liability to the Producer as a result of such cancellation."

And in paragraph 7 it further provided:

"The Producer agrees to comply with all orders of the Director of Public Safety with reference to fire and police protection and safety including, but not limited to, the following:

(a) Auxiliary generator for lighting;
(b) Firefighters for fire protection and First Aid duties;
(c) Portable firefighting equipment, state area;
(d) Seating to be arranged so that aisles point near exits off the field as well as possible—all chairs to be wired together. Exits and entrances shall be provided as directed;
(e) All seats to be installed and ready for occupancy no later than 3:00 P.M. on August 29, 1975."

At the time the contract was entered into the program had been advertised in both the New York *Times* and Providence *Journal* as featuring David Brubek, Herbie Mann, Ahmad Jamal, Buddy Rich, Miles Davis, Maynard Ferguson, Sarah Vaughan and Stan Getz.

On Sunday, August 24th, two days after the Friday that the contract had been signed, an ad appeared indicating that a group named "Blood, Sweat and Tears" had been substituted for Sarah Vaughan who had cancelled her commitment to appear in Newport.

The next day Nelson Amado, one of the principals in Fact Concerts, received a call that "some problems had been raised" concerning the substitution of Blood, Sweat and Tears on the program. As a result of this call, Mr. Amado requested a meeting of the council and one was called for and held on August 26th.

The minutes of that meeting indicate that it was called to order at 11:30 A.M.; that all of the defendants were present and that "After a long discussion, pro and con, Mayor Donnelly moved that unless Blood, Sweat and Tears was removed from the bill on Sunday, the license for the contract would be cancelled by the City Council."

As a result of this meeting representatives of the plaintiffs met and decided "unanimously to abide by their decision to remove Blood, Sweat and Tears from the show and replace them."

On either Wednesday or Thursday of that same week Amado received a call from the City Solicitor advising him that Blood, Sweat and Tears would be permitted to play if they did not play rock music but rather jazz.

A second and most critical meeting was held on Friday, August 29th. The principals in Fact Concerts were present with their attorney along with members of the City Council, the City Solicitor, James O'Brien and City Manager Perry. The minutes reveal that the meeting was called to order at 4:28 P.M. and that it began with a discussion of "a possible lawsuit" and what appeared to be the offering of two alternatives to the plaintiffs; that is to say, cancellation of the concert, or the execution of an affidavit that rock music would not be played.

It is clear from the testimony of all witnesses that no such affidavit was ever executed by the plaintiffs or prepared by the defendants.

Shortly before the meeting and shortly after 3:00 P.M. on that date City Manager Perry had gone to the site of the concert at the request of the Council to determine whether or not the promoters had complied with paragraph 7 of the contract. He observed that the chairs were not wired together, but rather attached to each other by tape and there were still 500 to 1000 chairs that had not been taped. He was also unable to find the auxiliary generator which had been called for in the contract, although there is some evidence that one had been located outside the walls of Fort Adams.

According to the minutes he reported this to the Council and after some discussion a motion was made, seconded and approved unanimously to cancel the contract. The meeting was recessed at 5:05 P.M.

All of the councilmen who testified indicated that they were concerned because of earlier disturbances (in 1960, 1969 and 1971) at so-called rock concerts and that it was this concern that prompted the vote to cancel.

The meeting was reconvened at 6:25 P.M. at which time the attorney for Fact Concerts advised the Council that suit would be instituted and requested a further continuance to consult with his client. That meeting was recessed at 8:55 P.M. and reconvened at 9:27 P.M. at which time the Council was again advised that litigation would result. The meeting was adjourned.

The next day, Saturday, August 30th, the plaintiffs obtained a Temporary Restraining Order in the State Superior Court against the Council and the concert went on as planned including the appearance of Blood, Sweat and Tears on Sunday, August 31st. Approximately 6400 people attended the two-day event.

Thereafter Facts Concerts, Inc. and Marvin Lerman (one of the promoters) brought a five count complaint in the United States District Court for the District of Rhode Island seeking declaratory relief, redress for a violation of their First Amendment rights, and compensatory and punitive damages for various pendant contract claims.

At trial the complaint was reduced to two counts, the first a Section 1983 claim and the second a claim for interference with contractual relationships.

The jury answered interrogatories finding all defendants liable on both counts and awarding $72,000.00 compensatory damages and punitive damages in the total amount of $275,000.00 of which $200,000.00 was assessed against the City of Newport.

A Motion for Judgment N.O.V. and a New Trial was filed and after hearing thereon the trial justice ordered a remittitur of $125,000.00 of the punitive damage award against Newport and sustained the verdicts in all other respects.

The United States Court of Appeals for the First Circuit affirmed.

Reasons for Granting the Writ

1. The United States Court of Appeals for the First Circuit has in the words of Rule 17(1)(c):

> "...[D]ecided an important question of federal law which has not been, but should be, settled by this Court...."

To quote the Court of Appeals:

> "Here, it is by no means certain that the court's instructions constituted error. This is an area of the law in which there has been and apparently still is, considerable movement. We have held on two occasions that punitive damages are available against Section 1983 defendants when there are aggravating circumstances. *Alicia Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968) (unwarranted invasion of privacy).
>
> Although the Supreme Court has never fully addressed the question, it has edged toward a similar conclusion. *Carlson* v. *Green*, 48 U.S. Law Wk. 4425, 4427 (April 18, 1980) (dictum); *Carrie* v. *Piphus*, 435 U.S. 247, 254-55, n.11 (1978). When our rule on this point is viewed in light of the Supreme Court's determination that municipalities are "persons" within the ambit of Section 1983, *Monnell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978); there arises a distinct possibility that municipalities, like all other persons, subject to suit under Section 1983, may be liable for punitive damages in proper circumstances. This certainly is no imposing body of law to the contrary.

> In short, the present state of the law as to municipal liability is such that we cannot with confidence predict its future course. Where the law is in such a state of flux and there is no appellate decision to the contrary, we would be hard pressed to say that the Trial Judge's punitive damages instruction was plain error. See *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). Nor is this a case containing such "peculiar circumstances (to warrant noticing error) to prevent a clear miscarriage of justice." *Numerad* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966)."

2. The United States Court of Appeals for the First Circuit in approving the District Court's sanctioning of the impermissible cross-examination of Councilman West so departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

3. The United States Court of Appeals for the First Circuit in approving the District Court's rulings regarding the defendant's motions for a Judgment N.O.V. so departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

Argument

I. A Municipality Is Not Liable for Punitive Damages in a Section 1983 Case.

The Trial Justice instructed the jury that they might award punitive damages against both the City of Newport and the individual defendants. Defendants' counsel failed to except to that instruction. Rule 51 of the Federal Rules of Civil Procedure would ordinarily bar further consideration of that issue. The present case is not ordinary. An Appellate Court on its own initiative may reverse on the grounds of plain error in a jury charge that was not objected to when such reversal is necessary to correct a fundamental error or to prevent a

miscarriage of justice. *Cohen* v. *Franchard Corporation*, 478 F.2d 115 (2d Cir. 1973), 17 F.R. Serv. 2d 912, *cert. denied*, 414 U.S. 857, 94 S.Ct. 161, 38 L.Ed.2d 106; *Williams* v. *City of New York*, 508 F.2d 356, 362 (2d Cir. 1974).

In *Williams* v. *City of New York*, supra, as in the present case an erroneous instruction allowed the jury to assess punitive damages against a municipality. That the innocent citizens of the City of Newport will bear the brunt of the error of court and counsel compels reconsideration of the instruction. The liability of a municipality for any damages whatsoever for alleged violations of the Civil Rights Act of 1871 was at the time of the trial a principle of law but recently created. That no developed legal doctrine regarding the issue exists both mitigates the error of the defendants' trial counsel (who is not counsel of record upon this petition) and now imperatively warrants consideration by this Court.

In *Monnell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978) this court held that municipal corporations were "persons" within the ambit of 42 U.S.C. Section 1983. The extent of and the limitations upon the liability of municipal corporations under 42 U.S.C. Section 1983 are undetermined. This court in *Monnell* expressly reserved decision on the availability of a qualified municipal immunity. Whether or not a municipal corporation or its elected members can be held liable for punitive damages is now squarely before this Court.

The main, if not the sole purpose of an award of damages under 42 U.S.C. Section 1983 is to compensate the victim for a loss resulting from the deprivation of a constitutional and protected right. To the extent that Congress intended that awards under Section 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages. *Carrie* v. *Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). The great majority

of lower Federal Courts have approved the award of punitive damages against individuals found liable under 42 U.S.C. Section 1983. This Court has implied neither approval nor disapproval of those lower Federal Court decisions. *Carrie* v. *Piphus*, (supra). Assuming *arguendo* that punitive damages may be awarded against unelected individual defendants, logic and justice require that no such award be allowed against a municipal corporation or its elected representatives.

An award of punitive damages is imposed in Civil Rights actions primarily for its effects upon the wrongdoer, to punish and to deter malicious or wanton conduct in public officials. *Aumiller* v. *University of Delaware*, 434 F.Supp. 1273 (D.C. Del. 1977). An award of punitive damages against the City of Newport and its elected officials would serve neither purpose. Those who will bear the burden of the award—the taxpaying citizens—cannot realistically be charged with the responsibility for the acts of their officials nor will the citizens be able to deter further wrongful acts on the part of the officials. Members of a municipal corporation do not stand in the same position as shareholders in a private corporation against which awards of punitive damages generally are upheld. Any superficial similarity evaporates in light of analysis. Private corporations are generally created for the purpose of profit. Those who become members of them do so voluntarily and in a majority of instances, in the hope of gain. There are manifold and speedy ways by which to reach and replace any representative or agent who so mistakes or disregards his duty as to render liable for punitive damages the persons in interest represented. The municipal corporation is different. It is not organized for any purpose of gain or profit, but it is a legal creation, engaged in carrying on government and administering its details for the general good and as a matter of public necessity. The individuals who in the aggregate constitute a municipal corporation submit certain of their affairs to its control and management, but they are not volunteers in so doing. They happen to

reside within a city's boundaries and they become members of it to the extent of being represented by its agents. While theoretically a citizen has a voice in selecting a person who shall represent them and control the city, more often the government is not totally their choice, city management not in complete accordance with their individual judgment. A large body of common law decisions have held that a municipal corporation cannot be held liable for punitive damages. While the public may be benefited by such an award against the malicious wrongdoer, there is no benefit when the public is penalized for the acts of an agent over whom it is able to exercise but little direct control. *Chapell* v. *Springfield*, 423 S.W.2d 810, 814 (1968).

The award of punitive damages in the present case against the City of Newport will be borne by the innocent. Although this court has upheld an award of compensatory damages in *Monnell* v. *Department of Social Services of the City of New York*, (supra) that decision cannot be extended to encompass awards of punitive damages. An award of punitive damages is a windfall to the plaintiffs. There is no legal entitlement to punishment. Where only the innocent, oftentimes the helpless, are to bear the brunt of the punishment, the rationale supporting exemplary damages disappears. The very fact that only the innocent will be punished demonstrates that the award of punitive damages against the municipality will fail to secure its intended effect. *M'Gary* v. *President and Council of LaFayette*, 12 Rob. 674, 43 Am.Dec. 239 (1846), (La.).

There exists yet another reason to overturn the award of punitive damages against the City of Newport. What amount of money punishes a municipality? The City of Newport's power to tax is virtually unlimited. Ordinarily, the theory of punitive damages dictates that the wealthier the wrongdoer, the greater the award. A relatively small sum might be adequate to punish a poor man. A much greater sum, for the same wrong, would be needed to punish a rich man. As against a municipal corporation, this theory would permit evidence of

the unlimited taking power as the measure of a proper verdict. In effect, a jury given a license to award punitive damages against the city will be free to assess damages with no proper guidelines. *Fisher* v. *City of Miami*, 172 So.2d 455, 457 (1965). The amount of the award will be determined by the caprice of the individual jurors. Justice cannot be made a matter of chance or prejudice.

The Trial Justice found that an award of punitive damages against a municipality might serve beneficial purposes:

> "The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious acts of the municipal government. This attention, in turn, well may have beneficial effect in the next election." (District Court of Rhode Island, 1979) (*infra*, p. B-9).

The award of punitive damages unquestionably will have an effect upon the next election. That effect will not be salutary. The punitive award against the city and its representative officials is a direct intervention by the federal judiciary into Newport's government. It is a sanction upon those duly elected representatives of Newport who have, in the court's opinion, governed badly. It is a sanction upon the citizens of Newport who have, in the court's opinion, allowed themselves to be ill governed. As early as 1849 in *Luther* v. *Borden*, 7 Howard 1, 12 L.Ed. 581 (1849), this court refused to determine sub judice which of two opposing factions was the true government of the State of Rhode Island. No court may maintain its neutrality while actively engaged in partisan politics. The punitive award in the present case, as both the parties and the Trial Justice recognized, expresses the court's disapproval of Newport's elected representatives. The punitive award endorses any political faction in opposition to the members of Newport's government as it was composed in the summer of 1975.

This direct involvement in the affairs of local politics is an intolerable abuse of the federal judicial power. The federal judiciary cannot dictate directly or indirectly to the citizens of Newport whom they must elect. The federal judiciary has long labored to assure every citizen of the United States a truly representative government. Is this Court now to punish those citizens who have in its opinion not chosen well? In *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court of the United States strongly reaffirmed its belief that the national government will fare best if the state's institutions are left free to perform their separate functions in their separate ways. While this court is bound to vindicate federal rights, that vindication must be accomplished in ways that will not unduly interfere with the legitimate activities of the state. In *Younger* v. *Harris*, (supra), this Court declared its reluctance to involve itself in state judicial proceedings. This Court must be even more reluctant to involve itself in the composition of an elected city council.

Clearly, the members of the Newport City Council and its Mayor did not foresee that their tenures in office would end in financial ruin. The award of punitive damages against individual office holders must have a chilling effect on those seeking to serve the municipality in a representative capacity. Even if the punitive award did not deter members of the council from again running for office, it would certainly not find favor with the citizens of the city who had also suffered a financial loss as a result of the award. It must be held as a matter of federal common law that a municipality and its elected officials are immune from awards of punitive damages.

II. The Cross-examination of Councilman West Exceeded the Permissible Limits of the Federal Evidentiary Rules.

During the cross-examination of one of the defendants, John H. West, the court permitted over objections, questions deal-

ing with remarks a witness had made the day before to his fellow defendants after court had closed. The witness over objection was compelled to admit that in his opinion the case was a travesty of justice and that the closest thing to God on earth was a Judge. (Opinion of the First Circuit, *infra*, pp. A-9 - A-15). Somewhat later, the Trial Judge permitted this further line of questions:

203 Q. Is it a true statement that you thought that Mr. Weinstein from my office was ludicrous?

A. I thought that those people appeared at the eleventh hour were ludicrous, yes, sir.

204 Q. You thought that Miss Elizabeth Rode, who questioned you in this examination, was ludicrous also, is that correct?

A. Did I say that, sir?

205 Q. Did you make some remarks when you got there that you thought you were going to be deposed under oath, and that just a little girl showed up, didn't you make that remark, sir, in my office?

A. Did I?

206 Q. Did you make that remark, sir?

Mr. Faerber: I object.

The Court: No, this is legitimate cross-examination. What's the question?

207 Q. Did you make that remark, did you make that remark, sir, in my office?

A. That, sir, I don't recall making that remark, no, not unless you have it in writing, or what have you. Can you show it to me or have someone testify to it, I don't recall it, no, sir.

208 Q. If I don't have it in writing, then you don't recall having made it, is that your statement, Sir?

A. I don't recall having made it, sir. I made that clear once.

These testimonial colloquies had, of course, absolutely nothing to do with the issues to be presented to the jury. But they could not fail to have been enormously prejudicial to all the defendants.

The plaintiffs' attorney recognized this as an examination of his closing remarks to the jury shows. At least on 22 occasions he made specific references to Councilman West, virtually every reference relating to the above quoted material. Councilman West was compared with Hitler, the "Watergate Gang", and George Lincoln Rockwell. He was described as a bully and a male chauvinist.

The vice of permitting this kind of cross-examination is amply illustrated by the closing argument to the jury. The attitude of a lay person to the conduct and trial, or his personal feelings regarding the attorneys for the opposing side or the court are absolutely no assistance to the jury in reaching a decision on the merits. Mr. West's attitude towards a trial in which he was a defendant against whom some substantial money damages were sought could not possibly have a bearing on the question of his good faith in voting on the resolution of the City Council on August 29, 1975. It was accordingly prejudicial error of the greatest kind to permit the foregoing cross-examination. The Court of Appeals, *infra*, pp. A-13, found that Mr. West's credibility was fair game in light of the fact that he was not only a member of the City Council, but held himself out as an expert regarding the production of concerts. The court below does not explain, nor could it have explained, how Mr. West's attitude towards the court, the judge or the opposing attorneys was in any way probative of Mr. West's truthfulness under direct and cross-examination. Rule 404 of the Federal Rules of Evidence expressly provides that evidence of a person's character or a trait of his character is not admissible.

Rule 611(b) of the Federal Rules of Evidence expressly provides that cross-examination should be limited to the subject

matter of direct examination and matters affecting the credibility of a witness. One cannot expect a defendant in a law suit to maintain friendly or even neutral feelings to opposing counsel and to the court. It is not unnatural for a defendant to view court and counsel as the instrumentalities of his possible ruin and disgrace. Moreover, Rule 608 of the Federal Rules of Evidence expressly limits occasions when specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, may be proved by extrinsic evidence. The testimony elicited from Councilman West does not fall within the enumerated exceptions to Rule 608. It was accordingly prejudicial error of the greatest kind to permit the foregoing cross-examination.

III. The Alleged Acts of the Petitioners Did Not Violate the Respondent's First and Fourteenth Amendment Rights So As To Give Rise to a Claim Pursuant to 42 U.S.C. Section 1983.

The Civil Rights Act of 1871, now codified as 42 U.S.C. Section 1983 is not itself a source of Substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal constitution that it describes. The first inquiry in any Section 1983 suit, therefore, is whether the plaintiff has been deprived of a right secured by the Constitution and the Laws of the United States.

The respondents in this action originally alleged that the defendants had deprived them of rights secured by the Fourteenth Amendment. Thereafter, the plaintiffs amended their complaint to allege that the acts of the defendants had deprived them of their rights pursuant to the First and Fourteenth Amendments of the Constitution.

The plaintiffs-respondents did not claim that they were unable to produce and present the concert. The concert went

on as scheduled. The injuries claimed by the plaintiffs were financial losses, lost revenues and profits and damage to their reputations. Any damage to the plaintiffs' reputations as entrepreneurs is not a wrong of constitutional dimensions. See *Paul* v. *Davis*, 424 U.S. 693, 47 L.Ed.2d 465, 96 S.Ct. 1155 (1976).

Lost profits are not "property" within the meaning of the Fourteenth Amendment. In *Arnett* v. *Kennedy*, 416 U.S. 135, 40 L.Ed.2d 1594 S.Ct. 1633 (1974), this Court reaffirmed that property interests are not created by the Constitution. Rather, such interests are created and their dimensions are defined by existing rules or understandings that stem from independent sources, such as state law. The plaintiffs' expectation of a profit arises from no contract. It was rather a hope that a commercial venture will be successful. Such hope is far too contingent to be considered a vested property interest under the meaning of the Fourteenth Amendment.

Moreover, the plaintiffs were given the process due them. They had two hearings before the City Council. The plaintiffs then successfully enjoined the defendants from interfering with the Jazz Festival. The alleged injury to the plaintiffs was solely from announcement of the cancellation of the concert.

The First Amendment is, of course, incorporated into the Fourteenth Amendment. *Douglas* v. *City of Jeannette*, 219 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877 (1943). Music is communication and song is speech. Yet, the First Amendment cannot be construed to guarantee a promoter the right to a profit. Each medium of expression must be assessed for First Amendment purposes by standards suited to it. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975). A commercial production is constitutionally protected not so much because it pertains to the promoter's business but because it furthers the societal interest in the free flow of personal expression. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 745, 55 L.Ed.2d 707, 98 S.Ct. 326 (1978).

In the instant case, every scheduled musician performed. If the plaintiffs-respondents had a right protected by the First Amendment to produce and present a concert program, that right was not abridged.

Conclusion

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 79-1397

FACT CONCERTS, INC. AND MARVIN LERMAN,

PLAINTIFFS-APPELLEES,

v.

THE CITY OF NEWPORT,
THE STATE OF RHODE ISLAND,
MAYOR HUMPHREY J. DONNELLY III,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS
MAYOR, THE CITY COUNCIL
FOR THE CITY OF NEWPORT AND
LAWRENCE NEWSOME
JOHN H. WEST
ROBERT O. BEATTI
RAYMOND H. CARR
EDWARD K. CORISTINE
JAMES F. RING
ALL INDIVIDUALLY AND IN THEIR OFFICIAL
CAPACITY AS MEMBERS OF THE
CITY COUNCIL FOR THE CITY OF
NEWPORT, RHODE ISLAND,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

BEFORE COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Guy J. Wells, with whom *Gunning, Lafazia & Gnys, Inc.*, was on brief, for appellants.

Leonard Decof, with whom *Jay S. Goodman* and *Decof, Weinstein & Mandell* were on brief, for appellees.

June 17, 1980

BOWNES, *Circuit Judge.* In August of 1975, the City Council of Newport, Rhode Island, voted to revoke a license to conduct two jazz concerts previously issued to Fact Concerts, Inc., unless the musical group Blood, Sweat and Tears was removed from the program. The City of Newport (the City) and five Newport city councillors now appeal from a jury verdict awarding compensatory and punitive damages to Fact Concerts for violation of its first amendment right to promote and produce the concerts and for interference with Fact Concerts' contractual relationships with its performers, ticket holders and concessionaires.

Appellants allege the district court erred in (1) denying the defendants' motion to dismiss, motion for a directed verdict, motion for judgment n.o.v. and motion for a new trial, (2) instructing the jury that punitive damages might be found against the City, and (3) allowing a defendant city councillor to be cross-examined concerning his knowledge of an earlier, unsuccessful attempt by the City to refuse to issue a permit for an antiwar exhibition and out-of-court remarks made by the councillor indicating contempt for the judicial process. After reviewing these allegations in a light clouded by the defendants' failure to object at trial to several of the matters now raised on appeal, we affirm.

The Facts

Evidence was introduced at trial tending to show the following facts.

In the summer of 1975, Fact Concerts obtained a license from the Rhode Island Department of Natural Resources to hold a series of three concerts in Fort Adams, a large, state-owned facility located in Newport, Rhode Island. The City issued a permit for the first concert, which featured Arthur Fiedler, and the concert took place uneventfully. The two remaining concerts, originally scheduled for early August, were rescheduled for August 30th and 31st and licensed under a contract entered into with the City on August 23, 1975.

Fact Concerts prepared for the concerts throughout the summer of 1975, retaining eight well-known acts, including Sarah Vaughn, Dave Brubeck, Herbie Mann, Miles Davis and Stan Getz, to perform during the two days. Late in the summer, Sarah Vaughn cancelled her appearance because of a conflicting engagement and the group Blood, Sweat and Tears was retained to replace her. When the members of the Newport City Council learned of the addition of Blood, Sweat and Tears to the program, they became concerned that the group, which they considered a rock group rather than a jazz band, would attract an unruly audience to Newport, and initiated the efforts to force the removal of Blood, Sweat and Tears from the program which are the gravamen of this case.

On Monday, August 20th, Newport Mayor Donnelly informed Fact Concerts that he considered Blood, Sweat and Tears to be a rock group and that, because of riots the City experienced at previous rock concerts, he did not want rock groups appearing in Newport. Fact Concerts requested permission to appear at a special City Council meeting the next day.

At the special Council meeting, Fact Concerts informed the Council that, contrary to its belief, Blood, Sweat and Tears was not a rock group. Fact Concerts offered as proof of this the group's appearances at Carnegie Hall and similar facilities around the world. Mayor Donnelly, also a member of the Council, reiterated his concern as to the audience Blood, Sweat and Tears would attract. Without attempting to verify Fact Concerts' representations concerning the nature of Blood, Sweat and Tears' music, the Council voted to cancel the license for both days unless the group were removed from the Sunday program. The Council's vote received extensive publicity, a fact subsequently shown to have dampened ticket sales.

Fact Concerts acceded to the Council's wishes by cancelling Blood, Sweat and Tears and hiring a replacement group,

Weather Report. On Thursday, August 28th, Newport City Solicitor O'Brien informed Fact Concerts that the Council had changed its position and would allow Blood, Sweat and Tears to appear if they did not play rock and roll music.[1] Fact Concerts then rehired Blood, Sweat and Tears and agreed to attend another specially convened Council meeting the next day.

Mayor Donnelly opened the Friday meeting by noting the possibility of a lawsuit against the City if Blood, Sweat and Tears were not allowed to perform. He further stated that the City could either cancel the entire concert or allow Blood, Sweat and Tears to play subject to the limitation concerning rock and roll music. Although the latter option was advocated by City Solicitor O'Brien, Fact Concerts was never given the opportunity to assent to such an agreement. The cancellation option received more favorable consideration after City Manager Perry reported that Fact Concerts had failed to fulfill two provisions of its contract: installation of an auxiliary electric generator and wiring together the individual spectator seats by 3:00 p.m. Friday.[2] Finding that Fact Concerts had failed to perform its obligation under the contract, the Council voted to cancel the contract. It then offered Fact Concerts a new contract for the same dates, specifically excluding Blood, Sweat and Tears. Fact Concerts informed the City that suit

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[1] Testimony at trial tended to show that the City made this decision because Blood, Sweat and Tears had stated publicly its intention to sue the City for injury to its reputation.

[2] Testimony at trial tended to show that the auxiliary generator was in place but had been overlooked by the City Manager. There also was testimony that the chairs were fastened together by tape and that this was completed shortly after the 3:00 p.m. deadline. Testimony was offered to the effect that the special tape used on the chairs was stronger and more effective than wire and that, in any event, the chairs were in solid blocks of twelve and could not be used as weapons. The Rhode Island Department of Natural Resources testified that the preparation of Fort Adams by Fact Concerts was satisfactory for health and safety purposes.

would be instituted if the original contract were not honored. Mayor Donnelly responded by stating that the contract was cancelled because it had been breached by Fact Concerts. News of cancellation of the contract was broadcast extensively over local media that night, the eve of the concerts.

On Saturday morning, Fact Concerts obtained an injunction in state court restraining the City from interfering with the concerts. The show went on; 6,308 of a possible 14,000 tickets were sold for the two days of music, resulting in a loss of $72,910 to Fact Concerts.

The Proceedings Below

Fact Concerts' complaint, as amended, included five counts. Count I sought a declaratory judgment of unconstitutionality of the ordinance under which Newport licensed concerts, and injunctive relief against the enforcement of it. Count II sought compensatory and punitive damages for violation, under color of state law, of Fact Concerts' first amendment right to promote and produce a concert. Counts III, IV and V, each pendent state claims, sought compensatory and punitive damages for breach of contract, interference with contractual relationships and tortious interference with advantageous relationships, respectively. The district court found the licensing ordinance constitutional and sent Counts II and IV to the jury redesignated as Counts I and II. The jury returned verdicts on both counts for Fact Concerts, awarding compensatory damages against all defendants in the amount of $72,910 and punitive damages as follows: the City, $200,000; Mayor Donnelly and Councillor West, $20,000 each; Councillors Carr, Coristine, and Newsome, $10,000 each; Councillors Beattie and Ring, $5,000 each. Faced with a new trial on the issue of damages, Fact Concerts accepted a remittitur of $125,000 in the punitive damages award against the City.

The Motion to Dismiss

Defendants' motion to dismiss for failure to state a claim on which relief could be based, Fed. R. Civ. P. 12 (b), lacked

merit. As amended, Fact Concerts' complaint alleged that the defendants, acting under color of state law, intentionally interfered with Fact Concerts' first amendment right to promote and produce a concert, in violation of 42 U.S.C. § 1983.[3] Fact Concerts sought compensatory and punitive damages under both the § 1983 claim and the three pendent state law claims.

Defendants do not dispute that the first amendment, as applied to the states, *Douglas* v. *City of Jeanette*, 319 U.S. 157 (1943), protects Fact Concerts' right to produce jazz concerts. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975). *See also Stepping Stone Enterprises, Ltd.* v. *Andrews*, 531 F.2d 1 (1st Cir.), *cert. denied*, 429 U.S. 823 (1976). And plaintiffs have not disputed that a municipality may deny a permit for legitimate public safety reasons, *see Stepping Stone Enterprises*, 531 F.2d at 3; *We've Carried the Rich for 200 Years Coalition* v. *City of Philadelphia*, 414 F. Supp. 611, 615 (E.D. Pa. 1976), *aff'd without published opinion*, 538 F.2d 322 (3d Cir. 1976). However, defendants deny that Fact Concerts enjoyed a constitutional right to earn a profit from the concerts. This somewhat ingenuous argument ignores the fact that section 1983 provides that violators "shall be liable . . . for redress" and that the Supreme Court has construed section 1983 to comprehend, at the least, the payment of compensatory damages. *Carey* v. *Piphus*, 435 U.S. 247, 254-57 (1978). Fact Concerts never claimed a property right in profits; it contended that the financial failure of the concerts was the result of the defendants' actions, and they were

[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

liable under section 1983 for the natural consequences of their acts. We note also that, since the jury's verdict does not indicate under which counts, the 1983 count or the pendent ones, the compensatory damages were awarded, this issue may be moot.

The Motions for a Directed Verdict and Judgment N.O.V.

In reviewing the denial of a motion for a directed verdict, we must examine the evidence in the light most favorable to the plaintiff and determine whether there are facts and inferences reasonably drawn from those facts which lead to but one conclusion — that there is a total failure of evidence to prove the plaintiff's case. Fed. R. Civ. P. 50 (a); *Dehydrating Process Co.* v. *A.O. Smith Corp.* 292 F.2d 653, 656 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1962). The standard of review for denial of a motion for judgment n.o.v. is the same. Fed. R. Civ. P. 50 (b); 5A Moore's Federal Practice § 50.07 [2] (1980). Fact Concerts presented evidence from which the jury could have found the following facts: that, because of the advice of the City Solicitor and the City's earlier unsuccessful attempts to refuse to issue a permit for an antiwar exhibition, the defendants were aware that the concerts could not be cancelled because of their content; that, upon learning of the addition of the group Blood, Sweat and Tears to the Sunday concert program, the defendants attempted to induce the removal of the group from the program first by persuasion and then by coercion; and that, upon learning of the possibility of a lawsuit being filed against the City for harm to the reputation of Blood, Sweat and Tears, the defendants cancelled the concert for pretextual reasons. We see no failure of evidence to prove Fact Concerts' case.

The Motion for a New Trial

The defendants requested a new trial on the grounds that punitive damages could not be awarded against a municipality under section 1983 and that, in any event, the size of the award of punitive damages against the City was excessive

and the result of passion or prejudice. We discuss defendants' first ground later in this opinion. The district court correctly found some merit in defendants' second ground and ordered a new trial on the issue of damages, if Fact Concerts did not accept a remittitur in the amount of $125,000 in the punitive damages award against the City. Fact Concerts accepted, thereby nearly equalizing the punitive damages awarded against the City and the individual defendants as a group. We see no reason for additional relief.

The Cross-Examination of Councillor West

As part of their case, defendants placed Councillor John West on the stand to testify concerning his extensive knowledge of the concert industry in general and the promotion of concerts in Newport in particular. The purpose of Councillor West's testimony was to show that defendants acted in good faith out of a reasonable concern for public safety. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). Defendants contend on appeal that the district court erred in allowing Councillor West to be cross-examined concerning his knowledge of an earlier, unsuccessful attempt by the City to refuse to issue a permit for an antiwar exhibition and out-of-court statements made by Councillor West indicating contempt for the judicial process. Although these matters have been framed by defendants to pose two different questions of law, we think they may be resolved in one analysis of their probative and prejudicial qualities.

The context of the cross-examination of Councillor West, ignored by defendants in their brief, is vital to this appeal. The district court indicated during Councillor West's direct testimony that it was having difficulty deciding plaintiff's many objections to that testimony because the direction or purpose of the testimony was unclear. After the jury had been dismissed for the day, but in the presence of Councillor West, counsel for defendants said the testimony was intended to show that "when the Council acted, whether they acted in

error, whether they acted imprudently, they did not act with malice, they did not act with intent to deprive anyone of their First Amendment rights, that they were merely exercising perhaps super caution for the safety of the public . . . ."

The next morning, prior to the resumption of Councillor Wests' direct testimony, counsel for Fact Concerts requested a bench conference at which he informed the court that, if defendants offered a good faith defense through Councillor West, he would cross-examine Councillor West on matters indicative of bad faith. Specifically, counsel for Fact Concerts said he would raise the earlier, unsuccessful effort of the Council to refuse to issue a permit for the exhibition in a city park of a "tiger cage," which opponents of the Vietnam War contended was used to incarcerate Vietnamese citizens. Counsel for Fact Concerts also said he would raise, on cross-examination of Councillor West, remarks made by him indicating contempt for the instant judicial proceeding. The court indicated such cross-examination would be permissible if a good faith defense were offered.[4] Thus, counsel for Fact

[4] Transcript of Bench Conference

MR. DECOF: I would like to place on the record that if Mr. Faerber goes forward now with this so-called good-faith evidence I intend to examine and educe *[sic]* from this witness the fact that he was aware that the right of free speech was involved, he had previously been enjoined by this very Court as had the City Council of Newport in a prior case involving a tiger case in Eisenhower Park in Newport, that he has not only disregard but contempt for that ruling of the Court, as well as the present proceeding.

THE COURT: That's permissible cross-examination.

MR. DECOF: And that he has, let me finish, please, that he has expressed his contempt for the present proceedings in my hearing while I was at counsel table and stated to the other members of the counsel, and I quote, "This is a travesty in this court, I don't have to go to church for ten weeks, because I've been in this courtroom for a week." Another quote, "The Judge is the closest thing to God on earth." And I just want to put this on the record before I ask these questions to go into the, if we go into the state of mind of this individual with reference to good faith.

Concerts made clear that the defendants' good faith defense would be rebutted in the only way available — by showing that the defendants were aware that Fact Concerts enjoyed a constitutional right to produce a concert featuring Blood, Sweat and Tears and that the defendants intentionally interfered with that right. Moreover, counsel for Fact Concerts made clear that out-of-court statements made by Councillor West showing contempt for the legal process by which constitutional rights are protected would be raised on cross-examination.

The cross-examination went according to the prediction of counsel for Fact Concerts.[5] It was brought out that

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THE COURT: It's permissible in cross-examination.

MR. DECOF: Thank you, your Honor.

MR. FAERBER: W , your Honor, I would simply observe that on the issue of the, I assume Mr. Decof is referring to the tiger cage issue, there was a restraining order issued in that case, he was, I believe, a member of the counsel at that time, but the case was never tried after the restraining order was issued. The tiger cage was permitted in Eisenhower Square, and the case was dismissed by stipulation.

THE COURT: I know, but you see, Mr. Faerber, you're talking now of good faith, and cross-examination can be directed to showing that there really isn't good faith.

MR. FAERBER: Yes, your Honor. Is this limited to this one individual?

THE COURT: I don't know, I can't rule now, I must rule as it develops.

(Conclusion of side bar colloquy)

[5] Transcript of Cross-Examination

Q You sat here in the courtroom yesterday while the jury was out, while his Honor stated to Mr. Faerber and in your presence that the only —

MR. FAERBER: I object to anything being stated while the jury was out, being recited before the jury.

THE COURT: Sustained.

Q You heard the discussion here to the effect that a defense that the City of Newport could raise, the only defense would be "public safety"? Didn't you, sir?

A I believe I did, yes.

Councillor West was a member of a prior City Council which had been enjoined on first amendment grounds from interfering with public exhibition of the "tiger cage." He also ad-

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Q Well, you know, don't you, sir, —
A There's also good faith.
Q You said "good faith," right?
A Right.
Q You heard these things?
A Yes, I did, but I think you have to say all statements, all things, not just the ones you want to state.
Q Mr. West, I will give you the opportunity to say every single thing you want to.
A I doubt it, sir, with you questioning me.
Q You don't like the way I question you, or you don't like what's going on in this courtroom?
A You only asked the question to which you want the answer.
Q Sir, let me ask you, with reference to the matter of free speech, you were a member of the City Council when the City Council was restrained by his Honor, Chief Judge Pettine, from limiting the right of free speech of certain people in Newport, isn't that correct, sir?
MR. FAERBER: I object.
THE COURT: Overruled.
A You must be more specific than that.
Q You don't know what I'm talking about?
A No, I don't.
Q Do you recall the event, sir, when some people wanted to demonstrate in the City of Newport over the way prisoners were being handled in the Vietnam War and they wanted to put a tiger cage on the premises at Eisenhower Park, do you remember that, sir?
A Yes, I do.
Q And you were on the City Council of the City of Newport, isn't that right?
A Yes, sir, I was.
Q And the city refused to allow that to happen?
A We refused to grant them a license, sir.
Q And they went to the Federal Court, to this very Federal Court, is that right?
A Yes, they did.
Q And before this very Chief Judge, Judge Pettine, isn't that right, sir?

mitted on cross-examination to making statements that could be interpreted as being contemptuous of the court's handling of the case.

A Yes.

Q And he issued a restraining order, an injunction restraining the City of Newport and you, as a member of the City Council, from interfering with the right of these people to exercise free speech in the form of demonstration, isn't that right, sir?

A Slightly incorrect, he refused the rights of us not to grant them a license, which is a little bit different as far as I was concerned. They had applied for a license, we refused it, and Judge Pettine refused to allow us to refuse the license.

Q More precisely what happened is, in other words, he enjoined you people from refusing a license?

A Well, that's his opinion, sir, you can't hold me accountable for the Judge's opinions.

Q As a matter of fact, you don't have much respect for the Judge's opinion, do you, sir?

A About as much as you have.

Q I take great issue with you, sir — did you not say in open court, not in open court, but in my presence last Friday to other members of the council, "This case is a travesty"?

MR. FAERBER: I object, your Honor.

THE COURT: Overruled.

A I don't recollect, sir.

Q You don't recollect that?

A No.

Q Please be careful, Mr. West, because there are a number of people who overheard this statement. I'd like you to search your memory, did you say last Friday. I'm sorry, just yesterday, sitting at that table, to the other members of the City Council, "This case is a travesty"?

A I may have.

Q Did you also say, sir, to the other members of the City Council in my hearing, "I don't have to go to church for ten weeks, because I've been in this courtroom for a week," did you say that sir?

A I may have.

Q Well, you know you did, don't you, sir?

A I may have said those things, yes.

Q Well, did you or didn't you?

A I may have.

Q You seem to have some difficulty recalling it, didn't you say those things yesterday, sir?

We find that the admission of the testimony concerning the "tiger cage" case was probative of the Council's knowledge of the law in the area of the first amendment and, thus, bore directly on the issue of good faith.

The cross-examination concerning Councillor West's out-of-court statements, to which defense counsel objected only sporadically, was also within the limits of proper cross-examination. West, a defendant in the case, was a hostile, ascerbic witness. He testified as an expert in the production of concerts, as well as a member of the City Council. His credibility was fair game, Fed. R. Evid. 611 (b), and his attitude toward the proceedings, as reflected in voluntary statements made by him to other parties, was probative of whether his testimony would be of the objective nature expected of an expert. In these circumstances, Fact Concerts had a right to expose to the jury the remarks Councillor West made out-of-court concerning the judicial process. *See United States* v. *Kartman*, 417 F.2d 893, 897 (9th Cir. 1969). *See also United States* v. *Houghton*, 554 F.2d 1219, 1225-26 (1st Cir.), *cert. denied*, 434 U.S. 851 (1977).

Q In the context that you present this, sir, its misdirected, my disrespect for the Judge, and if you took it that way, that's your opinion, it could have been misdirected for you, and what you're attempting to do, because —

Q But didn't you make those remarks, sir?

A Yes.

Q All right. We've got that established. We also established that it wasn't the Judge, perhaps, that you were mad at, but did you also say, sir, that the closest thing to God on earth is a Judge, did you say that, sir?

A I think that's a matter of public fact, everyone knows that, you included.

Q And didn't you say this in a derogatory manner?

A No, sir, I did not, in fact I envied Judge Pettine's position, I wish I could be him.

Q I'm sure that you do, sir — as a matter of fact, you acted as a judge in this case in refusing to permit the concert to go on.

MR. FAERBER: I object.

Q Didn't you, sir?

A That's your opinion.

The Punitive Damages Instruction

Defendants challenge as error the district court's instruction allowing the jury to award punitive damages against the City of Newport. Like other of defendants' allegations of error, this one is flawed by the failure to object to the charge at trial. *See* Fed. R. Civ. P. 51.[6] We may overlook a failure of this nature, *Williams* v. *City of New York*, 508 F.2d 356, 362 (2d Cir. 1974), but only where the error is plain and "has seriously affected the fairness, integrity or public reputation of a judicial proceeding." *Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976) *quoting* 9 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2558 at 675 (1971).

Here, it is by no means certain that the court's instructions constituted error. This is an area of the law in which there has been and apparently still is, considerable movement. We have held on two occasions that punitive damages are available against section 1983 defendants when there are aggravating circumstances. *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940 (1968) (unwarranted invasion of privacy). Although the Supreme Court has never fully addressed the question, it has edged toward a similar conclusion. *Carlson* v. *Green*, 48 U.S.L.W. 4425, 4427 (April 18, 1980) (dictum); *Carey* v. *Piphus*, 435 U.S. 247, 254-55 n.11 (1978). When our rule on this point is viewed in

[6] Rule 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

light of the Supreme Court's determination that municipalities are "persons" within the ambit of section 1983, *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658 (1978), there arises a distinct possibility that municipalities, like all other persons subject to suit under section 1983, may be liable for punitive damages in the proper circumstances. There certainly is no imposing body of law to the contrary.

In short, the present state of the law as to municipal liability is such that we cannot with confidence predict its future course. Where the law is in such a state of flux and there is no appellate decision to the contrary, we would be hard-pressed to say that the trial judge's punitive damages instruction was plain error. *See United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). Nor is this a case containing such "peculiar circumstances [to warrant noticing error] to prevent a clear miscarriage of justice." *Nimrod* v. *Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966).

Affirmed.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 76-0071

FACT CONCERTS, INC., et al.

v.

CITY OF NEWPORT, et al.

OPINION AND ORDER

PETTINE, *Chief Judge*. On August 29, 1975, the City Council of Newport, Rhode Island voted to prohibit the band "Blood, Sweat and Tears" from performing at a Newport jazz concert. The case was tried to a jury at which time testimony was presented in support of the plaintiffs' claim of discriminatory conduct by the City Council due to the musical content of the proposed concert; this was evident in the council's minutes reciting as the reason for the prohibition the band's rock music. At the same time, the defendants denied any wrong doing, claiming that they acted to preserve the public's safety and well being and further that the promoters had failed to comply with certain contract conditions.

The jury was not convinced by the defendants' varied explanations. They found that the defendants, who consisted of the City of Newport, the mayor, and the members of the city council had denied the license on the basis of the content of the group's music—so called "rock" music—and, thereby, violated the clearly established first amendment rights of the plaintiffs/promoters. The jury also found that this denial and the subsequent actions and statements of the mayor constituted tortious interference with plaintiffs' contracts with the band, ticket holders and various concessionaires.

After being instructed on 42 U.S.C. §1983, the "good faith" defense, and state tort law, the jury returned verdicts against

all the defendants on both counts. They awarded compensatory damages in the amount of $72,910.00 against the City of Newport and all the individually named defendants; and punitive damages as follows: City of Newport—$200,000.00; Mayor Humphrey J. Donnelley, III—$20,000.00; John H. West—$20,000.00; Robert O. Beattie—$5,000.00; Raymond H. Carr—$10,000.00; Edward K. Coristine—$5,000.00; James F. Ring—$5,000.00 and Lawrence Newsome—$10,000.00. Seventy-five percent of the total punitive award as to each defendant was assessed against Count I (First Amendment claim) with twenty-five percent as against Count II (state claim).

Defendants now move for judgment notwithstanding the verdict (Fed.R.Civ.P. 50) and for a new trial (Fed.R.Civ.P. 59). These motions are discussed separately.

JUDGMENT NOTWITHSTANDING THE VERDICT

A judgment notwithstanding the verdict is only appropriate if the Court determines that:

> when all the evidence is considered together with all reasonable inferences to be drawn therefrom most favorable to the plaintiff there is a total failure or lack of evidence to prove the necessary element of the plaintiffs' case.

Marchant v. *American Airlines*, 146 F.supp. 612, 614 (D.R.I. 1956), *aff'd*, 249 F.2d 612 (1st Cir. 1957).

Defendants demand a judgment n.o.v. and assert that this Court's instructions on the law were erroneous. Defendants allege that legal error infested nearly every aspect of the Court's jury charge, including the description of both state and federal substantive offenses, the immunity instruction, and the punitive damage instruction.

None of these legal arguments were ever raised at trial. In fact, the defendants failed to request that any of their current legal interpretations be inserted into the jury instructions and

never objected to any aspect of that charge before or after the jury retired. Defendants appear to forget that Fed.R.Civ.P. 51 clearly provides that:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Therefore, defendants' untimely objections are not the proper basis for this post-trial motion.

Although the policies of fairness and economy which Rule 51 incorporates are vital, *see, e,g., Morris* v. *Travisono*, 528 F.2d 856, 859 (1st Cir. 1976), this Court does not rest its decision on this procedural ground alone. Defendants' substantive legal arguments do not constitute a sufficient basis for granting a motion for judgment n.o.v.

A. LEGISLATIVE IMMUNITY

1. *Section 1983 Claim*

The recent Supreme Court case of *Lake County Estates, Inc.* v. *Tahoe Regional Planning Agency*, 47 U.S.L.W. 4256 (U.S. Mar. 5, 1979) held that federal, state, and regional legislators may claim absolute legislative immunity from federal damage liability when they are acting in their legislative capacities. Although the Supreme Court did not directly address the issue, *id.* n. 26, much of the Court's reasoning may logically extend the absolute legislative immunity to municipal legislators. The defendant councilmen, therefore, assert that, as elected municipal legislators, they are immune from this federal damage action.

The defendants' reasoning overlooks one critical element of the argument: to qualify for absolute legislative immunity, the official must be acting in his legislative capacity. The fact that city councilmen are elected officials with several legislative duties cannot shield them totally from federal damage liability. The absolute immunity announced in *Lake County Estates* pertains only to legislative acts; the immunity is not

dependent upon one's particular position or title in government, but upon the particular functions one is performing at the time. *Id.* at 4260. *See also Butz* v. *Economou*, 438 U.S. 478 (1978).

What constitutes a legislative act is not always a simple question to resolve. This Court confidently concludes, however, that the councilmens' denial of the license does not fall within the spectrum of legislative activity, rather such an act must be classified as administrative. The debate, deliberation, investigation and drafting of statutes and ordinances are plainly legislative functions. *See Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Powell* v. *McCormack*, 395 U.S. 486, 501-06 (1969). In contrast to the formulation and passage of broadly applicable rules and regulations, the ad hoc enforcement of such regulations to a particular individual is an administrative function. *See, e.g., Freitag* v. *Carter*, 489 F.2d 1377 (7th Cir. 1973) (denial of chauffeur's license). *Cf. BiMettalic Investment Co.* v. *Colorado*, 239 U.S. 441 (1915) (formulating generally applicable standard in rulemaking, particular application of that standard is adjudication). *See generally* H. Hart & A. Sax, Materials on the Legal Process, 717-23, 1092-1100 (tent. ed. 1958). In this case, the council applied the state licensing and town ordinance to this particular request for an entertainment license. Such ad hoc licensing decisions are uniformly considered administrative acts and not immune from section 1983 liability. *See, e.g., Cordeco* v. *Santiago Vazquez*, 539 F.2d 256 (1st Cir. 1976), *cert. denied*, 429 U.S. 978 (1976) (denial of license to extract sand); *Tollett* v. *Laman*, 497 F.2d 1231 (8th Cir. 1974), *cert. denied*, 419 U.S. 1088 (1974). Absolute immunity does not extend to such administrative acts because judicial review of the motives behind the individualized application of the law is critical and does not involve or impede the unfettered deliberations and occasional rough-and-tumble debate of a free functioning political and legislative system. *Compare Tenney* v. *Brandhove, supra* at 377-78 with *Wood* v. *Strickland*, 420 U.S. 308 (1975).

For such administrative actions, the council members were still entitled to the "good faith" immunity set forth in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Wood* v. *Strickland*, *supra*. *See Cordeco* v. *Santiago Vazquez*, *supra*. A description of this qualified immunity was fully detailed in the jury charge.

The Mayor of Newport cannot complain of the qualified immunity instruction. As mayor, he was acting in an executive role and only entitled to the "good faith" immunity instruction contained in the jury charge. *Scheuer* v. *Rhodes*, *supra*.

2. *State Claim*

Defendants also claim an absolute legislative immunity to the state tort claim of interference with contractual relations. The Rhode Island Supreme Court has not decided the extent of the governmental immunity for the executive and administrative acts involved in this case; however, one may confidently conclude that the state Supreme Court would not hold administrative acts privileged to an absolute immunity. In *Calhoun* v. *City of Providence*, 390 A.2d 350 (1978), the Rhode Island Supreme Court reaffirmed the existence of absolute judicial immunity but only after carefully considering the competing societal interests:

> There must be a weighing of the injured party's demand for justice against the state's equally valid claim to exercise certain powers for the good of all without the burdensome encumbrances and disruptive forces.

Id. at 355. The Rhode Island Court indicated that such a weighing process might recommend "judicial, prosecutorial and legislative immunities"; no mention was made of any absolute administrative or executive immunity. Undoubtedly, the Rhode Island Supreme Court was aware that the United States Supreme Court recently had engaged in an identical weighing process and concluded that those exercising executive and administrative functions deserved only a qualified good faith immunity from federal liability. *Scheuer* v.

Rhodes, supra; Wood v. *Strickland, supra.* In the absence of any contrary indication from the Rhode Island Supreme Court, the careful and convincing analyses contained in *Scheuer* and *Wood* provide this Court with a firm guideline. The jury charge carefully followed those two Supreme Court decisions; the defendants cannot request more.

B. Substantive Causes of Action

1. *Claim under Section 1983*

Defendants seek judgment n.o.v. on the ground that plaintiffs have failed to state a cause of action. They argue that, as promoters, plaintiffs suffered no infringement of their own first amendment rights and can claim no derivative or vicarious ability to assert the band's right of artistic expression. Defendants' argument is unsupportable. Cases such as *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) directly hold that one has a first amendment right to promote and produce a musical production. *See also Stepping Stone Enterprises, Ltd.* v. *Andrews*, 531 F.2d (1st Cir. 1976). Section 1983 is the appropriate vehicle for plaintiffs to utilize in asserting this first amendment right.

2. *Claim of Tortious Interference with Contractual Relations.*

Plaintiffs' pendent state law claim is equally legitimate. The plaintiffs alleged and submitted evidence showing that the defendants maliciously interfered with plaintiffs' existing contracts. The jury found that defendants did indeed intentionally interfere with the plaintiffs' already consummated contracts with the band, with various concessionaires, and with numerous ticketholders. Such interference constitutes an actionable tort in Rhode Island. *See Local Dairymen's Assoc., Inc.* v. *Potvin*, 54 R.I. 430 (1934); *Smith Development Corp.* v. *Bilow*, 112 R.I. 203 (1973). A judgment n.o.v. on this valid state law claim plainly is inappropriate.

MOTION FOR NEW TRIAL

Defendants argue that even if the finding of liability was correct, the size of the punitive awards are clearly excessive, inappropriate and constitute grounds for a new trial. Fed.R.Civ.P. 59. First, defendants assert that punitive damages cannot be awarded, in any amount, against a municipality under 42 U.S.C. §1983. Second, they argue that the punitive awards were excessive and the result of passion or prejudice. The Court cannot agree with the first contention, but is partially persuaded by the second.

The massive punitive damage award of $200,000.00 against the City of Newport is particularly troublesome. Again, defendants failed to object, in a timely fashion, to the jury instruction holding municipalities liable for punitive damages. Despite defendants' tardiness, a careful resolution of this novel question is critical to a just verdict in this case.

In holding that municipalities can be sued directly for monetary damages under section 1983, the Supreme Court left undecided whether punitive damages were legally permissible. *Monell* v. *Department of Social Services*, 97 S.Ct. 2018, 2035-36 (1978). The remaining contours of section 1983 liability were left to be sketched by the lower federal courts. The question of whether or not a municipal corporation can be held liable for punitive damages is now squarely before this court.

This question requires the Court to tread upon relatively virgin territory. The language and legislative history of section 1983 provide little aid in determining whether municipalities should be held open to punitive liability. The *Monell* case does speak in broad terms: local governments can be sued directly for "monetary" relief "like every other §1983 'person'." *Id.* at 2035-36. This broad language, however, was not in reference to the novel issue of punitive liability for municipalities. The contours of such punitive liability can only be determined by a careful balancing of factors and by analogizing from prior federal case law.

As a matter of general principle, punitive damages are permissible in section 1983 actions. *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir), *cert. denied*, 393 U.S. 940 (1968); *Basista* v. *Weir*, 340 F.2d 74 (3d Cir. 1965). The primary purpose behind section 1983 punitive damages is future deterrence; thus, punitive awards are most appropriate when there has been a showing of a pattern of illegal conduct or malicious and willful acts that may be deterred in the future by the example of a punitive award. *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Aumiller* v. *University of Delaware*, 434 F.Supp. 1273 (D.C. Del. 1977).

Defendants argue that punitive damages should not be awarded against a city because such an award only results in punishing the innocent taxpayer. As the Supreme Court of Missouri reasoned:

> One of the principal reasons advanced by the courts why punitive damages should not be recoverable against a municipality...is that since punishment is the objective, the people who would bear the burden of the punishment—the taxpaying citizens—are the same group who are supposed to benefit from the public example which the punishment makes of the wrongdoer.

Chapell v. *Springfield*, 423 S.W.2d 810, 814 (1968).[1] Such

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[1] The majority of the state courts follow the Missouri approach and hold that, in the absence of statutory authority, punitive damages may not be recovered against a municipality. *See, e.g., Herilla* v. *Mayor & City Council of Baltimore*, 37 Md. 481 (1977); *Hutchinson* v. *Lott*, 110 So.2d 421 (Fla. 1959); *Moody* v. *City of Galveston*, 524 S.W.2d 583 (Tex.); *M'Gary* v. *President & Council of La Fayette*, 12 Rob. 674 (La. 1846). Some states, however, have begun to hold municipalities punitively liable for reckless or intentional deprivations. *See, e.g., Henningan* v. *Atlantic Refining Co.*, 282 F.Supp. 667 (E.D. Pa.), aff'd 400 F.2d 857 (3d Cir. 1968); *Minneapolis* v. *Richardson*, 307 Minn. 80 (1976); *Governale* v. *City of Owosso*, 59 Mich. App. 745 (1975); *Hayes* v. *State*, 80 Misc. 2d 498,

reasoning serves as salutary advice and provides any court reason to pause before awarding punitive damages against a municipality.

In some circumstances, however, a punitive award against a municipality may serve beneficial purposes. The payment of such an award necessarily serves to focus taxpayer and voter attention upon the malicious acts of the municipal government. This attention, in turn, well may have a beneficial effect in the next election. To characterize the municipality's voters and taxpayers as innocent victims of a punitive award does not comport with our theory of representative democracy; each voter/taxpayer is responsible, of course, for the election and formation of a government that will uphold and defend the Constitution. This responsibility is the essence of representative government. It bears repeating that the government of the United States stems from the people. The wrongs of the government, even if it betrays the electorate, are theoretically the wrongs of the people; the people may always exorcise those wrongs through the democratic process. The votes of the electorate, stirred by their pocketbooks, constitute one of the strongest corrective forces in American law. Therefore it should come as no surprise that federal courts have indicated a willingness, in other contexts, to hold cities liable for punitive damages. *See Fulton Market Cold Storage* v. *Cullerton*, 582 F.2d 1071, 1073 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3483 (No. 78-748, Jan. 16, 1979); *Hanna* v. *Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975); *Patterson* v.

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363 N.Y.S. 2d 486 (Ct. Cl.), *rev'd on other grounds*, 50 App. Div. 2d 693, 376 N.Y.S. 2d 647 (1975).

Defendants do not assert that municipalities cannot be held liable for punitive damages under Rhode Island law; instead, their attack appears confined to federal law. It is sufficient to note that Rhode Island has no statutory or case law prohibiting such an award. Therefore, the Court sees no reason to raise this difficult state law question *sua sponte*. Instead, we leave the question for the state courts to deal with on another day.

City of Chester, 389 F.Supp. 1095-96 (E.D. Pa. 1975). There is no reason that courts should not cautiously pursue this policy in the area of section 1983.

Although a municipality may be held liable for punitive damages, am analysis of the facts of this case convince this Court that the punitive award of $200,000.00 against the City of Newport is excessive, against the weight of the evidence, and fails to comport with substantial justice.

The jury's verdict, of course, is entitled to great deference; the jury is the fact finding body that must weigh the evidence, the inferences, the witnesses' credibility and determine damages on the basis of that weighing process. "Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Marchant* v. *American Airlines*, 146 F.Supp. 612, 615 (D.R.I. 1956), *quoting Tennat* v. *Peoria & P.U.R.R.*, 321 U.S. 29, 35 (1944) (citations omitted). A federal court should never interfere with the jury's damage award unless "it is quite clear that the jury has reached a seriously erroneous result." 6A J. Moore, Federal Practice, 59.08[5], at 160 (1974). The punitive award against the City was such a "seriously erroneous result"; the sum was both unreasonable and devoid of firm support in the record.[2] In these circumstances it is

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[2] The jury may have granted this excessive punitive award without a firm evidentiary basis; but, there is no reason to believe that the award was the result of passion or prejudice that infected the entire trial. *See generally* C. Wright & A. Miller, Federal Practice and Procedure, §2807, p. 103 (completely new trial must be granted "if the verdict was the result of passion and prejudice, since prejudice may have infected the decision of the jury on liability as well as on damages.") At no point during the trial did either side attempt to provoke any illegitimate passions or particular fact pattern or personality that made a verdict infected by passion or prejudice from the jury. Nor was there any particular fact pattern or personality that made a verdict infected by passion or prejudice a

appropriate for a court to order a remittitur and direct that if the plaintiff refuses to accept it, there be a new trial pursuant to Fed.R.Civ.P. 59. *See Occidental Life Ins. Co. of North Carolina* v. *Pat Ryan & Associates, Inc.*, 496 F.2d 1255 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Holmes* v. *Wack*, 464 F.2d 86 (10th Cir. 1972). *See generally* C. Wright & A. Miller, Federal Practice and Procedure §2807.

The wrong complained of in this case was not a policy or ordinance traditionally adhered to by various municipal administrators, instead the unconstitutional permit denial was an isolated, intentional act by several council members and the mayor. The evidence certainly supports the punitive damage awards granted against the individual councilmen and mayor. There was evidence showing that the city council, despite the City Solicitor's legal advice that such a denial would be unconstitutional voted to deny the license. Evidence also revealed that the City Council members attempted to avoid the responsibility for their actions by offering varied and ever changing reasons for their actions. The jury could easily find that some of the council members lacked credibility, particularly those members who altered their testimony, and who remained resolute in their own peculiar interpretation of the Constitution. This evidence strongly supports the various punitive sums awarded against the individuals. These individual sums ranged between five and twenty thousand dollars and totalled an impressive $75,000.00.[3] Considering

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likelihood. As for the differing damage awards against the individual councilmen, these appear to be roughly equated with their individual culpability. These differing awards cannot be considered erroneous or the result of prejudice. *See* n. 3 *infra*.

[3] The fact that the jury awarded different sums against the various individuals cannot be considered error. The jury is to weigh the actions of each individual and award damages accordingly. In deciding the amount of punitive damages, the jury was entitled to consider not just the unanimous vote of the City Council to revoke the license, but also the various explanations that each councilor

how the trial focused upon these individual's foreknowledge, conduct and changing testimony, these punitive damages cannot be considered unreasonably high. *See Aumiller* v. *Univ. of Delaware*, 434 F.Supp. at 1311. Likewise, because the city acts through its councilmen, it could be held punitively liable.

The $200,000.00 award against the City, however, is completely extravagant. As stated, the City, of course, acts through its councilmen; but, there was no substantial evidence that the City was peculiarly guilty of the alleged constitutional violation. The wrong complained of in this case was not a policy or ordinance traditionally adhered to by various municipal administrators; instead, the unconstitutional permit deprival was an isolated, intentional act by several council members and the mayor. The wrong could be, and was, pinpointed at specific individuals as the primary wrongdoers. Logic dictates that they shoulder a major portion of the punitive award.

To prevent future violations of the first amendment, the jury apparently felt that a punitive award against the City was necessary. Even if the City is to shoulder some punitive award, there is no evidence to show that the City should be assessed disproportionate punitive damages. The facts of this case indicate that the City should be treated simply as another individual defendant; there are no facts to suggest that the City should become the repository for the great bulk of the punitive damage award. The sole fact that a city is never judgment proof cannot prove a basis for extreme punitive awards. Theoretically, a city always can raise its taxes and afford any punitive award; yet, this hardly comports with a fair system of justice that roughly proportions damages to the facts of the case.

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gave for doing so, as well as their demeanor and credibility while certifying. As the Seventh Circuit noted "the appropriate consideration in deciding the issue of punitive damages is the motive and attitude of the defendants...." *Jeanty* v. *McKey & Pogue, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974).

Reviewing the evidence against the sensitive backdrop of municipal liability convinces this Court that a remittitur or a new trial on damages must be ordered. When a verdict is excessive in light of the facts, it is settled law that the plaintiff may opt for the court determined remittitur or submit to a new trial on damages. *Blunt* v. *Little*, 3 Fed. Cases 760 (C.C.D. Mass. 1822) (No. 1578) (Storey, J.); *Gorsalitz* v. *Olin Mathieson Chem. Corp.*, 429 F.2d 1033 (5th Cir. 1970). *See Dimick* v. *Schiedt*, 293 U.S. 474 (1935). The remittitur this Court would award should constitute the maximum permissible punitive award that a jury properly could award on the facts of this case. *See Dimick* v. *Schiedt*, 293 U.S. at 486. *See also* C. Wright & A. Miller, Federal Practice and Procedure §2815, p. 104. The maximum permissible punitive award on the facts of this case cannot logically exceed the total punitive sum awarded against the individual councilmen and mayor. The City, in this case, only acted through its elected officials. The City's guilt can be no greater than the collective guilt of its officials. Thus, it can only be liable to the same extent as those elected officials. Considering the punitive sums awarded against the other individuals in this case, $75,000.00 appears the maximum permissible punitive award for the City. The plaintiff is free to accept or reject this remittitur sum. If the remittitur is rejected, the motion for new trial on damages will be granted.

The plaintiffs will advise the Court of its decision.

By Order,
(s) KATHLEEN M. LYNCH
Deputy Clerk

Enter:
(s) RAYMOND J. PETTINE
Chief Judge
July 2, 1979