City of Newport v. Fact Concerts
No. 80-396

Brief for the Petitioners

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I

Question Presented

IS A MUNICIPALITY LIABLE FOR PUNITIVE DAMAGES IN A SECTION 1983 CASE?

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-396

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.

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

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 626 F.2d 1060 and appears at Appendix A-1 to A-15 to the Petition for a Writ of Certiorari. 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-1 to B-15 to the Petition for a Writ of Certiorari.

Jurisdiction

The opinion of the United States Court of Appeals for the First Circuit was rendered on June 17, 1980, and that Court's mandate was issued on July 8, 1980. The Petition for a Writ of Certiorari was filed on September 12, 1980 and the Writ was issued on December 15, 1980. 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 spech, 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. Section 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 the Case

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 30th and 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." (J.A., pp. 27-29).

At the time the contract was entered into the program had been advertised in both the New York *Times* and Providence *Journal* as featuring Dave Brubek, Herbie Mann, Ahmad Jamal, Buddy Rich, Miles Davis, Maynard Ferguson, Sarah Vaughan and Stan Getz. (R. I; pp. 10, 17)

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. (R. I; p. 20).

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. (R. II; pp. 126-7)

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." (J.A. p. 63).

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" (R. I; p. 31)

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. (R. II; p. 129)

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. (J.A., p. 64)

It is clear from the testimony of all witnesses that no such affidavit was ever executed by the plaintiffs or prepared by the defendants. (R. II; pp. 131, 133-34)

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. (J.A., p. 64)

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. (J.A., p. 65)

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. (J.A., pp. 34-9, 42-8)

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. (J.A., pp. 65-66)

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. (R. III, pp. 134-5, 324)

Thereafter Fact 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. (J.A., pp. 8-13)

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 and $75,000 against the councilmen.

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. (App. B to Pet. for Cert.)

The United States Court of Appeals for the First Circuit affirmed. (App. A to Pet. for Cert.)

Summary of the Argument

The arguments against permitting an award of punitive damages against a municipality fall generally into two categories—historic and legal.

I.

HISTORIC

This Court has repeatedly held that traditional immunities deeply rooted in public policy have remained undisturbed by the enactment of Section 1983. *Imbler* v. *Patchman*, 424 U.S. 409 (1975) (state prosecutor); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (state judges); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (qualified immunity for state executives); and *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (state legislators).

Prior to the enactment of Section 1983 by the 42nd Congress in 1871, no jurisdiction which had considered the question had allowed such an award of punitive damages to stand. This was not a new or novel approach in 1871; it was a settled principle of the common law.

City Council of Montgomery v. *Gilmer & Taylor*, 33 Ala. 116, 70 Am. Dec. 562 (1858); *Chicago* v. *Langlass*, 52 Ill. 256, 4 Am. Rep. 603 (1869); *McGary* v. *President and Council of Lafayette*, 12 Rob. 674, 43 Am. Dec. 239 (1846); *Hunt* v. *Boonville*, 65 Mo. 620, 27 Am. Rep. 299 (1877); *Order of Hermits of St. Augustine* v. *County of Philadelphia*, 4 Clark 120, Brightly NP 116 (1847); *Herfurth* v. *Corporation of Washington*, 6 Dist. Col. 288 (1868); *Chicago* v. *Martini*, 49 Ill. 241, 95 Am. Dec. 590 (1868); Cf. *Whipple* v. *Walpole*, 10 N.H. 130 (1839); *Woodman* v. *Nuttingham*, 49 N.H. 387, 6 Am. Rep. 528 (1870) (overruling *Whipple*, supra).

In each of these cases the reviewing court recognized the societal value of compensating the injured plaintiff for his actual loss but shrank from the notion that a punitive award would ever be available.

Some members of the 42nd Congress showed great reluctance to impose any form of liability upon a municipality and it cannot be argued that the whole Congress intended to impose a new and potentially ruinous form of liability by way of punitive damages. Commenting in the debate on the Sherman amendment (a precursor of Section 1983) Representative Blair observed:

> "There are certain rights and duties that belong to the states. . . there are certain powers that inhere in the state government. They create these municipalities, they say what their power shall be and what their obligations shall be. If the Government of the United States can step in and add to these obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, where will its power stop, in what obligations might it not lay upon a municipality. . ."
>
> Representative Blair
> Cong. Globe, 42nd Cong, 1st Sess. 795 (1871)

Lastly an award of punitive damages represents an unwarranted intrusion by the federal government into affairs of a municipality. The Trial Justice noted (in passing upon the motion for judgment N.O.V. and a new trial) that

> "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."
>
> Appendix B to the Petition for Certiorari, p. 9.

This Court should display the same reluctance to interfere directly in municipal elections as it did with state judicial proceedings in *Younger* v. *Harris*, 401 U.S. 37 (1971).

II.

LEGAL

The propriety of an award of punitive damages against a municipality in a Section 1983 case is clearly governed by federal common law. And since at least 1818 federal common law has regarded the function of a punitive damage award as punishment of the offender and not as compensation to the victim or vindication of society. *The Amiable Nancy*, 3 Wheat. 546 (1818), *Lake Shore Railway Co.* v. *Prentice*, 147 U.S. 101 (1893).

The burden of any punitive damage award ultimately falls upon the taxpaying resident of the municipality. But is he the offender? If he is, it is by reason of his residence in the community and nothing more. And escaping the punishment are all non-taxpaying residents except to the extent that they are deprived of municipal services that would otherwise be provided by the tax dollars that are diverted to pay the award of punitive damages.

Should the taxpayer bear this additional burden without limiting his liability to "only the costs of injury inflicted" by the execution of municipal policy. *Owen* v. *City of Independence*, 100 S.Ct. 1398 (1980) at p. 1419.

If the "fairness" test suggested in *Owen* (supra) is applied to that question, the inevitable answer must be "no".

In a day when municipal budgets are strained to the breaking point and at least two of the country's major cities have teetered on the brink of bankruptcy, it makes no sense to impose a further burden on a local treasury for the dubious purpose of punishing someone who probably is not at all guilty.

While it is clear that prior to 1871 virtually every court of the United States that had considered the question had held that punitive awards are not recoverable against a municipality (supra, p. 7). It is equally clear that post 1871 courts have displayed the same unanimity. Indeed, few principles seem so deeply rooted in the common law of this nation.

III.

Lastly, it is undisputed that Trial Counsel failed to preserve objections to the charge on punitive damages as required by Rule 51.

Nonetheless defendants urge that this lapse may and should be rectified by application of the "plain error" rule. *Williams* v. *City of New York*, 508 F.2d 356 (2nd Cir. 1974). The overwhelming authority, both historic and legal, mitigating against such an award and obvious miscarriage of justice which will result if it stands cry out for a thorough review of the issue.

Argument

The arguments against permitting awards of punitive damages against municipalities in Section 1983 cases fall generally into two categories—historic and legal. In *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978) and later in *Owen* v. *City of Independence, Mo.*, 100 S.Ct. 1398 (1980) this Court examined the legislative history of Section 1983 applying (in *Owen*) the following test:

> "However, notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so pro-

> vided had it wished to abolish the doctrine.' Pierson v. Ray, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). Thus in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), after tracing the development of an absolute legislative privilege from its source in 16th century England to its inclusion in the Federal and State Constitutions, we concluded that Congress 'would (not) impinge on a tradition so well grounded in history and reason by covert inclusion in the general language' of § 1983. Id., at 376, 71 S.Ct. at 788."

The defendants urge that in 1871 the doctrine of municipal immunity from awards of exemplary damages was firmly rooted in our common law and the 42nd Congress could not have been unaware of it.

The defendants urge further that the legal policy reasoning behind such a doctrine is as strong today as it was then and Congress could not possibly have intended to alter it.

I. The Historic Background of the Immunity

1. 42 U.S.C. 1983 is absolute and unqualified on its face. The statute does not specifically provide for any immunities or defenses which a municipality may or can assert. In numerous cases, however, this court has created defenses for recognized immunities. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In *Owen* v. *City of Independence*, *supra*, this court held:

> "Where the immunity claimed by the defendant was well established in common law at the time, Section 1983 was enacted, and where the rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity."

at p. 1409

By 1871, it was virtually unanimously established that exemplary or punitive damages were not recoverable against a municipal corporation. One of he earliest American cases on point is *Order of Hermits of St. Augustine* v. *County of Philadelphia*, 4 Clark 120, Brightly N.P. 116 (1847, Pa.). Pennsylvania had enacted an ordinance, very similar to the Sherman Amendmert to the First Civil Rights Act, which allowed individuals to sue the county for the destruction of property situated therein by mob violence. The Court of Pennsylvania held that while the action, if it were against the rioters, would have permitted the assessment of exemplary damages, such damages were not recoverable against the county itself. In *McGary* v. *The City of Lafayette*, 12 Robinson 674, 43 Am. Dec. 239 (1846), the officers of Lafayette had, in violation of an injunction, willfully and intentionally ordered the demolition of the plaintiff's building. The court held at Page 677,

> "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case, admitting that she was entitled to recover any from the defendants, being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification."

The majority of courts which, prior to 1871, considered the question of the propriety of an award of punitive damages against a municipality, refused to recognize such awards with little or no comment. The case of *Chicago* v. *Langlass*, 52 Ill. 256, 259 (1869) is typical. The court there held simply,

> "But in fixing the compensation the jury have no right to give vindictive or punitive damages, against a municipal corporation. Against such a body there should only be compensatory, and not by way of punishment."

In *City Council of Montgomery* v. *Gilmer and Taylor*, 33 Ala. 116, 70 Am. Dec. 562 (1858), the Supreme Court of Alabama overturned a verdict awarding punitive damages against the City Council of Montgomery again without extended comment. The court there held:

> "The corporation cannot, upon any principle known to us, be responsible for the malice of its officers towards the plaintiffs."
> p. 132

The various jurisdictions at or about the time of the Civil Rights Act of 1871 refused to award exemplary damages against a municipality even in the face of a statute which apparently expressly provided for such an award. In an 1877 case, *Hunt* v. *Boonville*, 65 Missouri 620, 27 Am. Rep. 299 (1877), the court held that a municipal corporation was not liable for treble damages for a trespass to the plaintiff's land and the removal therefrom of the plaintiff's stone, notwithstanding a statute which specifically provided for treble damages against any person wrongfully quarrying or carrying away any stones or ore. The Supreme Court of Missouri held that a municipal corporation could not do a criminal act or a malicious and willful wrong and thus would not come within the provisions of the statute as to exemplary damages. In *Herfurth* v. *Corporation of Washington*, 6 D.C. 288, 293 (1868), the courts of the District of Columbia refused to award punitive damages against the Corporation of Washington. The court held:

> "The whole doctrine of exemplary damages as applied to an agent has no solid foundation. Such a case as this is

> not a case for exemplary damages. The Corporation of Washington is an agent of the people. The people are bound for their negligence, but they are not insurers of every wayfarer on the streets."

Only one case. *Whipple* v. *Walpole*, 10 N.H. 130 (1839) admitted even the possibility of a punitive award against a municipality. The court held that were a municipality guilty of gross negligence, exemplary damages might be awarded against it. But one year prior to the enactment of the Civil Rights Act of 1871, the Supreme Court of New Hampshire in *Woodman* v. *Nottingham*, 49 N.H. 387, 394 6 Am. Rep. 526 (1870), the court expressly overruled *Whipple*, holding:

> "Nor do we believe it to be necessary or proper in actions generally against towns under our statute, to instruct the jury to allow vindictive damages eo nomine; for it cannot be presumed that towns in cases of this kind are influenced by malice when accidents of this nature occur; and if the circumstances of any case show even gross negligence, it appears to us to be enough, for the jury in making up their verdict, to give all the actual damages the plaintiff has suffered, and no more; nor do we think that the legislature ever contemplated anything more than a full indemnity for the injury received to the person or property, by their statute regulating the subject."

2. That punitive damages might be assessed against a municipal corporation was wholly foreign to the common law as it existed in 1871. Nor does an examination of the debate surrounding passage of the Civil Rights Act of 1871 support any inference that the legislators intended such an award should be proper under Section 1983. The debate evidenced great concern over the destructive effects of imposing a novel liability upon a municipality. Representative Blairs' statement in that regard, is particularly in point:

> "There are certain rights and duties that belong to the states . . . there are certain powers that inhere in the state government. They create these municipalities, they say what their power shall be and what their obligations shall be. If the Government of the United States can step in and add to these obligations, may it not utterly destroy the municipality? If it can say that it shall be liable for damages occurring from a riot, where will its power stop, in what obligations might it not lay upon a municipality . . .
>
> "Not only the other day, the Supreme Court . . . decided that there is no power in the Government of the United States, under its authority to tax, to tax the salary of a state officer. Why? Simply because the power to tax involves the power to destroy, and it was not the intent to give the Government of the United States power to destroy the government of the states in any respect." Globe supra.

There is no basis to assume that the legislators in 1871 either wished or intended to allow assessments of punitive damages against municipalities. There is every reason to assume otherwise. In this case, it is particularly easy to divine the intent of the dead. The same policies which uniformly compelled the courts in the nineteenth century to deny punitive awards against municipalities apply equally as well today. In these days of municipal fiscal crises, the necessity of providing immunity against punitive awards is, if anything, even more urgent.

3. 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 a beneficial effect in the next election." (Appendix B to the Pet. for Cert. p. 9)

That the award of punitive damages will have an effect upon the next election is unquestionable. But that effect will not be salutary.

Clearly, the members of Newport's City Council and its Mayor did not foresee that their tenures in office would end in financial ruin. The award of punitive damages against the individual office holders must have a chilling effect upon those seeking to serve the municipality in a representative capacity. Even if the punitive award did not deter members of the council from running for office, they would certainly not find favor with the citizens of the City who also had suffered a financial loss as a result of the award.

The punitive award against the City 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 How. 1 (1849) the Supreme Court of the United States 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 Courts' 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 has long labored to assure every citizen of the United States a truly representative government. Is the Court now to punish those citizens who have in its opinion not chosen well? In *Younger* v. *Harris*, 401 U.S. 37 (1971), the Supreme Court of the United States strongly reaffirmed its belief that the National Government will fare best if the States and their 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 States. In *Younger* v. *Harris*, supra, the Supreme 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. This Court must hold as a matter of federal common law that a municipality immune from awards of punitive damages.

II. The Legal Rationale of the Immunity

1. In the jurisdictions where punitive or exemplary damages are awarded, their assessment is rationalized on one of three theories—compensation for the victim, vindication of society or punishment of the offender as a deterrent to others.[1] In the United States only three have adopted the compensation approach and all others utilize one or both of the latter two theories.[2] To the extent that there is a federal common law,[3] it is clear that it embraces the punishment rationale.

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[1] 46 Va. L. Rev. 1036, *Punitive Damages and their Possible Application in Automobile Accident Litigation.*

[2] 70 H. L. Rev. 517, *Exemplary Damages in the Law of Torts* at pages 520-2.

[3] *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir. 1968), *cert. denied*, 393 U.S. 940, 89 S.Ct. 299.

As early as 1818 this Court determined that the function of punitive or exemplary damages awarded in federal cases was to punish offenders. Writing for a unanimous Court in *The Amiable Nancy*, 3 Wheat. 546, Mr. Justice Story, reforming a decree of the Circuit Court for the Southern District of New York and commenting on the propriety of an award of punitive damages, stated:

> "And if this were a suit against the original wrong-doers, it might be proper to go yet further, and visit upon them in the shape of exemplary damages, the proper *punishment* which belongs to such lawless misconduct.
>
> . . .
>
> "While the government of the country shall choose to authorize the employment of privateers in its public wars, with the knowledge that such employment cannot be exempt from occasional irregularities and improper conduct, it cannot be the duty of courts of justice to defeat the policy of the government, by burdening the service with a responsibility beyond what justice requires, with a responsibility for unliquidated damages, resting in mere discretion, and *intended to punish* offenders." (emphasis supplied) p. 558, 9

In 1885, Mr. Justice Matthews reiterated this view in *Barry v. Edmunds*, 116 U.S. 550, stating:

> "The cause of action stated in the declaration is a wilful and malicious trespass, in seizing and taking personal property, with circumstances of aggravation and averments of special damage. The trespass is alleged to have been committed by the defendant, colore officii, under the pretended authority of void process, in open defiance of known law, accompanied by conduct intended to bring the plaintiff into public contempt and odium, and amounting to oppression in office.

"It is quite clear that the amount of the taxes alleged to be delinquent, for non-payment of which the seizure was made, is immaterial. It is equally clear that the plaintiff is not limited in his recovery to the mere value of the property taken. That would not necessarily cover his actual, direct, and immediate pecuniary loss. In addition, according to the settled law of this court, he might show himself, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it against future similar invasions. 'It is a well established principle of the common law,' said Mr. Justice Grier in Day v. Woodworth, 13 How. 362, 371, 'that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.' We are aware that the propriety of this doctrine has been questioned by some writers; but, if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument... In actions of trespass, where the injury has been wanton and malicious or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of *punishment* or example, which has sometimes been called 'smart money'. This has always been left to the discretion of the jury, as the degree of the punishment to be thus inflicted must depend on the peculiar circumstances of each case." (emphasis supplied) at p. 562.

And in 1893, Mr. Justice Gray traced the history of such awards thusly:

"The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liablity of a railroad corporation as a common carrier of goods or passengers—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment—*is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several States.* Railroad Co. v. Lockwood, 17 Wall. 357, 368; Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 443; Myrick v. Michigan Central Railroad, 107 U.S. 102, 109; Hough v. Railway Co., 100 U.S. 213, 226.

"The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the King's messengers for trespass and imprisonment under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover 'exemplary damages,' the Chief Justice instructed the jury as follows: 'I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, *but likewise as a punishment to the guilty*, to deter from any such proceeding for the future, and as a proof of the

detestation of the jury to the action itself.' Wilkes v. Wood, Lofft, 1, 18, 19; S.C. 19 Howell's State Trials, 1153, 1167. See also Huckle v. Money, 2 Wilson, 205, 207; S.C., Saver on Damages, 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

"In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559; Day v. Woodworth, 12 How. 363, 371; Philadelphia &c. Railroad v. Quigley, 21 How. 202, 213, 214; Milwaukee & St. Paul Railway v. Arms, 91 U.S. 489, 493, 495; Missouri Pacific Railway v. Humes, 115 U.S. 512, 521; Barry v. Edmunds, 116 U.S. 550, 562, 563; Denver & Rio Grande Railway v. Harris, 122 U.S. 597, 609, 610; Minneapolis & S. Louis Railway v. Beckwith, 129 U.S. 26, 36.

"Exemplary or punitive damages, being awarded, not by way of compensation to the suffered, *but by way of punishment of the offender*, and as a warning to others, can be awarded only against one who has participated in the offense." (emphasis supplied)

Lake Shore Railway Co. v. *Prentice*, 147 U.S. 101 (1893) at pp. 106, 7

It is clear that the burden of a punitive damage assessment against a municipality will fall upon the taxpayers and no one else. In short they are punished. But are they the offenders?

If they are divided into categories, there will be taxpayers who resided in the city when the wrong was done and who voted for the administration, taxpayers who resided in the city when the wrong was done and who voted against the administration, taxpayers who resided in the city when the wrong was done and who did not vote, taxpayers who resided in the city when the wrong was done and who were ineligible to vote, corporate taxpayers, non-resident taxpayers and finally taxpayers who did not reside in the city when the wrong was done but have moved to the city prior to the assessment of damages. Of these groups only the first could conceivably be classified as guilty and then only remotely. Escaping altogether are the non-taxpaying residents of the city and those taxpayers who were residents at the time the wrong was committed and who moved before the assessment of damages. The inequity of such a scheme of punishment is obvious.

In the *Owen* case (supra) this Court adopted what may be described as a "fairness" test in determining where the burden of compensatory damages should fall in a case against a municipality when it stated:

> "It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in Thayer v. Boston, supra—'that the city, in its corporate capacity, should be liable to make good the damages sustained by an (unlucky) individual, in consequence of the acts, thus done.' 19 Pick. at 516. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus,

even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. See generally 3 K. Davis, Administrative Law Treatise § 25.17 (1958 and Supp. 1970); Prosser § 131, at 978; Michelman, Property, Utility, and Fairness: Some Thoughts on the Ethical Foundations of 'Just Compensation' Law, 80 Harv. L. Rev. 1165 (1967) at p. 1417.

. . .

"(1c) In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

"We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a

> whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' Monell v. New York City Dept. of Social Services, 436 U.S. at 694, 56 L.Ed.2d 611, 98 S.Ct. 2018." (at pp. 1418-9)

While fairness shifts the burden of injury from the innocent plaintiff to taxpayers as a whole insofar as compensation is concerned, it certainly does not require that the innocent taxpayer bear the burden of what is literally a windfall to the plaintiff—punitive damages.

Conceding that there is an obvious societal interest in making the injured whole, there is certainly no justifiable reason to go further than that when public funds are involved.

This is particularly true when it is evident that the judicial interest in punishing the wrongdoer is accomplished slightly if at all and no actor is deterred from a repetition of his wrong except to the extent that he *is* a taxpayer. If vindication of society plays a role in the assessment of punitive damages, the opposite effect is felt here—it is society that is punished.

Lastly, permitting the court to award exemplary damages against a municipality presents a true legal dilemma in light of this Court's holding in *Owen* (supra). Good faith has always been a defense to a claim for punitive damages. 25 C.J.S. *Damages* § 123(7). Yet that defense has been found to be unavailable to a municipality in a Section 1983 case. (*Owen*, supra).

It is suggested that some of the same reasoning that prompted this court to bar awards of punitive damages in union unfair representation cases is applicable here. In *Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), this Court measured the potential depletion of a union treasury and the concomitant disruption of its business against the potential deterrent effect of the impositions of punitive damages thusly:

"(9) This limitation on union liability thus reflects an attempt to afford individual employees redress for injuries caused by union misconduct without compromising the collective interests of union members in protecting limited funds. To permit punitive damages, which, by definition, provide monetary relief 'in excess of. . . actual loss,' Scott v. Donald, 165 U.S. 58, 86, 41 L.Ed. 632, 17 S.Ct. 265 (1897), could undermine this careful accommodation. Because juries are afforded broad discretion both as to the imposition and amount of punitive damages, see Gertz v. Robert Welch, Inc. supra, at 349-350, 41 L.Ed.2d 789, 94 S.Ct. 2997; Prosser, § 2, pp. 13-14, the impact of these windfall recoveries is unpredictable and potentially substantial. Cf. Hall v. Cole, 412 U.S. 1, 9 n.13, 36 L.Ed.2d 702, 93 S.Ct. 1943 (1973). Such awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have. Cf. Automobile Workers v. Russell, 356 U.S. 634, 658, 2 L.Ed.2d 1030, 78 S.Ct. 932 (1958) (Warren, C.J., dissenting)."

(footnote omitted) at pp. 50 and 51.

This reasoning is as applicable to an exemplary award against a municipality as it is to an award against a union.

2. While the question of the propriety of an award of punitive damages in a section 1983 case is clearly governed by federal law,[4] it is of significance to note that an overwhelming majority of post 1871 jurisdictions have held that municipalities are not liable for exemplary damages unless expressly authorized by statute.[5]

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[4] *Batista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965); Antieau, *Federal Civil Rights Acts* § 212 at p. 355.

[5] 18 McQuillan, *Municipal Corporations* (3rd Ed.) (1977 Rev. Vol.) § 53.18a, p. 161-2.

Some representative cases are *State* v. *Sanchez*, 119 Ariz. 64, 579 P.2d 568 (1978); *Charles E. Smith, Jr.* v. *District of Columbia*, D.C. App., 336 A.2d 831 (1975); *Fisher* v. *City of Miami*, 172 So.2d 455 (Fla. 1965); *Fulton County* v. *Baranan*, 240 Ga. 837, 242 S.E.2d 617 (1978); *Lauer* v. *YMCA of Honolulu*, 57 Haw. 390, 557 P.2d 1334 (1966); *City of Gary* v. *Falcone*, 169 Ind. App. 295, 348 N.E.2d 41 (1976); *Foss* v. *Maine Tpke. Auth.*, Me., 309 A.2d 339 (1973); *Herilla* v. *City of Baltimore*, 337 Md. App. 481, 378 A.2d 162 (1977); *Des Forge* v. *West St. Paul*, 231 Minn. 205, 42 N.W.2d 633 (1950); *Newton* v. *Wilson*, 128 Miss. 726, 91 So. 419 (1922); *Chappell* v. *City of Springfield, Mo.*, 423 S.W.2d 810 (1968); *Ranells* v. *Cleveland*, 41 Ohio St.2d 1, 321 N.E.2d 885 (1975); *Nixon* v. *Oklahoma City, Okla.*, 555 P.2d 1283 (1976); *Cole* v. *City of Houston*, 442 S.W.2d 445 (Tex. Civ. App. 1969); and *Wilson* v. *City of Wheeling*, 19 W.Va. 323, 42 AR 780 (1882).

Indeed there are probably few legal principles upon which the courts of the various states have been in such accord.

As one writer has put it:

> "Although the law is not altogether free from doubt on the subject of municipal liability for exemplary damages, it is a settled principle that exemplary damages may not be recovered against a municipal corporation, nor a state, in the absence of statutory authority." (footnotes omitted)[6]

This unanimity is undoubtedly a recognition of a rather universal common law rule which probably had its genesis in *Russell* v. *Men of Devon*, 2 T.R. 667 (1778) and one which the drafters of Section 1983 must have been aware.

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[6] Hines, *Municipal Liability for Exemplary Damages*, 15 Cleve. Mar. L. Rev. 304 (1966).

III. The Failure To Make Objections to the Trial Justice's Charge on Punitive Damages

1. Defendants concede (as they must) that trial counsel failed to make timely objection to the District Court's charge on punitive damages in accordance with Rule 51. This failure was recognized by both the District Court (Appendix to Petition for Certiorari pp. B-2, 3) and the Court of Appeals (Appendix to Petition for Certiorari p. A-14).

In light of the almost universal rule that punitive damages are not recoverable against a municipality, it may fairly be said that such a charge constituted "plain error" and the fact that innocent taxpayers will bear the burden of such award certainly qualifies as a "miscarriage of justice".

In this respect the case is remarkably similar, if not identical to the case of *Williams* v. *City of New York*, 508 F.2d 356, 362 (2nd Cir. 1974) in which the Appellate Court stated:

> "(9,10) Review of the punitive damage award, however, faces a procedural hurdle. The jury's award of punitive damages to Williams rested upon an erroneous statement of the law by the trial court. For the court in its instructions to the jury failed to indicate the need to find the City, rather than its agents alone, was culpable of any wrongdoing. This was error in the charge. But reversal on this basis normally requires timely objection to the allegedly defective instruction in the district court, Fed.R.Civ.P. 51, and the appellant city neglected to object to the punitive damages charge.
>
> (11,12) Under applicable standards, this court may take cognizance of the court's error, though timely objection was not made, if it is "plain and may result in a miscarriage of justice." McNamara v. Dionne, 293 F.2d 352, 355 (2d Cir. 1962). Relief under this plain error doctrine may not be granted casually, Troupe v. Chicago,

> D. & G. Bay Transit Co., 234 F.2d 253, 259 (2d Cir. 1956). However, consideration of error not properly raised under the rule is warranted in exceptional cases in the interests of justice, Ferrara v. Sheraton McAlpin Corp., 311 F.2d 294 (2d Cir. 1962); cf. Johnson v. United States, 318 U.S. 189, 200, 63 S.Ct. 549, 87 L.Ed. 704 (1943); and the demonstrable deviation of the court's instruction here from the appropriate standard, the serious harm suffered by the defendant as a result of this error, and the remediability of this error without a new trial below, combine to justify overlooking counsel's failure timely to object in this instance. The award of punitive damages must be reversed." (footnote omitted)

See also *Fulton County* v. *Baranan* (supra).

Here the *Williams* test is met. The plaintiffs will be compensated for their actual loss. The error can be remedied without recourse to a new trial. And a clear miscarriage of justice will be corrected. See also *Ferrara* v. *Sheraton McAlpin Corp.*, 311 F.2d 294 (2d Cir. 1962); *McMello* v. *John B. Kelly, Inc.*, 238 F.2d 96 (3rd Cir. 1960) and *O'Brien* v. *Willys Motors Inc.*, 385 F.2d 163 (6th Cir. 1967). Each of these latter cases involved private litigation and a charge to the jury that was less than accurate on a fundamental principle of law. And in each the reviewing court found that the interest in correcting a miscarriage of justice outweighed rigid adherence to a procedural rule.

How much more compelling is the argument here where the burden of such miscarriage will fall upon the innocent taxpayer rather than upon the acting wrongdoer.

Conclusion

That portion of the judgment below relating to punitive damages should be reversed and the case remanded to the District Court.

Respectfully submitted,

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