

## Damages: A Remedy for the Violation of Constitutional Rights

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One of the most significant developments in the field of civil rights litigation has been the emergence of damages as a remedy for the enforcement of constitutional guarantees. In 1871, Congress created a cause of action,<sup>1</sup> now codified in 42 U.S.C. section 1983,<sup>2</sup> to redress the violation of constitutional rights by persons acting under color of state law. Subsequently, in a fitting centennial celebration of section 1983's enactment, the United States Supreme Court, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>3</sup> recognized a comparable cause of action against federal officials implicit in the Constitution.<sup>4</sup> The volume of section 1983 and *Bivens* litigation<sup>5</sup> has steadily increased during the last two decades.<sup>6</sup> Lower federal courts have al-

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1. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

2. 42 U.S.C. § 1983 (1976) 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 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.

3. 403 U.S. 388 (1971) (violation of fourth amendment).

4. In *Davis v. Passman*, 99 S. Ct. 2264 (1979), the Court extended *Bivens* beyond the fourth amendment by implying a cause of action and a damages remedy under the equal protection component of the due process clause of the fifth amendment.

5. Throughout this Article the terms "*Bivens* litigation" and "*Bivens* action" will be used interchangeably to describe a private action against a federal official to redress a constitutional violation. The word "*Bivens*" will be used to describe the case itself.

6. In 1960, 280 lawsuits were filed under § 1983. The annual total increased to 3,985 by 1970 and to 12,313 in 1977. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 452 (1978). A substantial

lowed plaintiffs to recover damages for a wide range of constitutional violations, including racial discrimination in voting, employment, public accommodations, and housing; interference with the first amendment freedoms of speech and assembly; unreasonable searches and seizures; and infringements of procedural and substantive due process.<sup>7</sup> Not until 1978, however, did the Supreme Court hand down a decision concerning the types of damages recoverable for an infringement of constitutional rights. In *Carey v. Piphus*<sup>8</sup> the Court ruled that while presumed compensatory damages may not be awarded in a section 1983 action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance.

Although *Carey* signals the Court's concern over the appropriate role for damages as a remedy in constitutional litigation, the opinion expressly limits the Court's decision to procedural due process cases.<sup>9</sup> This Article addresses the functions of legal relief for constitutional violations and the kinds of damages that ought to be recoverable in section 1983 and *Bivens* actions in the aftermath of the *Carey* decision.<sup>10</sup> Part I will discuss the range of damages recoverable in common law tort actions. Part II will analyze *Carey* as a case study of a typical constitutional tort action. Parts III and IV will discuss the various problems raised by *Carey* concerning awards of compensatory and nominal damages in constitutional litigation. Part V will consider the efficacy of awarding punitive damages. Finally, Part VI will recommend judicial or legislative recognition of presumed compensatory

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percentage of these suits were filed by prisoners. Turner, *When Prisoners Sue: A Study of Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979).

7. For a collection of illustrative cases decided under § 1983, see McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 54-66 (1974). For a comparable collection of lower federal court *Bivens* decisions, see Lehmann, *Bivens and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials*, 4 HASTINGS CONST. L.Q. 531 (1977).

8. 435 U.S. 247 (1978).

9. *Id.* at 265.

10. In contrast with the enormous volume of literature on other aspects of civil rights litigation, relatively few articles have dealt with the problems of fashioning damage awards in § 1983 and *Bivens* actions. See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Hagarty & Tynan, *Evaluation of Damages in Civil Rights Litigation*, 25 FED. INS. COUNSEL Q. 149 (1975); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969); McCormack, *supra* note 7, at 55-66; Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 25 n.89 (1974); Newman, *supra* note 6; Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 SO. CAL. L. REV. 1322, 1366-83 (1976); Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015 (1967). The focus of this Article is on the types of damages recoverable in constitutional tort litigation, and not on whether legal relief is an appropriate remedy. For a discussion of the latter topic, see Hill, *supra*; Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968).

damages in actions for violations of constitutional rights that protect intangible, dignitary interests.

# I

## COMMON LAW DAMAGES

Since Congress has not specified the damages recoverable in section 1983 and *Bivens* litigation,<sup>11</sup> the courts have drawn upon the common law of damages to fashion remedies<sup>12</sup> for deprivations of constitutional rights.<sup>13</sup> The following sections provide a cursory overview of tort damages as a prelude to full consideration of *Carey v. Phipus*.

### A. Compensatory Damages

Compensatory damages are awarded for the harm caused by the defendant's violation of the plaintiff's legal rights.<sup>14</sup> Such damages may be special or general. Special damages are awarded for past, pecuniary losses arising out of circumstances peculiar to the plaintiff's case,

11. Section 1983 merely states that the defendant "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 (1976). As for the *Bivens* action, the Court derived the right of action against federal officials from the Constitution itself, and Congress has not legislated in the area.

12. Section 1988 explicitly authorizes the use of common law remedies in § 1983 actions. 42 U.S.C. § 1988 (1976), reproduced in relevant part at note 135 *infra*. *Carey* is the first Supreme Court decision to articulate federal rules to govern the recovery of damages under § 1983. The determination as a matter of federal law of the amount of nominal damages recoverable, 435 U.S. at 267, marks a departure from lower court decisions that have applied state law on this question, see, e.g., *United States ex rel. Tyrell v. Speaker*, 535 F.2d 828, 830 n.13 (3d Cir. 1976). This aspect of *Carey* will be welcomed by judges and commentators who have advocated a uniform law of damages in constitutional tort actions. *Basista v. Weir*, 340 F.2d 74, 86 (3d Cir. 1965); Bristow, § 1983: *An Analysis and Suggested Approach*, 29 ARK. L. REV. 255, 301 (1975); Nahmod, *supra* note 10, at 9; Comment, *supra* note 10, at 1024-25. The decision will facilitate the development of a consistent body of remedial law for all constitutional tort actions, since the rules developed under § 1983 will usually be applied in *Bivens* actions. See, e.g., *Paton v. LaPrade*, 524 F.2d 862 (3d Cir. 1975) (*Bivens* action in which court looks to § 1983 actions for guidance on damages).

In *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Court, applying a state survival statute in a § 1983 action, made it clear that sometimes the content of the federal remedial rule under § 1983 will be determined by state law. This "obviously means that there will not be nationwide uniformity on these issues." *Id.* at 593 n.11. A comparison of *Robertson* and *Carey* suggests that the Court may be more likely to apply state statutory law than state decisional law in formulating § 1983 remedies. Similarly, with respect to § 1983 defenses, the courts have developed a body of federal, judge-made law to govern immunities, but often have looked to state law for the applicable statute of limitations. Glennon, *Constitutional Liberty and Property, Federal Common Law and Section 1983*, 51 SO. CAL. L. REV. 355, 386-92 (1978) (citing the relevant cases). It is assumed in this Article that the Court will continue to formulate a federal common law of constitutional tort damages which will control the most substantial questions in both § 1983 and *Bivens* actions. For the present, *Bivens* approves the use of the remedial mechanisms "normally available in the federal courts." 403 U.S. 388, 397 (1971).

13. See, e.g., *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

14. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.1 (1973).

and are recoverable only upon proof of actual loss.<sup>15</sup> General damages, on the other hand, may be awarded for either pecuniary or non-pecuniary losses, and provide compensation for harm that any plaintiff can be expected to suffer as a result of the commission of the tort in question.<sup>16</sup>

General damages for nonpecuniary losses may be proven or presumed. They are recoverable only upon proof of actual loss when the sole nonpecuniary harm sustained by the plaintiff is harm to the person, such as pain and suffering, mental and emotional distress, or humiliation.<sup>17</sup> In contrast, when the substantive cause of action is for harm to other intangible interests, such as reputation,<sup>18</sup> voting rights,<sup>19</sup> liberty,<sup>20</sup> and privacy,<sup>21</sup> general damages are presumed, although the scope of the presumption varies. In defamation actions, for example, general damages are presumed for any type of loss that would normally result from the publication of a defamatory statement.<sup>22</sup> In privacy actions, on the other hand, general damages are presumed solely for harm to the plaintiff's interest in privacy.<sup>23</sup>

The Supreme Court has recently recognized a conflict between first amendment values and the protection of the plaintiff's reputation through the remedy of presumed general damages. In *Gertz v. Robert*

15. *Id.* § 3.2; C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 8 (1935); H. MCGREGOR, DAMAGES 15-20 (13th ed. 1972).

16. The terms "special" and "general" damages have multiple meanings in the law of remedies. In the pleading context, special damages are those that must be itemized in the complaint (such as past medical expenses), whereas general damages require no specific allegations. H. MCGREGOR, *supra* note 15, at 19-20. When the focus shifts to the trial of a case, special damages can be measured precisely (such as pecuniary losses), while general damages cannot be assessed by any measure other than the opinion and judgment of a reasonable person. *Id.* at 18. In actions for property damage, general damages are awarded for the losses that "'generally' flow from the kind of substantive wrong done by the defendant," and are typically measured by the difference between the market value of the property before and after the commission of the tort. D. DOBBS, *supra* note 14, § 3.2. Special damages, on the other hand, include items of loss "that are more or less peculiar to the particular plaintiff." *Id.*

In defamation actions, special damages are compensation for actual, proven economic loss resulting directly from the publication of a defamatory statement, and are a prerequisite to recovery in actions for slander or libel per quod. *Id.* § 7.2. General damages, on the other hand, are compensation for pecuniary and nonpecuniary losses presumed to result from the publication of a defamatory statement. *Id.* They may be awarded without proof of special damages in actions for slander per se or libel per se, and in addition to special damages in actions for slander or libel per quod. *Id.*

17. See H. MCGREGOR, *supra* note 15, at 39-42, 1406-10.

18. C. McCORMICK, *supra* note 15, § 116. Presumed general damages are also recoverable in actions for malicious prosecution. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 4.7 (1956) [hereinafter cited as HARPER & JAMES]; RESTATEMENT (SECOND) OF TORTS § 670 (1977).

19. *Wayne v. Venable*, 260 F. 64 (1919).

20. C. McCORMICK, *supra* note 15, § 107.

21. RESTATEMENT (SECOND) OF TORTS § 652(H)(a) (1977).

22. C. McCORMICK, *supra* note 15, § 116.

23. RESTATEMENT (SECOND) OF TORTS § 652(H) (1977).

*Welch, Inc.*,<sup>24</sup> the Court held that an award of presumed general damages against a media defendant in a defamation action is unconstitutional, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth. In lieu of presumed general damages, the Court authorized the recovery of "compensation for actual injury."<sup>25</sup> *Gertz*, of course, is confined to defamation actions, and does not affect the validity of presumed general damages in other types of common law tort actions.

The principal purpose of both special and general compensatory damages is to put the plaintiff in the same position as the plaintiff would have been but for the defendant's breach of a legal duty.<sup>26</sup> By placing the costs of breach on the wrongdoer, compensatory damages also perform a deterrence function.<sup>27</sup> In addition, an award of presumed general damages enables a jury to vindicate the valuable intangible rights of a plaintiff who has been unable to prove any actual loss.<sup>28</sup>

### B. Nominal Damages

Nominal damages typically consist of a one dollar allocation awarded upon proof that the defendant has violated the plaintiff's legal rights.<sup>29</sup> They are recoverable only in select actions, such as trespass to land, battery, assault, false imprisonment, defamation, and malicious prosecution.<sup>30</sup> Since they are awarded for the purposes of declaring<sup>31</sup>

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24. 418 U.S. 323 (1974).

The Court held presumed damages unconstitutional because "the largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.* at 349.

25. The Court gave the following description of "actual injury":

We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

*Id.* at 350.

26. D. DOBBS, *supra* note 14, § 3.1.

27. See generally G. CALEBRESI, *THE COSTS OF ACCIDENTS* (1970).

28. *Young v. Gormley*, 120 Iowa 372, 375, 94 N.W. 922, 924 (1903); RESTATEMENT (SECOND) OF TORTS § 901(d), Comment c (1979).

29. D. DOBBS, *supra* note 14, § 3.8; RESTATEMENT (SECOND) OF TORTS § 907 (1979).

30. D. DOBBS, *supra* note 14, § 3.8.

31. *Id.* Although this is also a function of modern declaratory judgment statutes, they have not displaced the nominal damages remedy. RESTATEMENT (SECOND) OF TORTS § 901(b), Comment b (1979).

and vindicating<sup>32</sup> legal rights, nominal damages do not require proof of harm.

### C. Punitive Damages

Punitive damages are awarded in addition to compensatory or nominal damages.<sup>33</sup> Proof of a highly culpable state of mind is necessary to support an award of punitive damages<sup>34</sup> and the amount of the award is dependent upon the defendant's financial circumstances.<sup>35</sup> Punitive damages primarily serve penal and deterrent functions.<sup>36</sup> In addition, when punitive damages are awarded in conjunction with general compensatory or nominal damages, they also perform a vindicatory function.<sup>37</sup> Finally, insofar as punitive damages provide an incentive for an aggrieved citizen to act as a private attorney general, they perform a law enforcement or "bounty" function.<sup>38</sup>

## II

### CAREY V. PIPHUS: A CASE STUDY OF A CONSTITUTIONAL TORT ACTION

#### A. Carey v. Piphus

During the 1973-1974 academic year, two students were suspended from a Chicago, Illinois public school without a hearing.<sup>39</sup> Jarius Piphus was suspended for twenty days for violating a rule that prohibited students from smoking marijuana on school property.<sup>40</sup> Silas Briscoe was suspended for twenty days for violating a rule that prohibited male students from wearing earrings to class.<sup>41</sup> Both boys brought actions against the school officials under section 1983, alleging a violation of procedural due process<sup>42</sup> and seeking declaratory and injunctive relief and damages.<sup>43</sup> Piphus was readmitted within eight days pursuant to a temporary restraining order.<sup>44</sup> Briscoe was voluntarily readmitted

32. RESTATEMENT (SECOND) OF TORTS § 901(d) (1979).

33. D. DOBBS, *supra* note 14, § 3.9; C. MCCORMICK, *supra* note 15, § 77.

34. D. DOBBS, *supra* note 14, § 3.9; C. MCCORMICK, *supra* note 15, § 81.

35. D. DOBBS, *supra* note 14, § 3.9.

36. *Id.*; C. MCCORMICK, *supra* note 15, § 77.

37. C. MCCORMICK, *supra* note 15, § 23; RESTATEMENT (SECOND) OF TORTS § 901(d), Comment c (1979).

38. D. DOBBS, *supra* note 14, § 3.9; C. MCCORMICK, *supra* note 15, § 77.

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

40. *Id.* at 249.

41. *Id.* at 250.

42. Jarius Piphus was never given an opportunity to prove that he had not been smoking marijuana. *Id.* at 249. Silas Briscoe was never allowed to offer evidence that his earring did not denote gang membership, but rather was a symbol of black pride. *Id.* at 250.

43. *Id.* at 250-51.

44. *Id.* at 250.

after seventeen days while a motion for a preliminary injunction was still pending in federal district court.<sup>45</sup>

The two cases were then consolidated and submitted for final adjudication on stipulated records.<sup>46</sup> The district court held that both students had been suspended without procedural due process.<sup>47</sup> Although the court stated that the students were entitled to declaratory relief and to have the suspensions expunged from their school records, it failed to enter an order to that effect.<sup>48</sup> In considering the prayer for damages, the court held that the defendants could not successfully assert the defense of official immunity,<sup>49</sup> but nevertheless declined to award damages because "[p]laintiffs put no evidence in the record to quantify their damages and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries."<sup>50</sup>

On plaintiffs' appeal, the Court of Appeals for the Seventh Circuit reversed and remanded.<sup>51</sup> It ruled that declaratory and injunctive relief should have been granted, even though the defendants represented that all reference to the invalid suspensions had been expunged from the plaintiffs' records.<sup>52</sup> The court found that the question of damages was controlled by one of its past decisions<sup>53</sup> in which it had distinguished two types of "nonpunitive" damages recoverable in civil rights cases: "[T]he nonpunitive damages to be awarded may be special, in the sense that they are related to the particular mental distress or other injury to the plaintiff, and general, in the sense that damages are inherent in the nature of the wrong."<sup>54</sup> The court of appeals concluded that the plaintiffs were entitled to recover nonpunitive damages,<sup>55</sup> and remanded the case to determine whether the suspensions had been for a just cause.<sup>56</sup> If they had been, the plaintiffs would be limited to general damages "for the injury which is 'inherent in the nature of the wrong' " caused by a denial of due process.<sup>57</sup> If the suspensions had not been for

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45. *Id.* at 251.

46. *Id.*

47. *Piphus v. Carey*, Nos. 73-C 2522 and 74-C 303 Consol. (N.D. Ill. 1975), *rev'd*, 545 F.2d 30 (7th Cir. 1976), *rev'd and remanded*, 435 U.S. 247 (1978).

48. *Piphus v. Carey*, Nos. 73-C 2522 and 74-C 303 Consol. at A13-14.

49. *Id.* at A14. For a discussion of public official immunity, see text accompanying notes 85-100 *infra*.

50. *Id.*

51. *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976), *rev'd and remanded*, 435 U.S. 247 (1978).

52. 545 F.2d at 31.

53. *Id.* (citing *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976)).

54. *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d at 580.

55. 545 F.2d at 31.

56. *Id.* at 32.

57. *Id.* at 31.

a just cause, the plaintiffs would be entitled to general damages and special or consequential damages for the harm resulting from the suspensions.<sup>58</sup> The court indicated that general damages would be recoverable without proof of individualized injury, such as pecuniary loss or mental distress. Instead, the trial court was instructed to fix an amount "neither so small as to trivialize the right nor so large as to provide a windfall."<sup>59</sup>

The United States Supreme Court granted certiorari to consider "whether, in an action under section 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages."<sup>60</sup> The Court held that such proof is a prerequisite to recovery in an action for the denial of procedural due process.<sup>61</sup> Whether presumed general damages would be recoverable to redress the violation of other constitutional guarantees,<sup>62</sup> however, remained unresolved.

Although the Court declined to affirm the Seventh Circuit's general damages award, it did acknowledge "the importance to organized society that procedural due process be observed."<sup>63</sup> Consequently, the Court held that nominal damages should be awarded to vindicate any deprivation of this "absolute" right.<sup>64</sup> Furthermore, the Court intimated that punitive damages might be permitted "in a proper case under section 1983 with the specific purpose of deterring or punishing violations of constitutional rights."<sup>65</sup> Such damages could not be awarded to Piphus and Briscoe, however, in view of the trial court's finding that the defendants had not acted "with a malicious intention to deprive [plaintiffs] of their rights or to do them other injury."<sup>66</sup>

### B. Constitutional Tort Actions

This section provides an overview of the prima facie case, defenses, and remedies applied in constitutional tort actions generally, with an emphasis on *Carey v. Piphus* in particular. It is designed to clarify the scope and content of section 1983 and *Bivens* litigation. Readers familiar with these actions may turn to Part III.

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58. *Id.* at 32.

59. *Id.* at 31-32.

60. *Carey v. Piphus*, 435 U.S. at 253.

61. *Id.* at 264.

62. *Id.* at 265.

63. *Id.* at 264.

64. *Id.*

65. *Id.* at 257 n.11.

66. *Id.*



### 1. *Plaintiff's Case*

There are two types of constitutional tort actions. Section 1983 creates a statutory cause of action against state or local officials.<sup>67</sup> In contrast, a *Bivens* action is judicially created and directed against federal officials.<sup>68</sup> In *Carey v. Piphus*, the plaintiffs brought suit under section 1983 because the defendants were public school board members and administrators.<sup>69</sup> To establish a *prima facie* case, the plaintiffs were compelled to prove (1) that the defendants acted under color of state law as officers of a local governmental entity; (2) that the plaintiffs had been deprived of the constitutional right to procedural due process; and (3) that the defendants had either subjected the plaintiffs or caused the plaintiffs to be subjected to the alleged deprivation.<sup>70</sup> The statutory language, which stipulates only these elements, suggests that Congress intended to impose liability without further proof of fault. Yet, it has been argued that section 1983 is a tort action requiring proof of culpable conduct.<sup>71</sup> In *Monroe v. Pape*,<sup>72</sup> the Supreme Court held that a section 1983 plaintiff need not establish a "specific intent to deprive a person of a federal right,"<sup>73</sup> but the Court has not yet considered whether a section 1983 plaintiff must prove some lesser degree of fault.<sup>74</sup>

If a factual dispute similar to *Carey v. Piphus* were litigated under *Bivens*, the threshold issue would be whether *Bivens* extends to procedural due process violations.<sup>75</sup> Although the Supreme Court has not addressed the question directly, it has characterized *Bivens* as establishing that "a citizen suffering a compensable injury to a *constitutionally protected interest* [can] invoke the general federal question jurisdiction

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67. For surveys of § 1983 actions, see Bristow, *supra* note 12; McCormack, *supra* note 7; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Developments*].

68. For a survey of the *Bivens* cases, see Lehmann, *supra* note 7.

69. 435 U.S. at 250-51 nn.2 & 4.

70. See *Monroe v. Pape*, 365 U.S. at 171, 187; 42 U.S.C. § 1983 (1976).

71. For discussions of whether proof of fault is required under § 1983, see Kirkpatrick, *Defining A Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 U. CIN. L. REV. 45 (1977); Nahmod, *supra* note 10, at 13-22; *Developments*, *supra* note 67, at 1204-17.

72. 365 U.S. at 187.

73. *Id.*

74. In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court agreed to consider "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under § 1983," or whether proof of greater culpability is required. *Id.* at 559 n.6. But the Court evaded the question by assuming that the plaintiff had established a *prima facie* case and holding that the defendants were immune from suit because they had acted in good faith with respect to an unsettled area of constitutional law. *Id.* at 566 n.14. In *Baker v. McCollan*, 99 S. Ct. 2689 (1979), the Court once again had an opportunity to decide "whether simple negligence can give rise to § 1983 liability," but found instead that the plaintiff had failed to prove a violation of the Constitution.

75. See Lehmann, *supra* note 7, at 566-72.

of the district courts to obtain an award of monetary damages against the responsible federal official."<sup>76</sup> This language is sufficiently broad to authorize an action for any constitutional violation, including an infringement of procedural due process. In *Davis v. Passman*,<sup>77</sup> the Court recognized an implied cause of action and damages remedy for a violation of the equal protection component of the fifth amendment's due process clause. The *Davis* Court identified several relevant considerations in determining whether to imply a damages remedy for a violation of the Constitution, including whether (1) an explicit congressional declaration barring the plaintiff's recovery of money damages from the defendant is extant; (2) "special factors counselling hesitation" are apparent; and (3) a damages remedy is appropriate.<sup>78</sup> Thus, although the question of whether *Bivens* extends to particular constitutional violations remains unresolved, *Davis* indicates that *Bivens* may be read expansively.

The *prima facie* case in a *Bivens* action remains relatively undefined. In a line of lower federal court decisions, *Bivens* has been characterized as the federal counterpart to section 1983.<sup>79</sup> Thus, it is likely that a plaintiff bringing a *Bivens* action will have to prove the deprivation of a constitutional right by a defendant acting under color of federal authority. Moreover, it is probable that the same degree of culpability will be required in *Bivens* as in section 1983 actions.<sup>80</sup>

## 2. Defenses

### a. Immunities

The most common defenses to both section 1983 and *Bivens* actions are the immunities that can be asserted by public officials and governmental entities.<sup>81</sup> Public official immunity serves principally to ensure that qualified persons will not be deterred from assuming poli-

76. *Butz v. Economou*, 438 U.S. 478, 486 (1978) (emphasis added).

77. 99 S. Ct. at 2264.

78. *Id.* at 2268.

79. See, e.g., *Paton v. La Prade*, 524 F.2d at 870. The cases are collected and cited with approval in *Butz v. Economou*, 438 U.S. at 500.

80. See, e.g., *Payne v. Government of Dist. of Columbia*, 559 F.2d 809, 818-19 (D.C. Cir. 1977).

81. The law governing immunities has developed rapidly in recent years. Recent publications on the subject include C. RHYNE, W. RHYNE, & S. ELMENDORF, *TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS* (1976); Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977); Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526 (1977); Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941 (1977); Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483 (1977); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 RUT.-CAM. L.J. 65 (1976); Nahmod, *Persons Who Are Not "Persons": Absolute Individual Immunity Under Section 1983*, 28 DE PAUL L. REV. 1 (1978); Theis, *Official Immunity and the Civil Rights Act*, 38 LA. L.

cymaking public service positions by the prospect of personal liability.<sup>82</sup> Governmental or sovereign immunity is recognized largely to protect the public fisc.<sup>83</sup> Because the primary purpose of both types of immunities is to prevent the imposition of pecuniary liability, they can be invoked only in actions for retroactive monetary relief.<sup>84</sup>

*i. Public Official Immunity.* Until recently, public officials subject to section 1983 actions enjoyed complete immunity in the execution of discretionary, policymaking functions.<sup>85</sup> Consequently, plaintiffs were restricted to obtaining judgments against those parties least likely to be capable of satisfying them, such as low-level officials performing ministerial tasks.<sup>86</sup> In 1974, however, the Supreme Court began to reexamine the absolute immunity doctrine.<sup>87</sup> In the aftermath of this reexamination, legislators,<sup>88</sup> judges,<sup>89</sup> and prosecutors<sup>90</sup> continue to enjoy absolute immunity, but executive officials at both the state<sup>91</sup> and federal<sup>92</sup> levels are limited to a qualified immunity, regardless of rank or function.

REV. 281 (1978); *Developments, supra* note 67, at 1190-1217; *Symposium—Civil Liability of Government Officials*, 17 L. & CONTEMP. PROB. 1 (1978).

82. *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974).

83. 2 HARPER & JAMES, *supra* note 18, § 29.3.

84. *Wood v. Strickland*, 420 U.S. 308, 314 n.6 (1975) ("immunity [of public officials] from damages does not ordinarily bar equitable relief as well"); *Edelman v. Jordan*, 415 U.S. 651 (1974) (eleventh amendment bars suit for accrued monetary liability); *Ex parte Young*, 209 U.S. 123 (1908) (eleventh amendment does not bar prospective injunctive relief). The Supreme Court has not yet ruled on the difficult question of whether back pay is to be regarded as retroactive monetary relief. *Developments, supra* note 67, at 1197-99 & n.58.

85. See generally *Lehmann, supra* note 7, at 587-97; *Developments, supra* note 67, at 1191-1204.

86. Dean Prosser described the ministerial-discretionary dichotomy as follows:

The courts have set up a finespun and more or less unworkable distinction between acts which are regarded as "discretionary," or "quasi-judicial," in character, requiring personal deliberation, decision and judgment, and those which are merely "ministerial," amounting only to an obedience to orders, or to the performance of a duty in which the officer is left no choice of his own.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS 988-89 (4th ed. 1971).

87. *Scheuer v. Rhodes*, 416 U.S. at 232.

88. *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

89. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

90. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Although one court has held that a prosecutor is entitled to a qualified immunity while performing investigatory functions, *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978), the United States Supreme Court in *Imbler* declined to rule on the immunity required "for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." 424 U.S. at 430-31.

91. *Procunier v. Navarette*, 434 U.S. 555 (1978); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). One court has questioned whether the qualified immunity should be extended to all executive personnel. *Downs v. Sawtelle*, 574 F.2d 1, 11, 13-14 (1st Cir.) (remanded to determine whether social workers entitled to immunity), *cert. denied*, 439 U.S. 910 (1978).

92. *Butz v. Economou*, 438 U.S. 478 (1978).

A qualified immunity is a conditional defense<sup>93</sup> that protects public officials who have acted with a reasonable belief that they have not violated the plaintiff's constitutional rights.<sup>94</sup> Its scope varies according to the "discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."<sup>95</sup> A qualified immunity cannot be invoked by officials who knew that they were violating the Constitution (subjective bad faith), or who should have known that they were transgressing a clearly established constitutional rule (objective bad faith).<sup>96</sup>

These principles were applied in a revealing fashion to the defendants in *Carey v. Piphus*. The district court ruled that the defendants had not acted in subjective bad faith because there was no evidence that they had acted maliciously in enforcing their disciplinary policies against the plaintiffs.<sup>97</sup> However, the court found that the defendants had demonstrated objective bad faith,<sup>98</sup> since the Court of Appeals for the Seventh Circuit had indicated in *Linwood v. Board of Education*<sup>99</sup> that a lengthy suspension without an adjudicative hearing violates procedural due process. The district court found that the defendants should have known that they were violating the plaintiff's constitutional rights as determined by *Linwood*.<sup>100</sup>

93. Although there is a division of opinion in the lower federal courts as to whether the plaintiff or the defendant has the burden of proving entitlement to the immunity, the better view is that the immunity is an affirmative defense as to which the defendant has the burden of proof. See, e.g., *Landrum v. Moats*, 576 F.2d 1320, 1327 (8th Cir.), cert. denied, 439 U.S. 912 (1978); *Skehan v. Board of Trustees*, 538 F.2d 53, 61-62 (3rd Cir. 1976); *Freed*, supra note 81, at 562-63; *Kattan*, supra note 81, at 986-89.

94. *Scheuer v. Rhodes*, 416 U.S. at 247-48.

95. *Id.* at 247. For two recent cases illustrating the application of this test, see *Landrum v. Moats*, 576 F.2d at 1327 n.14, and *Duchesne v. Sugarman*, 566 F.2d 817, 829-30, 832 n.32 (2d Cir. 1977).

96. *Wood v. Strickland*, 420 U.S. at 322. See also *Butz v. Economou*, 438 U.S. at 506-07.

97. *Piphus v. Carey*, Nos. 73-C 2522 and 74-C 303 Consol. at A13 (N.D. Ill. 1975), rev'd, 545 F.2d 30 (7th Cir. 1976), rev'd and remanded, 435 U.S. 247 (1978).

98. *Piphus v. Carey*, Nos. 73-C 2522 and 74-C 303 Consol. at A13-14.

99. 463 F.2d 763 (7th Cir. 1972) (upholding the constitutionality of a state statute which authorized seven-day suspensions of students without a hearing), cert. denied, 409 U.S. 1027 (1972).

100. *Piphus v. Carey*, Nos. 73-C 2522 and 74-C 303 Consol. at A14. Actually, it may be questioned whether the defendants "should have known that they were transgressing a clearly established constitutional rule," which is the test set forth in *Wood v. Strickland*, 420 U.S. at 322 (emphasis supplied). At the time of the plaintiffs' suspensions the Supreme Court had not yet decided *Goss v. Lopez*, 419 U.S. 565 (1975), which held that procedural due process must be accorded to students temporarily suspended from school. *Carey* did not address the issue, however, because the defendants chose not to challenge the district court's holding on appeal. *Carey v. Piphus*, 435 U.S. at 251 n.6. For a discussion of the "settled law" test in *Wood*, see *Kattan*, supra note 81, at 976-86; *Yudof*, supra note 10, at 1338-46.

ii. *Governmental Immunity*. Since *Monroe v. Pape*<sup>101</sup> had established that municipal corporations (and presumably other local government entities) are not "persons" subject to suit under section 1983,<sup>102</sup> the plaintiffs in *Carey v. Phipps* did not join the school district as a defendant. But in the recent decision of *Monell v. Department of Social Services*,<sup>103</sup> the Supreme Court reconsidered the relevant legislative history.<sup>104</sup> The Court concluded that Congress had intended section 1983 to apply to municipalities and other local governmental units when (1) "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers,"<sup>105</sup> or (2) the constitutional deprivation "[has been] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."<sup>106</sup> If *Monell* had been applicable to the *Carey* case, the plaintiffs could have sued the school district because they were suspended pursuant to a school board rule authorizing the temporary removal of students for a period not exceeding one month without a hearing.<sup>107</sup>

Under *Monell*, local governmental units continue to enjoy a certain measure of protection from section 1983 actions. First, the Court held that section 1983 does not authorize the imposition of vicarious liability against a governmental entity.<sup>108</sup> Thus, while a municipal body may incur liability for an official policy sanctioning the commission of a constitutional tort, the existence of an employer-employee relationship with an official who is responsible for a constitutional violation is an insufficient premise for governmental liability. Second, the Court indicated that it might be willing to recognize a qualified immunity for local governmental entities.<sup>109</sup> However, since the parties

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101. 365 U.S. 167 (1961).

102. *Id.* at 187-92.

103. 436 U.S. 658 (1978). For a discussion of the impact of *Monell*, see Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213 (1979).

104. 436 U.S. at 664-89.

105. *Id.* at 690.

106. *Id.* at 690-91. The Court provided few guidelines as to what constitutes an "official policy or custom." *Id.* at 713 (Powell, J., concurring); *Molina v. Richardson*, 578 F.2d 846, 855 (9th Cir. 1978) (dissenting opinion), *cert. denied*, 439 U.S. 1048 (1979).

107. *Phipps v. Carey*, Nos. 73-C 2522 and 74-C 303 Consol. at A9.

108. 436 U.S. at 691.

109. *Id.* at 701. The question of whether a qualified immunity should be extended to local governmental bodies is pending before the Court. *Owen v. City of Independence*, 589 F.2d 335 (8th Cir.), *cert. granted*, 48 U.S.L.W. 3189 (U.S. Oct. 2, 1979). At least one lower court has recognized such an immunity for municipalities. *Ohland v. City of Montpelier*, 467 F. Supp. 324 (D. Vt. 1979). *Contra*, *Shuman v. City of Philadelphia*, 470 F. Supp. 449 (1979). It still may be possible to bring a vicarious liability action against a municipality by suing under *Bivens* for a fourteenth amendment violation. See, e.g., *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978) (refusing to allow recovery against city), *cert. denied*, 439 U.S. 1048 (1979).

in *Monell* had not briefed the question, the Court expressed no views on the matter.<sup>110</sup>

States might also have been subject to a suit for damages under section 1983. Congress has the power under section 5 of the fourteenth amendment to override the eleventh amendment and subject the states to liability for retroactive monetary relief.<sup>111</sup> However, the Supreme Court concluded in a recent decision that Congress did not intend to exercise that power when it enacted section 1983.<sup>112</sup> The states therefore enjoy absolute immunity from liability for damages in section 1983 actions.

An entirely different set of criteria governs the liability of the United States for the unconstitutional conduct of a federal agent. As a general proposition, the United States enjoys sovereign immunity.<sup>113</sup> The Federal Tort Claims Act,<sup>114</sup> however, waives governmental immunity in actions for money damages "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."<sup>115</sup> Thus, in contrast to section 1983, which was construed in *Monell* to impose only direct liability on governmental entities,<sup>116</sup> the Federal Tort Claims Act makes the United States vicariously liable for the acts of its employees.<sup>117</sup> The Act contains numerous exceptions to the general rule of vicarious liability, including section 2680(h), which in its original form immunized

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110. 436 U.S. at 701. The Court refused to recognize an absolute immunity for municipal bodies. *Id.*

111. *Hutto v. Finney*, 437 U.S. 678, 702 (1978) (Brennan, J., concurring). As a general proposition, the eleventh amendment immunizes states from liability for monetary relief. *Edelman v. Jordan*, 415 U.S. 651 (1974). But in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), a Title VII action against a state for money damages, the Court permitted recovery, ruling that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id.* at 456. The Court held that when Congress enacts legislation to enforce the fourteenth amendment, it "may provide for private suits against States or State officials which are constitutionally impermissible in other contexts." *Id.*

112. *Quern v. Jordan*, 440 U.S. 332 (1979). In a concurring opinion, Justice Brennan characterized the Court's statement as "dictum" because resolution of the issue was not necessary to the decision of the case. *Id.* at 350.

113. 1 HARPER & JAMES, *supra* note 18, § 29.1.

114. 28 U.S.C. §§ 2671-2680 (1976).

115. *Id.* § 1346(b).

116. See text accompanying note 108 *supra*.

117. Section 1346(b) provides that the federal courts shall have jurisdiction over claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant . . . .

28 U.S.C. § 1346(b) (1976).

the government from liability in *Bivens* false arrest actions.<sup>118</sup> The section was amended in 1974 to provide that "with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of [the Act imposing liability] shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."<sup>119</sup> Although the amendment makes no direct reference to *Bivens*, its legislative history indicates that Congress intended to subject the United States to vicarious liability for violations of the fourth amendment.<sup>120</sup> It is unclear, however, whether the section covers actions against the federal government for other types of constitutional tort claims.<sup>121</sup>

Assuming that the United States is vicariously liable for the constitutional torts of its employees, the question remains whether the federal government can invoke the qualified immunity of its agents.<sup>122</sup> In the only case that has raised the issue, the Court of Appeals for the Fourth Circuit held that the qualified immunity defense was available to agents of the federal government.<sup>123</sup> The court reasoned that the imposition of liability without regard to the individual officer's good faith would be such a substantial departure from general principles of *respondeat superior* and would impose such a significant burden on the treasury that a clearer expression of legislative intent would be required than that manifested in the amendment of section 2680(h).<sup>124</sup> Nevertheless, the Act contains no provision expressly authorizing the invocation of such a defense.

The government might also seek to avoid liability by relying on section 2680(a) of the Federal Tort Claims Act,<sup>125</sup> which retains sover-

118. Section 2680(h), as originally enacted, immunized the United States from liability for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* § 2680(h).

119. *Id.* § 2680(h).

120. Boger, Gitenstein, & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis*, 54 N.C.L. REV. 497, 510-16 (1976).

121. Legislation to remove the ambiguity was unsuccessfully introduced during the 95th Congress. S. 2117, 95th Cong., 1st Sess. (1977); H.R. 9219, 95th Cong., 1st Sess. (1977). This bill would have authorized a cause of action against the United States "where the claim sounding in tort for money damages arises under the Constitution of the United States when [an] employee of the Government is acting within the scope of his office or employment, or under the color thereof." *Id.*

122. See text accompanying note 92 *supra*.

123. *Norton v. United States*, 581 F.2d 390 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978).

124. 581 F.2d at 397.

125. Section 2680(a) reads:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a fed-

eign immunity for actions arising out of the exercise of discretionary functions. Under section 2680(a), bad faith conduct does not defeat sovereign immunity.<sup>126</sup> There is an obvious disparity between the language of section 2680(a) and those recent Supreme Court decisions governing public official immunity that reject the ministerial-discretionary dichotomy in favor of a qualified immunity for good faith conduct.<sup>127</sup> If a federal official commits a bad faith constitutional violation in the performance of a discretionary function, the United States may be exonerated from liability despite the official's culpability. It therefore remains unclear whether Congress intended to impose vicarious liability on the United States for the constitutional torts of its agents committed in a discretionary capacity when it amended section 2680(h).<sup>128</sup>

### b. Other Defenses

Although immunities are by far the most important defenses in constitutional tort actions, other defenses are available. In *Monroe v. Pape*,<sup>129</sup> the Court stated that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."<sup>130</sup> This language has been interpreted to mean that common law defenses are applicable to section 1983 actions.<sup>131</sup> While the Supreme Court has not discussed the availability of common law defenses in *Bivens* actions,<sup>132</sup> the Court could conceivably look to section 1983 cases for guidance.<sup>133</sup> Different defenses might be formulated in response to these two types of actions, however, insofar as *Bivens* actions are governed exclusively by federal common law,<sup>134</sup> while section 1983 actions, in contrast, may be subject to state law.<sup>135</sup>

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eral agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1976).

126. See *Butz v. Economou*, 438 U.S. at 505 (dictum).

127. See text accompanying notes 92-100 *supra*.

128. See *Boger, Gitenstein, & Verkuil*, *supra* note 120, at 530-32.

129. 365 U.S. 167 (1961).

130. *Id.* at 187.

131. *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967) (recognized common law defenses of good faith and probable cause); *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974) (self-defense), *cert. denied*, 420 U.S. 964 (1975); *Skehan v. Board of Trustees*, 436 F. Supp. 657, 664 (M.D. Pa. 1977) (unclean hands), *aff'd in part and remanded in part*, 590 F.2d 470 (3d Cir. 1978).

132. Lower courts have begun to recognize the common law defenses in *Bivens* actions. See, e.g., *Payne v. Government of Dist. of Columbia*, 559 F.2d 809, 829 (D.C. Cir. 1977) (self-defense).

133. See *Butz v. Economou*, 438 U.S. at 496-504 (citing and approving cases that apply § 1983 public official immunity doctrines to *Bivens* actions).

134. See note 12 *supra*. But see *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) (applying state statute of limitations to both § 1983 and *Bivens* actions).

135. See note 12 *supra*. 42 U.S.C. § 1988 provides in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts by the pro-



### 3. Remedies

Although declaratory judgments, injunctive relief, and damages are the most commonly requested remedies in section 1983 actions,<sup>136</sup> the statute authorizes any type of legal or equitable relief.<sup>137</sup> *Bivens*, on the other hand, recognizes only the right to recover damages.<sup>138</sup> The Supreme Court has not directly addressed the propriety of other types of remedies in actions against federal officials who have violated the Constitution, but it has sustained the jurisdiction of federal courts to protect constitutional rights by entertaining declaratory judgment actions<sup>139</sup> and issuing injunctions.<sup>140</sup> Consequently, the full range of legal and equitable remedies appears to be available in actions against federal officials.

## III

### COMPENSATORY DAMAGES

The *Carey* Court declined to recognize presumed general damages for procedural due process deprivations. It did, however, authorize recovery of proven compensatory damages. This section critically analyzes the Court's refusal to allow presumed damages and addresses unresolved questions regarding the recovery of proven compensatory damages.

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visions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988 (1976). In *Robertson v. Wegmann*, 436 U.S. 584, 589 n.5 (1978), the Court declined to decide whether § 1988's reference to "the common law" is a reference to the decisional law of the forum state or to federal common law.

136. *E.g.*, *Carey v. Piphus*, 435 U.S. 247 (1978) (action for declaratory judgment, injunctive relief, and damages). See *Developments, supra* note 67, at 1217-50.

137. The statute provides that the defendant "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1976).

138. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).

139. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

140. See cases cited in *Bivens v. Six Unknown Named Agents*, 403 U.S. at 402-07 (Harlan, J., concurring). In *Bell v. Hood*, 327 U.S. 678, 684 (1946) (action for damages), the Court observed that it is "established practice . . . to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."

*A. Presumed Compensatory Damages*

The *Carey* plaintiffs advanced two theories to support their contention that general damages should be awarded without proof of actual loss. First, they argued in the conjunctive that presumed damages should be awarded because "constitutional rights are valuable in and of themselves, and because of the need to deter violations of constitutional rights."<sup>141</sup> The Court inquired into the intended functions of section 1983 damages and concluded that "the basic purpose of a section 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights."<sup>142</sup> Furthermore, the Court stated that even if Congress intended section 1983 damages to 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."<sup>143</sup> The Court thus explicitly rejected the plaintiffs' deterrence argument. At the same time, however, it implicitly rejected the plaintiffs' contention that constitutional rights are inherently valuable by narrowly construing the scope of the interests compensable under section 1983. The Court restricted the range of compensable "injuries"<sup>144</sup> to pecuniary losses, such as the loss of education or employment opportunities, and nonpecuniary losses of a personal nature, such as emotional distress.<sup>145</sup> It thereby excluded nonpersonal intangible losses, including the inherent value loss which results from the violation of a constitutional right. In contrast, the Court of Appeals for the Seventh Circuit had broadly construed the interests compensable under section 1983, recognizing that there is a compensable "injury inherent in the nature of the wrong" attendant upon a violation of procedural due process.<sup>146</sup>

The second theory advanced by the plaintiffs was that "even if the purpose of a section 1983 damages award is . . . primarily to compensate persons for injuries that are caused by the deprivation of constitutional rights, every deprivation of procedural due process may be presumed to cause some injury."<sup>147</sup> Because it had already determined that the loss of an inherently valuable constitutional right was not a

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141. 435 U.S. at 254.

142. *Id.*

143. *Id.* at 256-57.

144. Early in its decision the Court said: "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Id.* Further evidence of the Court's restrictive definition of the term "injuries" may be found in the following statement: "[T]he principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871." *Id.* at 255.

145. *Id.* at 259-64.

146. *Piphus v. Carey*, 545 F.2d at 31.

147. 435 U.S. at 254.

compensable section 1983 injury, the Court confined its inquiry to pecuniary and personal nonpecuniary losses, concluding that damages should not be presumed for either type of harm.<sup>148</sup> Thus, the Court's discussion of presumed damages was necessarily incomplete; it had by its own logic obviated the possibility of an award of presumed damages for the infringement of an inherently valuable constitutional right.

The most perplexing aspect of *Carey*'s silence on the propriety of awarding presumed general damages for the inherent value of procedural due process is the Court's failure to follow the method described in the *Carey* opinion for fashioning section 1983 remedies. The Court suggested that the common law rules governing tort damages should be regarded as providing "an appropriate starting point,"<sup>149</sup> but not necessarily "a complete solution"<sup>150</sup> to the damages issues in a section 1983 action. It stressed the importance of first identifying the interests protected by a particular constitutional right, and then determining whether those interests are also protected by the common law.<sup>151</sup> If the interests are protected by the common law, the standard tort remedies are directly applicable to the section 1983 action.<sup>152</sup> If they are not, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common law rules of damages themselves were defined by the interests protected in the various branches of tort law."<sup>153</sup>

The Court properly identified the two interests protected by the procedural due process clause. One is to guarantee the "feeling of just treatment" by the government.<sup>154</sup> The other is to protect persons against "the mistaken or unjustified deprivation of life, liberty or property."<sup>155</sup> The Court also correctly recognized that there is no common law tort action to redress deprivations of procedural due process.<sup>156</sup> However, when it identified the compensable losses caused by a deprivation of the "feeling of just treatment," it ignored the inherent value of that interest and focused exclusively on the "feelings of mental and emotional distress [aroused] in the individual who is denied" the right.<sup>157</sup> Furthermore, when the Court consulted the common law for

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148. *Id.* at 259-64.

149. *Id.* at 258.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 259.

154. *Id.* at 261.

155. *Id.* at 259.

156. *Id.* at 258.

157. *Id.* at 261.

remedies protecting interests comparable to those guaranteed by the procedural due process clause, it ignored the most relevant body of case law.

In its examination of analogous common law remedies, the Court cited the following principle from a chapter entitled "Damages in Accident Cases" in volume two of Harper and James' torts treatise:<sup>158</sup> "The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to the plaintiff by defendant's breach of duty."<sup>159</sup> Negligence actions are indeed brought primarily to compensate, and therefore proven compensatory damages are the only remedy allowed in such actions.<sup>160</sup> But section 1983 actions for deprivations of procedural due process are not analogous to negligence actions. Instead, the intangible constitutional interests protected by the procedural due process clause more closely resemble the dignitary interests protected by such tort actions as defamation, false imprisonment, and invasion of privacy.<sup>161</sup> These actions are discussed by Harper and James in volume one of their treatise,<sup>162</sup> where the authors state that deterrence and the vindication of personal interests are as important as compensation in dignitary tort actions,<sup>163</sup> and that these three objectives are accomplished through an award of presumed general damages.<sup>164</sup>

After consulting the common law, the Court properly asked whether Congress intended section 1983 damages to perform the same functions as those performed by common law damages.<sup>165</sup> In its search for indicia of legislative intent, the Court found that neither the text of section 1983 nor its legislative history contained any express statement concerning the functions of constitutional tort damages.<sup>166</sup> The language of the statute merely provides for an "action at law,"<sup>167</sup> and the

158. 1 HARPER & JAMES, *supra* note 18, § 25.1.

159. 435 U.S. at 254-55 (quoting 1 HARPER & JAMES, *supra* note 18, § 25.1).

160. Nominal damages are not recoverable in negligence actions. D. DOBBS, *supra* note 14, § 3.8.

161. Yudof, *supra* note 10, at 1371-74. As further evidence that § 1983 actions are more closely analogous to the common law dignitary torts than to negligence actions, it should be noted that the transgressions of government officials were typically actionable under the writ of trespass at the time that § 1983 was enacted. Hill, *supra* note 10, at 1132.

162. 1 HARPER & JAMES, *supra* note 18, §§ 3.6-3.9, 4.7, 5.30, 9.6-9.7.

163. *E.g.*, *id.* § 5.30, at 468-70. See also D. DOBBS, *supra* note 14, § 3.1. In England, the courts have recognized two components of compensatory damages awards in actions for dignitary harm: "material loss" and "aggravated damages." *Cassell & Co. v. Broome*, [1972] A.C. 1027, 1070-74 (defamation action). The latter are defined as damages for the plaintiff's subjective losses, and "they inflict an added burden on the defendant proportionate to his conduct." *Id.* at 1071. Thus, the English courts also distinguish between the functions of compensatory damages in negligence and dignitary tort actions.

164. See authorities cited in notes 162-63 *supra*.

165. 435 U.S. at 255-57.

166. *Id.* at 255.

167. 42 U.S.C. § 1983 (1976). For the full text of the statute, see note 2 *supra*.

members of Congress did not discuss their reasons for authorizing legal relief.<sup>168</sup> Seeking circumstantial evidence of legislative intent, the Court turned to the principles of the common law of damages extant in 1871.<sup>169</sup> Since the Court focused on the rules governing damages in negligence cases<sup>170</sup> instead of those governing dignitary tort damages,<sup>171</sup> however, this historical exercise led to the same questionable conclusion that compensation is the basic purpose of section 1983 damages.<sup>172</sup>

The Court compounded its error by overlooking available circumstantial indicia of legislative intent. Section 1983 was enacted as part of the Ku Klux Klan Act of 1871.<sup>173</sup> The Act grew out of a message to Congress from President Grant which called for legislation to "secure life, liberty, and property and the enforcement of law in all parts of the United States."<sup>174</sup> President Grant was principally concerned with the "lawless conditions in the South" created by the Ku Klux Klan activities and the failure of state governments to punish the wrongdoers or provide redress for Klan victims.<sup>175</sup> Therefore, one of the primary objectives of the Act was to provide a federal forum in which both blacks and whites could sue for violations of the fourteenth amendment.<sup>176</sup> This historical setting persuasively suggests that Congress intended section 1983 damages both to deter Klan activities and to vindicate the constitutional rights of the Klan's victims,<sup>177</sup> as well as to compensate the victims for their actual losses. Thus, it would have been appropriate for the Court to have inferred that Congress intended section 1983 damages to serve the three purposes of common law dignitary tort damages.

Having misconstrued Congress' intent, the Court went on to make an independent evaluation of the need for section 1983 damages to accomplish noncompensatory objectives. Perhaps because the plaintiffs did not advance vindication as a justification for awarding presumed

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168. As stated by the Court in *Carey*, "[t]he Members of the Congress that enacted § 1983 did not address directly the question of damages." 435 U.S. at 255.

169. *Id.* at 255-56 & n.9.

170. See text accompanying notes 158-60 *supra*.

171. See text accompanying notes 161-64 *supra*.

172. 435 U.S. at 254.

173. Act of April 20, 1871, ch. 22, 17 Stat. 13. For a description of the Act's historical background, see *Monroe v. Pape*, 365 U.S. 167 (1961). See also M. BERGER, *EQUALITY BY STATUTE* (rev. ed. 1967); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

174. *Monroe v. Pape*, 365 U.S. at 173.

175. *Id.* at 174.

176. *Id.* at 170-74; Nahmod, *supra* note 10, at 10-11; Comment, *supra* note 10, at 1026.

177. Section 1988 explicitly recognizes the vindicatory function of § 1983 insofar as it provides that federal courts shall have jurisdiction over § 1983 actions "for the protection of all persons . . . in their civil rights, and for their vindication." 42 U.S.C. § 1988 (1976).

general damages, the Court focused exclusively on deterrence.<sup>178</sup> It concluded that the existing deterrents—the criminal law, the right to recover attorney's fees, and the possibility of obtaining punitive damages—were adequate.<sup>179</sup>

Each of these deterrents, however, has its limitations. Specifically, the criminal counterpart of section 1983, 18 U.S.C. section 242, has not proven to be an effective deterrent because "[i]ts use is bound to be sporadic at best."<sup>180</sup> The sporadic nature of its use most likely is a function of prosecutorial reluctance to charge officials with whom they maintain close working relationships.<sup>181</sup> Another limitation on the efficacy of a criminal action is the requirement of proof beyond a reasonable doubt that the defendant acted with specific intent to infringe a constitutional right.<sup>182</sup> This requirement, coupled with the reluctance of jurors to return verdicts against public officials,<sup>183</sup> ensures "that even when prosecutions are brought, convictions will be rare."<sup>184</sup>

Perhaps in part because of the infrequency with which prosecutors invoke section 242, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976.<sup>185</sup> This statute is designed to encourage citizens to act as private attorneys general.<sup>186</sup> Although the prospect of recovering attorney's fees from defendants will encourage the filing of civil actions under section 1983, it is not enough that lawyers have an incentive to sue. Prospective plaintiffs also must have a reason to litigate. It is doubtful that the remedy authorized by *Carey*—a nominal damages award of one dollar—will motivate many aggrieved citizens to act as private prosecutors.

Apparently recognizing the inadequate deterrent effect of nominal damages plus attorney's fees, the Court suggested in *Carey* that it might be willing to award exemplary or punitive damages "in a proper case" under section 1983 "with the specific purpose of deterring or punishing violations of constitutional rights."<sup>187</sup> But the Court indicated that pu-

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178. 435 U.S. at 254-57 & nn.10-11.

179. *Id.* at 257 n.11. For an empirical study suggesting that § 1983 damages have very little deterrent effect, see Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 809-14 (1979).

180. Newman, *supra* note 6, at 450.

181. *Id.*

182. *Id.*

183. *Id.*; Project, *supra* note 179.

184. Newman, *supra* note 6, at 450.

185. The Act amended 42 U.S.C. § 1988 to read in part as follows: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976). For a discussion of the Act, see Comment, *The Civil Rights Attorney's Fees Awards Act of 1976*, 52 ST. JOHN'S L. REV. 562 (1978); Comment, *The Civil Rights Attorneys' Fees Awards Act of 1976*, 34 WASH. & LEE L. REV. 205 (1977).

186. 435 U.S. at 257 n.11.

187. *Id.*

nitive damages could be imposed only upon proof of malicious intention.<sup>188</sup> Consequently, only the more egregious constitutional violations would be deterred by such a remedy.<sup>189</sup> In contrast, an award of presumed general damages would have the potential to deter the entire spectrum of constitutional violations.

The Court's disallowance of presumed general damages for the inherent value of procedural due process is not surprising in light of its conclusion that compensation is the basic purpose of an award of damages under section 1983. Presumed general damages are recoverable at common law only when a tort action serves three objectives: deterrence, vindication, and compensation.<sup>190</sup> Had the Court consulted the proper body of common law doctrine, considered all the relevant indicia of legislative intent, and conducted a more thorough independent evaluation of the purposes to be served by section 1983 legal relief, it presumably would have acknowledged the deterrent and vindictory functions of section 1983 damages. Upon such analysis it would have become apparent to the Court that presumed general damages are the only available remedy to redress the loss of an intangible constitutional interest worthy of legal protection.<sup>191</sup>

Although the significance of presumed general damages for the inherent value of procedural due process eluded the Supreme Court, the lower federal courts had recognized the need for this remedy in several cases decided before *Carey*.<sup>192</sup> In *Unified School District No. 480 v. Epperson*,<sup>193</sup> for example, two public school teachers claimed that their employment had been terminated without a hearing as a result of their collective bargaining activities on behalf of the National Educational Association. The trial court accepted the school district's assertion that budgetary considerations had prompted the terminations.<sup>194</sup> Upon appeal the Court of Appeals for the Tenth Circuit held that the plaintiffs were not entitled to reinstatement with back pay and consequential damages.<sup>195</sup> It remanded the case, however, for an award of presumed

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188. *Id.*

189. For a discussion of the state of mind required to impose punitive damages, see text accompanying notes 304-22 *infra*.

190. See D. DOBBS, *supra* note 14, § 3.1.

191. See text accompanying notes 18-23 *supra*.

192. Procedural due process plaintiffs were allowed to state a cause of action for presumed general damages in four cases prior to *Carey*. *Unified School Dist. No. 480 v. Epperson*, 551 F.2d 254, 260-61 (10th Cir. 1977); *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 579-80 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976); *Bruce v. Board of Regents*, 414 F. Supp. 559, 569 (W.D. Mo. 1976); *Endress v. Brookdale Community College*, 144 N.J. Super. 109, 127, 364 A.2d 1080, 1097-98 (1976).

193. 551 F.2d 254 (10th Cir. 1977).

194. *Id.* at 256-57.

195. *Id.*

general damages.<sup>196</sup> The court's justification of the remand persuasively articulates the need for presumed damages to redress procedural due process violations:

To reach a contrary result in the instant case would to us be a bit incongruous, in that we would be holding that there was no relief or remedy whatsoever for an admitted violation of a constitutional right. The right to notice and a hearing before termination or nonrenewal of a teaching contract, assuming the particular individual enjoys such a right, is an important one, and to hold that such a right may be violated without affording the injured party any redress of any kind tends to deprive the right of meaning.<sup>197</sup>

The *Carey* Court not only refused to allow compensatory damages for the inherent value loss alleged by the plaintiffs, but also declined to allow presumed damages for the mental anguish and emotional distress directly caused by a procedural due process violation.<sup>198</sup> The Court rejected the plaintiffs' analogy to the presumed damages recoverable in defamation *per se* actions because (1) "it is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, inherently is as likely to cause injury to reputation and distress;"<sup>199</sup> and (2) it could foresee "no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself."<sup>200</sup> The Court may have felt that it was inappropriate to presume damages for such losses because they are unlikely to occur. The Court suggested this concern when it observed that, "[i]n contrast to the immediately distressing effect of defamation *per se*, a person may not even know that procedures *were* deficient until he enlists the aid of counsel to challenge a perceived substantive deprivation."<sup>201</sup> On the other hand, the Court may have been reluctant to presume damages because it had disallowed general damages for similar losses in *Gertz*.<sup>202</sup> In *Gertz*, however, the state court's award of presumed damages adversely affected the constitutional freedoms of speech and press.<sup>203</sup> In contrast, the *Ca-*

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196. *Id.* at 260-61.

197. *Id.*

198. 435 U.S. at 264.

199. *Id.* at 263.

200. *Id.*

201. *Id.* The most distressing aspect of this statement is the implicit proposition that procedural due process deprivations cause compensable harm only when they produce mental or emotional distress. This follows of course from the Court's initial decision to exclude the inherent value of constitutional rights from the scope of the interests protected by compensatory damages under § 1983.

202. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

203. *Id.* at 349. For a description of the Court's holding in *Gertz*, see text accompanying notes 24-25 *supra*.



rey Court's recognition of presumed general damages would have protected a fundamental constitutional right.

The Court also discussed the appropriateness of awarding presumed general damages for consequential losses caused by a procedural due process violation.<sup>204</sup> The Court and the parties agreed that proven damages would adequately compensate any harm suffered by a plaintiff as a result of an unjustified deprivation of life, liberty, or property.<sup>205</sup> This aspect of the Court's decision is commendable because it reduces the likelihood of presumed damages resulting in a windfall to the plaintiff. Although a plaintiff may have difficulty proving the value of items of consequential loss caused by a procedural due process violation,<sup>206</sup> it is preferable to require the plaintiff to marshal the available evidence, subject to a lenient standard of proof, than to give the jury discretion to presume such losses.

To summarize, the Court in *Carey* refused to award presumed compensatory damages for any type of harm resulting from a deprivation of procedural due process. Yet, tort principles and the legislative history of section 1983 suggest that constitutional tort damages should perform deterrent and vindictory, as well as compensatory, functions. Alternative remedies have not diminished the need to recognize presumed damages to achieve these objectives. Therefore, the Court should at least have allowed presumed general damages for the plaintiffs' loss of the inherent value of procedural due process. Furthermore, presumed damages should perhaps have been recognized for the mental anguish and emotional distress directly caused by the procedural due process deprivation.

The *Carey* Court's denial of presumed general damages may be partially explained by the unique nature of procedural due process rights. Although these rights have an intangible dignitary value, they protect no specific substantive interest.<sup>207</sup> This distinguishes them from the types of intangible interests for which general damages are normally presumed at common law,<sup>208</sup> and may help to distinguish them from other constitutional rights as well. In this regard it is appropriate to reemphasize that the Court's denial of presumed general damages in *Carey* is expressly restricted to procedural due process cases<sup>209</sup> brought

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204. 435 U.S. at 260-65. Consequential losses are the injuries caused by an unjustified deprivation of life, liberty, or property that could have been avoided by allowing a prior hearing.

205. *Id.*

206. *Pipus v. Carey*, 545 F.2d at 32.

207. For an excellent discussion of the interests protected by the procedural due process clause, see Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

208. See text accompanying notes 18-23 *supra*.

209. 435 U.S. at 265.

under section 1983.<sup>210</sup>

### B. Proven Compensatory Damages

The *Carey* Court authorized the recovery of proven compensatory damages<sup>211</sup> for the tangible and intangible losses precipitated by a constitutional violation.<sup>212</sup> However, the Court did not address several important questions concerning the availability and extent of such an award. Specifically, further definition is required on the nature of compensable intangible losses, the evidentiary standard for compensatory relief, and the causation test for compensatory damages.

#### I. Types of Intangible Losses

The *Carey* Court ruled that a plaintiff who has been deprived of procedural due process may obtain compensation for the resulting distress irrespective of whether the substantive deprivation was justified.<sup>213</sup> Although the Court did not define "distress" precisely, it did state that the term includes "mental suffering or emotional anguish."<sup>214</sup> Unfortunately, the Court did not expand upon its itemization of recoverable intangible losses. In contrast, in *Gertz v. Welch*<sup>215</sup> the Court defined the "actual injury" compensable in defamation actions as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."<sup>216</sup> Lower federal courts have awarded damages in section 1983<sup>217</sup> and *Bivens*<sup>218</sup> actions

210. *Carey* is not binding in a *Bivens* action because the Court in *Carey* was construing congressional intent regarding a statutory cause of action, whereas *Bivens* is a judicially created action. The *Bivens* Court had no occasion to discuss the deterrent or vindicatory functions of compensatory damages because the plaintiff in that case sought damages for compensatory purposes only. *Bivens v. Six Unknown Named Agents*, 403 U.S. at 407-08 (Harlan, J., concurring).

211. 435 U.S. at 259-64.

212. Recovery for tangible losses should present few special problems because the application of standard common law principles usually will ensure adequate compensation. Thus, the focus of this section will be on damages for intangible loss. For a statement of the standard common law principles governing proven compensatory damages, see D. DOBBS, *supra* note 14, §§ 3.1-7. For a discussion of the relationship between common law damages and constitutional tort damages, see *Clappier v. Flynn*, 605 F.2d 519, 528-31 (10th Cir. 1979).

213. 435 U.S. at 266.

214. *Id.* at 264 n.20. In an interesting post-*Carey* decision, the Seventh Circuit has ruled that the substantive due process clause protects against arbitrary intrusions on both emotional and physical well-being. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979) (action for emotional distress).

215. 418 U.S. 323 (1974).

216. *Id.* at 350.

217. *E.g.*, *Konczak v. Tyrrell*, 603 F.2d 13, 17 (7th Cir. 1979) (mental distress, humiliation, loss of reputation, pain and suffering); *Baskin v. Parker*, 602 F.2d 1205, 1209-10 (5th Cir. 1979) (humiliation); *Vetters v. Berry*, 575 F.2d 90 (6th Cir. 1978) (pain and suffering, humiliation, mental distress); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.) (embarrassment, humiliation, personal helplessness), *cert. denied*, 404 U.S. 866 (1971); *Manfredonia v. Barry*, 401 F. Supp. 762 (E.D.N.Y. 1975) (public notoriety, embarrassment); *Stokes v. Lecce*, 384 F. Supp. 1039 (E.D. Pa.

for all of the losses identified in *Gertz*, recognizing that such losses may result from the violation of constitutional rights. Since this approach is consistent with the common law principle that a plaintiff should be compensated for all losses proximately caused by the defendant's wrongful act,<sup>219</sup> the Supreme Court should follow the lead of the lower courts in allowing recovery for personal humiliation or damage to reputation which has resulted from a constitutional tort defendant's actionable conduct.

After *Paul v. Davis*<sup>220</sup> there may be some confusion as to whether constitutional tort plaintiffs can recover damages for incidental harm to reputation. In *Paul*, the Court held that a complaint seeking compensation *solely* for harm to reputation failed to state a cause of action under section 1983 because damage to reputation is not actionable as a deprivation of either "liberty" or "property" under the due process clause of the fourteenth amendment.<sup>221</sup> At least one court has construed *Paul* broadly to preclude legal relief for harm to reputation in all section 1983 actions.<sup>222</sup> A preferable reading of the opinion, however, would restrict its holding to cases in which the only actionable conduct is harm to the plaintiff's reputation.<sup>223</sup> Such a construction would permit compensation when harm to reputation is one of several losses resulting from the violation of a constitutional right. It would at the same time, however, preclude the use of a section 1983 action to avoid the constraints that have been developed to protect defamation defendants.<sup>224</sup>

## 2. Proof of Intangible Losses

Presumably because the plaintiffs offered no evidence of distress, the *Carey* Court declined to discuss the critically important matter of the quantum of proof required to sustain an award of damages for in-

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1974) (damage to reputation); *Lykken v. Vavreck*, 366 F. Supp. 585 (D. Minn. 1973) (embarrassment); *Sexton v. Gibbs*, 327 F. Supp. 134 (N.D. Tex. 1970) (humiliation, embarrassment, discomfort), *aff'd per curiam*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967) (pain and suffering, humiliation).

218. *Payne v. Government of Dist. of Columbia*, 559 F.2d 809 (D.C. Cir. 1977) (extreme mental anguish); *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975) (stigmatization, invasion of privacy, interference with personality development).

219. *D. DOBBS*, *supra* note 14, § 3.3.

220. 424 U.S. 693 (1976).

221. *Id.* at 710-12.

222. *Cox v. Northern Va. Transp. Comm'n*, 551 F.2d 555 (4th Cir. 1976).

223. *See, e.g., Harris v. Harvey*, 605 F.2d 330, 338 (7th Cir. 1979) (allowing recovery for harm to reputation caused by a denial of equal protection); *Collier v. Bachman*, 421 F. Supp. 869, 870 (E.D. Mich. 1976) (allowing recovery for harm to reputation caused by a denial of procedural due process).

224. To forestall such attempts at circumvention, the courts have recognized defamation defenses in "false light" invasion of privacy cases. *W. PROSSER*, *supra* note 86, at 812-14.

tangible losses.<sup>225</sup> Lower federal courts, however, have expressed widely divergent views on this issue.<sup>226</sup> Some lower courts have adopted a stringent evidentiary standard. In *Perez v. Rodriguez Bou*,<sup>227</sup> for example, the Court of Appeals for the First Circuit approved an award of no more than nominal damages in an action by suspended public school students because

the only evidence of actual injury is plaintiffs' own statements that they experienced some psychological discomfort as a result of their suspensions. There is no evidence of loss of employment or employment opportunities, or delay in meeting academic requirements, or significant harm to plaintiffs' reputation in the community, or medically cognizable psychological distress. In such circumstances courts are not inclined to award compensatory damages for general mental distress.<sup>228</sup>

The court thus refused to premise recovery upon the plaintiffs' testimony and proof of the circumstances surrounding the twelve-day suspensions. Instead, it implicitly required medical expert testimony to substantiate mental distress and explicitly required proof of "significant harm" to recover for loss to reputation.

The Court of Appeals for the Second Circuit, on the other hand, has taken a less restrictive approach to the requisite quantum of proof. In *United States ex rel. Larkins v. Oswald*,<sup>229</sup> the court affirmed a \$1,000 compensatory damage award to a prisoner whose seven-day term of solitary confinement, issued without a hearing, was extended for an additional five days. The court required no proof of mental distress beyond the plaintiff's testimony.<sup>230</sup> Of course, there is a significant difference between a twelve-day suspension from school and a twelve-day isolation in solitary confinement. Nevertheless, the Second Circuit appears more willing than the First Circuit to allow the jury to infer mental distress from the plaintiff's testimony coupled with proof of the surrounding circumstances.

The housing discrimination cases suggest that the quantum of proof required may vary depending upon the importance of the constitutional right at stake. The lower federal courts in these section 1982 cases have permitted inferences of compensable loss from surrounding

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225. 435 U.S. at 267 n.25.

226. See text accompanying notes 227-32 *infra*. The wide range of evidentiary standards has produced an equally wide range of awards.

227. 575 F.2d 21 (1st Cir. 1978).

228. *Id.* at 25. But see *Rivera Morales v. Benitez de Rexach*, 541 F.2d 882 (1st Cir. 1976) (a pre-*Carey* case awarding a substantial sum for intangible losses based on very little evidence). For a case in which psychiatric testimony was introduced into evidence, see *Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1309 (D. Del. 1977).

229. 510 F.2d 583 (2d Cir. 1975). But see *Stolberg v. Board of Trustees*, 474 F.2d 485 (2d Cir. 1973).

230. 510 F.2d at 590.

circumstances<sup>231</sup> and have sustained recoveries based solely upon the plaintiff's testimony.<sup>232</sup> Their leniency may be attributable to the element of racial discrimination present in section 1982 cases.

While the Court in *Carey* did not address the evidentiary question directly, it did rule that the "distress" for which recovery is permissible "may be evidenced by one's conduct and observed by others."<sup>233</sup> Furthermore, the Court could "foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself,"<sup>234</sup> for "[d]istress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff."<sup>235</sup> These statements suggest that the Court will eventually favor the adoption of a lenient standard of proof for intangible losses. Such a development would ultimately ameliorate the inequities engendered by the *Carey* Court's rejection of presumed compensatory damages.<sup>236</sup>

### 3. Causation

The Court in *Carey* adopted a stringent test of causation which will aggravate the effects of the Court's decision to disallow presumed general damages for violations of procedural due process. The plaintiff must prove that the deprivation of procedural due process was the primary cause of each loss claimed.<sup>237</sup> The test will not have a particularly adverse impact in instances of an unjustified deprivation of life, liberty, or property since it will permit recovery for both the harm caused by the denial of a hearing and the substantive violation. In the *Carey* case, for example, it would allow the plaintiffs to recover for lost school time and for any distress caused by either the failure to conduct a hearing or the unjustified suspension.<sup>238</sup> The test will operate more restrictively, however, when the substantive deprivation would have been justified had a hearing been held. In such cases, the only compensable harm may be the mental anguish and emotional distress directly

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231. *E.g.*, *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974); *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Cal. 1976).

232. *E.g.*, *Lamb v. Sallee*, 417 F. Supp. 282 (E.D. Ky. 1976); *Walker v. Fox*, 395 F. Supp. 1303 (S.D. Ohio 1975).

233. 435 U.S. at 264 n.20.

234. *Id.* at 263.

235. *Id.* at 263-64 (footnote omitted).

236. Consider, for example, the post-*Carey* case of *Morrow v. Igleburger*, 584 F.2d 767 (6th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979), in which plaintiff was awarded \$1,000 for out-of-pocket expenses and emotional distress suffered during detention prior to arraignment on forgery charges for one day longer than was reasonable.

237. 435 U.S. at 260. *See also* *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977).

238. *Piphus v. Carey*, 545 F.2d at 32.

resulting from the procedural due process violation.<sup>239</sup> The trier of fact would then have to perform the almost impossible task of distinguishing the distress caused by the unjustified procedural deprivation from that caused by the justified substantive deprivation.

The Court has adopted a similarly restrictive test of causation in first amendment cases.<sup>240</sup> It has explicitly stated that reinstatement of a public employee who has been suspended or terminated from employment in retaliation for the exercise of free speech rights will be denied if the defendant can show "by a preponderance of the evidence that it would have reached the same decision as to [the plaintiff's] reemployment [or continued employment] even in the absence of the protected conduct."<sup>241</sup> The justification for this rule is that the employee should not benefit from involvement in a constitutionally protected activity.<sup>242</sup>

In contrast, the housing discrimination cases decided by the lower courts under section 1982 have adopted a more liberal test of causation.<sup>243</sup> If a plaintiff proves that race was one reason for the defendant's refusal to rent or sell, the defendant cannot avoid liability by showing that other reasons existed for the refusal.<sup>244</sup> These cases suggest that the Court may adopt a more liberal "substantial factor" test for the violation of select constitutional rights which are so fundamental that a plaintiff should be able to obtain redress despite the presence of concurrent causes.

239. 435 U.S. at 263. The *Carey* Court disapproved a line of cases allowing the recovery of consequential damages for the period between the date of the procedural due process deprivation and the time when a hearing either was or could have been held. *Id.* at 260 n.15. Some of those cases had been decided by the Court of Appeals for the Fourth Circuit and have now been overruled. *Burt v. Abel*, 585 F.2d 613, 615-16 (4th Cir. 1978).

240. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

241. *Id.* at 287. In *Mt. Healthy*, the trial court had found that the plaintiff's release of a memo regarding the defendant's adoption of a dress code for teachers was a "substantial factor" in the defendant's decision not to rehire him. The Court remanded the case for a determination of whether the defendant would have reached the same decision on the grounds that the plaintiff had had arguments with school employees, referred to students as "sons of bitches," and made an obscene gesture to two girls when they failed to obey his commands as cafeteria supervisor. The Court ruled that if his contract would not have been renewed for the latter reasons, he could not be reinstated, even though his dismissal stemmed in part from his exercise of protected free speech rights.

242. In the words of the Court, "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." *Id.* at 285-86.

The lower courts have also applied a restrictive test of causation in first amendment actions for damages. *See, e.g.*, *Stoddard v. School Dist. No. 1*, 590 F.2d 829, 834 (10th Cir. 1979); *Buise v. Hudkins*, 584 F.2d 223, 231 (7th Cir. 1978).

243. *See, e.g.*, *Bishop v. Pecsok*, 431 F. Supp. 34, 37 (N.D. Ohio 1976); *Hughes v. Dyer*, 378 F. Supp. 1305 (W.D. Mo. 1974).

244. *E.g.*, *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 349-50 (7th Cir. 1970).

## IV

## NOMINAL DAMAGES

The *Carey* Court held that nominal damages are recoverable for any violation of procedural due process, regardless of whether the resulting substantive deprivation of life, liberty, or property is deemed to be justified.<sup>245</sup> Significantly, the Court authorized the recovery of nominal damages not only to perform a declaratory function,<sup>246</sup> but also to vindicate a legal right.<sup>247</sup> Noting that common law courts "traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money," the Court concluded that the right to procedural due process is absolute both because "of the importance to organized society that procedural due process be observed" and because "it does not depend upon the merits of a claimant's substantive assertions."<sup>248</sup>

The Court specified that the nominal damage award should not exceed the standard sum<sup>249</sup> of one dollar.<sup>250</sup> This part of the Court's decision will eliminate the confusion that has been generated by lower court opinions awarding "nominal" damages approaching \$1,000.<sup>251</sup> However, the insubstantial amount of an award of nominal damages underscores its limited utility as a separate and independent remedy. Apart from the possibility of bringing a class action,<sup>252</sup> potential plaintiffs are not apt to initiate constitutional tort litigation to recover nominal damages alone.<sup>253</sup> The more typical pattern will consist of the plaintiff suing for substantial monetary relief<sup>254</sup> and establishing the violation of a constitutional right, but failing to recover either compensatory or punitive damages. The nominal damages remedy would then justify the imposition of costs<sup>255</sup> or attorney's fees<sup>256</sup> on the defendant.

245. 435 U.S. at 266-67.

246. *Id.*

247. *Id.*

248. *Id.*

249. D. DOBBS, *supra* note 14, § 3.8.

250. 435 U.S. at 267.

251. *E.g.*, United States *ex rel.* Motley v. Rundle, 340 F. Supp. 807 (E.D. Pa. 1972).

252. In one of the few cases that has considered the question, the court refused to allow a class action solely for nominal damages to proceed because "[t]he cost of administering such an award would far outweigh the miniscule benefit that would accrue to plaintiffs." Callahan v. Sanders, 339 F. Supp. 814, 819 n.6 (M.D. Ala. 1971), *aff'd*, 466 F.2d 59 (5th Cir. 1972) (granting injunctive relief). State courts have also been reluctant to allow class actions to proceed for nominal damages. Blue Chip Stamps v. Superior Ct., 18 Cal. 3d 381, 556 P.2d 755, 134 Cal. Rptr. 393 (1976) (citing other California cases); Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12 (1976), *cert. denied*, 429 U.S. 828 (1976).

253. See D. DOBBS, *supra* note 14, § 3.8.

254. See text accompanying note 43 *supra* (describing relief requested in *Carey*).

255. See, e.g., Joseph v. Rowlen, 425 F.2d 1010 (7th Cir. 1970) (nominal damages would have been appropriate, although trial court failed to award them; costs assessed against the defendant).

Alternatively, the plaintiff might sue for specific equitable relief,<sup>257</sup> discover later that the claim for an injunction has become moot, and then rely on the action for nominal damages to prevent the entire controversy from being dismissed.<sup>258</sup> In either situation, the nominal damages award will not provide the incentive for bringing suit; it will merely serve to "rescue" the plaintiff whose case would otherwise be dismissed.<sup>259</sup>

The Court's approval of nominal damages in *Carey* is confined to procedural due process deprivations.<sup>260</sup> It remains to be seen whether the Court will broadly or only selectively authorize the recovery of nominal damages for other constitutional violations. At common law, nominal damages are awarded to vindicate important legal rights by expressing disapproval of tortious conduct irrespective of whether the defendant caused the plaintiff any actual or provable loss.<sup>261</sup> Given the fundamental significance of constitutional rights in American legal culture, nominal damages should be awarded in all section 1983 and *Bivens* actions to facilitate the declaration and vindication of the entire spectrum of constitutional rights.<sup>262</sup> Indeed, after the Court's refusal to recognize presumed general damages in *Carey*, nominal damages will frequently constitute the exclusive legal expression of disapprobation of constitutional violations by public officials.

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256. See, e.g., *Marr v. Rife*, 545 F.2d 554 (7th Cir. 1976) (action brought under the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1976)). In a 1976 amendment, Congress authorized the court, in its discretion, to award a reasonable attorney's fee as part of the costs to the prevailing party in an action brought under 42 U.S.C. § 1983 (1976). Pub. L. No. 94-559, § 2, 90 Stat. 2641 (1976) (codified at 42 U.S.C. § 1988 (1976)). An award of nominal damages should qualify the plaintiff as a prevailing party under the statute. See, e.g., *Perez v. University of Puerto Rico*, 600 F.2d 1 (1st Cir. 1979); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 197-98 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 2053 (1979). Of course, the court, in its discretion, may still decline to grant attorney's fees to a plaintiff who has recovered no more than nominal damages. E.g., *Huntley v. Community School Bd.*, 579 F.2d 738, 742 (2d Cir. 1978).

257. See text accompanying note 43 *supra* (describing relief requested in *Carey*).

258. E.g., *Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463 (2d Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976).

259. See D. DOBBS, *supra* note 14, § 3.8.

260. 435 U.S. at 266.

261. C. McCORMICK, *supra* note 15, § 20.

262. The lower federal courts have awarded nominal damages to vindicate the first amendment freedoms of speech and association. See, e.g., *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978); *Familias Unidas v. Briscoe*, 544 F.2d 182 (5th Cir. 1976); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975). They have also granted nominal damages for unreasonable searches and seizures in violation of the fourth amendment. *Magnett v. Pelletier*, 488 F.2d 33 (1st Cir. 1973); *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970); *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965).



## V

## PUNITIVE DAMAGES

The United States Supreme Court has not yet ruled on whether punitive damages are recoverable in section 1983<sup>263</sup> or *Bivens*<sup>264</sup> actions. Rather, the Court in *Carey* concluded that there was no basis for a punitive damages award because the defendants had not acted "with a malicious intention to deprive [plaintiffs] of their rights or to do them other injury."<sup>265</sup> At the same time, however, the Court indicated that it might be willing to allow punitive damages in "a proper case" under section 1983 "with the specific purpose of deterring or punishing violations of constitutional rights."<sup>266</sup> In so doing, the Court cited six cases from as many circuits authorizing the recovery of punitive damages by section 1983 plaintiffs, although it expressly refused to approve or disapprove them.<sup>267</sup>

*A. The Functions of Punitive Damages in Constitutional Tort Actions*

Punitive damages traditionally have been awarded to achieve at least three distinct objectives: deterrence, punishment, and law enforcement.<sup>268</sup> To determine the propriety of punitive damages awards in section 1983 and *Bivens* actions, each of these objectives must be considered in the context of constitutional tort litigation.

The deterrence function of section 1983 and *Bivens* damages serves to protect individuals against abuse by public officials.<sup>269</sup> The Court of Appeals for the Third Circuit has observed that "[t]he availa-

263. The lower federal courts have approved punitive damages awards in § 1983 actions. See, e.g., *Cochetti v. Desnond*, 572 F.2d 102, 105-06 (3d Cir. 1978); *Zarcone v. Perry*, 572 F.2d 52, 54-55 (2d Cir. 1977); *Basista v. Weir*, 340 F.2d at 87-88.

264. The lower federal courts have also allowed punitive damages in *Bivens* litigation. See, e.g., *Paton v. La Prade*, 524 F.2d 862, 872 (3d Cir. 1975); *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975).

265. 435 U.S. at 257 n.11. This factual finding was made by the district court in the context of holding that the defendants had not abused their qualified immunity by acting in subjective bad faith.

266. *Id.*

267. *Id.*

268. D. DOBBS, *supra* note 14, § 3.9; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1277-78 (1976). See also text accompanying notes 36-38 *supra*.

In a line of cases that is generally disapproved, some courts have recognized compensation as another function of punitive damages, particularly in actions for dignitary torts. D. DOBBS, *supra* note 14, § 3.9. In these cases, punitive damages were awarded in part for "the wounded feelings of the plaintiff." *Id.* There is an obvious similarity between an award of punitive damages in this context and an award of general damages. The principal difference is that in order to recover punitive damages the plaintiff must prove that the defendant acted with malice or engaged in some form of aggravated conduct.

269. For a discussion of the deterrent purpose of § 1983, see text accompanying notes 177-89 *supra*. For an indication that damages in *Bivens* actions may perform either a deterrent or a compensatory function, see 403 U.S. at 407-08 (Harlan, J., concurring).

bility of punitive damages as a deterrent may be more significant than ever today, in view of the apparent trend of decisions curtailing the powers of federal courts to impose equitable remedies to terminate [constitutional] violations."<sup>270</sup> Recent developments abroad underscore the importance of punitive damages as a deterrent against public officials. In England, for example, the House of Lords has preserved the generally disapproved punitive damages remedy in cases of "oppressive, arbitrary or unconstitutional actions by servants of government."<sup>271</sup>

Several commentators have questioned the efficacy of punitive damages as a deterrent in the common law context. Such damages have been characterized as "an invitation to engage in prejudice" resulting in a "windfall to the plaintiff" with no proven deterrent effect.<sup>272</sup> These criticisms, however, are less valid in the context of constitutional tort litigation. A jury is more likely to respect a public official in a section 1983 or *Bivens* action than a private citizen in a typical tort action.<sup>273</sup> Consequently, both the risk of prejudice to the defendant and the amount of any windfall to the plaintiff are substantially reduced. A survey of the range of punitive damages allowed by the lower federal courts in section 1983<sup>274</sup> and *Bivens*<sup>275</sup> cases indicates

270. *Cochetti v. Desmond*, 572 F.2d 102, 105-06 (3d Cir. 1978).

271. *Cassell & Co. v. Broome*, [1972] A.C. 1027, 1130; *Rookes v. Barnard*, [1964] A.C. 1129, 1226.

272. D. DOBBS, *supra* note 14, § 3.9; Owen, *supra* note 268, at 1267 n.41.

273. See Newman, *supra* note 6, at 450.

274. The cases cited below are arranged by amount in ascending order. If two different amounts were awarded, the case appears twice. *Fisher v. Volz*, 496 F.2d 333 (3d Cir. 1974) (\$250); *Johnson v. Shreveport Garment Co.*, 422 F. Supp. 526 (W.D. La. 1976) (\$300 nominal and punitive), *aff'd mem.*, 577 F.2d 1132 (5th Cir. 1978); *Vargas v. Correa*, 416 F. Supp. 266 (S.D.N.Y. 1976) (\$300); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976) (\$350); *Morris v. Travisono*, 528 F.2d 856 (1st Cir. 1976) (\$500); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974) (\$500); *Manfredonia v. Barry*, 401 F. Supp. 762 (E.D.N.Y. 1975) (\$500); *Davidson v. Dixon*, 386 F. Supp. 482 (D. Del. 1974) (\$500), *aff'd mem.*, 529 F.2d 511 (3d Cir. 1975); *Antelope v. George*, 211 F. Supp. 657 (D. Idaho 1962) (\$500 exemplary or punitive); *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975) (\$1,000), *cert. dismissed*, 429 U.S. 118 (1976); *Campise v. Hamilton*, 382 F. Supp. 172 (S.D. Tex. 1974) (\$1,500), *cert. denied*, 429 U.S. 1102 (1977); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972) (\$2,000), *cert. denied*, 410 U.S. 955 (1973); *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973) (\$2,500), *cert. denied*, 417 U.S. 908 (1974); *Lykken v. Vavreck*, 366 F. Supp. 585 (D. Minn. 1973) (\$2,500); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967) (\$2,500); *Aldridge v. Mullins*, 474 F.2d 1189 (6th Cir. 1973) (\$3,000); *Morris v. Travisono*, 528 F.2d 856 (1st Cir. 1976) (\$5,000); *Aumiller v. University of Delaware*, 434 F. Supp. 1273 (D. Del. 1977) (\$5,000); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976) (\$5,500); *Fiedler v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) (\$9,000); *Vetters v. Berry*, 575 F.2d 90 (6th Cir. 1978) (\$10,000); *Guzman v. Western State Bank*, 540 F.2d 948 (8th Cir. 1976) (\$10,000); *Cordeco Dev. Corp. v. Santiago Vasquez*, 539 F.2d 256 (1st Cir. 1976) (\$15,000), *cert. denied*, 429 U.S. 978 (1976); *Palmer v. Hall*, 517 F.2d 705 (5th Cir. 1975) (\$15,000); *Fiedler v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) (\$20,000); *Vetters v. Berry*, 575 F.2d 90 (6th Cir. 1978) (\$25,000); *Zarcone v. Perry*, 572 F.2d 52 (2d Cir. 1978) (\$60,000); *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979) (\$200,000).

275. *Fisher v. Volz*, 496 F.2d 333 (3d Cir. 1974) (\$250).

that the awards normally do not exceed \$10,000, and often consist of much smaller sums.<sup>276</sup> Punitive damages also are more apt to serve as an effective deterrent against public officials, who are capable of recurrent constitutional violations by reason of their office, than against private citizens, who usually commit only isolated tortious acts. The deterrent effect is enhanced by the fact that public officials are employed by governmental entities which have an institutional incentive to discourage recurring constitutional violations.<sup>277</sup>

Another argument against allowing punitive damages is that the awards will deter public officials not only from committing constitutional violations, but also from holding public office. This danger is more apparent than real, however, because the public official immunity doctrine provides substantial protection against the imposition of damages for good faith violations of the Constitution.<sup>278</sup> Even greater protection could be provided by conditioning the recovery of punitive damages upon proof of a more culpable state of mind than the objective bad faith standard which disqualifies a public official from invoking the immunity doctrine.<sup>279</sup>

With respect to the punishment function, Congress enacted the Civil Rights Act of 1871 to suppress the organized violence of the Ku Klux Klan,<sup>280</sup> and included criminal as well as civil sanctions in the statutory scheme.<sup>281</sup> An award of punitive damages under section 1983 would complement the objectives of its criminal counterpart.<sup>282</sup> Since *Bivens* litigation has no criminal analogue, it is less apparent that punishment is an object of such actions. Yet the lack of a parallel criminal statute actually constitutes a justification for the award of punitive damages. In the absence of criminal sanctions, punitive damages are the most effective means of punishing federal officials who have violated citizens' constitutional rights.<sup>283</sup>

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276. See generally Annot., 14 A.L.R. Fed. 608 (1973) (punitive damages in actions for violations of federal civil rights acts).

277. For a summary of the argument that punitive damages have their greatest deterrent effect when they are levied against "going concerns with continuing institutional motivations to respond," see D. DOBBS, *supra* note 14, § 3.9.

278. See text accompanying notes 85-100 *supra*.

279. See text accompanying notes 307-22 *infra*.

280. *Developments*, *supra* note 67, at 1154. See text accompanying notes 173-76 *supra*.

281. 18 U.S.C. §§ 241-242 (1976).

282. *Id.* § 242.

283. Most courts that have considered the question have allowed punitive damages in *Bivens* actions. See note 264 *supra*. The cases decided by the Court of Appeals for the District of Columbia are in conflict, however. See *Payne v. Government of Dist. of Columbia*, 559 F.2d 809, 827 (D.C. Cir. 1977) (concurring opinion) (summarizing conflicting cases). The argument against punitive damages is summarized in the following passage:

[P]unitive damages are unnecessary to the vindication of constitutional interests because their justificatory functions of deterrence and punishment might just as well be served by

Although the Civil Rights Attorney's Fees Awards Act of 1976<sup>284</sup> will provide some incentive for constitutional tort plaintiffs to act as private attorneys general,<sup>285</sup> there is no comparable statute authorizing *Bivens* plaintiffs to recover fees.<sup>286</sup> Furthermore, the typical constitutional tort victim will often be unwilling to sue for nominal damages and attorney's fees.<sup>287</sup> Therefore, the possibility of recovering punitive damages in aggravated cases would create an additional incentive to bring suit, thereby fulfilling the law enforcement function of punitive damages.

When the defendant is a public official, an award of punitive damages would thus serve all three of the remedy's traditional functions. When the defendant is a governmental entity, however, a different response is required.<sup>288</sup> The Federal Tort Claims Act, which expressly disallows punitive damages awards against the United States,<sup>289</sup> forecloses the issue in *Bivens* litigation. The Act reflects the prevailing philosophy that it is inappropriate to award punitive damages against governmental entities because they would "ultimately fall upon innocent citizens, whose taxes would be raised, or whose services would be cut back."<sup>290</sup>

The same policy might prompt the United States Supreme Court to insulate local governmental entities now subject to suit under section 1983<sup>291</sup> from liability for punitive damages. But there are important differences between section 1983 and the Federal Tort Claims Act which suggest that punitive damages should be recoverable against local governmental entities. First, the language of section 1983 makes no distinction between the remedies available against individual and governmental defendants.<sup>292</sup> Second, the liability imposed by section 1983 is direct,<sup>293</sup> while the liability imposed by the Federal Tort Claims Act may be vicarious.<sup>294</sup> Holding an active tortfeasor liable for punitive

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according the victims of constitutional violations compensatory damages, . . . especially where the lack of clear standards in setting compensation in any given case may permit amplification of an award on exemplary grounds anyway.

*Id.* at 827-28. This passage was written prior to *Carey*. After *Carey* it is unlikely that a judge would characterize compensatory damages as having an exemplary component.

284. 42 U.S.C. § 1988 (1976), reproduced at note 135 *supra*.

285. See text accompanying notes 135-36 *supra*.

286. The pending legislation that would authorize *Bivens* actions against the United States provides for the award of "a reasonable attorney's fee." S. 2117, 95th Cong., 1st Sess. § 3 (1977).

287. See text accompanying notes 135-36 *supra*.

288. D. DOBBS, *supra* note 14, § 3.9.

289. 28 U.S.C. § 2674 (1976).

290. D. DOBBS, *supra* note 14, § 3.9.

291. See text accompanying notes 101-07 *supra*. States are protected from suit by the eleventh amendment. See text accompanying notes 111-12 *supra*.

292. The text of § 1983 is set forth in note 2 *supra*.

293. See text accompanying note 108 *supra*.

294. See text accompanying notes 113-17 *supra*.

damages poses far fewer problems than assessing punitive damages against an innocent defendant.<sup>295</sup> Finally, section 1983 is limited to constitutional torts,<sup>296</sup> while the Federal Tort Claims Act is applicable to all types of official misconduct, ranging from automobile accidents to constitutional deprivations.<sup>297</sup>

### *B. Rules Governing Recovery of Punitive Damages*

Should the Court decide to allow punitive damages, it will have to resolve two important questions controlling their recovery. First, it will need to determine whether compensatory damages must be awarded before punitive damages are recoverable. Second, it will have to specify the mental state required to justify an award of punitive damages.

#### *1. Foundation for Punitive Damages*

Under federal common law, punitive damages are recoverable upon proof that the plaintiff is entitled to nominal damages.<sup>298</sup> Several state courts, however, have ruled that an award of compensatory damages is a prerequisite to the recovery of punitive damages.<sup>299</sup> Presumably, the purpose of the rule is to restrict the number of cases in which punitive damages can be awarded.<sup>300</sup> Yet there is no correlation between the punitive and deterrent functions of punitive damages and the proof required to substantiate an award of compensatory damages. As the Court of Appeals for the Third Circuit has observed:

[T]here is neither sense nor reason in the proposition that [punitive] damages may be recovered by a plaintiff who is able to show that he has lost \$10, and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury, but is unable to prove that he is poorer in pocket by the wrongdoing of defendant.<sup>301</sup>

A decision by the Court to allow punitive damages should not be undermined by predicating the recovery of punitive damages upon prior allowance of compensatory damages. Federal common law, allowing punitive damages upon proof that the plaintiff is entitled to

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295. For a discussion of the law governing the assessment of punitive damages against a vicariously liable defendant, see D. DOBBS, *supra* note 14, § 3.9.

296. See note 2 *supra*.

297. See text accompanying note 115 *supra*.

298. See, e.g., *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976); *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975). The same rule governs the recovery of punitive damages in dignitary tort actions. C. MCCORMICK, *supra* note 15, § 83.

299. See D. DOBBS, *supra* note 14, § 3.9.

300. For a discussion of the rule, see C. MCCORMICK, *supra* note 15, § 83.

301. *Basista v. Weir*, 340 F.2d 74, 88 (3d Cir. 1965) (allowing recovery of punitive damages based solely upon an award of nominal damages in a § 1983 action).

nominal damages,<sup>302</sup> should apply. The adoption of such a rule would enhance both the deterrent and the vindicatory effects of punitive damages in constitutional tort litigation.<sup>303</sup>

## 2. *The Requisite Mental State*

Although the Supreme Court has not ruled on the mental state required for an award of punitive damages, the Court in dictum has offered two different standards. In *Carey*, Justice Powell noted that there was "no basis" for a punitive damages award because the defendant had not acted with a "malicious intention" to deprive the plaintiffs of their rights.<sup>304</sup> In *Adickes v. Kress & Co.*,<sup>305</sup> on the other hand, Justice Brennan said in a concurring opinion that punitive damages should be recoverable under section 1983 whenever the defendant "acted with actual knowledge that he was violating a [constitutional] right" or with "reckless disregard of whether he was violating such a right."<sup>306</sup>

Selection of an appropriate standard for the recovery of punitive damages must accommodate the fact that a defendant in a constitutional tort action usually will assert a qualified immunity.<sup>307</sup> To defeat this immunity, the plaintiff must prove that the defendant acted in at least "objective bad faith."<sup>308</sup> A few lower courts have ruled that the standard for recovering punitive damages is coterminous with the "objective bad faith" test,<sup>309</sup> which gives punitive damages their maximum deterrent impact by exposing any official who is not immune from suit to punitive damages liability.<sup>310</sup> Most courts, however, have held that "objective bad faith" is an inappropriate standard for punitive damages<sup>311</sup> because it is essentially a negligence standard.<sup>312</sup> Punitive dam-

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302. For citations to lower federal court cases that have applied the federal common law in constitutional tort actions, see notes 298, 301 *supra*.

303. Some jurisdictions require proof of a reasonable relationship between the amounts of the punitive and compensatory damages awards. D. DOBBS, *supra* note 14, § 3.9. The rule has no relevance, however, when punitive damages are recoverable without proof of actual loss, as under the federal common law.

304. 435 U.S. at 257 n.11.

305. 398 U.S. 144 (1970).

306. *Id.* at 233.

307. See text accompanying notes 85-100 *supra*.

308. See text accompanying notes 93-96 *supra*.

309. See, e.g., *Donahue v. Staunton*, 471 F.2d 475, 482 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973).

310. A few courts have suggested that they might be willing to award punitive damages whenever they would serve a deterrent function. *Keker v. Procunier*, 398 F. Supp. 756, 768 (E.D. Cal. 1975) (dictum); *Walker v. Fox*, 395 F. Supp. 1303, 1306 (S.D. Ohio 1975) ("where the conduct is found to be willful or wanton or where a deterrent effect will be accomplished").

311. *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977). See *Aumiller v. University of Delaware*, 434 F. Supp. 1273, 1311 (D. Del. 1977); *United States ex rel. Motley v. Rundle*, 340 F. Supp. 807, 811 (E.D. Pa. 1972).

312. See text accompanying notes 93-96 *supra*.

ages are not imposed for acts of negligence at common law,<sup>313</sup> and likewise should not be assessed against section 1983 and *Bivens* defendants who have merely acted in negligent disregard of the plaintiff's constitutional rights.<sup>314</sup>

At the other end of the spectrum, some lower courts have ruled that punitive damages are recoverable only if the defendant "maliciously" or "oppressively" violated the plaintiff's rights.<sup>315</sup> This standard is very close to the "subjective bad faith" standard<sup>316</sup> articulated by Justice Powell in the *Carey* dictum.<sup>317</sup> Adoption of the "malicious" or "subjective bad faith" standard would allay the concerns of those who fear that punitive damages may constitute an excessively effective deterrent.<sup>318</sup> On the other hand, requiring proof that the defendant knowingly violated the plaintiff's constitutional rights would severely restrict the availability of punitive damages in section 1983 and *Bivens* actions.<sup>319</sup>

The alternative, compromise standard is the "reckless disregard" test advocated by Justice Brennan in *Adickes*.<sup>320</sup> This test is recognized by both the majority of jurisdictions in common law actions<sup>321</sup> and the majority of lower federal courts in section 1983 and *Bivens* actions.<sup>322</sup>

313. See D. DOBBS, *supra* note 14, § 3.9.

314. Because punitive damages are traditionally awarded only upon proof of malice or aggravated misconduct, they are often deemed to be uninsurable. D. DOBBS, *supra* note 14, § 3.9; Burrell & Young, *Insurability of Punitive Damages*, 62 MARQ. L. REV. 1 (1978); Comment, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431 (1976).

315. *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975) ("willful and malicious"); *Skinner v. Spellman*, 480 F.2d 539, 540 (4th Cir. 1973) (per curiam) ("malice"). See *Vetters v. Berry*, 575 F.2d 90, 96 (6th Cir. 1978) ("malicious and wanton disregard"); *Gill v. Manuel*, 488 F.2d 799, 801 (7th Cir. 1973) ("willful and malicious").

A few courts have taken the position that punitive damages are appropriate only if there has been a "constant pattern or practice of behavior" by the defendant and the practice has been "willful and in gross disregard" for the rights of the plaintiff. *Urbano v. McCorkle*, 334 F. Supp. 161, 170 (D.N.J. 1971), *aff'd mem.*, 481 F.2d 1400 (3d Cir. 1973). *Accord*, *Sostre v. McGinnis*, 442 F.2d 178, 205 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

316. See, e.g., *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977).

317. See text accompanying note 304 *supra*.

318. See text accompanying notes 278-79 *supra*.

319. For a discussion of the proof required to satisfy the subjective bad faith standard, see C. RHYNE, *TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICERS* 137-45 (1976); Freed, *supra* note 81, at 552-64; Kattan, *supra* note 81, at 968-70, 976-86.

320. See text accompanying note 306 *supra*.

321. D. DOBBS, *supra* note 14, § 3.9.

322. *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978) ("acted with actual knowledge that he was violating a federally protected right or with reckless disregard of whether he was doing so"); *Simpson v. Weeks*, 570 F.2d 240, 243 (8th Cir. 1978) ("willfully and in gross disregard for the [plaintiff's] rights"), *cert. denied*, 99 S. Ct. 3101 (1979); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977) ("willfully and with gross disregard for the plaintiff's rights"); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976) ("reckless indifference to the property rights of others, ill will, a desire to injure or malice"); *Caperci v. Huntoon*, 397 F.2d 799, 801 (1st Cir. 1968) (per curiam) ("outrageous invasion of plaintiff's privacy"), *cert. denied*, 393 U.S. 940 (1968).

Under this standard, punitive damages would be imposed not only against those defendants who acted in subjective bad faith, but also against those who acted in aggravated objective bad faith. This is the preferable standard because it maximizes the deterrent impact of punitive damages awards in constitutional tort litigation without departing from established common law principles.

## VI

### CONSTITUTIONAL TORT DAMAGES AFTER *CAREY* : SECURING THE INHERENT VALUE OF CONSTITUTIONAL RIGHTS

Although the Supreme Court limited *Carey*'s scope to section 1983 actions involving procedural due process violations, the opinion supports certain predictions about the types of damages generally awardable in constitutional tort actions. Specifically, it appears that a successful plaintiff will be entitled to recover nominal and proven compensatory damages.<sup>323</sup> It is less clear whether and when punitive damages will be available.<sup>324</sup> Perhaps the most important unresolved issue is whether the Court's denial of presumed general damages will extend beyond the peculiar context of a procedural due process violation.<sup>325</sup> The resolution of that question should depend on the extent to which the types of damages that now appear to be recoverable promote the compensatory, vindictory, deterrent, and "bounty" purposes served by presumed general damages.<sup>326</sup>

Nominal damages are designed primarily to declare the violation of a right.<sup>327</sup> While declaration may at times advance the objective of vindication, an award of one dollar is so insubstantial that nominal damages will more often have the symbolic effect of diminishing the legitimacy of the plaintiff's complaint. Thus, nominal damages are often not as effective as presumed general damages in vindicating the infringement of constitutional rights.

Proven compensatory damages adequately compensate a plaintiff for losses that are provable with reasonable certainty.<sup>328</sup> The spate of small judgments entered by lower federal courts in actions involving primarily intangible losses demonstrates, however, that proven dam-

323. See Parts IIIB and IV *supra*.

324. See Part V *supra*.

325. See Part IIIA *supra*.

326. See text accompanying notes 26-28 *supra*.

327. See Part IV *supra*.

328. See, e.g., *Taken Alive v. Litzau*, 551 F.2d 196 (8th Cir. 1977) (\$10,000 for personal injury); *Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973) (\$22,993 for personal injury); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971) (\$85,000 for personal injury), *cert. denied*, 404 U.S. 866 (1972). See also Part IIIB *supra*.



ages do not always effectuate full compensation.<sup>329</sup> A lenient standard of proof would alleviate this problem,<sup>330</sup> but only presumed general damages will ensure adequate compensation for the infringement of constitutionally protected intangible interests.<sup>331</sup>

Generally speaking, proven compensatory damages provide neither a significant deterrent against the violation of such constitutional rights as due process and privacy nor an effective incentive for their enforcement.<sup>332</sup> In order to secure these objectives, the common law courts have traditionally awarded punitive damages. But even assuming that a court may award punitive damages in a constitutional tort action,<sup>333</sup> there are several doctrinal and practical limitations on their effectiveness. First, proof of aggravated misconduct on the defendant's part is necessary to support an award of punitive damages.<sup>334</sup> Thus, in the ordinary case, punitive damages are unavailable to accomplish the deterrent and bounty objectives. Second, while it may be commonly assumed that awards of punitive damages result in substantial recoveries, this has not been true in section 1983 and *Bivens* litigation. Federal court decisions indicate that punitive damage awards rarely exceed \$3,000.<sup>335</sup> Third, since a governmental entity is typically immune from liability for punitive damages,<sup>336</sup> such awards cannot be used to promote institutional vigilance in protecting citizens' constitutional rights. Finally, judgments for punitive damages may be difficult to collect because insurance<sup>337</sup> and statutory indemnity<sup>338</sup> are generally unavailable to shift the burden of satisfying such judgments from the individual defendant. Rules denying a wrongdoer this form of assistance maximize the punitive and deterrent impact of such judgments at the expense, however, of the vindictory and bounty objectives of the remedy.

In light of these shortcomings of nominal, proven compensatory, and punitive damages, presumed general damages emerge as an important remedial device in constitutional tort litigation. An award of pre-

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329. See, e.g., *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976) (\$350 for unreasonable use of force in making arrest); *Johnson v. Anderson*, 420 F. Supp. 845 (D. Del. 1976) (\$300 for denial of procedural due process); *Tatum v. Morton*, 386 F. Supp. 1308 (D.D.C. 1974) (\$100 for unlawful arrest).

330. See text accompanying notes 225-36 *supra*.

331. See Part IIIA *supra*.

332. See Part III *supra*.

333. See text accompanying notes 263-67 *supra*.

334. See text accompanying notes 304-22 *supra*.

335. See text accompanying notes 274-76 *supra*.

336. See text accompanying notes 288-97 *supra*.

337. See note 314 *supra*.

338. See, e.g., CAL. GOV'T CODE § 825 (West Supp. 1979) (providing indemnification for compensatory but not punitive damages).

sumed general damages provides effective vindication and adequate compensation for the infringement of all constitutionally protected interests, including those losses not readily subject to evidentiary proof. Since punitive damages are generally unavailable, presumed damages also provide a more effective means of deterring official misconduct and ensuring that the plaintiff will bring suit in the first instance.

Presumed general damages would not displace proven compensatory and punitive damages in section 1983 and *Bivens* actions. The courts should continue to employ these remedies in combination with presumed general damages in order to provide full relief in all cases. If common law precedents are followed,<sup>339</sup> double recovery can be avoided by limiting presumed damages to nonpersonal, intangible losses.<sup>340</sup> The courts that have allowed presumed damages in constitutional tort actions have properly restricted their coverage to the inherent loss caused, for example, by procedural due process,<sup>341</sup> voting rights,<sup>342</sup> equal protection,<sup>343</sup> and first amendment violations.<sup>344</sup> If the scope of presumed damages is so restricted, proven compensatory dam-

339. See text accompanying notes 18-23 *supra*.

340. The distinction is drawn between intangible losses for personal, nonphysical harm and intangible losses to dignitary interests. See text accompanying notes 17-21 *supra*. When an action is brought under the due process clause for the infliction of emotional distress, for example, it may not be necessary to presume compensatory damages. See, e.g., *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). At common law, the accepted remedy in an action for the intentional infliction of emotional distress is proven compensatory damages. RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

A few courts have presumed damages for both the loss of civil rights and mental anguish. See, e.g., *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1971) (housing discrimination). A presumption of damages for personal, nonphysical harm should be rebuttable, as it is in defamation actions. *D. DOBBS*, *supra* note 14, § 7.2.

341. *Unified School Dist. No. 480 v. Epperson*, 551 F.2d 254 (10th Cir. 1977); *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975); *Bruce v. Board of Regents*, 414 F. Supp. 559, 569 (W.D. Mo. 1976).

342. *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919) (plaintiff barred from polling booth; awarded \$2,000 in general damages):

In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.

In *Carey*, the Court observed that it had allowed damage actions to be maintained for wrongful deprivations of voting rights, but that it had "not considered the prerequisites for recovery." 435 U.S. at 265 n.22. The Court cited *Nixon v. Herndon*, 273 U.S. 536 (1927), its leading decision on the subject, and *Ashby v. White*, 1 Eng. Rep. 417 (H.L. 1703). In *Ashby*, the House of Lords affirmed an award of five pounds to an alleged pauper who had been denied the right to vote for an alleged failure to pay taxes. Since the plaintiff was awarded substantial compensatory damages without proof of actual loss, the verdict sanctioned general damages. Thus, it is significant that in *Carey* the Court noted that "[t]he common-law rule of damages for wrongful deprivations of voting rights embodied in *Ashby v. White* would, of course, be quite relevant to the analogous question under § 1983." 435 U.S. at 265 n.22. It should also be noted that, in *Wiley v. Sinkler*, 179 U.S. 58 (1900), the Court held that a complaint alleging \$2,500 in damages for the deprivation

ages for humiliation and mental anguish should be liberally allowed in situations where the plaintiff has offered some proof of such injury.<sup>345</sup>

There are a number of ways in which the amount of a presumed general damages award could be established. At common law the trier of fact determines the amount, subject to the general guideline that the award should be "neither so small as to trivialize the right nor so large as to provide a windfall."<sup>346</sup> Although the courts might control this discretion by placing a ceiling on the recoverable amount,<sup>347</sup> the imposition of arbitrary cutoff points would be more appropriate in a legislative response to this issue.

Congress could authorize recovery of a liquidated sum,<sup>348</sup> guarantee recovery of a minimum amount, or grant the trier of fact discretion to allow recovery within a specified range. Ample precedent for such legislation may be found in the federal and state civil rights statutes that have been enacted since 1871. In 1968, for example, Congress enacted the Omnibus Crime Control and Safe Streets Act,<sup>349</sup> which provides that any victim of an illegal wiretap may recover "actual damages but not less than liquidated damages computed at the rate of \$100 a

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of voting rights without alleging any actual losses satisfied the jurisdictional amount requirement of \$2,000.

343. *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977) (§ 1982 action for housing discrimination); *McNeil v. P-N-S, Inc.*, 372 F. Supp. 658 (N.D. Ga. 1973) (§ 1982 action for housing discrimination).

In *Hodge v. Seiler*, the plaintiff's claim for damages was dismissed by the trial court for failure to prove actual losses after she testified that "she was not upset when she learned of the defendants' discriminatory motive in refusing her housing because she was aware at that time that she had a legal remedy." 558 F.2d at 287. The court of appeals reversed, citing the voting rights cases and holding that damages could be presumed from the denial of the constitutional right. *Id.* at 287-88.

344. *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977); *Thonen v. Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974); *Endress v. Brookdale Community College*, 144 N.J. Super. 109, 127, 364 A.2d 1080, 1098 (1976).

345. See text accompanying notes 212-24 *supra*.

346. See, e.g., *Piphus v. Carey*, 545 F.2d 30, 32 (7th Cir. 1976), *rev'd*, 435 U.S. 247 (1978).

347. There is precedent for judicially limiting the amount of damages recoverable in a tort action. In England, where the courts allow recovery for the loss of expectation of life, they have limited the amount recoverable to a relatively small sum, occasionally increasing the award to take inflation into account. P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW 83-84 (2d ed. 1975). The first case placing such a limit on this type of damage allowed for the recovery of up to £200. *Benham v. Gambling*, [1941] A.C. 157. Later cases raised the amount to £500, and then to £750. See *H. West & Son, Ltd. v. Shephard*, [1964] A.C. 326, 361-63 (dissenting opinion) (urging extension of *Benham* to other types of intangible losses). For a description of the Australian cases imposing a similar ceiling, see H. LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH 103-06 (1974).

348. For example, the proposed amendments to the Federal Tort Claims Act would allow recovery in a *Bivens* action of no "less than liquidated damages of \$1,000." S. 2117, 95th Cong., 1st Sess. § 3 (1977).

349. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-350, 82 Stat. 197 (codified at 18 U.S.C. §§ 2510-2520 (1976)).

day for each day of violation, or \$1,000, whichever is higher.”<sup>350</sup> Similarly, a Massachusetts statute which prohibits discrimination in any place of public accommodation provides that a violator shall pay “to any person aggrieved thereby not less than one hundred nor more than five hundred dollars.”<sup>351</sup> Regardless of the exact limits that might be chosen, the amount of any statutory recovery should be sufficient to ensure the fulfillment of the remedial objectives of compensation, vindication, deterrence, and law enforcement.

### CONCLUSION

Despite the dramatic increase in constitutional litigation during the preceding two decades, the United States Supreme Court did not consider the appropriate nature of legal relief in such actions until 1978. In that year, the Court in *Carey v. Piphus* articulated the general proposition that constitutional tort damages should be fashioned by reference to common law damages. The Court cautioned, however, that if the interests protected by a particular constitutional right were not directly analogous to the interests protected by common law damages, the common law rule should be tailored to fit the constitutional right in question. Unfortunately, the Court failed to heed its own advice. Although it allowed the recovery of nominal and proven compensatory damages for a procedural due process deprivation, the Court refused to recognize presumed general damages for the loss of the inherent value of the constitutional right. As a result, there is no fully effective remedy in the aftermath of *Carey* to vindicate and compensate procedural due process infringements.

This Article has recommended that *Carey* be confined to procedural due process deprivations. It has advocated the judicial or legislative recognition of presumed general damages for the infringement of other constitutional rights. It has also proposed the adoption of rules to facilitate the recovery of proven compensatory damages for intangible losses and the recognition of punitive damages in constitutional litigation. The adoption of these recommendations would enhance the capacity of section 1983 and *Bivens* damages to perform the traditional functions of legal relief.

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350. 18 U.S.C. § 2520 (1976).

351. MASS. GEN. LAWS ANN. ch. 272, § 98 (West Supp. 1978). See also N.Y. CIV. RIGHTS LAW § 41 (McKinney 1976).