

Carey v. Piphus and Remediating Constitutional Torts

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Once a court has determined that a plaintiff's civil rights have been violated by a defendant, it must formulate an appropriate remedy. This task is most difficult in damage actions where the court must, in a sense, assign a price to the Constitution.¹ Where constitutional violations cause direct pecuniary losses, courts appear to have little difficulty formulating appropriate remedies.² Civil rights violations, however, often involve damage to intangible interests that are difficult to define and measure. For example, the due process clause of the fourteenth amendment protects an individual's "feeling of just treatment" by the government.³ And the fourth amendment protects individuals from invasions of their homes and privacies by those who assert the powers of the federal and state governments.⁴

Remedies for constitutional violations can be sought under 42 U.S.C. § 1983,⁵ directly under the Constitution,⁶ or under various other federal civil rights statutes.⁷ Nevertheless, civil rights damage actions⁸ are strongly analogous to common-law tort damage actions.⁹ In fact,

1. See Editorial, *Pricing the Constitution*, 102 N.J.L.J. 468, 468 (1978).
2. See, e.g., *Jannetta v. Cole*, 493 F.2d 1334, 1338 (4th Cir. 1974); *Steele v. Title Realty Co.*, 478 F.2d 380, 383-84 (10th Cir. 1973); *Jenkins v. Averett*, 424 F.2d 1228, 1233 (4th Cir. 1970).
3. *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).
4. See *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 391-95 (1970). See also *Dellums v. Powell*, 566 F.2d 167, 175 (D.C. Cir. 1977).
5. That section states:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
42 U.S.C. § 1983 (1976).
6. See, e.g., *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 392 (1970); *Turpin v. Mailet*, 579 Fed. 152, 155-158 (2d Cir. 1970), *cert. denied*, 439 U.S. 974 (1979); *Dellums v. Powell*, 566 F.2d 167, 175-76 (D.C. Cir. 1977).
7. See, e.g., 42 U.S.C. §§ 1981, 1982, 1985 (1976).
8. The discussion in this Comment is limited to those brought under the Civil Rights Act of 1871, 42 U.S.C. § 1981-1988 (1976).
9. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976); *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967); *Monroe v. Pape*, 365 U.S. 167, 172-83 (1961), *overruled on other grounds*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

when a federal remedy is deficient, 42 U.S.C. § 1988¹⁰ directs the court to turn to the common law of the forum state.¹¹ But such reference may not be inconsistent with the Constitution or other federal law.¹² Thus, where an interest protected by the Constitution is analogous to an interest protected by the common law, the appropriate remedy will be similar.¹³ If there is no clear common-law parallel to a constitutionally protected interest, however, the common law must be adapted to provide an appropriate remedy.¹⁴

In framing prerequisites for recovery, the common law distinguishes actions that seek redress for injury to physical and pecuniary interests from actions that primarily involve injury to such intangible interests as reputation, mental and emotional equanimity, and personal dignity.¹⁵ Actions seeking recovery for injury to tangible interests require proof of actual damages before the plaintiff may recover substantial damages.¹⁶ In contrast, dignitary torts such as defamation *per se* and invasion of privacy are actions where damages are presumed or considered inherent in the wrong.¹⁷

Because the common law is a source of rules for recovery under section 1983 and related civil rights actions,¹⁸ the presumed damage doctrine may apply where the constitutionally protected interests are intangible.¹⁹ In *Carey v. Phipus*,²⁰ however, the Supreme Court treated a damage action for violation of procedural due process like actions

10. Section 1988 provides in part:

The jurisdiction . . . conferred on the district courts . . . 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 . . . the common law, as modified and changed by the constitution and statutes of the State wherein the Court having jurisdiction . . . 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

42 U.S.C. § 1988 (1976).

11. *Robertson v Wegmann*, 436 U.S. 584, 588 (1978).

12. *See* 42 U.S.C. § 1988 (1976); *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978).

13. *Carey v. Phipus*, 435 U.S. 247, 258-59 (1978). *See* *Dellums v. Powell*, 566 F.2d 167, 175-76 (D.C. Cir. 1977) (comparing a fourth amendment violation to the common law action for false arrest); *Burt v. Board of Trustees*, 521 F.2d 1201, 1206 (4th Cir. 1975) (comparing a due process violation in the public employment context to a breach of contract). A fourth amendment search and seizure violation, for example, bears strong resemblance to common-law trespass and invasion of privacy, and therefore, courts may justifiably look to the common law in formulating an appropriate remedy. *See* *Yudof, Liability for Constitutional Torts and the Risk-Adverse Public School Official*, 49 S. CAL. L. REV. 1322, 1371 (1976).

14. *Carey v. Phipus*, 435 U.S. 247, 258 (1978). Examples of constitutional interests that may have no common law parallel include interests in due process, first amendment protections, and freedom from racial discrimination.

15. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 7.3, at 528-29 (1973).

16. *Id.* at 529-30.

17. *Id.* at 528.

18. *Carey v. Phipus*, 435 U.S. 247, 258-59 (1978).

19. *See* *Yudof, supra* note 13, at 1371-74.

20. 435 U.S. 247 (1978).

that require proof of actual injury.²¹

Carey may arouse fears that certain constitutional wrongs may go unremedied because of the difficulties in proving actual damages.²² The decision, however, need not be read with so apocalyptic a view. The Court did not foreclose protecting constitutional interests more intangible than the due process clause by a presumption of damages. Finally, reasonable methods for proving mental distress may be available to the civil rights plaintiff.

Three aspects of the *Carey* opinion will be discussed in this Comment. In analogizing a section 1983 action to common-law tort, *Carey* promotes the "borrowing" of common-law remedial rules for civil rights actions. Thus, if dignitary constitutional torts parallel common-law dignitary torts, then arguably dignitary constitutional interests, such as the first amendment, may be protected by the presumption of damages when these interests are injured. Finally, the method of proving damages in such cases will be considered.

THE PROBLEMS RAISED AND RESOLVED IN *CAREY V. PIPHUS*

Carey v. Piphus involved two students suspended from school without a hearing as required by the due process clause of the fourteenth amendment.²³ The district court, however, declined to award substantial damages because the plaintiffs offered no proof of damages, and thus there was no evidence from which the court could infer the extent of the injuries they suffered.²⁴

The court of appeals reversed, holding that even if the students' suspensions were justified, they would be entitled to recovery substantial, nonpunitive damages simply upon a showing that their due process rights had been violated.²⁵ Even though no pecuniary loss was shown,²⁶ the court concluded that plaintiffs were entitled to recover damages for the violation of their civil rights.²⁷ Such damages were considered inherent in the nature of the wrong.²⁸

21. *Id.* at 262-64.

22. See Editorial, *supra* note 1, at 468. "The constitution and the public appear to be the losers in *Carey*. One dollar for a constitutional wrong . . . seems to be a poor price to put on rights that are priceless." *Id.*

23. 435 U.S. at 249-51. See *Goss v. Lopez*, 419 U.S. 565, 581-84 (1975). In *Carey*, one student was suspended for smoking marijuana, and the other for wearing an earring to school. 435 U.S. at 248-50.

24. 435 U.S. at 251-52. The district court explained: "Plaintiffs 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 . . ." *Id.* In addition, no finding was made as to whether the students would have been suspended had they been provided with a hearing. *Id.* at 252.

25. *Piphus v. Carey*, 545 F.2d 30, 31 (7th Cir. 1976), *rev'd*, 435 U.S. 247 (1978).

26. 545 F.2d at 32.

27. *Id.* at 31-32.

28. *Id.* at 31. The court of appeals relied upon its previous holding in *Hostrop v. Board of*

The Supreme Court reversed, observing that, as with common-law tort actions, the basic purpose of damage awards in civil rights cases is compensation.²⁹ According to the Court, Congress did not intend section 1983 to serve as a greater deterrent than compensatory damages.³⁰ The Court explained that common-law rules of damages might serve as suitable guideposts where the interests protected by a particular branch of tort law closely paralleled the interests protected by a particular constitutional right.³¹ But even where the interests protected by a particular constitutional right have no common-law analogy, the common law may be a guide for solving section 1983 problems.³² The common-law guides help tailor the remedy for the deprivation of a constitutional right to the interests protected by that constitutional right.³³

The Court then analyzed the interests involved in a due process violation. In arguing that a due process violation ought to be accompanied by a presumption of damages, the plaintiffs sought to analogize this civil rights action with the common law tort of defamation *per se*, where harm to emotional equanimity and reputation is presumed to follow the wrong.³⁴ The Court, however, did not find defamation *per se* to be a proper common-law source of a remedy for a due process violation.³⁵ Instead, proof of actual harm was required before substantial damages could be awarded.³⁶ The Court argued that unlike defamation *per se*, every departure from due process, no matter how slight, cannot be assumed to cause mental distress.³⁷

Moreover, where the plaintiff has been justifiably deprived of a protected interest through deficient procedures, no recovery is permitted for any injury flowing from the justifiable deprivation.³⁸ Thus, any mental distress that results from the justifiable deprivation rather than

Junior College Dist., 523 F.2d 569 (7th Cir. 1975). In *Hostrop*, the plaintiff's employment termination was determined to be justified, but was made without affording him his procedural due process right to a hearing. *Id.* at 579. Although the plaintiff was not entitled to damages from his contract termination, the court held that he was entitled to recover damages for the constitutional violation itself. *Id.* Since no pecuniary loss was shown, the trier of fact had to measure the damage inherent in the wrong by considering the nature of the constitutional deprivation and the magnitude of the mental distress and humiliation suffered by the plaintiff. *Id.* at 579-80.

29. 435 U.S. at 254-57.

30. *Id.* at 256-57.

31. *Id.* at 258-59.

32. *Id.*

33. *Id.* at 259. Otherwise, "the purpose of Section 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Id.* at 258.

34. *Id.* at 261.

35. *Id.* at 262-64.

36. *Id.*

37. *Id.* at 263.

38. *Id.* In fact, the affected person may not even realize the procedures were deficient until he seeks the advice of counsel. *Id.* Cf. *Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir. 1977) (plaintiff's awareness of her legal remedy prevented her from becoming upset when she learned of the defendant's discrimination).

the deficient process is not an element of recovery.³⁹ Damage, in order to be compensated, must be causally connected to the wrong.⁴⁰ The Court has thus imposed a damage standard that resembles proximate cause in cases alleging due process violations.⁴¹

Since the context of a due process violation presents such potential ambiguities in causation, the Court found inappropriate any presumption of a causal connection between the injury and the wrong.⁴² The Court observed that this ambiguity in causation is not prevalent with publications defamatory *per se*.⁴³

No particular difficulty was foreseen for a plaintiff in proving that mental and emotional distress was actually caused by the deficient procedure.⁴⁴ Although the Court declined to set a standard of proof,⁴⁵ it noted that distress is "customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff."⁴⁶

SECTION 1983 AS A TORT ACTION

The analogy of section 1983⁴⁷ to common-law torts is illustrated in *Monroe v. Pape*.⁴⁸ That case arose when thirteen Chicago policemen broke into the plaintiffs' home in the early morning without a search warrant, forced them to stand naked in the living room, and then proceeded to ransack the house.⁴⁹ The Supreme Court held that a damage action for unlawful search and seizure against the offending officers was available under section 1983.⁵⁰ Drawing upon tort principles, the Court held that no showing that the officers specifically intended to violate the plaintiffs' civil rights was necessary; instead, the officers should be held liable for the natural consequences of their intentional

39. 435 U.S. at 263.

40. *Id.*

41. In order to recover, the plaintiff must show that the damage is causally connected to the defendant's wrongful conduct. Compare *Carey v. Piphus*, 435 U.S. at 263 with *W. PROSSER, HANDBOOK OF THE LAW OF TORTS* § 42, at 245 (4th ed. 1971).

42. 435 U.S. at 263.

43. *Id.*

44. *Id.* at 263-64.

45. *Id.* at 267 n.25.

46. *Id.* at 263-64.

47. One purpose of § 1983 is to afford a federal right of action to protect the rights, privileges, and immunities guaranteed to United States citizens by the fourteenth amendment. *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978). A federal remedy is necessary because prejudice, passion, neglect, or intolerance, may prevent state laws from protecting such claims. *Id.* Thus, the existence of a state law which, if enforced, would provide relief, does not matter. *Id.* at 183. Congress recognized that state remedies, though adequate in theory, might not be available in practice. *Id.* at 174.

48. 365 U.S. 167 (1961), *overruled on other grounds*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

49. *Id.* at 169.

50. *Id.* at 172-83.

acts.⁵¹ Analogously, liability for intentional torts does not depend upon any desire to do wrong or hostile motive on the part of the defendant.⁵² Liability may be imposed upon a defendant where he performs an intentional act that invades the rights of others even if he acts upon a mistaken belief that he is doing no wrong.⁵³ Therefore, *Monroe v. Pape* correctly applied tort principles by examining the consequences of the defendants' intentional acts,⁵⁴ rather than the state of mind of the actors.⁵⁵

In addition to its focus upon tort concepts of intent, *Monroe v. Pape* involved the kind of physical abuse and interference with property rights that falls within the scope of traditional tort law.⁵⁶ The interests protected by the fourth amendment's restriction upon search and seizure parallel, in part, those interests protected by the common law actions for trespass and invasion of privacy.⁵⁷

Though courts have generally accepted the analogy between civil rights actions and tort law,⁵⁸ Justice Powell in *Carey v. Phipps*, pursues this analogy to its logical conclusion in his borrowing principle.⁵⁹

Civil Rights Actions Borrowing from Common-Law Torts

To formulate remedial rules for a particular civil rights action, *Carey v. Phipps* promotes the borrowing by the civil rights action from its

51. *Id.* at 187. See McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 54 (1974).

52. W. PROSSER, *supra* note 41, § 8, at 31.

53. *Id.* A police officer, nevertheless, has a qualified immunity if he acted in good faith and with probable cause. *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967).

54. An official may violate the civil rights of a citizen without being aware of these consequences of his official actions. A negligent act by a state official might not support a § 1983 action. See *Jenkins v. Averett*, 424 F.2d 1228, 1233 (4th Cir. 1970) (Bryan, J., dissenting) (Judge Bryan argued against giving gross and culpable negligence the identity of intent for § 1983 purposes merely because the common law equates gross negligence as fictional intent). Similarly, medical malpractice does not become a constitutional violation merely because the victim is a prisoner. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Negligence in diagnosis or treatment is insufficient to state an eighth amendment claim; rather, the plaintiff must show evidence of deliberate indifference to serious medical needs. *Id.*

55. See text & note 51 *supra*.

56. Yudof, *supra* note 13, at 1371.

57. See *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 390 (1970); *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Inst.*, 566 F.2d 289, 302 n.16 (D.C. Cir. 1977) (Robinson, J., concurring); *Jenkins v. Averett*, 424 F.2d 1228, 1231-32 (4th Cir. 1970).

58. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); *Dellums v. Powell*, 566 F.2d 167, 175-76 (D.C. Cir. 1977); *De Malherbe v. International Union of Elevator Constructors*, 449 F. Supp. 1335, 1340-41 (N.D. Cal. 1978). Arguably this analogy ought not be pushed too far. The premise of § 1983, for example, is that state tort policy often is inadequate to deter violation of civil rights, especially those of disfavored groups. *Robertson v. Wegmann*, 436 U.S. 584, 600 (1978) (Blackmun, J., dissenting). Moreover, whereas tort law regulates the conduct of private individuals, § 1983 and other civil rights actions presuppose that the defendant has exercised the authority of the state, and therefore, the interest in protecting persons from wrongdoing may be different when the offender has exercised the authority of government than when he has acted as a private individual. See *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 392 (1970).

59. See text & notes 31-33 *supra*.

nearest tort cousin.⁶⁰ Injuries caused by constitutional torts, however, should not go "uncompensated simply because the common law does not recognize an analogous cause of action."⁶¹ The "borrowing" notion merely permits direct application of tort damage rules to the civil rights action where the interests protected by the constitutional right and the corresponding branch of tort law are analogous.⁶²

How closely analogous the actions must be in order to invoke the borrowing process remains unclear. Strict identity would be an inappropriate test because "a deprivation of a constitutional right is significantly different and more serious than a violation of a state right."⁶³ Instead, the following two-fold test would seem more workable. First, the common-law action must be substantively analogous to the constitutional tort.⁶⁴ If the similarities outweigh the differences, the remedial rules ought to be borrowed, adapting them as necessary in order to obtain a better fit.⁶⁵ Second, the interests protected by the comparable branch of tort law and the constitutional right must also be parallel.⁶⁶ In other words, the policies behind the analogous actions must be consistent.⁶⁷

This borrowing test is consistent with Justice Powell's rejection in *Carey* of the plaintiffs' attempt to equate the constitutional tort of a due process violation with the common-law tort of defamation *per se*.⁶⁸ Damage is presumed in defamation *per se* because defamatory communications are virtually certain to cause mental and emotional distress, and injury to reputation, yet injuries to these dignitary interests are difficult to prove.⁶⁹ In contrast, Justice Powell observed that a denial of

60. *Id.* Nevertheless, Justice Blackmun warns against such a process, describing it as a "questionable procedure . . . since the interests protected by tort law and constitutional law may be quite different." *Robertson v. Wegmann*, 436 U.S. 584, 602 (1978) (Blackmun, J., dissenting). See note 58 *supra*.

61. *Carey v. Piphus*, 435 U.S. at 258.

62. *Id.*

63. *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). Justice Harlan, however, concluded that even though the same act may constitute both a state tort and a deprivation of a constitutional right, the remedy must be different since the constitutional deprivation is significantly more serious. *Id. Carey*, in sanctioning the borrowing of state tort law to formulate appropriate remedial rules, and *Robertson v. Wegmann*, 436 U.S. 584, 602 (1978), in applying state survivorship provisions to § 1983 actions, appear to reject Justice Harlan's apparent call for strictly federal common-law remedies for constitutional torts.

64. *Expeditions Unlimited Aquatics Enterprises, Inc. v. Smithsonian Inst.*, 566 F.2d 289, 302 n.16 (D.C. Cir. 1977) (Robinson, J., concurring); *DeMahlerbe v. International Union of Elevator Constructors*, 449 F. Supp. 1335, 1340-41 (N.D. Cal. 1978) (applying relevant state statute of limitations in a *Bivens* action).

65. See *De Malherbe v. International Union of Elevator Constructors*, 449 F. Supp. 1335, 1341 (N.D. Cal. 1978).

66. *Carey v. Piphus*, 435 U.S. at 259.

67. See *id.* For example, the interests protected by the fourth amendment are also protected by the common law torts of trespass and invasion of privacy. See text & notes 57-58 *supra*.

68. 435 U.S. at 259.

69. *Id.* at 262 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 373, 376 (1974) (White, J., dissenting)).

due process is not as likely to cause intangible injury.⁷⁰ Moreover, causation problems inherent in actions seeking redress for due process violations are not present in defamation actions.⁷¹ Finally, Justice Powell foresaw no particular difficulty in proving any mental distress that may result from a due process violation.⁷² Implicitly, the Court may be distinguishing a tort where injury is primarily dignitary and intangible (defamation *per se*) from a constitutional tort where the primary injury is tangible and nondignitary (due process violation). Therefore, because the due process constitutional tort primarily involves interests that are tangible and nondignitary, this action is analogous to those tort actions where actual damages must be proved.⁷³ An analysis of the distinction in tort law between certain dignitary torts, where damage is presumed, and nondignitary torts, where damage must be proved, may be helpful to ascertain which constitutional torts may be appropriately remedied by presumed damages.

THE COMMON LAW'S DIFFERING TREATMENT OF DIGNITARY AND NONDIGNITARY TORTS

A distinction in tort law is made between those actions which seek redress for injury to physical, proprietary and pecuniary interests, and those actions involving injury to the more intangible interests in personality and dignity.⁷⁴ Dignitary torts include such causes of action as invasion of privacy, assault, defamation *per se*, false imprisonment, and malicious prosecution.⁷⁵

What distinguishes the purely dignitary torts from other tort actions is that although some pecuniary injury may be involved,⁷⁶ the primary harm is "the affront to the plaintiff's dignitary, the damage to his self-image, and the resulting mental distress."⁷⁷ In contrast to other intentional torts, where a plaintiff must prove either pecuniary loss or emotional harm before he may recover anything more than nominal damages;⁷⁸ general damages may be awarded without proof of emo-

70. *Id.* at 263.

71. *Id.*

72. *Id.* at 263-64.

73. See text & notes 74-78 *infra*.

74. See D. DOBBS, *supra* note 15, § 7.3, at 528; Yudof, *supra* note 13, at 1371-74.

75. D. DOBBS, *supra* note 15, § 7.3, at 528-29. "[T]he law protects interests of personality, as well as the physical integrity of the person and that emotional damage is just as real (and as compensable) as physical damage." *Stewart v. Rudner*, 349 Mich. 459, 467, 84 N.W.2d 816, 822 (1957).

76. An example would be a defamatory publication that injures the plaintiff's business reputation. As a result, loss of profits would also be an element of damages. Another example is a claim for lost wages in the case of false imprisonment.

77. D. DOBBS, *supra* note 15, § 7.1, at 509-10.

78. *Id.* § 7.3, at 529-30.

tional harm for dignitary torts such as defamation *per se*⁷⁹ and invasion of privacy.⁸⁰

An important justification for presumed damages is that some acts are inherently capable of causing intangible injury and are difficult to prove; therefore, burdening the victim with proving actual damages would be unfair.⁸¹

Where damages are presumed, the trier of fact examines the nature of the defendant's behavior in order to assess the extent of the harm suffered by the plaintiff, as this will affect the plaintiff's sense of outrage and distress.⁸² Included in this assessment are such factors as the defendant's motives and the outrageousness of his conduct,⁸³ factors that are ordinarily considered in determining the propriety of awarding punitive damages.⁸⁴

Ordinarily, the focus in awarding compensatory damages is upon the nature and extent of the injury and not upon the conduct of the defendant that caused the injury. Since both presumed and punitive damages focus upon the nature of the invasion rather than its consequences, the purposes of presumed damages may, by inference, include deterring conduct that society deems outrageous. For example, the law of defamation is deeply concerned with the malicious intentions, or state of mind of the publisher.⁸⁵

Just as tort law treats injury to dignitary interests in a different fashion than injury to physical or pecuniary interests, the interests protected by civil rights actions may require similar classification.

79. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). This tort is "an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss." *Id.* Thus, the existence of injury is presumed from the fact of publication. *Id.* Libel *per se* constituted written material likely to lower the defamed person in the estimation of the community. *Id.* at 371 (White, J., dissenting). Slander was actionable *per se* only if it imputed a criminal offense, a venerable or loathsome disease, improper conduct of a lawful business, or unchastity by a woman. RESTATEMENT (SECOND) OF TORTS § 570 (1977).

80. *Birnbaum v. United States*, 436 F. Supp. 967, 987 (E.D.N.Y. 1977), *aff'd*, 588 F.2d 319 (2d Cir. 1978); *Reed v. Real Detective Publishing Co.*, 63 Ariz. 294, 305-06, 162 P.2d 133, 139 (1945). *But see* RESTATEMENT (SECOND) OF TORTS § 652H Comment c (1977).

81. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 375 (1974) (White, J., dissenting). The justification for presuming damages in defamation *per se* for loss of reputation is that the content of the publication is so likely to cause injury, but the effect may be subtle and difficult to trace to the person defamed. *Id.* at 373.

82. D. DOBBS, *supra* note 15, § 7.3, at 530-31. Since there is often a lack of objective harm, the trier of fact must evaluate the evidence in light of personal experience to assess such imponderables as damage to reputation, and future mental pain and suffering. *See* *Birnbaum v. United States*, 436 F. Supp. 967, 987-88 (E.D.N.Y. 1977), *aff'd*, 588 F.2d 319 (2d Cir. 1978).

83. In essence, the trier of fact is called upon to determine the nature of invasion, rather than its consequences on the victim. *See* *Alcorn v. Ambro Eng'r*, 2 Cal. 3d 493, 498-99, 468 P.2d 216, 218 (1970); *Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952).

84. D. DOBBS, *supra* note 15, § 7.3, at 530-31; *Yudof, supra* note 13, at 1361.

85. W. PROSSER, *supra* note 41, § 113, at 771-72.

CLASSIFYING CONSTITUTIONAL TORTS AS DIGNITARY OR
NONDIGNITARY

Though civil rights actions may be likened to dignitary torts,⁸⁶ the Supreme Court in *Carey v. Phipps* denied such treatment to the "constitutional tort" of denial of procedural due process. Rather, proof of actual damages was required to support an award of substantial damages.⁸⁷ The Court left open, however, the question whether other constitutional torts may be appropriately treated as dignitary torts accompanied by the presumption of damages. In *Carey*, the Court emphasized that since the interests protected by each constitutional provision are distinct, the elements and prerequisites for recovery must be considered with reference to the particular right in question.⁸⁸

Thus, an examination of the constitutional interests protected by section 1983 and other constitutional actions is necessary in order to develop appropriate remedial standards. If the common law distinguishes dignitary and nondignitary torts, permitting damage to be presumed in the former, but requiring actual proof in the latter, the borrowing principle may be utilized to similarly distinguish constitutional torts. Certain constitutional rights protect interests that are primarily intangible and dignitary, while other provisions may protect interests that are more tangible. Justice Powell, in *Carey*, recognized that the due process clause protects both economic⁸⁹ and intangible⁹⁰ interests.⁹¹ Therefore, an analysis of the interests that lie behind the due process clause is in order.

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."⁹² The due process clause merely enables "persons to contest the basis upon which the State proposes to deprive them of protected interests."⁹³

The due process clause necessitates a hearing before a student may

86. D. DOBBS, *supra* note 15, § 7.3, at 528-31; Yudof, *supra* note 13, at 1371-83. In *Curtis v. Loether*, 415 U.S. 189, 196 n.10 (1974), Justice Marshall observed:

An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law of insult and indignity, racial discrimination might be treated as a dignitary tort."

(citation omitted).

87. 435 U.S. at 262-64.

88. *Id.* at 258-59, 264-65.

89. The fourteenth amendment forbids the government from dispossessing its citizens of property interests without due process of law. *Id.* at 259.

90. The due process clause also guarantees the "feeling of just treatment by the government." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

91. 435 U.S. at 262, 264.

92. *Id.* at 259.

93. *Id.* at 260 (quoting *Fuentes v. Shevin*, 407 U.S. 61, 81 (1972)).

be suspended from school, as the "State is constrained to recognize a student's legitimate entitlement to a public education as a *property* interest which is protected by the Due Process Clause."⁹⁴ The recognition of the student's property interest in his schooling is what activates any constitutional protection a student may enjoy when school officials seek to enforce standards of conduct.⁹⁵ Thus, the dignitary interest in being treated fairly by one's government⁹⁶ is parasitic to the property interest, and is not the primary interest that is being protected.

Even more clearly protective of property interests are due process requirements encountered in the context of public employment contracts.⁹⁷ Actions based on violations of these requirements are analogous to the common-law action for breach of contract.⁹⁸ Where a public employee is wrongfully discharged, courts uniformly hold that the plaintiff is entitled to recover losses sustained as a result.⁹⁹ Although some courts have ordered reinstatement with back pay,¹⁰⁰ the predominant view is that the dismissed employee should recover lost wages and other benefits, less what he or she actually earned or reasonably should have earned during the remainder of the term of the contract.¹⁰¹ Thus, as in an action for breach of a contract for employment, the damages are measured by the value of the contract to the wrongfully discharged employee.¹⁰² Whereas the policy behind the common-law rule is to compel the employer to perform his contractual obligations, the policy behind the civil rights action is to compel the public employer to provide the employee with the opportunity to be heard.¹⁰³

Some courts hold that a teacher discharged in violation of due process is entitled to recover back pay even if the court can find reasonable grounds for dismissal.¹⁰⁴ *Carey* appears to dictate a contrary result because damage must be causally related to the constitutional infringement.¹⁰⁵ Where the deprivation is justified, but the procedure

94. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (emphasis added).

95. *Id.* at 573-74.

96. See text & note 3 *supra*.

97. See, e.g., *Perry v. Sinderman*, 408 U.S. 593, 599-603 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1971); *Burt v. Board of Trustees*, 521 F.2d 1201, 1203 (4th Cir. 1975); *Janetta v. Cole*, 493 F.2d 1334, 1335 (4th Cir. 1974).

98. *Burt v. Board of Trustees*, 521 F.2d 1201, 1207 (4th Cir. 1975) (Winter, J., concurring and dissenting).

99. See cases cited at note 97 *supra*.

100. See, e.g., *Vitarelli v. Seaton*, 359 U.S. 535, 545-46 (1959); *McNeill v. Butz*, 480 F.2d 314, 326 (4th Cir. 1973); *Cooley v. Board of Educ.*, 453 F.2d 282, 287 (8th Cir. 1972).

101. *Burt v. Board of Trustees*, 521 F.2d 1201, 1207 (4th Cir. 1975) (Winter, J., concurring and dissenting). See *Cox v. Northern Va. Transp. Comm'n*, 551 F.2d 555, 557-58 (4th Cir. 1976); *Horton v. Orange County Bd. of Educ.*, 464 F.2d 536, 538 (4th Cir. 1972).

102. See cases cited at note 101 *supra*.

103. *Burt v. Board of Trustees*, 521 F.2d 1201, 1207 (4th Cir. 1975).

104. *Id. Contra*, *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 579 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976).

105. See 435 U.S. at 263.

deficient, the plaintiff is not entitled to recover damages resulting from the justifiable deprivation.¹⁰⁶ Therefore, an employee dismissed without due process may be barred from obtaining a back pay award if the defendant can prove the dismissal was proper.¹⁰⁷

Since due process violations involving public employment contracts affect tangible interests that are more easily measurable than dignitary interests, the actual damage rule in *Carey* is especially justified in such cases.¹⁰⁸ Nevertheless, in *Carey*, the Court recognized that an individual may have intangible interests in seeing that he is treated fairly by his government.¹⁰⁹ The Court merely held that any mental distress caused by a due process violation cannot be presumed, but must be proved.¹¹⁰

The Problem of the Political Rights Plaintiff

Although tangible constitutional interests can be protected adequately without the presumption of damages, a distinct problem is posed where the interests to be protected are political. Such interests are primarily dignitary and intangible.¹¹¹ What is meant by political interests is the right of individuals to participate in influencing the policies of their society. Examples include freedom from racial discrimination,¹¹² voting rights, and first amendment rights.

Since 1703¹¹³ courts have recognized a damage action where an individual has been wrongfully deprived of his right to vote.¹¹⁴ Damages need not be proven, but are deemed to be inherent in the wrong:

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 particularly appropriate for the determi-

106. *Id.* at 260, 263. In *Carey*, the Court noted that the plaintiffs would not be entitled to recover for injuries caused by the suspensions if the defendant could prove the suspensions were justified, despite the lack of a proper hearing. *Id.* at 263. Otherwise a damage award would not represent compensation, but would constitute a windfall to the plaintiffs. *Id.* at 260.

107. See *Hernandez del Valle v. Santa Aponte*, 575 F.2d 321, 324 (1st Cir. 1978) (dicta). In *Hernandez*, the plaintiff was discharged from employment without a proper hearing, but the evidence indicated he would have been dismissed because of his disabilities even if a proper hearing had been held. *Id.* The court noted that the plaintiff would have been denied compensation on this ground alone. *Id.*

108. See 435 U.S. at 262-64.

109. *Id.*

110. *Id.* at 264.

111. See *Yudof*, *supra* note 13, at 1371-73.

112. The right to be free from racial discrimination, though containing economic elements, is the right to fully participate in one's society free from the arbitrary barrier of race. For an excellent treatment of the problems inherent in seeking satisfactory remedial standards for racial discrimination damage suits see generally Note, *Developing "Tort" Standards for the Award of Mental Distress Damages in Statutory Discrimination Actions*, 11 U. MICH. J. L. REF. 122 (1977).

113. *Ashby v. White*, 1 Eng. Rep. 417, 418 (H.L. 1703).

114. See, e.g., *Nixon v. Herndon*, 273 U.S. 536, 540 (1927); *Wiley v. Sinkler*, 179 U.S. 58, 64-65 (1900); *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919).

nation of the jury, because each member of the jury has personal knowledge of the value of the right.¹¹⁵

The public purpose in permitting such an award is implicit. Society fears that election results may not reflect majority will if each person entitled to vote is not allowed to do so.¹¹⁶ The injury to the electorate may be greater than that to the individual who has been deprived of his right to vote.¹¹⁷ Most importantly, the right to vote has little if any monetary value. Without the presumption of damages, the recovery of substantial damages would be difficult and the utility of this action would be nullified.¹¹⁸

The first amendment also protects intangible political interests. The deprivation of first amendment rights, like the deprivation of voting rights, may harm the general public more than the individual victim. The first amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹¹⁹ The first amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."¹²⁰ Moreover, the freedoms of speech and religion are "essential to enlightened opinion and right conduct on the part of the citizens of a democracy."¹²¹

The public has a compelling interest in protecting free expression. It is essential to provide for a more stable community, since when reason is allowed to prevail over force, society is better able to adapt to changing circumstances.¹²² Above all, free expression is essential in order to provide for the participation in decision making by all members of society, and to expose society to all sides of a question.¹²³ A progressive society must make use of different minds.

The first amendment also comprehends dignitary interests of the individual, in that free expression is essential to individual self-fulfillment.¹²⁴ Since man has a right to share in those societal decisions that affect him, the suppression of expression places the individual under the arbitrary control of others.¹²⁵ Such repression of an individual's beliefs and opinions constitutes an affront to that individual's dignity and sense of self-worth, for such suppression serves to eliminate an impor-

115. *Wayne v. Venable*, 260 F. 64, 66 (8th Cir 1919).

116. *Yudof*, *supra* note 13, at 1373.

117. *Id.* at 1373.

118. *See* RESTATEMENT (SECOND) OF TORTS § 865, Comment a (1979).

119. *Roth v. United States*, 354 U.S. 476, 484 (1957).

120. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

121. *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

122. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1971).

123. *Id.* at 7.

124. *Id.*

125. *Id.* at 6.

tant element of self-determination.¹²⁶

The first amendment protects dignitary interests similar to those protected by dignitary torts. One may fairly argue that the denial of an individual's right to freely express his beliefs and participate fully in the politics and culture of his society is as likely to cause intangible injury as would communications defamatory *per se*.¹²⁷ Furthermore, presumed damages may be necessary in order to vindicate the public's interests.

First amendment violations, nevertheless, may occur in circumstances where a common-law tort action may be borrowed in order to provide an appropriate remedy. In *Manfredonia v. Barry*¹²⁸ the plaintiffs were a speaker at a birth control lecture and a listener, a mother with a child.¹²⁹ The plaintiffs were arrested for endangering the welfare of the child, even though there was no probable cause to believe that contraceptives were being distributed illegally.¹³⁰ Neither plaintiff claimed any resulting out-of-pocket expenses, diminution of earnings, or physical injury to warrant a large award of compensatory damage.¹³¹ Nevertheless, the court held that these familiar elements of damage need not be shown to recover a reasonably substantial award in a civil rights case.¹³² Rather, under these circumstances, this deprivation of constitutional rights through the misuse of official power entitled plaintiff to substantial damages.¹³³

The court recognized the difficulty of assigning an appropriate monetary value to the denial of the plaintiffs' highly prized first amendment rights, as well as their rights to be free from illegal arrests.¹³⁴ In awarding damages of \$3,500 to each plaintiff, the court analyzed the circumstances surrounding the illegal arrests and inferred that the plaintiffs must have suffered mental distress and injury to their reputations as a result of the false arrests.¹³⁵ *Manfredonia*, therefore, may represent an example of a court borrowing the common-law dignitary tort of false arrest and false imprisonment, where general damages for mental distress and injury to reputation are presumed,¹³⁶ in order to remedy a denial of free expression.¹³⁷

126. *Id.*

127. See text & notes 81-83 *supra*.

128. 401 F. Supp. 762 (E.D.N.Y. 1975).

129. *Id.* at 765-66.

130. *Id.* Specimens of birth control devices were displayed, but not distributed at the lecture.

131. *Id.* at 770.

132. *Id.*

133. *Id.*

134. *Id.* at 770-71.

135. *Id.* at 771-72.

136. D. DOBBS, *supra* note 15, § 7.3, at 528, 531.

137. 401 F. Supp. at 772. The court explained: "Having recklessly deprived these plaintiffs of

The problems confronting the political rights plaintiff are evident if one contrasts the opinions of the district court and court of appeals in *Birnbaum v. United States*.¹³⁸ The plaintiffs brought an action under the Federal Tort Claims Act¹³⁹ for invasion of privacy resulting from illegal CIA tampering with their mail.¹⁴⁰ The intangible nature of the harm suffered by the plaintiffs was recognized by the district court:

The plaintiffs in these cases suffered none of the tangible indicia of harm for which a dollar amount may easily be assigned. They experienced no financial losses. Their jobs, their reputations and prestige in their communities did not suffer. They were not subjected to intrusive or humiliating investigations by the government. Their homes were not broken into. They were not assaulted or detained. They lost no time from work and incurred no medical expenses.¹⁴¹

This lack of objective harm was held not to bar recovery, however, because the deprivation of privacy is an independent wrong for which damages are presumed.¹⁴² Accordingly, the court asked the advisory jury¹⁴³ to draw upon their experience to recommend an appropriate award.¹⁴⁴ If the wrong done was found to be slight or trivial, nominal damages were to be recommended.¹⁴⁵ Though the plaintiffs did not suffer any objective, observable injury as a result of the interference with their civil liberties, the jury recommended up to \$10,000 in damages, which was found to be too high.¹⁴⁶

Though the common-law tort of invasion of privacy presumes damages, the *Birnbaum* court intimated a special public enforcement purpose that would also justify presumed damages.¹⁴⁷ The court noted an interest in insuring public confidence in the integrity of the mails and in the right of individuals to be free from surreptitious intrusions into their privacy by government officials.¹⁴⁸ The court emphasized the

important constitutional rights . . . and wrongfully subjected them to mental and emotional distress of being charged as criminal offenders and to the public humiliation which inevitably followed, the defendants must make compensation." *Id.*

138. 436 F. Supp. 967 (E.D.N.Y. 1977), *aff'd*, 588 F.2d 319 (2d Cir. 1978).

139. 28 U.S.C. § 1346(b) (1976).

140. 436 F. Supp. at 986.

141. *Id.* at 987.

142. *Id.*

143. *Id.* at 988. While trial by jury is specifically prohibited in Federal Tort Claims Act cases, 28 U.S.C. § 2402 (1976), use of an advisory jury is permitted. 436 F. Supp. at 988.

144. *Id.*

145. *Id.*

146. *Id.* at 989.

147. *Id.* at 989-90. The district court, however, appeared also to make a finding that the plaintiffs had proved actual harm: "The court credits the testimony of the plaintiffs in these cases that they suffered actual mental pain, outrage and shock when they learned that government agents had interfered with their privacy by opening and reading their mail." *Id.* at 987. Though the district court cited the *Restatement of Torts* in support of its conclusion that damages may be presumed for invasion of privacy, *id.*, the court of appeals affirmed on the basis that actual harm was found. 588 F.2d at 334.

148. 436 F. Supp. at 989.

deterrent effect of such a damage award:

[K]nowledge by government officials that individuals have effective legal remedies to enforce their rights may deter future illegality. The existence of a court system capable of protecting the right to privacy by granting money damages . . . against the government and its agents make our Constitution and laws consequential to our citizens rather than pretentious, empty promises.¹⁴⁹

The Second Circuit affirmed the district court's decision but found that actual, rather than presumed damages had been awarded.¹⁵⁰ This conclusion is troubling on three grounds. First, though the district court used language that could be construed as a finding of actual harm, the district court, at great length, explained that under the common law, general damages may be recovered for the invasion of privacy itself, as well as for any mental distress that may result.¹⁵¹ In other words, the invasion itself is an independent wrong for which damages may be awarded.¹⁵² In contrast, actual damage tort actions require that there be compensable loss over and above the deprivation itself.¹⁵³

Additionally, the Second Circuit impliedly held that *Carey's* actual damage rule is applicable to all federal actions involving civil rights, even those pursued as common-law torts of invasion of privacy under the Federal Tort Claims Act.¹⁵⁴ The court ignored language in *Carey* that remedial rules must be "tailored to the interests protected by the particular right in question"¹⁵⁵ and that the "prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another."¹⁵⁶ Further, *Carey* mandates that the damage issue must be "considered with reference to the nature of the interests protected by the particular constitutional right in question."¹⁵⁷

149. *Id.* at 989-90.

150. *Birnbaum v. United States*, 588 F.2d 319, 333-35 (2d Cir. 1978). The court of appeals explained: "Though we could view this finding as one merely of damage presumed from the circumstances, worth only the nominal sum of one dollar, . . . we interpret the finding more generously as determining that these plaintiffs, whose demeanor the trial judge observed, actually suffered personal anguish." *Id.* at 334-35.

151. 436 F. Supp. at 987.

152. *Id.*

153. *See Turpin v. Mailet*, 579 F.2d 152, 170 (2d Cir. 1978) (Oakes, J., concurring), *cert. denied* 439 U.S. 974 (1979); D. DOBBS, *supra* note 15, § 7.3, at 529. In addition, the district court supported its conclusion by citing *Piphus v. Carey*, 545 F.2d 30, 31-32 (7th Cir. 1976), later to be overruled by the Supreme Court on this very issue. *Carey v. Piphus*, 435 U.S. at 253, 262-64.

154. 588 F.2d at 333.

155. *Carey v. Piphus*, 435 U.S. at 259.

156. *Id.* at 264-65.

157. 435 U.S. at 265. In this regard, the Court, in *Carey*, deemed as not controlling a line of cases holding that substantial damages may be awarded simply upon a showing that the plaintiff was wrongfully deprived of the right to vote. *Id.* at 264-65 n.22. In fact, the Court observed that

Most importantly, perhaps, the Second Circuit in *Birnbaum* ignored the utilization of the borrowing process supported by *Carey*. Rather than interpreting *Carey* as holding that a due process violation may not be remedied by presumed damages because this constitutional tort is not analogous to common-law dignitary torts,¹⁵⁸ the court understood *Carey* as requiring proof of actual damages in all civil rights actions.¹⁵⁹ In the circumstances of *Birnbaum*, the borrowing of the common-law tort of invasion of privacy seems altogether appropriate because this civil rights action is truly a common-law tort.¹⁶⁰

The court of appeals opinion, however, may yet prove supportive of civil rights plaintiffs. The court implied that if the testimony of the plaintiffs regarding their suffering mental pain, outrage, and shock is credited by the trier of fact, such evidence will be sufficient to support an award of actual damages.¹⁶¹ Thus, the *Carey* Court's confidence that proving actual damages will not be so difficult as to justify presuming damages in the due process context¹⁶² may well be fortified by the Second Circuit's opinion in *Birnbaum*.

Nevertheless, not only does the language in *Carey* seem to dictate that the Second Circuit's reading of the actual damage rule is inappropriate, but policy reasons also argue for a narrower reading of *Carey*. The constitutional tort plaintiff who suffers the loss of intangible political rights should not be foreclosed from a meaningful remedy. As in defamation *per se*, the harm suffered may be so difficult to prove that policy may dictate that the plaintiff should not be burdened with the extraordinarily difficult task of proving actual harm. Thus, the presumption of damages may ensure the viability of this kind of action, where dignitary harm is primarily at issue. Moreover, *Carey* recognizes that compensatory damages in civil rights actions do have a deterrent effect upon official misconduct.¹⁶³ A viable damage action is necessary to ensure that government officials respect the rights of the citizens they serve.¹⁶⁴ The application of the *Carey* rule to the political rights plaintiff may remove any deterrent effect otherwise inherent in the civil rights damage action.

In sum, since *Carey* mandates that remedial rules be formulated by reference to the nature of the interests protected by the constitu-

the common-law rule of damages for the wrongful deprivation of voting rights will be relevant to an analogous question under § 1983. *Id.*

158. See 435 U.S. at 262-64.

159. 588 F.2d at 333.

160. See 436 F. Supp. at 976-78.

161. Compare 436 F. Supp. at 987 with 588 F.2d at 334-35.

162. 435 U.S. at 264.

163. *Id.* at 256-57.

164. See *Birnbaum v. United States*, 436 F. Supp. 967, 989-90 (E.D.N.Y. 1977), *aff'd*, 588 F.2d 319 (2d Cir. 1978).

tional right in question,¹⁶⁵ compensatory damage ought to be presumed where the primary interests to be protected are dignitary. In the case of such dignitary constitutional torts, *Carey* would seem to support the notion that common-law dignitary torts may be borrowed to supply remedial rules for this kind of civil rights action. On the other hand, where the constitutionally protected interest is primarily tangible, the actual damage rule ought to apply.

THE STANDARD OF PROOF NECESSARY FOR ACTUAL DAMAGES

A viable alternative to a remedial scheme that presumes damages only where dignitary interests are primarily involved, would be a standard of proof that takes into account the intangible interests that may be involved in any civil rights action. The civil rights plaintiff need not be foreclosed from a substantial award for failure of proof on the damage issue if an appropriate standard of proof is adopted regarding injury to mental and emotional equanimity. Although the Court did not consider the standard of proof necessary to support an award of substantial damages,¹⁶⁶ there are strong reasons why the standard ought not be a strict one.

One of the decisions employed by the Court as support for its conclusion regarding presumed damages may be interpreted as supporting an opposite conclusion. *Seaton v. Sky Realty Co.*¹⁶⁷ was read to suggest that the existence of mental distress is a question of fact.¹⁶⁸ The Seventh Circuit in *Seaton* rejected the argument that unless there is actual evidence of economic loss or medical testimony of mental or emotional impairment, there can be no award of substantial damages.¹⁶⁹ The plaintiffs sought damages as a result of a realty broker's racially motivated refusal to negotiate the sale of a residence in a predominantly white neighborhood.¹⁷⁰ *Seaton* held that humiliation can be inferred from the circumstances¹⁷¹ and that inferring the nature and extent of the injury suffered by the plaintiff is within the particular province of the jury.¹⁷² The court of appeals in *Birnbaum* described such a process, however, as presuming damages.¹⁷³

165. *Carey v. Phipus*, 435 U.S. at 265.

166. *Id.* at 267 n.25.

167. 491 F.2d 634 (7th Cir. 1974)

168. *Carey v. Phipus*, 435 U.S. at 264 n.22.

169. 491 F.2d at 636. The plaintiffs in *Seaton* brought suit under 42 U.S.C. §§ 1982, 3612 (1976). *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 637. In fact, *Seaton* went so far as to hold that the evidence necessary to get to the jury on the damage issue would be identical to that of *Wayne v. Venable*, 260 F. 64, 65 (8th Cir. 1919), a presumed damage voting rights case. See text & note 115 *supra*.

173. 588 F.2d at 334.

A consideration of *Carey's* treatment of *Seaton* reveals uncertainty as to the Court's definition of "presumed" as opposed to "actual" damages. Justice Powell implies that although a finding of actual damages is considered to be a question of fact, some other undescribed process is operative with presumed damages.¹⁷⁴ Conceivably, Justice Powell interprets the doctrine of presumed damages as automatically entitling a plaintiff to recover substantial damages merely upon a showing that his rights have been violated.¹⁷⁵ Presumed damages are more accurately described, however, as merely permitting the trier of fact to use its discretion to award damages even in the absence of objective proof of actual injury.¹⁷⁶ Moreover, the fact that a court may award substantial damages absent proof of actual damages does not compel an award of substantial damages where the actual damages are specifically found by the trier of fact to be minimal.¹⁷⁷ Therefore, both presumed and actual damages implicitly involve findings of fact; presumed damages merely permit such findings without objective proof.¹⁷⁸ Consequently, *Carey's* conception of a finding of actual damages may include the inference of injury from the circumstances surrounding the loss or deprivation of the plaintiff's civil rights.¹⁷⁹

Inferring mental distress from the circumstances surrounding the defendant's actions is not foreign to tort law. In *State Rubbish Collectors Association v. Siliznoff*,¹⁸⁰ the court determined the existence of mental distress not by focusing upon the plaintiff but upon the nature of the defendant's conduct.¹⁸¹ "From their own experience, jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct. . . . Greater proof that mental suffering occurred is found in the defendant's conduct . . . than in physical injury that may or may not have resulted therefrom."¹⁸² The trier of fact must analyze the distress producing event, an objective occurrence, instead of attempting to examine the nature and extent of a subjective injury. In essence, the jurors are asked to place themselves in the plaintiff's position in order to determine whether the defendant's

174. See 435 U.S. at 264-65.

175. See *id.* at 262-65.

176. See *Wayne v. Venable*, 260 F. 64, 65 (8th Cir. 1919); D. DOBBS, *supra* note 15, § 7.3, at 528-31.

177. *Koehler v. Wales*, 16 Wash. App. 304, 312, 556 P.2d 233, 238 (1976). In *Mid-America Food Service v. ARA Services, Inc.*, 578 F.2d 691 (8th Cir. 1978), however, the court interpreted *Carey* and the common law of Kansas as requiring the *conclusive* presumption of damages in defamation *per se*, requiring courts to take "judicial notice" of their existence. *Id.* at 697.

178. See *Birnbaum v. United States*, 436 F. Supp. 967, 987-88 (E.D.N.Y. 1977), *aff'd*, 588 F.2d 319 (1978).

179. See *Carey v. Piphus*, 435 U.S. at 264-65 n.22.

180. 38 Cal. 2d 330, 240 P.2d 282 (1952).

181. *Id.* at 338, 240 P.2d at 286.

182. *Id.*

conduct would produce emotional disturbance.¹⁸³ If one focuses upon the distress causing event rather than the wholly subjective results in order to affix an award for mental distress, proof of actual damages may not be too burdensome.¹⁸⁴

The approach of *Seaton* and *Siliznoff* can be contrasted to that of the Second Circuit in *Birnbaum*. Whereas the former find mental distress by looking to the nature and circumstances of the tortious conduct, *Birnbaum* relies upon crediting the plaintiffs' testimony.¹⁸⁵ Rather than relying solely upon the credibility of the plaintiffs' testimony, common sense dictates that the trier of fact ought to look as well to the circumstances of the tortious conduct to determine the reasonableness of the inference that the plaintiffs suffered emotional distress. Emotional distress is more likely to have been suffered by the plaintiffs in those circumstances where a reasonable person would have been subjected to such harm.¹⁸⁶

The approach of *Siliznoff* and *Seaton* does not guarantee a verdict for the plaintiff on the damage issue. Focusing upon the alleged distress causing event may lead the trier of fact to conclude that the plaintiff suffered no mental distress. In *Tyrrell v. Speaker*,¹⁸⁷ an unconvicted prisoner awaiting trial was transferred from a county prison to a state prison in order to place him in administrative segregation.¹⁸⁸ No hearing was provided.¹⁸⁹ Even though the plaintiff was transferred to a prison where the conditions were considerably more restrictive, the court held the plaintiff was entitled only to nominal damages.¹⁹⁰

In *Stolberg v. Board of Trustees*,¹⁹¹ an educator was dismissed improperly because of his political views.¹⁹² The court awarded compen-

183. *Id.*

184. Arguably, therefore, expert testimony will not be required in order to prove that the distress suffered was attributable to the deficient process in due process violation cases. Expert testimony is not always required to establish a causal connection between the event complained of and the resulting distress. Such testimony is unnecessary where ordinary experience indicates a relation between the event demonstrated and the mental distress to be proved. *John A. Brown Co. v. Shelton*, 391 P.2d 259, 267 (Okla. 1963); *accord*, *Jakoski v. Holland*, 520 P.2d 569, 575 (Alaska 1974); *Smith v. German*, 434 Pa. 47, 51, 253 A.2d 107, 109 (1969).

185. *Compare Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974) and *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952) with *Birnbaum v. United States*, 588 F.2d 319, 334-35 (2d Cir. 1978).

186. The Second Circuit appears to have rejected this approach. *Birnbaum v. United States*, 588 F.2d 319, 334 (2d Cir. 1978).

187. 535 F.2d 823 (3d Cir. 1976).

188. *Id.* at 825.

189. *Id.* Thus, the transfer amounted to a violation of due process since the plaintiff was a pre-trial detainee. *Id.* at 827. The only legitimate state interest in detaining him was to guarantee his presence at trial. *Id.*

190. *Id.* at 829-30. *Cf. Larkins v. Oswald*, 510 F.2d 583, 585 (2d Cir. 1975) (where the plaintiff was given twelve days of solitary confinement without a hearing for possession of revolutionary papers in his cell). The jury award of \$1000 was held to be not excessive. *Id.* at 589.

191. 474 F.2d 485 (2d Cir. 1973).

192. *Id.* at 488.

satory damages,¹⁹³ but rejected his claim of damages for humiliation, distress, and injury to reputation because of a "failure of proof."¹⁹⁴ Although the plaintiff testified that he had encountered public damage to his reputation, had been hindered in his campaign efforts and his effectiveness later as a state legislator, and had experienced disruption of personally valuable relationships with former students, the court noted that he obtained a new teaching position with relative ease and was a successful legislator.¹⁹⁵ In relying upon the circumstances surrounding the plaintiff's dismissal, the court spared itself the problems inherent in relying solely upon the plaintiff's testimony¹⁹⁶ as to his own feelings of humiliation and outrage.¹⁹⁷

The *Carey* actual damage rule may be less harsh if such damages can be proved by reference to the distress causing event rather than its consequences. The Court's analysis of the circumstances surrounding the students' dismissals revealed potential ambiguities in causation that led the Court to disapprove presumed damages.¹⁹⁸ To infer that mental distress resulted from the deficient process rather than the justifiable suspensions in *Carey* would be difficult.¹⁹⁹ Under these circumstances, the plaintiffs were properly required to prove their damages.²⁰⁰ The immense practical difficulty in proving that emotional distress resulted from the wrongful process rather than the justifiable suspension would seem to foreclose the plaintiff in a case like *Carey* from obtaining substantial damages.²⁰¹

The causation ambiguities present in *Carey* do not seem to pose a problem, however, where rights other than due process have been violated. A plaintiff in a case like *Carey* may be barred from recovery by a concept analogous to a lack of proximate cause in tort law. In contrast, the victim of racial discrimination or a first amendment violation may face no such causation problem. Rather, emotional distress is more easily inferable from the defendant's conduct in such cases.

A workable framework for compensation in civil rights cases may be derived from this analysis. Where causation difficulties, such as those presented in due process violations, are involved, *Carey* will re-

193. *Id.*

194. *Id.*

195. *Id.* at 489.

196. *But cf.* *Birnbaum v. United States*, 588 F.2d 319, 334-35 (2nd Cir. 1978) (court relied on plaintiffs' testimony to find actual damages).

197. The success the plaintiff achieved subsequent to his improper dismissal in effect discredited his own testimony. *Stolberg v. Board of Trustees*, 474 F.2d at 488-89.

198. 435 U.S. at 263.

199. *See id.*

200. Although what must be specifically shown in order to support an award of substantial damages is unclear, something more than a presumption of damages must be relied upon by the plaintiff, at least in the context of a due process violation. *Id.* at 267 n.25.

201. *See id.* at 263.

quire proof of actual harm causally connected to the constitutional wrong. Where the injury is directly related to the defendant's wrongful conduct, however, emotional distress may be proved by inferring that a plaintiff would suffer such injury as a result of the defendant's conduct. Such recovery would be truly compensatory as the amount would be directly related to the trier of fact's assessment of the harm suffered by the plaintiff. Consequently, the deterrent effect of the civil rights damage action would not be lost due to an unnecessarily strict standard of proof for establishing actual harm.

Conclusion

Carey v. Phipus is an important civil rights decision. The Supreme Court in that case directed courts to borrow from the common law of torts in order to formulate remedial rules for section 1983, and by implication, other civil rights actions as well. The Court thus left open the possibility that presumed damages may be applicable to remedy civil rights violations where the constitutionally protected interest is dignitary and analogous to common-law dignitary torts. Therefore, the actual damage rule of *Carey* may apply only to those civil rights actions that seek redress from injury to tangible interests.

Finally, even if the actual damage rule should extend to all civil rights actions, the standard of proof may not present an impenetrable barrier if harm may be inferred from the circumstances of the deprivation.