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## Section 1983: An Analysis of Damage Awards: *Carey v. Phipus*, 435 U.S. 247 (1978)

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## Section 1983: An Analysis of Damage Awards

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

### I. INTRODUCTION

Very early in our judicial history Chief Justice Marshall stated: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."<sup>1</sup>

Section 1983<sup>2</sup> was passed with the purpose of providing a means of protecting a federal right, *i.e.*, the right to enjoy fourteenth amendment privileges and immunities. As Justice Douglas noted in *Monroe v. Pape*:<sup>3</sup>

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws may not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.<sup>4</sup>

The primary purpose of section 1983 was to give all persons, particularly the recently emancipated slaves, an effective weapon with which to protect their rights and freedoms.<sup>5</sup> However, the evolu-

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

2. 42 U.S.C. § 1983 (1976) (corresponds to Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13). Now known as the Civil Rights Act, it provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. 365 U.S. 167 (1961), *overruled in part*, *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978).

4. 365 U.S. at 180.

5. *Id.* at 172-87. See also *Monell v. Department of Social Serv.*, 436 U.S. 658, 683-90 (1978); Comment, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 CALIF. L. REV. 191, 201-02 (1972).

tion and application of section 1983 throughout the years has been neither clear nor consistent. Through judicial refinement it has gradually been stripped of much of its force.<sup>6</sup> Its effectiveness as a legal remedy for the deprivation of constitutional rights was further limited by the Supreme Court's decision in *Carey v. Piphus*.<sup>7</sup>

In *Carey*, the Court held that school students who had been suspended without procedural due process were entitled to recover only nominal damages from school officials, absent proof of actual injury.<sup>8</sup> But more importantly, the Court decided that in order to further the purpose of section 1983 the common law rules of damages should be used to formulate an appropriate remedy of compensation.<sup>9</sup> After analyzing the judicial and legislative history of section 1983, the Court concluded that the principle of compensation should adequately deter the violations of constitutional rights, that only nominal damages should be awarded absent proof of injury, and that punitive damages should be awarded only on a finding of malicious intent.<sup>10</sup> These findings have a sweeping impact on all section 1983 litigation, particularly actions seeking redress for the indignity and the mental and emotional distress caused by the deprivation of procedural due process.

## II. FACTS

Two cases were consolidated for trial in *Carey*. One case was brought by Piphus, a freshman high school student, whom the principal observed passing an irregularly shaped cigarette back and forth with other students while on school premises. The principal approached the students and smelled what he believed to be the odor of burning marijuana. When the students became aware

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6. "The great fervor with which the elected representatives of the people decided to nationalize civil rights has been cooled by the breath of judicial construction." Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1357 (1952).

7. 435 U.S. 247 (1978).

8. The district court found that the defense of good faith immunity was not available to the school authorities because they failed to satisfy the two-pronged test of *Wood v. Strickland*, 420 U.S. 308, 322 (1975). Analyzing this finding, the Court of Appeals for the Seventh Circuit stated that "although there was no evidence that the defendants acted maliciously, and therefore the first test of *Wood v. Strickland* . . . was satisfied, the defendants 'should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs.'" 545 F.2d 30, 31 n.2 (7th Cir. 1976). Therefore, the second test enunciated in that decision was not met. Inasmuch as the school authorities did not question this finding on appeal, the Seventh Circuit decided that the district court's determination was conclusive. *Id.* at 31.

9. 435 U.S. at 256-57.

10. *Id.* at 266.

of the principal's presence, they threw the cigarette into a nearby hedge.<sup>11</sup> The principal took the students to the school's disciplinary office and directed the assistant principal to impose the usual twenty-day suspension for using drugs. The students, including Piphus, denied smoking marijuana, but to no avail. Meetings among Piphus, his mother, his sister, school officials, and legal aid representatives took place, but only to explain the reason for the suspension, not to determine whether Piphus had been smoking marijuana.<sup>12</sup> Piphus filed suit under 42 U.S.C. § 1983 and 28 U.S.C. § 1343<sup>13</sup> claiming he had been suspended without due process. After eight days of his suspension, he was readmitted under a temporary restraining order.<sup>14</sup>

In the case which was consolidated with Piphus' at trial, the student came to school wearing a small earring. The previous year the principal had issued a rule forbidding males to wear earrings because earrings were thought to denote membership in certain street gangs and increase the likelihood that gang members would terrorize other students. The student denied he was a member of a gang and refused to remove the earring, asserting that it was a symbol of his black pride.<sup>15</sup> After unsuccessful efforts to persuade the student to conform to the rule, school officials imposed a twenty-day suspension.<sup>16</sup> The student filed suit under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 alleging he had been suspended without procedural due process in violation of the fourteenth amendment.<sup>17</sup>

The district court<sup>18</sup> held that both students had been suspended without procedural due process<sup>19</sup> but declined to award damages without proof of injury. It decided that in the absence of any demonstration by the plaintiffs regarding the nature and extent of their injuries, a recovery would be too speculative.<sup>20</sup>

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11. *Id.* at 248-49.

12. *Id.* at 249.

13. Section 1343 is the jurisdictional counterpart to 42 U.S.C. § 1983 (1976). It gives federal district courts original jurisdiction to hear actions for damages or equitable relief, or to redress the deprivation of any right, privilege or immunity secured by the Constitution.

14. 435 U.S. at 250.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Piphus v. Carey*, No. 76-1649 (D. Ill. Nov. 5, 1975), *rev'd*, 545 F.2d 30 (7th Cir. 1976), *rev'd*, 435 U.S. 247 (1978).

19. The school officials did not challenge the holding that the students were denied due process. The sole issue before the Supreme Court involved the right to recover damages when procedural due process is denied.

20. 435 U.S. at 251-52.

The Court of Appeals for the Seventh Circuit<sup>21</sup> reversed and remanded stating that even if the district court found that the students' suspensions were justified, they were entitled to recover "non-punitive"<sup>22</sup> damages simply because they had been denied procedural due process. Such an award was justified on the notion that a certain amount of injury is inherent in the nature of the wrong just as it is inherent in the deprivation of other constitutional rights such as voting. According to the court, these damages should be awarded even if there is no proof of injury to the individual such as mental distress.<sup>23</sup> Additionally, it stated that the amount to be awarded when there is no proof of individualized injury is dependent on the nature of the wrong, yet it "should be neither so small as to trivialize the right nor so large as to provide a windfall."<sup>24</sup>

The Supreme Court reversed the Seventh Circuit, stating that neither the difficulty of proving the injury nor the likelihood of its occurrence was so great as to permit the award of compensatory damages without proof of actual injury.<sup>25</sup> The Court held the denial of procedural due process without proof of actual injury to be actionable for nominal damages only.<sup>26</sup>

### III. BACKGROUND OF SECTION 1983<sup>27</sup>

#### A. Legislative Intent

The events which gave rise to section 1983 were the extensive violations of human rights occurring in the South during the Re-

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21. 545 F.2d 30 (7th Cir. 1976), *rev'd*, 435 U.S. 247 (1978).

22. 545 F.2d at 31.

23. The students argued before the Supreme Court that injury should be presumed to occur with every denial of due process. They compared this injury to the intangible harm suffered in a case of defamation *per se*. *Id.* at 254. See generally D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES 509 (1973); W. PROSSER, TORTS § 111 (4th ed. (1971)); Yudof, *Liability for Constitutional Torts and The Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322,1366 (1976).

24. 545 F.2d at 32.

25. 435 U.S. 247 (1978).

26. *Id.* at 266.

27. The literature on section 1983 is enormous. See generally Bristow, § 1983: *An Analysis and Suggested Approach*, 29 ARK. L. REV. 255 (1975); Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1155-58 (1969); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974); Yudof, *supra* note 23; Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015 (1967); Developments in the Law, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Note, *Damages Under § 1983: The School Context*, 46 IND. L. REV. 521 (1971).

construction era. Through deliberate inactivity and disregard of the law, state officials fostered outrageous violations of personal rights, *e.g.*, whippings, robberies, and murders.<sup>28</sup> Against this background, section 1983 was passed, not only to alleviate the atrocities perpetrated by the Ku Klux Klan,<sup>29</sup> but also the intentional maladministration of the laws by state officials.<sup>30</sup> Since the offenses which culminated in the passage of section 1983 were of an extreme and callous nature, the existence of mental distress, in addition to physical injury, could readily be presumed. A much more difficult problem, however, and one with which the courts have consistently struggled, is determining the degree of mental and emotional distress which occurs as a result of a nonviolent abuse of an individual's constitutional rights, such as a denial of procedural due process. Because mental and emotional distress is a speculative injury and easily feigned, the courts have been reluctant to redress this variety of injury, fearing that trivial cases will tremendously increase the burden on the courts.<sup>31</sup>

It seems unlikely, however, that Congress intended section 1983 to apply to outrageous conduct alone. As one commentator has noted, "Severe deprivations can result from civilized conduct; without brutality or outrageousness, a system can function effectively for all but a class against which it displays prejudice."<sup>32</sup> Since section 1983 was intended to be the guardian against abuses perpetrated through official action and inaction, it has been urged that Congress intended to give a broad remedy for the violations of federally protected rights.<sup>33</sup> In *Imbler v. Pachtman*, for instance, Justice White noted in his concurring opinion: "It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed this was precisely the proposition

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28. See generally Developments in the Law, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977).

29. *Id.* at 1154.

30. CONG. GLOBE, 42d Cong., 1st Sess., pt. 1, 153 (1871) (remarks of Rep. Garfield). See Developments in the Law, *supra* note 28 at 1137-56, (excellent discussion of the outrages that precipitated enactment of section 1983).

31. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4, at 1031 (1956).

32. Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1507-08 (1969).

33. "As the language itself makes clear, the central purpose of § 1983 is to 'give a remedy to the parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.'" *Imbler v. Pachtman*, 424 U.S. 409, 433 (1976) (White, J., concurring) (emphasis in original) (citing *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). See *Monell v. Department of Social Serv.*, 436 U.S. 658, 685-86 n.45 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 231 (1970) (Brennan, J., concurring in part & dissenting in part).

upon which § 1983 was enacted."<sup>34</sup>

Since no provision for damages was included in section 1983, it has been difficult to determine the appropriate measure of recovery. In *Carey*, the Court interpreted the legislative history of section 1983 to mean that Congress intended no more formidable deterrent than that inherent in the award of compensatory damages.<sup>35</sup> If, as the Court reasons, the purpose of section 1983 was merely to compensate those individuals whose constitutional rights had been violated under color of state law, then the common law tort rules for damages will provide an appropriate solution. But the Court's conclusion as to the purpose of section 1983 is certainly not unanimously accepted, as evidenced both by the minority opinions of the Court throughout the years<sup>36</sup> and by several legal commentators.<sup>37</sup>

### B. *Monroe v. Pape*: The New Direction

The broad language and tremendous scope of section 1983 has undoubtedly led to much of the confusion and distortion in its application. After a period of limited application, the Supreme Court, in *Monroe v. Pape*,<sup>38</sup> breathed new life into section 1983. The plaintiff in *Monroe* alleged that thirteen police officers entered his home without warning and forced him and the other occupants to stand naked in the living room while the entire house was ransacked. Monroe was arrested, detained for ten hours at the police station, and later released without being charged. He thereafter filed suit against the officers under section 1983. Analyzing the legislative history of section 1983, Justice Douglas concluded the statute had three purposes:<sup>39</sup> (1) to "override certain kinds of state laws";<sup>40</sup>

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34. 424 U.S. at 442 (White, J., concurring). See Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 32 (1974).

35. 435 U.S. at 256-57.

36. See *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring).

37. See text accompanying notes 28-34 *supra*.

38. 365 U.S. 167 (1961), *overruled in part*, *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). In *Monell* the Court reexamined the scope of section 1983, focusing in particular on the issue of whether municipal corporations were to be included within the ambit of those who could be sued. After analyzing the legislative history, the Court concluded that local governments were intended to be included among the persons to which section 1983 applies, and accordingly overruled *Monroe* insofar as it held that local governments were immune from suit under section 1983. 436 U.S. at 700-01. While immunity was not a relevant issue in *Carey*, see note 8 *supra*, *Monell* is pertinent insofar as it briefly examines the legislative debates on section 1983, and concludes as did Justice Douglas in *Monroe* that it was a broad remedial act which was to be "liberally and beneficially construed." 436 U.S. at 684.

39. Justice Douglas indirectly stated a fourth purpose of section 1983 in *McNeese v. Board of Educ.*, 373 U.S. 668 (1963), in which he included the additional

(2) to provide "a remedy where state law was inadequate";<sup>41</sup> and (3) "to provide a *federal remedy* where the state remedy, though adequate in theory, was not available in practice."<sup>42</sup> It seemed that section 1983 would become a truly formidable weapon to deter unconstitutional infringements of an individual's rights.

Nevertheless, Justice Douglas introduced a major complication in *Monroe* which has had considerable impact on section 1983 litigation and has led to perplexing results. In a brief statement he asserted 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>43</sup> This appears to have been the principle upon which the Court in *Carey* concluded that the common law tort rules should provide the model for compensatory damages in section 1983 claims.<sup>44</sup> But this conclusion is questionable in light of the explicit purposes of section 1983, which Justice Douglas articulated in *Monroe v. Pape*,<sup>45</sup> and in light of the legislative intent.<sup>46</sup> The Supreme Court's decision in *Carey*, although consistent with earlier decisions by the Court, seems to be inconsistent with the spirit and purpose of the law,<sup>47</sup> and will, in many instances, leave the individual who seeks recovery for mental and emotional distress with a wholly inadequate remedy.

#### IV. STATE TORT REMEDIES

The inherent problem encountered in applying state tort reme-

purpose, "to provide a remedy in the federal courts supplementary to any remedy any State might have." *Id.* at 672. *See also* Note, *supra* note 32, at 1489-90.

40. 365 U.S. at 173.

41. *Id.*

42. *Id.* at 174 (emphasis added).

43. *Id.* at 187.

44. This confusing position is also reflected in the lower courts. *See, e.g.*, *Basista v. Weir*, 340 F.2d 74, 81 (3d Cir. 1965).

45. *See* text accompanying notes 39-42 *supra*.

46. *See* text accompanying notes 28-35 *supra*.

47. As Justice Brennan explained in *Adickes v. S.H. Kress & Co.*:

Section 1983 in effect authorizes the *federal courts* to protect rights "secured by the Constitution and laws" by invoking any of the remedies known to the arsenal of the law. Standards governing the granting of relief under § 1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law . . . . Of course, where justice requires it, federal district courts are duty-bound to enrich the jurisprudence of § 1983 by looking to the remedies provided by the States wherein they sit. . . . But resort to state law as such should be had only in cases where for some reason *federal remedial law* is not and cannot be made adequate to carry out the purposes of the statute.

398 U.S. at 231 (Brennan, J., concurring in part & dissenting in part) (citations omitted; emphasis added).

dies to federal rights is that two entirely different interests are involved; state tort law protects a private right while section 1983 protects a public right.<sup>48</sup> The primary emphasis of tort law is on shifting the loss from the individual who is injured to the individual who perpetrates the injury.<sup>49</sup> Its primary purpose is neither punishment nor deterrence, but compensation.<sup>50</sup> Justice Powell was correct when he noted in *Carey* that the fundamental principle of damages in Anglo-American law is that of compensation for plaintiff's injury which was sustained through defendant's breach of duty.<sup>51</sup> At the same time the underlying policy of section 1983 is quite different:

It seems clear, however, from the statements of a few legislators, the title of the Act itself, and the circumstances surrounding its passage that the Act's primary purpose was to enforce the fourteenth amendment by providing a *positive, punitive*, civil remedy for acts of racial discrimination. Thus an award of damages would depend not on the common-law test of whether a plaintiff had suffered a measurable physical or economic injury, but on whether the defendant's conduct came within the scope of actions that the statutes were intended to penalize. While traditional tort-law damages rules may be appropriate to accomplish some of the civil rights statutes' purposes, the tort-law rules do no [sic] allow full realization of those purposes because of their emphasis upon loss-shifting rather than upon punishment and deterrence.<sup>52</sup>

Common law tort remedies can often limit or prevent recovery under circumstances designed to be remedied by section 1983,<sup>53</sup> as Justice Harlan noted in his concurring opinion in *Monroe*:

There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional

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48. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring); *Monroe v. Pape*, 365 U.S. at 196 (Harlan, J., concurring).

49. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 25.1, at 1301 (1956); W. PROSSER, *supra* note 23, at 6.

50. W. PROSSER, *supra* note 23, at 9.

51. 435 U.S. at 254-55.

52. Comment, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015, 1026 (1967) (emphasis added). See also text accompanying notes 28-34 *supra*. The court of appeals in *Carey* held that if the school administrators could prove on remand that the students would have been suspended even if a proper hearing had been held, then the students would not be able to recover damages for the suspension, but only damages resulting from the deprivation of due process rights. 545 F.2d at 32.

Indeed the whole idea of punitive damages has been forcefully criticized as a windfall to the plaintiff who ought to receive compensation and no more. But this may be true only in a theoretical sense, since the plaintiff will probably use the damage award to defray the expenses of litigation which are generally not reimbursed by the ordinary compensatory award. But more importantly, punitive awards may be necessary to discourage official abuse of authority. See D. DOBBS, *supra* note 23, at 220.

53. See Yudof, *supra* note 23, at 1370.

right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land.<sup>54</sup>

If one of the primary purposes of section 1983 was deterrence,<sup>55</sup> applying the common law principles of tort will often frustrate this design because state tort remedies vary from jurisdiction to jurisdiction.<sup>56</sup> For instance, an individual who prevails in a section 1983 suit in Nebraska may be denied punitive damages because Nebraska law does not permit such awards.<sup>57</sup> On the other hand, if another party files a similar grievance in a state which permits recovery of punitive damages, the recovery would differ significantly in many cases, although the injury, physical or mental, was indistinguishable.

As Justice Harlan warned in *Monroe*: "It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection."<sup>58</sup> Additionally, total reliance on common law notions of tort is inconsistent with the legislative intent. When a federal statute provides redress for certain conduct, the nature of the remedy, though often left to judicial discretion, is a federal question, the answer to which should be derived from the policy underlying enactment of the statute.<sup>59</sup> As the Supreme Court stated in *Bell v. Hood*:<sup>60</sup>

Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.<sup>61</sup>

Furthermore, in *Sullivan v. Little Hunting Park, Inc.*,<sup>62</sup> the Court concluded that the "existence of a statutory right implies the exist-

54. 365 U.S. at 196 n.5 (Harlan, J., concurring).

55. *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring). See also *Nahmod*, *supra* note 34, at 10-11, 32.

56. To apply state common-law rules of damages to issues under the Civil Rights Act could, in certain circumstances, "create a legal hybrid of an incredible and unworkable kind." *Basista v. Weir*, 340 F.2d 74, 86 n.11, 87 (3d Cir. 1965). See note 91 *infra*.

57. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975).

58. 365 U.S. at 196 n.5 (Harlan, J., concurring).

59. *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

60. 327 U.S. 678 (1946).

61. *Id.* at 684.

62. 396 U.S. 229 (1969).

ence of all necessary and appropriate remedies."<sup>63</sup>

This is not to say that the common law principles of tort cannot serve a valuable purpose when actions are filed under section 1983. The rules of the common law may in certain instances provide an appropriate base upon which to build. Tort rules are anything but static and have demonstrated a high degree of adaptability to new issues.<sup>64</sup> In this regard, state tort remedies may be an instructive and valuable model. Federal courts can look to the common law principles of tort in order to supplement and enhance the federal remedy if for some reason the federal remedy is inadequate to satisfy the legislative intent.<sup>65</sup> Both remedies could be used in order to best serve the purpose of deterring unconstitutional infringements; but it should not be forgotten that the principle of damages for a federal right should be based on a federal rule that is responsive to the need when constitutional rights are violated.<sup>66</sup> When common law remedies are solely relied on as the Court in *Carey* proposes, they may become unpredictable.<sup>67</sup> While the state tort remedies can be a beneficial guide in certain instances, it is essential that the remedies for section 1983 violations do not derive entirely from state tort remedies, because the interests they protect, while often similar, may not be entirely complementary. For instance, in *Carey* the nature of the students' injuries, in addition to the pecuniary value of the days they were suspended, is injury to their dignity, loss of esteem and/or damage to their reputation. Since mental and emotional distress is not a readily detectable loss, tort law may prevent recovery. Still, if the purpose of section 1983 is to deter violations of constitutional rights, an award of damages should depend not on whether the plaintiff suffered harm but on whether the defendant acted in a manner intended to be deterred by the act.<sup>68</sup> The words of Justice Brennan in *Adickes v. S.H. Kress & Company*<sup>69</sup> are instructive:

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63. *Id.* at 239.

64. W. PROSSER, *supra* note 23, at 3.

65. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 231 (1970) (Brennan, J., concurring in part & dissenting in part).

66. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969).

67. See *Nahmod*, *supra* note 34:

To the extent that tort concepts of duty, proximate cause, and cause in fact, as well as various defenses such as consent may assist a court by analogy in deciding 1983 cases, well and good. But courts in 1983 cases should be careful not to let tort law alone determine 1983 liability; for not only possible different purposes, but different interests as well are *usually* at stake.

*Id.* at 32-33 (emphasis added).

68. Comment, *supra* note 52, at 1023, 1025. Note that the Court disavowed a deterrence purpose for section 1983 in *Carey*. 435 U.S. at 256.

69. 398 U.S. 144 (1970).

In other types of cases, however, the common law of torts may be divided on important questions of defenses and relief, or it may be inadequate to carry out the purposes of the statute. Thus the common law is not an infallible guide for the development of § 1983. In particular, denial of equal protection on the basis of race was the central evil that § 1983 was designed to stamp out. Where that is the basis for recovery, relief should not depend on the *vagaries of the general common law* but should be governed by uniform and effective federal standards.<sup>70</sup>

Congress enacts legislation to remedy the deficiencies of pre-existing law including the common law.<sup>71</sup> A primary purpose of section 1983 was to interpose the federal government between the states and the people as guardian and guarantor of federal rights.<sup>72</sup> The states, applying their common law, were either unwilling or incapable of remedying the widespread violations of human rights.<sup>73</sup> State officers were antagonistic towards vindicating federally created rights.<sup>74</sup> Furthermore, there was an inherent potential for bias when state officials were called upon to review the actions of other state officials.<sup>75</sup>

Since the purpose of section 1983 was to provide the necessary means to protect constitutional rights,<sup>76</sup> the path the Court has elected to pursue in *Carey*—reliance on the tort remedies of the common law to redress constitutional infringements—will prove to be an inadequate remedy in many situations. There is no better illustration of the problems encountered when common law remedies are the sole relief than in the area of recovery for emotional and mental distress.

## V. MENTAL AND EMOTIONAL DISTRESS

One court has described the state of the law regarding recovery for mental or emotional distress in the following manner: "In respect to the right to recover damages for personal injuries result-

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70. *Id.* at 232 (Brennan, J., concurring in part & dissenting in part) (emphasis added).

71. *Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting).

72. *Mitchum v. Foster*, 407 U.S. 225, 239, 242 (1972).

73. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; *i.e.*, the full and complete administration of justice in the courts.

CONG. GLOBE, 42d Cong., 1st Sess., pt. 2, 653 (1871) (remarks of Senator Osborn).

74. *Mitchum v. Foster*, 407 U.S. at 242.

75. See Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1358 (1970).

76. See *Monroe v. Pope*, 365 U.S. at 196 (Harlan, J., concurring).

ing from an emotional or mental disturbance, it has been said that 'the authorities are in a state of dissension probably unequalled in the law of torts.'<sup>77</sup> This observation appears to adequately reflect the state of turmoil and confusion which exists today among state jurisdictions.<sup>78</sup> There are innumerable court positions on this topic, none of which harmonize into any discernible pattern.<sup>79</sup>

The courts have been reluctant to redress intangible injuries for various reasons:<sup>80</sup> the notion that the injury is something metaphysical, too subtle and speculative to be capable of measurement by any standard known to the law;<sup>81</sup> the burden on society;<sup>82</sup> and the fear of false and trivial claims.<sup>83</sup> Moreover, there are typically difficulties of proof in such cases. Mental suffering may be easily feigned and extremely difficult to detect, so the individual's interest must be balanced against the burden on society of distinguishing those who are actually injured from the impostors. Perhaps the best explanation for refusing to properly compensate for these injuries is the following: "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be."<sup>84</sup> Whatever the reason, the right of freedom from emotional distress has received

77. *Emden v. Vitz*, 88 Cal. App. 2d 313, 316, 198 P.2d 696, 698 (1948).

78. J. STEIN, *DAMAGES AND RECOVERY* § 30, at 47-48 (1972).

79. For example, some jurisdictions follow the scientifically discredited rule that physical contact must occur in order for emotional distress, and hence a damage award, to result. See H. OLECK, *DAMAGES TO PERSONS AND PROPERTY* § 177, at 252.5 to .6 (1961).

80. RESTATEMENT (SECOND) OF TORTS § 436A, Comment b (1965), offers three explanations:

One is that emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles. It is likely to be so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for it would unduly burden the courts and the defendants. The second is that in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned, depending, as it must, very largely upon the subjective testimony of the plaintiff; and that to allow recovery for it might open too wide a door for false claimants who have suffered no real harm at all. The third is that where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance.

*Id.* at 461-62.

81. W. PROSSER, *supra* note 23, at 50.

82. 2 F. HARPER & F. JAMES, *supra* note 49, § 18.4, at 1032.

83. *Id.* at 1032, 1034.

84. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

wholly incomplete protection by the law.<sup>85</sup>

In *Carey* the Court found that courts of law are capable of making accurate estimations of actual injury in order to afford meaningful compensation.<sup>86</sup> To a limited extent a court may be able to evaluate a student's pecuniary loss by looking at such factors as the cost of securing private education for the period of the suspension, the additional cost of transportation to another school, and the loss of earnings due to late graduation. Yet the problem of recovery for mental and emotional distress poses an entirely different question. This is an area of unparalleled confusion in the law.<sup>87</sup> To a large extent much of the confusion is due to the imprecise nature of the injury and the immense range of injuries included in the category,<sup>88</sup> such as fright, grief, shame, humiliation, embarrassment, anger, chagrin and disappointment.<sup>89</sup> Where the spectrum of compensable injuries among various jurisdictions includes everything from petty annoyances to permanent, disabling injury, confusion is not only unavoidable but highly predictable.<sup>90</sup> It is difficult to find a completely satisfactory scale by which the harm caused by emotional distress can be measured. How, for instance, can one place monetary value on a stigmatization? But, the remedy for federally created rights should not vary with the geography—a highly probable occurrence if common law remedies are applied or adapted to vindicate federal rights.<sup>91</sup> The measure of

85. 2 F. HARPER & F. JAMES, *supra* note 49, § 18.4, at 1031.

86. 435 U.S. at 259. The Court in *Carey* cites the language of Justice Harlan in an earlier case for the proposition that courts of law are capable of making the types of judgments necessary to accord meaningful compensation for the invasion of constitutional rights. But Justice Harlan was speaking of fourth amendment rights, and he even stated that "[t]he same . . . may not be true with respect to other types of constitutionally protected interests." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 409 n.9 (1971) (Harlan, J., concurring).

87. Annot., 64 A.L.R.2d 100 (1959) (discussion of the numerous court positions on the right to recover for emotional disturbance).

88. 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 43a, at 52 (9th ed. 1912).

89. RESTATEMENT (SECOND) OF TORTS § 46, Comment j (1965).

90. J. STEIN, *supra* note 78, § 32, at 50.

91. The fear of unequal protection of the laws from state to state appears to have been a crucial consideration behind the passage of section 1983. *See, e.g., Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965); *Chevigny, supra* note 75, at 1357. In *Basista*, the court stated:

We believe that the benefits of the [Civil Rights] Acts were intended to be uniform throughout the United States, that the protection to the individual to be afforded by them was not intended by Congress to differ from state to state, and that the amount of damages to be recovered by the injured individual was not to vary because of the law of the state in which the federal court suit was brought. Federal common law must be applied to effect uniformity, otherwise the Civil

damages under section 1983 should be a uniform federal remedy, available whenever a federal right is impaired.<sup>92</sup>

Justice Powell was correct in *Carey* when he suggested that damages for mental and emotional distress should not be presumed to flow from every deprivation of procedural due process.<sup>93</sup> Indeed, there may be instances in which the individual in fact experiences no indignity or distress from the violation, either because he or she is unaware that it constitutes a violation of a constitutional right or because it is so petty that it goes unnoticed, as when a student is unjustifiably sent home one-half hour early from school. If the purpose of section 1983 is compensation as the Court concludes in *Carey*,<sup>94</sup> the harm to the individual is only nominal. However, if the purpose of section 1983 is deterrence, a reasonable assumption in light of the statute's background, then the Court's focus should be on determining what remedy will adequately deter further violations. Nominal damages would seem to be no more than a token gesture, a recognition of the legal right, but hardly sufficient to deter further transgressions.<sup>95</sup>

The Court in *Carey* seems to believe that there will be no difficulty in producing evidence of mental and emotional distress caused by the denial of procedural due process: "Distress 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>96</sup> But the effects of mental and emotional distress may not be manifest for a long period, even though they are substantial, because physically undetectable harm may result.<sup>97</sup> The effect of this intangible injury may be so subtle and indirect that it is impossible to trace its effects directly. And, if the federal remedy is

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Rights Acts would fail to effect the purposes and ends which Congress intended.

340 F.2d at 86.

92. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 409-11 (1971) (Harlan, J., concurring); *Martin v. Duffie*, 463 F.2d 464, 467 (10th Cir. 1972). The advantages of a uniform remedy have been well documented by legal scholars. See, e.g., Chevigny, *supra* note 75; Comment, *supra* note 52. See also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 231-33 (1970) (Brennan, J., concurring in part & dissenting in part).

93. 435 U.S. at 263.

94. 435 U.S. at 254-57.

95. However, in addition to nominal damages, 42 U.S.C. § 1988 (1976) provides that in a section 1983 action, the court in its discretion may allow the prevailing party reasonable attorney's fees as part of the costs. This would appear to serve as an inducement for those individuals who are reluctant to file an action due to the tremendous costs involved. Conversely, it may serve as a deterrent to public officials who might otherwise expect only minimal reprimand for their actions. See *Hutto v. Finney*, 98 S. Ct. 2565 (1978).

96. 435 U.S. at 263-64.

97. See T. SEDGWICK, *supra* note 88.

to be grounded in state common law tort rules, proof of emotional distress, absent physical manifestation of injury, may be insufficient to state a cause of action.<sup>98</sup> The variations in remedies for mental distress among the states point up the necessity of a uniform federal remedy, to be developed by the federal courts, if the purpose of section 1983 is to be fulfilled. Otherwise, recovery for violation of the right to procedural due process will differ, depending on the state in which the violation occurred.

## VI. CONCLUSION

Perhaps ultimately the damage issue will have to be resolved not by the judiciary but by the legislature. Congressional action to make remedies uniform would certainly appear to be the most satisfactory solution. For instance, the legislature could provide for a system of liquidated damages to redress deprivations of rights which do not result in physical injury. The amount of damages would be based on the reasoning of the court of appeals in *Carey*, *i.e.*, it "should be neither so small as to trivialize the right nor so large as to provide a windfall."<sup>99</sup> The individual would be required to substantiate any additional damages beyond this predetermined amount. This would have the advantage of deterring repeated or negligent abuses of authority without unnecessarily inhibiting the discretion an official must exercise in the performance of his or her duties, particularly in the context of school administration. Alternatively, the legislature might provide for an ombudsman to deal with section 1983 legislation, thus providing the necessary resources to vindicate individual rights and to more adequately control abuses.

The decision in *Carey* may seriously limit remedies under section 1983 for individuals who suffer mental distress as a result of an official's abuse of authority. Those individuals who have had their constitutional rights infringed may find themselves with a perfectly legitimate right but a wholly inadequate remedy. If one of the Court's missions is to fill in the gray areas of the law by directing the law along lines which will insure that federal rights are realities not promises, then the decision in *Carey* has cheated us.

*David J. Dempsey '80*

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98. See notes 77-91 & accompanying text *supra*.

99. 545 F.2d at 32. See note 24 & accompanying text *supra*.