

*Symposium on Federal Jurisdiction and Procedure*

## Measuring Damages for Violations of Individuals' Constitutional Rights

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## MEASURING DAMAGES FOR VIOLATIONS OF INDIVIDUALS' CONSTITUTIONAL RIGHTS

### INTRODUCTION

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>1</sup> the United States Supreme Court considered an alleged fourth amendment violation committed by federal agents operating under color of federal law.<sup>2</sup> In reversing the district and appeals court dismissal of the case for lack of jurisdiction, the Court held that the complaint stated a cause of action under the fourth amendment and that money damages were an appropriate remedy.<sup>3</sup> As a result of *Bivens* the fourth amendment (and arguably other constitutional guarantees) can be used as the basis for a damage suit against federal officials who violate an individual's constitutional rights while acting under color of federal law.

Because *Bivens* creates the basis for a damage suit against federal officials, a method of measuring damages resulting from violations of constitutional rights must be developed. An analagous cause of action, 42 U.S.C. § 1983,<sup>4</sup> has been in existence for some time. Presumably, cases filed under the *Bivens* rule will be similar to those filed under § 1983 and the courts will apply § 1983 damage valuation standards to the new cause of action created in *Bivens*.<sup>5</sup>

The purpose of this note is to investigate the sufficiency of the damage award system currently in use. Included is a critical analysis of proposed systems for improving the ascertainment of compensation for civil rights violations. After a brief discussion of the value of retaining the traditional civil jury, a new proposal is offered which permits the jury to treat violations of constitutional

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1. 403 U.S. 388 (1971).

2. *Id.* at 389-90.

3. *Id.* at 397.

4. § 1983 provides that:

Every person who under the color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects or causes to be subjected any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party involved in any action of law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1974).

5. The essential difference in the cases would lie in the source of authority cloaking the defendant: the defendant under the *Bivens* cause of action would be operating under color of federal law, whereas under § 1983 he would be operating under color of state law.

6. See note 5 *supra*.

rights as causes of action separate and distinct from traditional torts and compensate them accordingly.

#### CURRENT DAMAGE STANDARDS

##### *Compensatory Damages*

When hearing cases that allege a violation of constitutional rights, courts must develop damage measurement standards. Since the cases filed under the new cause of action will be similar to those currently filed under 42 U.S.C. § 1983, it is likely that the courts will look to these cases for guidance.<sup>6</sup> However, since possible constitutional rights violations are not separated from other causes of action (*i.e.*, false imprisonment, assault, battery) in the § 1983 cases, it is difficult to discern a damage measurement standard from them. Consequently, it cannot be determined if the violation itself has been compensated. Even when it appears that the violation has been compensated, it is impossible to determine what standards were used in arriving at a final award.

In discussing the § 1983 cases, the first problem encountered is determining whether the constitutional rights violation present in the action was considered and compensated. The problem arises because the final awards contain no mention of the fact that plaintiff's constitutional rights were violated. The case of *McArthur v. Pennington*<sup>7</sup> is illustrative. In this case plaintiff proved that he was beaten by police officers during an illegal arrest.<sup>8</sup> Present in this case were the traditional torts of false arrest and battery. Plaintiff also suffered a violation of his fourth amendment rights and a deprivation of the right to be free from unwarranted attacks upon the integrity of his person. The final award consisted of \$3401.49 for out-of-pocket expenses and lost wages and \$1698.51 for physical and mental suffering, humiliation and injury to reputation.<sup>9</sup> From this judgment it cannot be determined whether the damages included an award for the violation of plaintiff's constitutional rights. If in fact the violation was considered, it is impossible to determine what standards were used to award damages.<sup>10</sup>

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7. 253 F. Supp. 420 (E.D. Tenn. 1963).

8. *Id.* at 428.

9. *Id.* at 430.

10. For other cases in which it was impossible to determine what damage standards were used, see *Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973); *Stolberg v. Members of Bd.*

The damage awards in § 1983 cases mirror the problems created by the merger of traditional torts and violations of plaintiff's constitutional rights. The plaintiff in *Arroyo v. Walsh*<sup>11</sup> received \$2500 for a broken nose sustained during a beating administered by police officers during a false arrest.<sup>12</sup> The plaintiff in *Jackson v. Dukes*<sup>13</sup> received \$5000 for similar injuries suffered under comparable circumstances, and the disparity cannot be reconciled.<sup>14</sup> It is impossible to discover if the difference in the awards stems from an attempt by the *Jackson* jury to compensate plaintiff for the violation of his constitutional rights.

A comparison of these awards with the award returned in *Collum v. Butler*<sup>15</sup> clearly presents the problems encountered in attempting to discover a damage standard for constitutional rights violations. In the *Collum* case, the plaintiff proved that he received a beating during a valid arrest.<sup>16</sup> In contrast to *Arroyo* and *Jackson* only the tort of battery and a deprivation of plaintiff's right to preservation of the physical integrity of his person were violated. Yet the jury returned a verdict of \$17,500.<sup>17</sup> If the jury was attempting to compensate plaintiff for the violation of his constitutional rights it failed; the judge refused to accept the verdict, claiming it shocked the "judicial conscience."<sup>18</sup> If the judge in *Collum* believed the *Arroyo* and *Jackson* cases to be comparable, then he clearly did not attach monetary value to the deprivation of liberty without due process. Plaintiffs in *Arroyo* and *Jackson* were falsely imprisoned and should have received compensation for this wrong in and of itself. Confusion such as this arises because it is unclear 1) which wrongs were compensated, and 2) whether the constitutional rights violations were considered as separate compensable acts.

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of Trustees for State Colleges, 474 F.2d 485 (2d Cir. 1973); *Horton v. Orange County Bd. of Educ.*, 464 F.2d 763 (8th Cir. 1971); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966); *United States ex rel Neal v. Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972); *McBeth v. Bd. of Educ.*, 300 F. Supp. 1270 (E.D. Ark. 1969); *Antelope v. George*, 211 F. Supp. 657 (D. Idaho 1962).

11. 317 F. Supp. 869 (D. Conn. 1970).

12. *Id.* at 873.

13. 259 F.2d 3 (5th Cir. 1958).

14. *Id.* at 7.

15. 288 F. Supp. 918 (N.D. Ill. 1968), *aff'd*, 421 F.2d 1257 (7th Cir. 1970).

16. *Id.* at 919.

17. *Id.* at 920.

18. *Id.*

There are occasions when an award will specifically state that damages for constitutional rights violations present in the action are included in the final award. However, even when this is done, there is no indication of the standards applied to the damage assessment. In *Rue v. Snyder*<sup>19</sup> the plaintiff recovered \$650 for false arrest, false imprisonment and the deprivation of his liberty without due process of law.<sup>20</sup> The final award explicitly stated that damages for the violation of plaintiff's constitutional liberty were included in the \$650 recovery.<sup>21</sup> There was, however, no proportionate breakdown in the final award isolating damages for the constitutional rights violations. In addition, there was no indication of the damage measurement standards which were applied.<sup>22</sup>

The lack of distinction between a violation of plaintiff's constitutional rights and other causes of action present in a case is particularly critical when no strong traditional cause of action is present. When a case consists solely of a violation of plaintiff's constitutional rights, there is a strong possibility that the action will be dismissed as de minimis.<sup>23</sup> In such a case not only is plaintiff unable to be compensated for the violation of his rights, but he loses the opportunity to present his case in court. For example, in *Northern v. Nelson*<sup>24</sup> the plaintiff alleged and proved that the defendant wrongfully confiscated plaintiff's newspapers.<sup>25</sup> An apparent conversion of the newspapers (value of \$1.05) and a first amendment violation were present.<sup>26</sup> Yet the action was dismissed as de minimis;<sup>27</sup> the lack of a strong traditional cause of action prevented the first amendment violation from being considered.<sup>28</sup>

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19. 249 F. Supp. 740 (E.D. Tenn. 1966).

20. *Id.* at 743.

21. *Id.*

22. For other cases in which there is no indication of the damage measurement standards applied, see *Sexton v. Gibbs*, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1002 (1972), *Rue v. Snyder*, 249 F. Supp. 740 (E.D. Tenn. 1966).

23. De minimis may be defined as a very small or trifling matter, *BLACK'S LAW DICTIONARY* 482 (Rev. 4th ed. 1968).

24. 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971).

25. 315 F. Supp. at 688.

26. 448 F.2d at 1266-67.

27. *Id.*

28. For other cases where the constitutional rights violation was dismissed as de minimis because of the lack of a strong traditional cause of action, see *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970); *Arunga v. New York City Dept. of Personnel*, 342 F. Supp. 983 (S.D.

Without a clear distinction between an alleged violation of plaintiff's constitutional rights and the other causes of action present in a given case, the consideration and awarding of damages for these violations will continue to be nonexistent or inadequate. A survey of existing case law indicates that adequate damage standards cannot be developed until it is recognized that there exists a possibility of an award of damages for constitutional rights violations separate and distinct from awards for other injuries.

### *Nominal and Punitive Damages*

As is true with compensatory damages, the award of nominal and punitive damages suffers from the lack of a clear distinction between the constitutional rights violation proved by plaintiff and other torts present in the case. Most courts presume nominal damages if the plaintiff can prove a violation of his constitutional rights. An expression of this view can be found in *United States ex rel. Mottley v. Rundle*,<sup>29</sup> a false imprisonment case, wherein the court stated: "Constitutional rights of a citizen are so valuable that an injury is presumed to flow from the deprivation itself."<sup>30</sup>

There are courts which reject this position and hold that proof of a violation of one's constitutional rights leads to no conclusion concerning the existence of damages. In *Jones v. Wittenberg*<sup>31</sup> the court granted plaintiff an injunction when he proved that the conditions of the jail in which he was legally confined violated the eighth amendment prohibition against cruel and unusual punishment.<sup>32</sup> However, absent proof of actual damages the court refused to award even nominal damages.<sup>33</sup>

The *Mottley* holding is clearly the more satisfactory of the conflicting views. While it is often difficult to present proof of measurable economic or physical loss resulting from a violation of one's

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N.Y. 1972); *Cordova v. Chonko*, 315 F. Supp. 953 (N.D. Ohio 1970); *Lowenstein v. McLaughlin*, 295 F. Supp. 638 (D. Mass. 1969). *But see* *Chubbs v. City of New York*, 324 F. Supp. 1183 (E.D.N.Y. 1971).

29. 340 F. Supp. 807 (E.D. Pa. 1972).

30. *Id.* at 810-11. For other cases applying the same rationale, *see* *International Prisoners Union v. Rizzo*, 356 F. Supp. 806 (E.D. Pa. 1973); *Speaks v. McGregor*, 355 F. Supp. 1129 (W.D. Va. 1973); *Washington v. Official Court Steno.*, 251 F. Supp. 945 (E.D. Pa. 1966).

31. 323 F. Supp. 93 (N.D. Ohio), *supplemented*, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972).

32. 330 F. Supp. at 721.

33. *Id.*

constitutional rights, this difficulty should not preclude recovery. If a jury finds that a violation of plaintiff's constitutional rights occurred, the award of damages should depend solely upon its deliberations. If it believes that the violation was minimal the jury should be permitted to return a minimal award. To require that the plaintiff prove actual damage before allowing any award is to preclude recovery in many cases and to deny the inherent value of constitutionally guaranteed rights.

Punitive damages are traditionally awarded for engaging in conduct so far removed from social standards that the jury believes that the defendant acted maliciously, willfully or wantonly.<sup>34</sup> If punitive damages are to be awarded there must be a finding that in fact plaintiff was harmed by defendant's acts; in other words, punitive damages must be supported by an award of nominal or compensatory damages.<sup>35</sup> When punitive damages have been awarded in cases containing both proven violations of plaintiff's constitutional rights and other proven injuries, it is impossible to determine whether the award was made for the traditional injuries or the rights violations.<sup>36</sup> If the purpose of punitive damages is to punish defendant's actions, it is not apparent why in cases involving violations of plaintiff's constitutional rights it is necessary to prove physical or economic damage before punitive damages can be awarded. If a jury decides that the violation of plaintiff's rights was minimal but occurred in such a manner as to require punishment or deterrence, its award of damages should not be disturbed.

### *Single Damage Award for Constitutional Rights Violations*

To improve the award of damages for violations of a plaintiff's constitutional rights in cases filed under § 1983 and the *Bivens* cause of action it is suggested that the traditional categories of

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34. See *Stolberg v. Members of Bd. of Trustees for State Colleges*, 474 F.2d 489 (2d Cir. 1973); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970); *Caplin v. Oak*, 356 F. Supp. 1250 (S.D.N.Y. 1973); *Urbano v. McCorkle*, 334 F. Supp. 161 (D.N.J. 1971), *supplemented*, 346 F. Supp. 51 (D.N.J. 1972); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967).

35. *Ollier v. Lake Central Airlines, Inc.*, 423 F.2d 554 (6th Cir. 1970); *Worden v. Tri State Ins. Co.*, 347 F.2d 336 (10th Cir. 1965).

36. See *Gieringer v. Center School Dist. No. 58*, 447 F.2d 1164 (8th Cir. 1973); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Sandborn v. Wagner*, 354 F. Supp. 291 (D. Md. 1973); *Gaston v. Gibson*, 328 F. Supp. 3 (E.D. Tenn. 1969); *Brooks v. Moss*, 242 F. Supp. 531 (W.D.S.C. 1965).

compensatory, nominal and punitive damages be abolished. Constitutional rights are difficult to value since the violation of these rights seldom creates measurable economic or physical loss. In a case involving a constitutional rights violation, the jury attempts to place a value on the damage suffered by the plaintiff because one of his constitutional rights was violated. The jury should separate this consideration from its deliberations concerning damage caused by traditional wrongs also present in the case.

It is maintained that the most accurate award for damages resulting from a violation of plaintiff's constitutional rights will result from a consideration of the circumstances surrounding each case. An attempt to divide the damage question into compensatory, nominal and punitive damages can only create confusion. Dealing with violations of constitutional rights presents sufficient conceptual difficulties without requiring that the final damage award be structured in traditional damage terms. By allowing the final award to reflect the jury's deliberations as to the value of the right in question, the extent of the violation, the circumstances surrounding the violation and the defendant's culpability, the plaintiff's interests will be more adequately protected.

Having investigated current damage awards in § 1983 cases, it is apparent that there is a definite need for improving the damage award system when the plaintiff pleads and proves violations of his constitutional rights. The primary difficulty with the present method is in the merger of the rights violations and other wrongs present in the case. This leads to a situation where the rights violation is either ignored or is compensated without reference to established damage standards. Various proposals have been presented to improve the damage award system for constitutional rights violations cases. Among these are a system of liquidated damages, a schedule of benefits to be applied to proven rights violations and the removal of rights violation cases to a quasi-judicial hearing board for extra-judicial determination of facts and damages. These plans all suffer from the common defect of removing in whole or in part the decision of damages from the jury.

#### PROPOSED SYSTEMS OF DAMAGE VALUATION AND AWARD

##### *Liquidated Damages*

One proposed solution to the damage award problem in cases

involving constitutional rights violations would require Congress to enact legislation creating a liquidated damage award for all proven rights violations.<sup>37</sup> Under this proposal, if the plaintiff proved that his constitutional rights were violated he would be entitled, at a minimum, to the congressionally mandated recovery. If the plaintiff could prove damages beyond the minimum award he would be entitled to unlimited recovery.<sup>39</sup> The mandated minimum recovery would serve as the standard recovery for constitutional rights violations of all types.

This plan does not deal with the question of the merger of the rights violations with other traditional wrongs present in the action. There is no insight offered to the jury into the problem of deciding whether a rights violation is present in any given case. Further, it is not clear whether the mandated minimum would be the minimum award for all damages or the minimum for the violation of constitutional rights.

Beyond these initial conceptual difficulties, there are many practical problems involved with the implementation of this proposal. Formulation of proper minimum awards would create serious legislative difficulties. The necessary congressional debate on the required legislation would place the problem of valuing individual rights into the political arena. While it is true that legislatures often debate personal rights and freedoms, the resulting legislation is general in nature and allows for application on a case by case basis.<sup>40</sup> The creation of a general constitutional rights violation damage award would depart from this pattern. In essence, Congress would substitute its judgment for that of the jury. Congress would deliberate and decide on a value for the various constitutional rights, and this value would be imposed on all future cases. There is no provision for the compensation of technical violations of constitutional rights with less than the mandated award. Finally, if the jury felt that the facts did not warrant an award of the mandated minimum amount, the inflexibility of the minimum recovery plan could well prompt a refusal to find that a constitutional right was violated.

The value of a constitutional right must depend upon the cir-

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37. Satler & Kalom, *Damages for False Arrest*, 6 TRIAL 41, 45 (June-July 1970).

38. *Id.*

39. *Id.*

40. *E.g.*, Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000a-2000h-6 (1974).

cumstances surrounding each individual case if a violation of that right is to be properly compensated. While the minimum recovery proposal might encourage prospective plaintiffs to file actions in an attempt to vindicate their rights, it gives no assurance that the right will be properly considered and compensated.

### *Schedule of Damages*

A second proposal to improve the award of damages for violations of individual constitutional rights requires the creation of a workmen's compensation type schedule of benefits.<sup>41</sup> Under this plan Congress would create a comprehensive list of possible violations of constitutional rights and would mandate a minimum and maximum recovery for each.<sup>42</sup> The exact amount of recovery would depend upon the facts of each case and would be determined by the trier of fact.<sup>43</sup> Although similar to the liquidated damages proposal, this plan would include mandated maximum recoveries and would limit recovery to those violations included within the schedule of benefits.<sup>44</sup>

In addition, however, Congress would not only legislate the amount of recovery possible but would, in effect, limit plaintiff's damage remedy for rights violations to only those types of violations it chose to compensate. Thus, a successful damage action for an alleged violation of constitutional rights would be dependent upon the will of Congress. If Congress failed to include the conduct alleged on the schedule of benefits, recovery would be impossible. Since damages serve useful punishment and deterrence functions in addition to compensating victims for their injuries, the limitation of the damage action would weaken the citizens' position with respect to the protection of their constitutional rights.

The minimum and maximum recoveries also preclude the jury from exercising full discretion in its deliberation of damages for constitutional rights violations. Furthermore, no provision is made for the possibility of a technical violation occurring in circumstances which do not make it worthy of the minimum damage recovery. The essence of the plan is a substitution of congressional judgment for

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41. Roche, *A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeal Board*, 30 WASH. & LEE L. REV. 223 (1973).

42. *Id.* at 225.

43. *Id.* at 228.

44. *Id.*

that of the jury. Thus, beyond limiting the type of violations for which damages may be awarded, the plan gives no guidance to the jury to aid it in finding that a violation occurred; nor does it aid it in developing standards to apply to the problem of reviewing the circumstances of each given violation to determine the exact damage recovery. The establishment of minimum and maximum limits on the damage recovery neither aids the decision making process nor improves the final award. It only places unnecessary and undesirable limits on the deliberations of the jury.

The entire subject of damages for violations of constitutional rights does not seem suited to a mechanical approach. While it is possible that medical proof concerning injury and extent of disability may be sufficiently standardized to allow creation of a schedule of benefits applicable to physical injury cases, violations of constitutional rights are not so standard. Each violation is dependent upon the sum of the circumstances surrounding the violation and must be compensated as such. An ad hoc determination of damages is necessary to provide the best award.

#### *Quasi-Judicial Hearing Board*

A third proposal for improving the method of compensating violations of constitutional rights was presented by Mr. Chief Justice Burger in his dissent to the *Bivens* decision.<sup>45</sup> According to the Chief Justice, Congress should remove jurisdiction over violations of constitutional rights from the courts and place it in a quasi-judicial hearing board.<sup>46</sup> This board would be staffed by attorneys, and its awards would be in lieu of any judicial proceedings.<sup>47</sup>

Under this proposal the board would create its own procedural

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45. 403 U.S. 422 (1971). The purpose of Chief Justice Burger's suggestion is to create an alternative to the exclusionary rule. According to the Chief Justice, a quasi-judicial review would be more effective than the exclusionary rule in that it would directly penalize police for violating a citizen's rights. Further, it would be available to all persons whose rights have been violated, instead of only to those persons whose cases eventually reach trial. However, allowing suits for money damages would accomplish the same objectives as the quasi-judicial hearing boards and would have the advantage of not requiring an outlay of funds to create the mechanics of the Chief Justice's system. The suits could be filed within the existing court system. See also Berch, *Money Damages for Fourth Amendment Violations by Federal Officials*, 1971 LAW & SOCIAL ORDER 43.

46. 403 U.S. 422 (1971) (Burger, C.J., dissenting).

47. *Id.* at 423.

rules,<sup>48</sup> thus freeing them from the burdens of the normal rules of procedure. Among these are the granting of immunity to certain classes of individual and institutional defendants, the problem of providing the plaintiff with defendants to be sued and the practice of allowing mitigation of damages by considering the plaintiff's moral position in the case.<sup>49</sup> The awards of this board would be subject to judicial control through appellate procedures and court enforcement of board awards.<sup>50</sup>

The Burger proposal can be criticized on several grounds. First, the subject of constitutional rights violations should not be removed from the judicial sphere. Traditionally, specialized hearing boards have been created when a high level of expertise in a particular field was necessary to render adequate decisions.<sup>51</sup> The subject of damages for violations of constitutional rights is not a subject requiring specialized knowledge. The creation of a specialized hearing board would isolate the entire proceeding from community standards and values. Although greater potential for standardized awards is present in this plan, the quasi-judicial hearing boards would not improve the adequacy of the awards.

In addition, it is not clear what portion of the case would be removed to the hearing board. If the board is only to hear the case for determination of the question of damages for violations of constitutional rights, the entire action would have to be re-tried in court to determine the outcome of the traditional causes of action present. This is needless duplication of effort. The courts are equipped to continue hearing cases dealing with constitutional rights violations. They are the proper place for the action to be heard.

#### RETENTION OF THE JURY FOR DAMAGE VALUATION

The major criticism of the Chief Justice's proposal, like that of the other proposals discussed, is that it removes the question of damage valuation from the jury. It is the contention of this note that in addition to stressing the independent nature of violations of constitutional rights, the question of damage valuation must rest

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48. *Id.* at 423-24 n.7.

49. *Id.* at 423.

50. *Id.*

51. R. LORCH, *DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW* 33 (1969); P. WALL, *ADMINISTRATIVE LAW* 5-8 (1963).

entirely with the jury. Only the jury can properly consider the factors involved in such a violation and return a verdict which is both adequate and acceptable to both parties involved and society in general.

There is a long tradition of allowing the jury to value damages involved in a suit.<sup>52</sup> The jury system was considered so important by our Founding Fathers that a guarantee of a jury trial was included in the Constitution.<sup>53</sup> In addition, the jury is the best representative of the people. Judges and attorneys (including attorneys serving as hearing officers) are not representative of the average citizen, because they are trained and educated far beyond the community norm.<sup>54</sup> By virtue of this training they view problems from a different perspective than the average citizen. Congress and other legislatures are also removed from the public.<sup>55</sup> Each legislator filters community values through a framework of overriding commitments and priorities. The need to satisfy a broad base of the population while not antagonizing the power structure forces the legislator to consider factors beyond the narrow question of awarding damages for violations of individual rights. The legislature is separated from the community by time, distance and bureaucracy.<sup>56</sup> In contrast, a jury composed of average community members is reflective of community values and standards. The members of the jury have no commitments or responsibilities beyond deciding the case at hand.

The fact that the jury is a small unrelated group of individuals deliberating in private improves the quality of the final decision.<sup>57</sup> Psychological studies prove that decisions are fairer, more accurate and are more efficiently reached when achieved under conditions simulating jury deliberations.<sup>58</sup> Prejudice and bias are exposed and can be controlled more effectively, and the pressure of an unpopular

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52. C. JOINER, *CIVIL JUSTICE AND THE JURY* 39-63 (1962) (hereinafter cited as JOINER).

53. The United States Constitution provides, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.

54. JOINER, *supra* note 52 at 17.

55. Kreindler, *The Jury System in Court Cases*, in *THE JURY* 9 (G. Winters ed. 1971).

56. *Id.*

57. JOINER, *supra* note 52 at 25-35.

58. *Id.*

decision is shared by an anonymous group rather than one individual.<sup>59</sup>

The major criticisms of the jury system are that it is arbitrary, subject to prejudice, expensive and time-consuming.<sup>60</sup> Studies have shown that the actual time required for a bench trial is not significantly less than that for a full jury trial.<sup>61</sup> As to the question of prejudice and arbitrariness, these seem to be more a criticism of the decision-making process itself than of the jury system as a vehicle of that process.<sup>62</sup> Judges, attorneys, legislators and hearing officers are all human and are subject to the same bias and prejudice as the typical jury member. While training and experience may remove some prejudice, it may also allow the judge or attorney to become more adept at masking his bias to the point where he actually believes himself to be free of this wholly human trait.<sup>63</sup> As long as humans make the final decisions in legal proceedings the results will be subject to bias, prejudice and arbitrariness.

Because of the strong tradition favoring the jury over the judge or hearing officer in the matter of valuing violations of constitutional rights, any proposal which in whole or in part removes the issue from the jury has an inherent weakness: the community approval of damage awards may be lost. It is the people's rights which are violated, and the task of the legal system is to provide a system of compensation which is acceptable to the people. The people favor the jury system for the determination of damages<sup>64</sup> and any device which removes the damage award issue from the sole province of the jury would undermine the public's acceptance of the legal system itself.

### CONCLUSIONS

Any proposed system for measuring damages for violations of constitutional rights must fully involve the jury in the decision-

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59. *Id.*

60. Clark, *The American Jury: A Justification*, in *THE JURY* 1, 5 (G. Winters ed. 1971).

61. *Id.* at 5-6.

62. JOINER, *supra* note 52 at 70.

63. *Id.*

64. The degree of public acceptance of the jury system can be ascertained from these statistics found in JOINER, *supra* note 52. Over 70% of the general public favors jury trials as opposed to only 9% favoring trials by judge alone. The other 21% are undecided. Of those having previous jury experience, the percentage favoring jury trials increases to 77%. *Id.* at 64.

making process. The scope of the jury's deliberations should not be artificially restricted by Congress, nor should the question of damages be removed from the jury and placed before a quasi-judicial hearing board. The jury system can be criticized because its damage awards are not standardized and are essentially ad hoc decisions as to the value of the constitutional rights violation in question. While it seems true that damage awards for rights violations do not always deal adequately with the question of the intangible injury suffered by plaintiff as a result of the violation, it is contended that this problem is not inherent in the jury system itself. The inadequate compensation of constitutional rights violations stems from the fact that there has not been sufficient emphasis placed on the fact that a constitutional rights violation is compensable in and of itself. Failure to instruct the jury as to the separability of the causes of action has led to the problem of inadequate or nonexistent damage awards.

An improved damage measurement system for cases dealing with violations of constitutional rights requires more than the opportunity to present the damage question to the jury independent of other causes of action. If the jury system is to be efficient there must be a controversy for the jury to hear. As long as constitutional rights violations cases continue to be restricted by traditional concepts of immunity a full deliberation of the issues will not be possible.<sup>65</sup>

A second problem arises once the plaintiff's case is allowed into court. The traditional tort defenses tend to obscure the fact that constitutional rights violations are not always susceptible to traditional methods of proof. However, since the effectiveness of any defense is based upon the allegations which are proved to the satisfaction of the jury, a proper jury instruction as to the segregation of the rights violation from the other actions present will equip the jury to deal with the problem effectively.

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65. On remand from the Supreme Court the Second Circuit Court of Appeals decided the immunity question against the defendants. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972). In essence the court held that while federal officers were operating within the outer limits of their authority, they would be granted immunity unless performing the type of discretionary acts for which they would not require immunity.

*Proposed Final Jury Instruction*

Implementing the above suggestions would significantly improve the damage valuation system employed in cases of violations of constitutional rights. Necessary for the final improvement of the system and vital to the successful implementation of the above suggestions is an instruction to the jury which stresses the fact that a rights violation is compensable in and of itself. In an effort to make the application of this proposed instruction clear the following situation will be presumed.

Plaintiff has alleged and proved that federal agents entered his home, verbally and physically abused him and his family, searched the home and offered no search warrant as justification for their actions. Defendants were denied immunity under the *Bivens* rationale<sup>66</sup> since they were not engaged in the discretionary type of acts for which immunity was necessary. Their defense is that they acted in good faith and in a reasonable belief that both the search and the method in which it occurred were valid.

There are traditional torts involved in this case, including assault, battery, false imprisonment and possible intentional infliction of mental distress. Traditional instructions for each of these torts would be given to the jury. In addition, a separate instruction dealing with the fourth amendment violation would be read to the jury as follows:<sup>67</sup>

In addition to other claims for damage, the plaintiff in this case claims damage for the alleged violation of his fourth amendment rights by defendant federal agents. The fourth amendment to the United States Constitution reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, sup-

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66. See note 65 *supra*. In accordance with the finding of the court of appeals in *Bivens* federal police officers have no immunity to protect them from damage suits for violations of constitutional rights while pursuing alleged violators of narcotics laws or other criminal statutes.

67. A general outline for the proposed jury instruction was obtained from 2 E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* 125, 285-304 (2d ed. 1970).

ported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Plaintiff specifically alleges that the defendants by their acts did knowingly violate his fourth amendment rights.

The defendants admit that they entered plaintiff's house and conducted a search therein, but they deny that they did this in knowing violation of plaintiff's rights. They claim that they entered the house as the result of a mistake and conducted the search in the manner that they did because they believed that they were entering a house occupied by known dealers in dangerous drugs.

In order to find for the plaintiff, it must be established by a preponderance of the evidence that the defendants entered plaintiff's house designedly and not as a result of a mistake. Plaintiff must also prove that defendants' actions violated plaintiff's fourth amendment rights. If you find that plaintiff has sustained his burden of proof you may find for the plaintiff and award him money damages for the violation of his rights.

If you find that the defendants violated plaintiff's fourth amendment rights your task is to place a monetary value on those rights. To do this you should look at the evidence presented in this case. You are attempting to determine what it is worth to the plaintiff to be free from unreasonable searches. Your final award should reflect the value you place on plaintiff's fourth amendment rights. You should consider the circumstances of the violation and the possible culpability of the defendants. The award at which you arrive is solely for the fourth amendment violation. Other awards of damage may be given for injuries that the plaintiff may have suffered as a result of other wrongs present in this case. Any other awards of damages you make in this case are not to be considered when you are deciding on the award for the fourth amendment violation, if you find that such a violation in fact occurred. A violation of the fourth amendment is a proper subject of damages in and of itself.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar station in life. The law is no respecter of persons; all persons stand equal before the law and are to be dealt with as equals in a court of justice. You are to perform your duty as jurors without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice or public opinion. Both parties and the public expect that you will carefully and impartially consider the evidence presented and the law as stated and will reach a just verdict regardless of the consequences.

It is the contention of this note that the above proposed jury instruction allows the jury to consider the alleged violation of plaintiff's constitutional rights as a separate and independent cause of action and award damages based on the violation itself. Further, this instruction offers guidance concerning the factors to be considered when deliberating the question of the damage award. By presenting a separate instruction to the jury, the court assures itself not only that the question of the violation of plaintiff's rights is being considered, but also that it is being considered within the guidelines of the instruction.

Damages for violations of constitutional rights will be awarded on an ad hoc basis, but they will be the result of a specific instruction to the jury. Further standardization of the damage award seems impossible without removing the question in whole or in part from the province of the jury and requiring that some official, hearing officer or legislative body substitute its values and judgment for that of the jury. The pattern jury instruction above stresses the constitutional rights violation as actionable in its own right and requires the jury to award damages for the violation separate from other wrongs present in the case. The use of such an instruction allows for the standardization of the decisional guidelines within the framework of the jury system, and awards of damages for violations of constitutional rights may thus become a regulated, systematic procedure within the body of the present civil jury trial.

