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ARTICLES

WHEN A JURY CAN'T SAY NO: PRESUMED DAMAGES FOR CONSTITUTIONAL TORTS

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Federal courts have grappled with the reality that some constitutional violations produce no harm. Sometimes when a constitutional infraction produces no injury, they will deny standing to a civil plaintiff.[1] Most often, however, they will ensure that a civil plaintiff be awarded at least nominal damages.[2] Courts have been urged to do more to reward a plaintiff for bringing unconstitutional conduct to light and to award presumed damages.[3] Although infringement of constitutional guarantees can frequently be excused as "harmless" in the criminal context,[4] there is no similar rule in the civil arena. There, a constitutional violation is not allowed to be inconsequential.[5]

But are presumed damages the answer? The Supreme Court has twice disapproved of presumed damages for constitutional violations, and virtually all federal circuit courts have adhered to that teaching.[6] The Court of Appeals for the Second Circuit, however, has endorsed the concept of presumed damages, at least for certain constitutional torts, and, accordingly, trial courts in that circuit are required to

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1. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (discussing constitutional standing, which requires a plaintiff to allege an injury in fact that is concrete and palpable, not abstract or conjectural); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) ("[A]lthough a suitor may derive great comfort and joy from the fact that . . . the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.").

2. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (holding that denial of procedural due process without proof of actual injury only entitled the plaintiffs to nominal damages).

3. I use the term "constitutional cases" in this Article to encompass claims brought against government officials for violating an individual's federal constitutional rights. Such claims are brought against state or local government officials pursuant to 42 U.S.C. § 1983 (2006), and against federal officials pursuant to the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny.

4. Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991) (Rehnquist, J., dissenting).

5. *See Carey*, 435 U.S. at 266 ("By making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . .").

6. *See, e.g.*, *id.* at 263 ("[I]t is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, inherently . . . cause[s] distress . . . ."); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309-11 (1986) (explaining that presumed damages are not automatic, but they "may possibly be appropriate" where injury is "likely to have occurred but difficult to establish").

instruct juries that they must award damages in some amount to plaintiffs who have suffered a "loss of liberty."[7] Because the doctrine has established a secure foothold in the Second Circuit and could eventually migrate to other circuits, the theoretical and practical implications of the remedy should be closely examined.

The practice of awarding presumed damages for constitutional wrongs is difficult to reconcile with much of our present remedial jurisprudence. The remedy seems contrary to Supreme Court pronouncements that compensatory damages should be the primary means of obtaining a monetary remedy for injuries stemming from constitutional violations and that nominal damages should be awarded when no such damages are proven.[8] Neither the importance of the right in question nor the need for the effective deterrence of constitutional misdoings are sufficient justifications, in the Supreme Court's view, for allowing a plaintiff to recover extracompensatory damages.[9]

Presuming damages represents an encroachment upon the parties' rights, under the Seventh Amendment's Trial by Jury Clause, to have a jury determine whether, and in what amount, damages should be awarded for a constitutional infraction.[10] It also invites a court to disregard a jury's determination that no damages should be awarded to a plaintiff. The Reexamination Clause of the Seventh Amendment was designed to prevent a court from disturbing such a finding.[11]

In addition to these doctrinal shortcomings, there are practical pitfalls to presuming constitutional damages. In light of the ease with which intangible harms can be redressed by monetary awards under existing compensatory damages law, presumed damages would appear to represent a gratuitous recovery.[12] Federal courts have removed the evidentiary barriers that used to block awards of compensatory damages for intangible mental and emotional harms and now routinely permit such awards based solely on a plaintiff's

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7. *See* Kerman v. City of New York, 374 F.3d 93, 128-29 (2d Cir. 2004) ("[I]t was fundamental error for the trial court to fail to instruct the jury that, upon finding that [defendant] unlawfully deprived [plaintiff] of his liberty, the jury could award [plaintiff] compensatory damages for that loss of liberty.").

8. *Carey*, 435 U.S. at 254-55, 266.

9. *See infra* text accompanying notes 121-27.

10. The Trial by Jury Clause 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.

11. The Reexamination Clause provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Id.*

12. *See infra* text accompanying notes 125-27.

uncorroborated testimony.[13] As a result, the supposed gap that the presumed damages remedy is intended to fill may no longer exist.

The shortage of reported applications of presumed damages within the Second Circuit to date suggests that the remedy will be prone to producing duplicative recoveries and inflated awards.[14] It is true that remedial excesses, such as the double counting of injuries, can always be corrected through postverdict judicial review. However, postverdict correction of jury awards usually entails a significant expenditure of judicial resources that, in the end, might not eliminate award inflation.[15] In cases where constitutional tort claims can be aggregated through the class action procedure, presumed damages, particularly when used to supplement a compensatory damage recovery, can threaten a municipality with fiscal ruin.[16]

With all those defects and little benefit, one may wonder why presumed damages have come to be accepted in the Second Circuit. One answer is that nominal damages, the remedy that all other circuits rely upon for plaintiffs who fail to prove injury, are held in low regard in that circuit. Outside of the Second Circuit, a nominal damages award can be the basis for an award of attorneys' fees under fee-shifting statutes.[17] The Second Circuit, in contrast, has consistently declared that fees should not be awarded for nominal damages recoveries.[18] Indeed, the Second Circuit appears to affirmatively use its policy against no attorneys' fees for nominal damages recoveries to dissuade civil plaintiffs from pressing constitutional claims and to convince government defendants to default on them.[19] This approach to constitutional tort litigation is misguided. Nominal damages recoveries should form the basis for an award of attorneys' fees in the Second Circuit.

Part I of this article explores the historical prominence of the damages remedy as a means of constitutional enforcement and the

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13. *See infra* Part II.B.

14. *See infra* Part III.B.

15. *See, e.g.*, Martinez v. Port Auth. of N.Y. & N.J., 445 F.3d 158, 160 (2d Cir. 2006), *aff'g*, No. 01 Civ. 721(PKC), 2005 WL 2143333 (S.D.N.Y. Sept. 2, 2005) (demonstrating an appellate court's level of scrutiny in reviewing a jury award for intangible injuries); *see infra* text accompanying notes 180-85.

16. *In re* Nassau Cnty. Strip Search Cases, 742 F. Supp. 2d 304, 321 (E.D.N.Y. 2010) (finding every member of the class is "entitled to the same dollar amount per new admit strip search by way of a general damages award").

17. *See infra* Part IV.A.

18. *See* Pino v. Locascio, 101 F.3d 235, 238 (2d Cir. 1996) (stressing that an award of attorneys' fees where plaintiff recovers nominal damages is meant to be rare) (citing Farrar v. Hobby, 506 U.S. 103, 113-16 (1992)); Amato v. City of Saratoga Springs, 170 F.3d 311, 317 n.5 (2d Cir. 1999) (noting that "a nominal damage award can be grounds for denying or reducing an attorney's fee award").

19. *See infra* Part IV.B.

central role that the jury was intended to play in that endeavor. Part II discusses the Supreme Court's refusal to permit awards of presumed damages in constitutional cases where compensatory damages can be obtained and how federal courts have made compensatory damages more accessible for intangible harms. Part III describes the Second Circuit's decision to recognize presumed damages and proceeds to analyze the doctrinal and constitutional flaws attendant to presumed damages. In Part IV, I contend that the Second Circuit's attraction to presumed damages can be explained by its wrong-headed refusal to recognize that attorneys' fees can and should be awarded for nominal damages recoveries.

I. THE JURY AND DAMAGES AT THE FOREFRONT OF CONSTITUTIONAL REMEDIES

A. Damages and the Constitution

The numerous scholarly works of Akhil Amar establish that damages were intended to play a central, if not preeminent, role in remedying infringements of constitutional rights. Marshalling the historical evidence relating to the pre-Ratification Era, Amar convincingly shows that the Framers recognized that the Constitution conferred legal rights to persons against the government and that there should be adequate redress, including the imposition of monetary liability, "whenever those rights [were] violated."[20] The Framers firmly believed that the "vindication of constitutional rights would . . . require direct [damages] suit[s]" by individuals against the government.[21] This belief was grounded in the long-standing English law tradition of allowing suits against government officials by victims of illegal searches or seizures.[22] Civil damages actions were also recognized in colonial legal systems as the

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20. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*].

21. *Id.* at 1488 ("Even in the absence of today's more expansive vision of affirmative rights, the framers recognized that affirmative relief would often be essential to protect negative rights—especially where the government violation could not be prevented ex ante, and where the government would enjoy the fruits of its past violations."); *see also* Oral Argument of Attorney General Edmund Randolph at 422, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 422 (1793) ("The common law has established a principle, that no prohibitory act shall be without its vindicatory quality . . . . In our solicitude for a remedy, we meet with no difficulty, where the conduct of a state can be animadverted on, through the medium of an individual."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164-66, 170-71 (1803) (applying the principle of *ubi jus, ibi remedium* to support a writ of mandamus against a government official).

22. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 13, 40 (1997) (citing Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.) 490; 19 Howell's St. Tr. 1153) [hereinafter AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE].

prototypical means of redressing oppressive government conduct.[23]

That is not to suggest that damages were considered to be the exclusive remedy for constitutional wrongs. The injunction was also an important enforcement mechanism, but it was subordinated to the damages remedy by the irreparable injury requirement. The Judiciary Act of 1789, enacted by the First Congress, provided that actions in equity could not proceed if there was a "plain, adequate and complete" remedy at law.[24] That prerequisite prevented resort to the injunction unless the plaintiff could convince the court that English law courts could not provide a monetary remedy that would make the plaintiff whole.[25] Where a plaintiff failed to meet this exacting burden, he was foreclosed from equity.[26]

In one of the more noteworthy constitutional cases decided by the Marshall Court, *Osborn v. Bank of the United States*, the Supreme Court emphasized that an injunction could not issue unless the plaintiff lacked an adequate remedy at law.[27] In *Osborn*, the state argued that the federal bank being subjected to a state tax had a sufficient legal remedy in the form of a common law action for trespass against the state tax collector.[28] The Court rejected the contention, observing that a trespass action for damages could not protect the bank from the "total destruction of its franchise," which was the avowed purpose of the state taxing authorities.[29] Certainly, the injunction was an important part of an effective judicial system.

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23. *Id.* at 40; *see Essays of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981); Essays by Hampden, MASS. CENTINEL, Jan. 26, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST 198, 200 (Herbert J. Storing ed., 1981); *Essays by a Farmer*, MD. GAZETTE, Feb. 15, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 5, 14 (Herbert J. Storing ed., 1981); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971) ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

24. The Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73. The first Judiciary Act, enacted by the same Congress that proposed the Bill of Rights, has enjoyed "quasi-constitutional status." Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 259 (1985) [hereinafter Amar, *A Neo-Federalist View of Article III*]; *see* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 594 (1874) ("[T]he venerable Judiciary Act of 1789 was . . . regarded as only [slightly] less sacred than the Constitution . . . .").

25. Harrison v. Rowan, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819); *see also* Mayer v. Foulkrod, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) ("The only inquiry here must be, what are the principles, usages, and rules of courts of equity, as distinguished from courts of common law, and . . . 'defined in that country, from which we derive our knowledge of those principles.'") (quoting Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 223 (1818)).

26. *Harrison*, 11 F. Cas. at 667.

27. 22 U.S. (9 Wheat.) 738, 841-42 (1824).

28. *Id.* at 838-39.

29. *Id.* at 840-46.

The injunction, however, should be the remedy of last resort. As Supreme Court Justice Joseph Story, perhaps the most authoritative commentator on equity jurisprudence in the early days of the Republic, declared: courts should exercise "extreme caution" when issuing injunctions, given their "liability [for] abuse."[30] The "'strong arm of equity . . . never ought to be extended, unless to cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages.'"[31] Injunctions should be issued only in "clear" cases, where the right asserted was not "doubtful" and where the injury could not be redressed except through prevention.[32] Clearly, injunctions would be subordinated to damages in the remedial hierarchy.[33]

B. The Prominent Role of Juries

The early federal bias in favor of damages had much to do with the fact that the jury awarded damages, while the chancellor issued injunctions. Suspicious of chancellors and other judicial officers because those officials were often too willing to assist the English Crown in the imposition of tyrannical measures,[34] the Framers considered a jury to be less susceptible to a progovernment bias and thus better suited to serve as a check on overreaching official power.[35]

Juries would possess the common sense, knowledge, and experience of the community and reflect the populist sentiments of the governed; whereas judges were presumed to be in synch with the

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30. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 959b, at 172 (F.V. Balch ed., 11th ed. 1873).

31. *Id.* at 172 n.1 (quoting Bonaparte v. Camden & Amboy R.R. Co., 3 F. Cas. 821, 827 (C.C.D.N.J. 1830)).

32. Truly v. Wanzer, 46 U.S. 141, 142-43 (1847).

33. Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 65-72 (2011).

34. AKHIL REED AMAR, THE BILL OF RIGHTS 87 (1998) ("In England, judges had at times abetted government tyranny . . . .") [hereinafter AMAR, THE BILL OF RIGHTS]; *Essays by a Farmer*, *supra* note 23, at 39 (Mar. 21, 1788) ("Whenever therefore the trial by juries has been abolished . . . [t]he judiciary power is immediately absorbed, or placed under the direction of the executive . . . ."). The Declaration of Independence harshly criticized the English Crown and Parliament for depriving colonials of "the benefits of [t]rial by [j]ury." THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

35. AMAR, THE BILL OF RIGHTS, *supra* note 34, at 84; *see, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES, *306; *Letters from the Federal Farmer No. 4*, POUGHKEEPSIE COUNTRY J., Nov., 1787 - Jan., 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 245, 249-51 (Herbert J. Storing ed., 1981). Juries composed of twelve individuals who would not be identified prior to trial were seen as less corruptible than judges. *See, e.g.*, *Letters from the Federal Farmer No. 15*, *supra*, at 319-20; THE FEDERALIST NO. 83, at 563-64 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

government and the powerful.[36] Accordingly, the Framers imposed constitutional constraints on the authority of judges and their ability to issue warrants,[37] their discretion to impose bail or punishment,[38] and their role in initiating criminal prosecutions.[39] The Constitution does not expressly impose any similar constraints upon the discretion of juries.[40]

In contrast to the perception of judges as progovernment sympathizers, juries were seen as potent instruments to guard against an overzealous government. Many Framers were familiar with the English experience, where civil juries assessed "substantial," "heavy," or "ruinous" damages against government officials who had conducted illegal searches or seizures.[41] In the

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36. *See, e.g.*, *Letters from the Federal Farmer No. 15*, *supra* note 35, at 319-20; Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON, at 282-83 (Julian P. Boyd ed., 1958); *see also* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (noting a historical preference for "the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge").

37. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

38. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

39. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V.

40. There is the exception, perhaps, of the Article III Treason Clause which prohibits a conviction for the crime of treason "unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1.

41. *See, e.g.*, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 154 (John B. McMaster & Frederick D. Stone eds., 1888) (explaining that the ability of a civil jury to assess heavy damages "would be our safest resource" against unlawful government conduct); *Essays by a Farmer*, *supra* note 23, at 14 ("It has become an invariable maxim of English juries, to give ruinous damages whenever an officer . . . [is] guilty of any unnecessary act of insolence or oppression . . . ."); *see also* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 751 (1993) ("The value of a jury buffer in civil cases was demonstrated by the English experience, where juries had awarded substantial damages against officials who had committed unreasonable searches and seizures.").

As Amar has observed, an English jury's award of punitive damages against government officials that had conducted an illegal search in *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.) 490; 19 How. St. Tr. 1153, was extremely influential in the anti-federalist crusade for constitutional jury trial rights. *See* AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, *supra* note 22, at 42; PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, at 781-82, n.217 (citing *Wilkes v. Wood*, 98 Eng. Rep. at 489, for the proposition that "[j]udges may be corrupted"); *cf.* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 510 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT DEBATES] (explaining that the committee at Maryland ratifying convention proposed an amendment to the Constitution that would require jury trial "in all cases of trespasses").

colonial era, jurors blocked unpopular prosecutions that had been initiated by overreaching prosecutors.[42] The Framers saw the jury as essential to curb a variety of government abuses springing from the "insolence of office."[43]

Juries were also recognized as being uniquely suitable for determining damages.[44] This was particularly true "in cases where the amount of damages was uncertain" or involved a matter of discretion.[45] In these determinations, an in-depth knowledge of law was considered to be less helpful than the ability to tap the varying experiences and "common sense [perceptions] of twelve individuals."[46] Because the imposition of damages was itself a potential instrument of government oppression, relegating damages determinations to the jury, the traditional "bulwark against tyranny," was seen as the safe route.[47]

Juries represented an element of popular sovereignty—an opportunity for the people to have a say with respect to who is right and who is wrong. Just as the people would participate in the legislative process by electing representatives in the House, they

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42. AMAR, THE BILL OF RIGHTS, *supra* note 34, at 84-85. When a grand jury refused to indict newspaper publisher John Peter Zenger, and prosecutors attempted an end run by proceeding by way of information, the trial jury acquitted Zenger. *Id.*

43. *Essays by Hampden*, *supra* note 23 (civil jury is crucial to afford effective relief "against the High Officers of State[] for abuse of private citizens"); Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately held at Philadelphia*, MD. GAZETTE, Dec. 28, 1787-1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 35, at 19, 70-71 (a constitutional provision for civil jury trial "is most essential for our liberty . . . in every case, whether civil or criminal, between government and its officers on the one part, and the subject or citizen on the other;" otherwise the citizen will have to endure "every arbitrary act of the general government, and every oppression of all those variety of officers appointed under its authority for the collection of taxes, duties, impost, excise, and other purposes").

44. Lord Townsend v. Hughes, (1677) 86 Eng. Rep. 994 (K.B.) 994-95; 2 Mod. 150, 151; *see* Duke of York v. Pilkington, (1693) 89 Eng. Rep. 918 (K.B.); 2 Show. 246 (jury award in a slander action); Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.) 499; Lofft 1 (jury award in an action of trespass); Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.); 2 Wils. 206 (upholding jury award in an action for trespass, assault, and imprisonment); Genay v. Norris, 1 S.C.L. (1 Bay) 6, 7 (1784) (jury award).

45. Dimick v. Schiedt, 293 U.S. 474, 480 (1935); *see* Coryell v. Colbaugh, 1 N.J.L. 77 (1791) (sustaining correctness of jury award of exemplary damages in an action on a promise of marriage); KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(2), at 27 (1980) (describing "primacy of the jury in the awarding of damages"); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 24 (1935) ("The amount of the damages . . . from the beginning of trial by jury, was a 'fact' to be found by the jurors.").

46. Murphy, *supra* note 41, at 745.

47. JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 258 (2003); *see* Duncan v. Louisiana, 391 U.S. 145, 150-57 (1968) (discussing how the jury was conceived as a major protection against governmental oppression).

would have a role in the dispensation of justice by serving as jurors. It was, moreover, presumed that twelve jurors were less corruptible than a single judge.[48]

Because of their role in determining damages, juries were expected to be the primary enforcer of Fourth Amendment rights.[49] In the free speech context, the Framers' acceptance of ex post civil suits for libel or sedition and prohibition of ex ante prior restraints were also predicated on their preference for the jury over the chancellor.[50] Civil juries also determined the "just compensation" to be paid to the former owner of taken property.[51]

Some among the Framers were so enamored with juries that they advocated a central role for them in deciding issues of law.[52] That is, a jury would be charged with determining what the law is and whether the law is constitutional. Indeed, several state constitutions in the founding era empowered juries to assess both factual and legal matters.[53] This view lost out in the early days of the Republic, as courts decided that lay jurors were not "competent" to decide the constitutionality of laws[54] and that "[i]t is emphatically the province and the duty of the judicial department to say what the law is."[55]

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48. THE FEDERALIST NO. 83, at 563-64 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *Letters from the Federal Farmer No. 15*, *supra* note 35, at 316, 319-20; Letter from Thomas Jefferson, *supra* note 36, at 282-83.

49. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, *supra* note 22, at 2-3; Martin, *supra* note 43 (emphasizing the importance of juries in civil suits by citizens against government); Notes of Speeches Delivered by Samuel Chase to the Maryland Ratifying Convention, *in* 5 THE COMPLETE ANTI-FEDERALIST, supra note 23, at 79, 82 (civil juries needed for suits against government officials).

50. AMAR, THE BILL OF RIGHTS, *supra* note 34, at 23-24; see 4 BLACKSTONE, supra note 35, at 150-53; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1879 (Boston, Hilliard, Gray & Co. 1833).

51. AMAR, THE BILL OF RIGHTS, *supra* note 34, at 80; City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 715 (1999) (plurality opinion) ("Early opinions, nearly contemporaneous with the adoption of the Bill of Rights, suggested that when the government took property but failed to provide a means for obtaining just compensation, an action to recover damages for the government's actions would sound in tort.").

52. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 239-42 (2005) (recounting that in the founding era, many viewed jury review as a supplement to judicial review) [hereinafter AMAR, AMERICA'S CONSTITUTION]; Murphy, *supra* note 41, at 746 ("Although the province of the jury to find facts was well-recognized, the Founders did not share a uniform view with respect to whether juries are competent to declare the law.").

53. *See, e.g.*, GA. CONST. of 1777, art. XLI; AMAR, THE BILL OF RIGHTS, *supra* note 34, at 101-02.

54. United States v. Callender, 25 F. Cas. 239, 253 (C.C.D. Va. 1800).

55. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

C. The Seventh Amendment

Of course, the primary means employed by the Framers to protect the civil jury's essential function in assessing damages was the Seventh Amendment's Trial by Jury Clause.[56] During the Marshall Court era, that clause was interpreted as preserving the right to a jury trial as it existed under prerevolutionary English law.[57] The federal courts would follow the practices of eighteenth century English law and chancery courts, which provided juries for claims at law but not for claims in equity or admiralty.[58]

As that analysis is currently applied, the primary focus is on the nature of the remedy being sought.[59] If the remedy is one that English law courts were authorized to award, then a jury right exists.[60] Thus, because juries assessed damages for copyright infringement in eighteenth century English practice, the parties to a current copyright infringement case can insist that a jury determine actual or statutory damages.[61] In contrast, because juries did not traditionally award equitable remedies, construe the scope of patents, or assess civil sanctions or fines, the parties to a modern litigation have no right to have a jury decide such matters.[62]

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56. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."). As one commentator has recounted, "[t]he colonial history of royal encroachments on jury trial . . . caused many to fear the absence of a constitutional right to jury trial in civil cases. . . . The right to jury trial was too important to leave to legislative prerogative." Murphy, *supra* note 41, at 744 (footnote omitted).

57. *See, e.g.*, United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812); Bains v. James and Catherine, 2 F. Cas. 410, 418 (C.C.D. Pa. 1832); *see* Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 447 (1830) ("By common law, they meant . . . suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered."); AMAR, AMERICA'S CONSTITUTION, *supra* note 52, at 233.

58. DiSarro, *supra* note 33, at 58; AMAR, AMERICA'S CONSTITUTION, *supra* note 52, at 234.

59. Chauffers, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) ("[E]xamin[ing] the remedy sought and determin[ing] whether it is legal or equitable . . . is the more important [inquiry].") (internal citations and quotation marks omitted); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42 (1989) (discussing remedy determination as the most important factor).

60. *Nordberg*, 492 U.S. at 41-42, n.4.

61. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353-55 (1998) (examining historical evidence of copyright cases where juries commonly awarded damages).

62. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring) (stating that the decision to award back pay is an equitable determination that a jury cannot make); Markman v. Westview Instruments, Inc., 517 U.S. 370, 378-84 (1996) (finding that the construction of a patent is not a guaranteed jury issue); Tull v. United States, 481 U.S. 412, 422-27 (1987) (stating that a jury is not required in determining the amount of civil fines for environmental law infractions). The omission

The Seventh Amendment's other clause, the Reexamination Clause,[63] was adopted to protect the jury's determinations from being disturbed by federal appellate courts.[64] The Clause was construed to prohibit federal courts from disturbing factual findings made by juries, except to the extent permitted under eighteenth century English law, which was limited to the correction of errors of law or the granting of a new trial.[65] The Judiciary Act of 1789 followed suit, mandating that juries decide issues of fact in all law cases pending in lower federal courts and curbing the Supreme Court's authority to disturb factual findings when considering appeals from state courts.[66]

The existence of injury and the measure of damages are matters that are subject to the prohibitions of the Reexamination Clause.[67] Thus, where both the fact and the extent of damages are disputed, neither the federal district court nor a federal appellate court can enter judgment for an amount other than that reflected in the jury's verdict.[68] The most a trial court can do is set aside a verdict and order a new trial, and that result is only permissible where the jury's award is not merely erroneous but "shock[s] the conscience."[69] An

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in the Constitution of any entitlement to jury trial in equity suits is understandable given the "general absence of the jury from equity" and that "[t]he hallmark of equity has been wide-ranging discretion." Murphy, *supra* note 41, at 753 n.146. As Alexander Hamilton explained, equity courts act "in extraordinary cases, which are exceptions to general rules." THE FEDERALIST NO. 83, at 569 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted).

63. The Clause provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

64. *See* AMAR, AMERICA'S CONSTITUTION, *supra* note 52, at 236 (stating the Seventh Amendment "safeguarded the right to civil-jury trial in federal courts while also shielding certain factual findings made by state court civil jurists").

65. *See, e.g.*, Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 447-48 (1830); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812); *see* Murphy, *supra* note 41, at 746 ("[W]ith its language permitting some 're-examination of facts,' the Seventh Amendment explicitly approves a judicial check on jury error[;] . . . it permits some judicial monitoring as a safeguard against inaccuracy or bias in the jury's decisionmaking.").

66. AMAR, AMERICA'S CONSTITUTION, *supra* note 52, at 235.

67. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 (2001); *see, e.g.*, St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915) (holding that the excessive damages awarded for pain and suffering "is not open to reconsideration here").

68. *See, e.g.*, Hetzel v. Prince William Cnty., 523 U.S. 208, 209-12 (1998); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 499-500 (1931) (holding that an appellate court cannot order a district court to enter a judgment for reduced damages without allowing the plaintiff the option of a new trial); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 426 (1912) (holding the Seventh Amendment does not permit the entry of judgment for an amount other than that awarded by the verdict of the jury.).

69. Marcano Rivera v. Turabo Med. Ctr., 415 F.3d 162, 173 (1st Cir. 2005); Tortu v.

appellate court can review that decision but only under a deferential abuse of discretion standard.[70] These limitations serve to protect the integrity of the jury's findings on injury and damages.[71]

The Seventh Amendment imposes even greater restrictions on a court where the jury's award is arguably too low. When a trial court concludes that a verdict award is excessive, it can threaten to order a new trial unless the plaintiff agrees to a reduced verdict.[72] Essentially, the plaintiff is given the opportunity to avoid the burden and risk of a new trial by agreeing to take a lesser amount. However, a court cannot use this approach against a defendant. The Reexamination Clause prohibits a court from conditionally ordering a new trial unless the defendant agrees to a higher award, or otherwise augmenting a jury's damages award.[73]

D. Damages and Juries Come into Disfavor

As federal constitutional law developed, lifetime-tenured federal judges came to be seen as more appropriate protectors of countermajoritarian constitutional rights than populist juries,[74] and

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Las Vegas Metro. Police Dep't, 556 F.3d 1075, 1086-87 (9th Cir. 2009) (upholding jury award because it was "not against the clear weight of the evidence"); Dossett v. First State Bank, 399 F.3d 940, 945-47 (8th Cir. 2005) (upholding the grant of a new trial where the jury verdict "was the product of passion and prejudice"). Courts have employed other phrases similar to "shocks the conscience" to describe the circumscribed nature of a trial court's power to set aside a jury award, such as the award is "monstrously excessive" or has "no rational connection" to the evidence. 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2807 (2d ed. 1995) (discussing the multitude of phrases used to describe the level of unreasonableness or excessiveness a damage award must reach to justify a judge's grant of new trial).

70. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 434-36 (1996).

71. In much the same way, the Double Jeopardy Clause serves to protect the jury's determination on guilt or innocence in criminal cases. *See* AMAR, THE BILL OF RIGHTS, *supra* note 34, at 96.

72. This practice is known as remittitur and is permissible under the Reexamination Clause on the theory that the jury has already awarded the higher amount and thus has implicitly authorized the lower amount. Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935); *see, e.g.*, Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1049-50 (8th Cir. 2002); Thorne v. Welk Inv., Inc., 197 F.3d 1205, 1211-12 (8th Cir. 1999); *In re* First Alliance Mortg. Co., 471 F.3d 977, 1003 (9th Cir. 2006). *But see generally* Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003) (arguing that remittitur is unconstitutional under both the common law and the Reexamination Clause).

73. *Dimick*, 293 U.S. at 486-87; *see* Hattaway v. McMillian, 903 F.2d 1440, 1451 (11th Cir. 1990) ("[T]he order of an additur by a federal court violates the seventh amendment . . . ."); Gibeau v. Nellis, 18 F.3d 107, 111 (2d Cir. 1994) ("[A] federal court's increase of a jury award would constitute impermissible additur . . . ."); DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 837 (9th Cir. 1963) (finding that "[f]ederal practice does not permit the use of additur").

74. *See* Henry P. Monaghan, *First Amendment "Due Process*,*"* 83 HARV. L. REV.

damages were downgraded within the remedial hierarchy. Damages suits were displaced as the primary means of enforcing Fourth Amendments rights by the judicially created exclusionary rule, and dismissal of criminal charges became the standard remedy for Sixth Amendment speedy trial right violations.[75] Injunctions, in turn, became the primary remedial device to effectuate rights under the Equal Protection Clause in schools or the Eighth Amendment in prisons.[76]

Federal courts replaced state courts as the primary forum for resolving federal constitutional challenges, and those challenges regularly came to be asserted as a direct claim against a government official, instead of as a defense to a state tort claim.[77] The federal courts, however, were mostly inhospitable to damages as a remedy in the constitutional context. It was not until the latter half of the twentieth century that plaintiffs could assert constitutional claims in federal court for money damages against government officials[78] or counties and municipalities.[79] It was not until the last quarter of that century that a plaintiff could obtain punitive damages from government officials in federal court.[80]

Federal courts both recognized and created a variety of immunity and fault doctrines that hindered the ability for a damages claim to succeed. State governments were deemed to have sovereign immunity from damages suits,[81] and government officials had either

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518, 526-32 (1970) (discussing the evolution of the First Amendment to protect unpopular, minority speech and that the insulated judiciary rather than the popular jury became its primary guardian). *But see* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1170-71 (1995) (arguing for a revival of the use of juries in assessing Fourth Amendment reasonableness).

75. *See* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (holding that evidence obtained by unconstitutional search is inadmissible in a criminal case); Strunk v. United States, 412 U.S. 434, 439-40 (1973) (dismissal with prejudice, though severe, is the only possible remedy for a Speedy Trial Clause violation); Barker v. Wingo, 407 U.S. 514, 522 (1972) (discussing the rights to a speedy trial).

76. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 878-89 (1999); *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26-27 (1971) (ordering busing to desegregate schools); Hutto v. Finney, 437 U.S. 678, 687 (1978) (ordering limits on amount of time a prisoner can spend in isolation); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (ordering the reapportionment of electoral districts).

77. Amar, *Of Sovereignty and Federalism*, *supra* note 20, at 1485, 1506-10.

78. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 178, 237 (1961); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting).

79. *See* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 701 (1978) (holding that there is "no justification for excluding municipalities from the 'persons'" covered in the Civil Rights Act).

80. Smith v. Wade, 461 U.S. 30, 34-35 (1983).

81. Seminole Tribe v. Florida, 517 U.S. 44, 55-56 (1996).

absolute or qualified immunity.[82] Municipalities were insulated from liability for constitutional torts unless its employees' misconduct was produced by a widespread custom or policy.[83]

Furthermore, many constitutional violations, such as the denial of expressive rights, illegal searches and unlawful detentions, or deprivations of due process, produced only psychological and intangible injuries.[84] Plaintiffs were often denied standing to assert such claims.[85] Federal courts initially refused to recognize damages claims for intangible harms[86] and then did so only where the plaintiff submitted expert medical or psychiatric testimony or other corroborative evidence.[87]

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82. Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976) (absolute immunity for prosecutors); Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) (absolute immunity for legislators); Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982) (qualified immunity for executive officials). These doctrines have no application to claims seeking prospective injunctive relief. *See* Edelman v. Jordan, 415 U.S. 651, 677-78 (1974) (sovereign immunity not a bar to claims for prospective injunctive relief); Pulliam v. Allen, 466 U.S. 522, 541-42 (1984) (judicial immunity does not preclude prospective injunctive relief).

83. *See Monell*, 436 U.S. at 663. The Supreme Court recently held that the fault requirement applies to claims for injunctive relief. Los Angeles Cnty. v. Humphries, 131 S. Ct. 447, 453-54 (2010).

84. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000) (discussing the inability to equate intangible harms into concrete damage values for constitutional violations).

85. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485-86 (1982) (determining plaintiff cannot sue if she has suffered no injury as a result of the alleged constitutional infraction, "other than the psychological consequence presumably produced by observation of conduct with which one disagrees"); *see also* Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle:* Hein v. Freedom from Religion Foundation, Inc. *and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 158-59 (2008) (stating that visual or aural exposure to a constitutional wrong, such as observing "patently unfair trials . . . blatant acts of racial discrimination, or cruel and unusual punishments," does not constitute a cognizable injury).

86. Prior to being recoverable as compensatory damages, intangible harms could only be redressed through an award of punitive damages. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting) (stating that punitive damages arose "at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. . . . fill[ing] this gap"); *see* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."); *see also* KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.3(A) (1980); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519-20 (1957).

87. *See, e.g.*, Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 204-05 (1st Cir. 1987) (affirming emotional damage award based on testimony from psychiatrist); Cowan v. Prudential Ins. Co. of Am., 852 F.2d 688, 690-91 (2d Cir. 1988) (affirming emotional damage award based on corroborating testimony); Wilmington v. J.I. Case Co., 793

The jury was also unceremoniously dumped from its central role in assessing constitutional liability and damages. Federal courts asserted the prerogative to conduct an independent review of the factual record in First Amendment cases and to draw their own inferences from the facts.[88] They also claimed the right in constitutional cases to conduct a de novo review of not just legal conclusions but the application of law to facts as well.[89]

Specifically with respect to damages, courts held it was within their powers to review, de novo, punitive damages awards to see if they are "constitutionally excessive."[90] They significantly expanded their ability to review and make determinations on factually laden damages questions by classifying them as questions of law.[91] Federal courts also imposed stringent corroborative evidence requirements that served to overturn jury verdicts for compensatory damages in intangible harm cases.[92]

F.2d 909, 922 (8th Cir. 1986) (affirming compensatory damage award based on testimony and evidence that "tended to show a deterioration in . . . health, mental anxiety, humiliation, and emotional distress").

88. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. Inc., 515 U.S. 557, 567 (1995) (stating that the court has "a constitutional duty to conduct an independent examination of the record as a whole," and cannot defer with respect to factual findings unless they concern witness credibility); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11 (1984) ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . ."); Tenafly Eruv Ass'n. v. Borough of Tenafly, 309 F.3d 144, 156-57 (3d Cir. 2002) ("[W]e examine independently the facts in the record and 'draw our own inferences' from them.") (quoting Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth., 148 F.3d 242, 247 (3d Cir. 1998)).

89. Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1221 (9th Cir. 2003) ("Given the 'special solicitude' we have for claims alleging the abridgment of First Amendment rights, . . . we review the application of facts to law on free speech questions de novo.") (internal citations omitted); Planned Parenthood of Columbia/Wilamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1070 (9th Cir. 2002) (en banc).

90. *See, e.g.*, *Cooper Indus. Inc.*, 532 U.S. at 436-37 (claiming the right to conduct a de novo review of punitive damages, notwithstanding the Reexamination Clause, on the purported ground that "the level of punitive damages is not really a 'fact' 'tried' by the jury") (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

91. Haywood v. Koehler, 78 F.3d 101, 104 (2d Cir. 1996) (holding that the appellate court can determine whether plaintiff in constitutional tort case is "entitled to some compensatory damages as a matter of law"); Atkins v. New York City, 143 F.3d 100, 103 (2d Cir. 1998) (holding that if it is "clear from the undisputed evidence" that the plaintiff sustained an injury that was caused by unconstitutional conduct, then "the jury's failure to award some compensatory damages should be set aside and a new trial ordered"); Westcott v. Crinklaw, 133 F.3d 658, 661 (8th Cir. 1998) (same).

92. *See* Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1265-66 (10th Cir. 1995) (vacating the emotional damage award where award was based solely on the testimony of the plaintiff); Gunby v. Pa. Elec. Co., 840 F.2d 1108, 1121-22 (3d Cir. 1988) (reversing an emotional distress award based on the lack of corroborating evidence); Erebia v. Chrysler Plastic Prod. Corp., 772 F.2d 1250, 1259 (6th Cir. 1985)

E. Diluting the Potency of the Seventh Amendment

Seventh Amendment jurisprudence accommodated the trend against juries. The Supreme Court declared that, notwithstanding the Trial by Jury Clause of the Seventh Amendment, Congress could eliminate the right to jury trial by replacing common law claims with a statutory scheme and assigning adjudication under the scheme to nonjury tribunals.[93] Essentially, Congress can employ this legislative technique for statutory rights that are "closely intertwined with a federal regulatory program" or where the "right . . . belongs to [or] exists against" the federal government.[94] Administrative agencies can, therefore, adjudicate constitutional claims, and, although § 1983 has been interpreted as not requiring utilization of those administrative remedies, that interpretative conclusion can be altered by Congress at any time.[95] The Court has also cited the existence of an administrative remedy as a basis to refuse to imply a private right of action based on alleged unconstitutional conduct.[96] These decisions serve to reduce the jury's role in redressing constitutional wrongs.

The Court has recognized that Congress can even prescribe the

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(reversing an emotional damage award and remanding with instructions to award nominal damages because plaintiff offered only his own testimony); Vance v. S. Bell Tel. & Tel. Co., 863 F.2d 1503, 1516 (11th Cir. 1989) (agreeing that jury award for emotional distress should be vacated where it was based solely on plaintiff's testimony), *abrogated by* Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993); Bellows v. Amoco Oil Co., 118 F.3d 268, 277 n.28 (5th Cir. 1997) (questioning whether plaintiff's testimony sufficiently supported an award of damages for emotional harm); Annis v. Cnty. of Westchester, 136 F.3d 239, 244, 249 (2d Cir. 1998) (holding that plaintiff's testimony that she was humiliated is insufficient to warrant an award of compensatory damages).

93. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 52-53 (1989); *see also* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 455 (1977) (stating that the Seventh Amendment does not prevent Congress "from committing some new types of litigation to administrative agencies with special competence in the relevant field").

94. *Nordberg*, 492 U.S. at 51-52, 54.

95. *Compare* Patsy v. Bd. of Regents, 457 U.S. 496, 516 (1982) (holding that exhaustion of administrative remedies is not a condition precedent to filing a § 1983 action), *and* Wilder v. Va. Hosp. Ass'n 496 U.S. 498, 523 (1990) (same), *with* Woodford v. Ngo, 548 U.S. 81, 85 (2006) (stating that the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), requires a prisoner to exhaust available administrative remedies). *See also* Smith v. Robinson, 468 U.S. 992, 1012-13 (1984) (finding that Congress, in enacting the Education of the Handicapped Act, 20 U.S.C. §§ 1400-1450, intended to exclude from § 1983's coverage duplicative claims brought under the Equal Protection Clause), *superseded by statute*, Handicapped Children's Protection Act of 1986, 100 Stat. 796.

96. Chappell v. Wallace, 462 U.S. 296, 297, 305 (1983) (claims by military personnel for redress of constitutional injuries); Bush v. Lucas, 462 U.S. 367, 389-90 (1983) (claims by federal government employees against their employers or supervisors based on constitutional rights); Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (constitutional claims based on denial of Social Security disability benefits).

damages to be awarded for unlawful conduct when a jury is used, and a jury must abide by that prescription.[97] This development would likely not disturb the Founders since legislative action represents implementation of the sovereign will, which jury determination is intended to supply.[98] Thus, jury awards may be subject to statutory caps or floors (or both).[99] Today's juries are no longer the sole arbiters of damages, at least where the democratically elected legislators have established the parameters of the remedy.[100]

Even in the absence of congressional action, federal courts have assumed the power to remove issues from a jury's consideration and to resolve them as matters of law. Federal courts have developed a variety of procedures that will allow them to determine constitutional claims without input from a jury.[101] These procedures include resolving matters on summary judgment, where the court concludes that there are no genuine issues of material fact extant, and through judgment as a matter of law, where the evidence presented at trial fails to exceed a minimum threshold of legal sufficiency.[102] Federal courts have further assumed the authority to

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97. *See* Curtis v. Loether, 415 U.S. 189, 190, 193-95 (1974) (explaining that the Seventh Amendment guarantees right to a jury trial to determine statutory damages under the housing discrimination provisions of the Civil Rights Act of 1968).

98. AMAR, THE BILL OF RIGHTS, *supra* note 34, at 94 (noting that analogies between legislatures and juries "abounded" in founding era literature).

99. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353-55 (1998) (holding that the Copyright Act does not grant the right to jury trial to assess statutory damages but the Seventh Amendment allows for a jury trial to assess all aspects related to a statutory damages award, including the amount itself).

100. Some states have imposed limits on certain types of damages, and while the Seventh Amendment does not apply against state action, those limitations have occasionally been the subject of state constitutional challenges. *See* Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 318-19 nn.17-18, 338 (2001); Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment"*, 54 S.C. L. REV. 47, 60 n.78, 61 & n.80 (2002).

101. AMAR, AMERICA'S CONSTITUTION, *supra* note 52, at 241 ("[J]udges increasingly reined in the powers of civil juries through a variety of technical devices—directed verdicts, special verdicts, demurrers, judgments notwithstanding verdicts—that limited general verdicts.").

102. *See* FED. R. CIV. P. 56(a) (permitting courts to enter judgment in favor of a moving party where there is "no genuine dispute as to any material fact"); FED. R. CIV. P. 50(a)(1) ("If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law . . . ."). The Supreme Court has upheld the summary judgment, directed verdict, and judgment notwithstanding the verdict devices against Seventh Amendment challenges. *See, e.g.*, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967) (affirming the constitutionality of judgment notwithstanding the verdict); Galloway v. United States, 319 U.S. 372, 396 (1943) (affirming constitutionality of directed verdict); Fid. & Deposit Co. v. United States, 187 U.S. 315, 320-21 (1902)

vacate jury verdicts that are against the weight of the evidence and to have the matters retried.[103]

Thus, contemporary Seventh Amendment jurisprudence has come to permit judges to assume functions that were traditionally reserved for juries.[104]

F. The Frequent Resort to the Injunction

The injunction came to occupy a more central role in the remedial landscape in the constitutional context. The enforcement of constitutional rights was often perceived by federal courts as involving more than simply recognizing individual rights and redressing discrete injuries, but as a "vindication of constitutional . . . policies."[105] The injunction was the principle tool used by federal courts to enforce constitutional values in segregated public schools, overcrowded prisons, and malapportioned electoral districts.[106]

The injunctive remedy was accorded favored status over damages awards when it came to giving effect to constitutional prescriptions.[107] In contrast to damages, injunctive relief against

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(affirming constitutionality of summary judgment).

103. FED. R. CIV. P. 59(a) (authorizing the ordering of a new trial). This practice has been held to conform to the Seventh Amendment. *See* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497 (1931) (noting at common law, "[i]f the verdict was erroneous with respect to any issue, a new trial was directed as to all"); Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899) (interpreting the Seventh Amendment to hold that this mode of reexamination of a jury's factfinding was permissible).

104. Murphy, *supra* note 41, at 789-90 (observing that many of these modern procedural devices had no analogs under eighteenth century English practice); JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 258-59 (2003) (commenting that prior to the middle of the twentieth century, there was a "clear policy of allowing the jury to assess damages in the federal system," but that, in the contemporary era, the "commitment to jury trial is more doubtful").

105. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976); *see also* Linda J. Silberman, *Injunctions by the Numbers: Less than the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279 (1987).

106. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 878-93 (1999) (discussing court use of injunctions to overcome "horrific' prison conditions); *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) (ordering busing to desegregate schools); Hutto v. Finney, 437 U.S. 678, 683-84 (1978) (ordering limits on the number of prisoners per cell); Baker v. Carr, 369 U.S. 186, 237 (1962) (ordering the reapportionment of electoral districts).

107. Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1135 (1989) ("Moreover, the present juxtaposition of a hesitancy to grant damages awards with a willingness to allow injunctive relief . . . gets the traditional interplay between law and equity exactly backwards."); OWEN FISS, THE CIVIL RIGHTS INJUNCTION 6 (1978) (arguing against the traditional subordination of the injunctive remedy to that of money damages in the field of constitutional rights enforcement); *see also* OWEN FISS & DOUG RENDELMAN, INJUNCTIONS 59-60 (2d ed. 1984) (noting that Fiss favors a nonhierarchical approach to choosing remedies, while Rendleman

state officials was not barred by the constitutional doctrine of state sovereign immunity.[108] Even where it would impact a state's treasury more than a retrospective damages award, prospective injunctive relief is not precluded by the Eleventh Amendment.[109] Courts could issue injunctions to remedy constitutional violations without having to address complex questions of official immunity.[110]

Injunctions were often considered the desideratum because damages awards were perceived as too difficult to obtain or too minute to justify a lawsuit.[111] Some questioned the "deterrent effect" of damages, contending that governments, unlike private parties, do not care about paying damages.[112] Others echoed a similar theme regarding suits against government officials, opining that indemnification eliminates any deterrent effect that a damages award would have.[113]

Injunctions, moreover, provided the court with an opportunity to impose prophylactic measures. In addition to directing the cessation of unconstitutional conduct (or mandating the performance of constitutionally required conduct), the injunctive decree can compel the undertaking of additional steps that will supposedly provide a

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supports an inadequacy prerequisite to injunctions).

108. *Ex parte* Young, 209 U.S. 123, 155-56 (1908) (allowing citizens to sue a state official for injunctive relief based on the fiction that it is not a suit against a state).

109. Edelman v. Jordan, 415 U.S. 651, 663-69 (1974).

110. *See* Mitchum v. Foster, 407 U.S. 225 (1972) (emphasizing traditional role of injunction in enforcing constitutional rights against states).

111. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 416-17 (2000) (suggesting that courts should rely more heavily on injunctions because they represent the "the best hope for preventing constitutional violations where a majority is willing to bear the costs of paying compensation or where a powerful interest group benefits from the unconstitutional activity"); *see also* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 876 (2001) (structural reform injunctions are a "uniquely appropriate remedial regime" for constitutional wrongs).

112. Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 219 (1998) (explaining that "the deterrent effect of traditional compensatory damages for constitutional torts is often weak" because the total harm to society may exceed the specific injury to the plaintiff); AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, *supra* note 22 at 42-43 (1997) (injuries from violations of the Fourth Amendment are mostly dignitary, and out-of-pocket losses are "small or nonexistent").

113. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 75-76 (1999) (pointing out that the federal government "indemnifies its employees against constitutional tort judgments or settlements . . . and takes responsibility for litigating such suits"); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998) ("[A] suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment.").

level of assurance that the proscribed conduct will not be repeated.[114] This gives courts wide latitude to impose conditions that are not mandated by the constitution or to restrain conduct beyond that which was alleged to be unconstitutional.[115] Even where a court does not intend to impose prophylaxis, an injunction might nevertheless restrain more than that which is alleged to be unconstitutional because the language of the decree might not be capable of sufficient precision.[116] Enjoined parties are prone to construe ambiguous language in an injunctive order expansively to avoid the risk of being held in contempt of court.[117]

These considerations have not prompted courts to dispense with the traditional requirements for obtaining injunctions.[118] Indeed, if anything, courts have imposed additional constraints on the ability of plaintiffs to secure injunctive relief in constitutional cases. The federalism-based abstention doctrine of *Younger v. Harris*, for example, precludes federal courts from enjoining pending or imminent state judicial or administrative proceedings.[119] A rigorous standing limitation further requires a plaintiff to show, not just that unconstitutional conduct causing injury has occurred, but that both

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114. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 596-98 (1983) (discussing how a prophylactic decree reduces the risk that the remedy will turn out to be ineffective or that the defendant will evade or misinterpret its remedial duties); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFF. L. REV. 301, 330 (2004) (describing how prophylactic relief "sweeps broadly to include legal conduct" and such breadth is the core of its effectiveness).

115. *See* David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 629-30 (1988) ("Without principles to guide the exercise of equitable discretion, the judge acts as a policy maker in framing the remedy, which throws into question the legitimacy of the judicial power to grant [prophylactic remedies]."); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1123-24 (1996) (arguing that prophylactic injunctions "violate principles of judicial restraint").

116. *See* Thomas, *supra* note 114, at 317 n.69 (discussing "broad injunctive relief" being characterized as prophylactic because it "reaches wide to redress harm").

117. Anthony DiSarro, *Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 284 (2010).

118. Dombrowski v. Pfister, 380 U.S. 479, 484-85 (1965) (stating plaintiff seeking to restrain unconstitutional conduct must show irreparable injury); Steffel v. Thompson, 415 U.S. 452, 462-63 & n.12 (1974) (same and noting that plaintiffs who cannot demonstrate irreparable injury can obtain a declaratory judgment); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (requiring irreparable injury to seek an injunction against unconstitutional conduct; otherwise, "a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment").

119. 401 U.S. 37, 41 (1971); Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 (1986) (applying *Younger* abstention to state administrative proceedings that are "judicial in nature" and in which plaintiff will have a "full and fair opportunity to litigate his constitutional claim[s]") (internal citations omitted).

the conduct and the injury will likely occur again in the future.[120]

Thus, although injunctions are frequently sought by plaintiffs, and preferred by courts as a remedy for unconstitutional conduct, they are not to be issued reflexively in cases, and in many instances, damages will be the only available remedy. It is against this background that presumed damages should be examined. The remedy represents an interesting hybrid from a historical perspective since it is consistent with the historical preference for damages as the remedy for constitutional violations, but it is contrary to the jury's traditional role as the ultimate arbiter of damages in the absence of legislation specifying the damages to be awarded. Presumed damages also present an interesting duality under the Seventh Amendment. The remedy enhances jury trial rights by enabling a jury to assess damages where there is no injury. However, presumed damages constrain a jury's freedom to award no damages when it finds that they are unwarranted.

II. THE PREFERENCE FOR CONSEQUENTIAL INSTEAD OF PRESUMED DAMAGES TO REDRESS INTANGIBLE HARMS.

It is often said that first impressions are lasting ones and that seems to be the case with presumed damages insofar as the Supreme Court is concerned. The Supreme Court addressed presumed damages in *Gertz v. Welch*, which presented the question of whether the First Amendment required a defamation plaintiff to prove malice where the alleged statement concerned a matter of public interest.[121] The Court answered the question by dividing the defamation claim into separate components based on the nature of the relief sought.[122]

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120. City of Los Angeles v. Lyons, 461 U.S. 95, 105-06, 108 (1983) (holding alleged victim of an illegal police chokehold lacked standing to seek injunctive relief barring use of the chokehold because there was "no more than conjecture" that he would be subjected to that chokehold if he were ever arrested in the future); Deshawn E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) ("[P]laintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future."); *see also* O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974) (finding that past injuries supply a predicate for compensatory damages, but not for prospective equitable relief).

The Lyons doctrine has been a frequent target of scholarly criticism. *See, e.g.*, Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1385-86 (2000).

121. 418 U.S. 323, 332 (1974). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), the Court ruled that a public official could not recover damages for defamation relating to his official conduct unless he proved malice—that the defendant knew the statement was false or recklessly disregarded whether it was false. The Court extended the malice requirement to defamatory criticism of public figures other than government officials. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967). *Gertz*, however, involved a non-public figure.

122. *Gertz*, 418 U.S. at 346.

The Court held that to the extent the plaintiff sought actual, provable damages—i.e., compensatory damages—he did not have to prove malice.[123] However, malice would have to be shown for punitive damages because they were extracompensatory.[124]

What about presumed damages? The Court described them as an "oddity" of state defamation law that had originated to ensure that victims of defamation would have a remedy since injury to reputation was traditionally viewed as indeterminate and thus noncognizable.[125] Compensatory damages law, however, had evolved to the point that it encompassed the "customary types of actual harm inflicted by defamatory falsehood," such as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[126] Because a defamation plaintiff would be able to recover for these injuries without presumed damages, awarding them on top of compensatory damages would be "gratuitous."[127]

A. The Supreme Court's Rejection of Presumed Damages

The Supreme Court adhered to this perception of presumed damages when it decided they could not be awarded for violations of constitutional rights in *Carey v. Piphus*,[128] and again in *Memphis Community School District v. Stachura*.[129] These cases established four critical principles concerning damages in constitutional tort cases. First, although § 1983 is modeled on state tort law, not all of that law should be applied to § 1983 actions. Tort concepts should not be incorporated into § 1983 litigation unless they comport with

123. *Id.* at 349.

124. *Id.* The Court noted that punitive damage awards were often "unpredictable" and bore "no necessary relation to the actual harm caused." *Id.* at 350. A jury's broad discretion to award punitive damages could be exercised "selectively to punish expressions of unpopular views[,]" which would tend to "exacerbate[] the danger of media self-censorship." *Id.*

125. *See id.* at 349.

126. *Id.* at 350 ("Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.").

127. *Id.* at 349 ("[T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.").

128. 435 U.S. 247, 262-64 (1978).

129. 477 U.S. 299, 311 (1986). The Court had to address the question twice because lower courts construed the Court's holding in *Carey*—that presumed damages could not be awarded for violations of procedural due process rights—as inapplicable to cases involving a violation of substantive constitutional rights. *Id.* at 301-03. Consequently, the Court reiterated the conclusion in *Stachura* where the violation pertained to First Amendment rights. *Id.* at 303.

the overarching rule that a plaintiff be compensated only for actual injuries sustained as a result of the defendant's unconstitutional conduct.[130] Thus, the fact that some states recognized presumed damages for certain tort claims did not justify incorporating the concept into tort claims under § 1983.

Second, the concept of compensatory damages under § 1983 should be defined expansively. An individual who is deprived of a constitutional right can seek redress for intangible harms, such as "mental and emotional distress"[131] or "'impairment of reputation, . . . personal humiliation, and mental anguish and suffering,'" but those injuries cannot be presumed.[132] As the Court explained: "[N]either the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused."[133] The Court indicated that, whatever the constitutional basis for liability, the statutory objective is to compensate for actual injuries, and this objective cannot be reconciled with monetary awards based on abstract values of constitutional rights.[134]

Third, nominal damages are "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."[135] Such an award, the Court reasoned, shows the "importance to organized society that [constitutional] rights be scrupulously observed."[136] In cases involving a malicious deprivation of rights, exemplary or punitive damages can also be awarded.[137] The availability of these remedies, plus the risk that compensatory damages might be awarded, are sufficient to deter the contravention of constitutional guarantees.[138]

Fourth, although there may be occasions where "some form of presumed damages may possibly be appropriate," those damages can only be "a substitute . . . not a supplement" for compensatory

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130. *Id*. at 307-11; *Carey*, 435 U.S. at 256-59.

131. *Carey*, 435 U.S. at 264 ("[M]ental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983.").

132. *Stachura*, 477 U.S. at 307 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)) (alteration in original).

133. *Carey*, 435 U.S. at 264.

134. *Stachura*, 477 U.S. at 309-10. The Court acknowledged that deterrence is an important objective underlying § 1983 remedies, but it refused to presume that "Congress intended . . . to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey*, 435 U.S. at 256-57.

135. *Stachura*, 477 U.S. at 308 n.11.

136. *Carey*, 435 U.S. at 266.

137. *See id.*

138. *Stachura*, 477 U.S. at 310 ("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations.") (quoting *Carey*, 435 U.S. at 256-57).

damages.[139] In *Stachura*, the plaintiff requested compensatory damages for intangible harms, and the district court informed the jury that it could award such damages.[140] Consequently, "no rough substitute for compensatory damages was required."[141] In *Carey*, the plaintiff made no attempt to prove damages, but it could have attempted to do so.[142] Accordingly, presumed damages are not available to plaintiffs who recover compensatory damages, unsuccessfully seek them, or choose not to pursue them though they are potentially available.[143]

The Court left very little room for presumed damages. It is not surprising that virtually all of the federal circuit courts have eschewed the concept of presumed damages in constitutional litigation.[144] As the Eighth Circuit remarked in one case, "[a]ny door

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139. *Id.* at 310-11. The Court noted, for example, that the remedy had been used in cases involving a denial of voting rights, but it refused to endorse its use in those cases: "Thus, whatever the wisdom of these decisions in the context of the changing scope of compensatory damages over the course of this century, they do not support awards of noncompensatory damages such as those authorized in this case." *Id.* at 311 n.14.

140. *Id.* at 303.

141. *Id.* at 312. The jury actually awarded damages, but because it had been instructed that it could award presumed damages and did not distinguish between compensatory and presumed damages in the award, the Court held that a new trial on damages was necessary. *Id.* at 312-13.

142. *See Carey*, 435 U.S. at 247, 251-52, 263 ("[W]e foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself.").

143. Presumed damages do not simply involve the type of evidentiary presumption authorized under the Federal Rules of Evidence. Those presumptions merely shift the burden of production (i.e., of going forward with evidence) from the plaintiff to the defendant. *See* FED. R. EVID. 301. It does not affect the ultimate burden of persuasion, which remains with the plaintiff, and indeed, if evidence that counters the presumption is introduced, the presumption dissipates. *Id.*; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993). By contrast, a presumption of damages is not rebuttable; it conclusively resolves an issue in the case. *See* Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 234 (1st Cir. 2006) ("[T]here is no presumption of injury and no automatic entitlement to damages.") (internal citations omitted).

144. *See, e.g.*, *Azimi*, 456 F.3d at 234-35 (finding no presumed damages for victim of racial and religious discrimination); Randall v. Prince George's Cnty., 302 F.3d 188, 207-09 (4th Cir. 2002) (finding no presumed damages for unlawful seizure); Norwood v. Bain, 143 F.3d 843, 855-56 (4th Cir. 1998) (finding no presumed damages for illegal search), *on reh'g en banc*, 166 F.3d 243 (4th Cir.); Baumgartner v. U.S. Dep't of Hous. & Urban Dev., 960 F.2d 572, 581-83 (6th Cir. 1992) (finding no presumed damages for gender discrimination in housing); Horina v. City of Granite, 538 F.3d 624, 637-38 (7th Cir. 2008) (finding no presumed damages for impermissible restriction of First Amendment right to distribute handbills); Lewis v. Harrison Sch. Dist. No. 1, 805 F.2d 310, 317-18 (8th Cir. 1986) (finding no presumed damages for violation of free speech rights); Phillips v. Hust, 477 F.3d 1070, 1080-81 (9th Cir. 2007) *vacated*, 555 U.S. 1150 (2009) (finding no presumed damages for violation of prisoner's First Amendment right of access to the courts); Searles v. Van Bebber, 251 F.3d 869, 875-79 (10th Cir. 2001)

left open by [*Stachura*] is not for plaintiffs . . . whose damages are readily measurable."[145] Even the few scholars who have maintained that these decisions did not completely foreclose presumed damages for constitutional wrongs have not tried to argue that the remedy should be applied outside the voting rights context.[146]

B. Expansion of the Consequential Damage Remedy

Carey and *Stachura* initially had a significant impact on a plaintiff's ability to recover money for constitutional violations. Although the compensatory damages remedy had expanded to include redress for intangible harms, courts imposed strict proof requirements for obtaining such awards.[147] The demanding nature of federal courts with respect to the evidentiary support necessary for an award of compensatory damages for mental and emotional injuries was premised on the same concerns that initially prompted courts to refuse to recognize those harms:

> Not only is emotional distress fraught with vagueness and speculation, it is easily susceptible to fictitious and trivial claims, and the intrusion of the federal courts into proscribing societal etiquette[.] Empathizing with the trepidation of common law courts in analyzing such claims, the federal courts have recognized that emotional distress claims arising from constitutional violations are not immunized from the nebulous, speculative character that plagues their common law analogues.[148]

But just as their initial reticence to recognize intangible harms was eventually overcome, judicial rigidity with regards to evidentiary support for such harms also subsided. In the Fifth Circuit, for example, the attitudinal shift was remarkably swift. In July 1996, the Fifth Circuit vacated a compensatory damages award to employees who had been subjected to racist comments in their

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(finding no presumed damages for violation of free exercise rights); Slicker v. Jackson, 215 F.3d 1225, 1229-32 (11th Cir. 2000) (finding no presumed damages for excessive force claim under Fourth and Fourteenth Amendments); Kelly v. Curtis, 21 F.3d 1544, 1557 (11th Cir. 1994) (finding no presumed damages for false arrest, malicious prosecution, and illegal detention claims).

145. *Lewis*, 805 F.2d at 317-18.

146. *See* Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 79 (1992) ("Although the Supreme Court has refused to award presumed general damages for the 'inherent value' of a constitutional right, it has not foreclosed the possibility of authorizing presumed general damages for certain nonmonetary harms caused by the deprivation of a constitutional right. . . . [T]he Court [has] explicitly reserved the question of whether presumed general damages should be recoverable in actions for a denial of the constitutional right to vote.") (footnote omitted).

147. *See supra* notes 87, 92 and accompanying text.

148. Price v. City of Charlotte, 93 F.3d 1241, 1250 (4th Cir. 1996) (citations omitted).

workplace.[149] The awards were based on the testimony of the plaintiffs that they experienced feelings of low self-esteem, hurt, anger, paranoia and inferiority, and that the comments had "emotionally scarred" one of the plaintiffs, caused her "mental anguish," and forced her to "endure[] a great deal of familial discord."[150] The court held that, in the absence of corroborating testimony or supporting medical or psychological evidence, any award other than a nominal damage award could not stand. It unsympathetically remarked: "Hurt feelings, anger and frustration are part of life."[151]

Barely a few months later, the Fifth Circuit abruptly changed course, upholding a jury award of compensatory damages based solely on the testimony of a plaintiff that, she felt "embarrassed," "belittled," "disgusted," and "hopeless" as a result of workplace discrimination.[152] The Circuit also upheld a compensatory damages award for nonpecuniary harm that was based solely on the uncorroborated testimony of a plaintiff that she experienced feelings of "low self-esteem" and "discomfort[]," and suffered from bouts of "crying" and "sleeplessness."[153] The court rejected the assertion that mental anguish damages required supporting medical evidence or other corroborating testimony.[154]

Other federal circuit courts have followed the Fifth Circuit's about-face and held that neither expert testimony nor independent corroborative evidence is necessary to support an award based on intangible harm.[155] When considering the propriety of compensatory

149. Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 937-40 (5th Cir. 1996).

150. *Id*. at 939-40.

151. *Id*. at 940. The Equal Employment Opportunity Commission, as the primary public enforcement mechanism against employment discrimination, was equally rigid when it came to compensatory damages for intangible injuries under Title VII and § 1981. The Commission emphasized the need to submit medical evidence of physical manifestations of emotional harm, such as "ulcers, gastrointestinal disorders, hair loss, or headaches" and medical or psychiatric corroboration of other objective determinable elements of such harm, like "sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." EEOC ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE CIVIL RIGHTS ACT OF 1991 § II(A)(2), at 6-7 (July 14, 1992) ("The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations.").

152. Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 809 (5th Cir. 1996).

153. Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1054 (5th Cir. 1998) (Barksdale, J. concurring in part and dissenting in part).

154. *Id*. at 1046-47.

155. *See* Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1040 (9th Cir. 2003) ("[Plaintiff's] testimony alone is enough to substantiate the jury's award of emotional distress damages."); Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 513 (9th Cir. 2000) (upholding a compensatory emotional distress damage award

damages awards in § 1983 cases, today's federal courts have refused to impose strict evidentiary requirements, even when they are mandated by the tort law of the state in which they sit.[156] The days when courts insisted on "objective" evidence of intangible harm are gone.[157]

This change makes it significantly easier for plaintiffs to pursue claims based on intangible harms. Requiring plaintiffs to retain expensive medical or psychiatric experts forced them to double down on what were low-percentage claims. Even if they managed to convince a jury of their ailment, there was no assurance that the cost of such experts could be recovered or that any damages award ultimately obtained would make the investment prudent.

Moreover, courts broadened the types of ailments that were compensable in litigation.[158] Under this expansive view, many afflictions were susceptible to credible proof simply through the testimony of the plaintiff or by family members—such as loss of

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based on testimony of plaintiff and corroborating testimony from her husband and sister); Randall v. Prince George's Cnty., 302 F.3d 188, 208-09 (4th Cir. 2002) ("We have recognized, in the § 1983 context, that a 'plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation.'") (quoting Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996)); Oden v. Oktibbeha Cnty., 246 F.3d 458, 470 (5th Cir. 2001) ("We however have not required corroborating testimony and medical evidence in every case involving nonpecuniary compensatory damages."); Tarr v. Ciasulli, 853 A.2d 921, 925-27 (N.J. 2004) (noting that New Jersey and federal law reject the notion that an award for emotional distress must be supported by expert testimony or objective corroboration); Smith v. Nw. Fin. Acceptance, Inc., 129 F.3d 1408, 1413 (10th Cir. 1997) (finding plaintiff's testimony that supervisor's offensive comments caused humiliation and loss of self-respect was sufficient); Kim v. Nash Finch Co., 123 F.3d 1046, 1065 (8th Cir. 1997) (affirming emotional distress damages award supported solely by employee's and spouse's testimony about sleeplessness, stress, anxiety, humiliation, and depression); Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1215 (6th Cir. 1996) ("A plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden [to prove emotional distress].") (internal citations omitted).

156. Chatman v. Slagle, 107 F.3d 380, 384-85 (6th Cir. 1997).

157. Harper v. City of Los Angeles, 533 F.3d 1010, 1030 (9th Cir. 2008).

158. Michelle Cucuzza, *Evaluating Emotional Distress Damage Awards to Promote Settlement of Employment Discrimination Claims in the Second Circuit*, 65 BROOK. L. REV. 393, 412-17 (1999) (highlighting that plaintiffs have been able to recover for a variety of mental and emotional conditions and afflictions, such as humiliation, inadequacy, loss of self-esteem, anxiety, loneliness, sleeplessness, loss of appetite, crying, or headaches); *see a*lso Robert S. Mantell, *The Range of Emotional Distress Compensable Under Anti-Discrimination Laws*, RODGERS, POWERS, & SCHWARTZ LLP, http://www.theemploymentlawyers.com/Articles/Emotional distress damages.htm (last visited Feb. 26, 2012) (mentioning that recovery can be obtained for intangible harms such as appetite loss, anxiety, concentration deficiency, confusion, depression, enjoyment of life impairment, frustration, helplessness, hopelessness, nightmares, trust issues, and weight loss or gain).

appetite, crying, loneliness, or sleeplessness.[159] This development is also significant since many plaintiffs are reluctant to share their pains with outside professionals.[160] These changes in the remedial landscape for intangible harms have served to ameliorate the harsh effects of the *Carey*/*Stachura* rulings.

III. THE SECOND CIRCUIT EMBRACES PRESUMED DAMAGES

A. The Kerman Decision

Although the Second Circuit followed suit and made it easier for juries and courts to remedy intangible harms,[161] in *Kerman v. City of New York*, the circuit court broke rank with all other circuits and recognized presumed damages.[162] The case arose when New York City policemen forcibly entered plaintiff's apartment after a 9-1-1 call had been placed by plaintiff's girlfriend stating that plaintiff was in a highly emotional state and possibly had a gun.[163] When the police forced open the door, they found the plaintiff lying naked on his floor and covered in cat feces.[164] Plaintiff became angry at the officers, complaining about the search and referring to the cops as "goons."[165] The cops eventually handcuffed plaintiff and took him to a hospital

159. Cucuzza, *supra* note 158, at 416; Zachary A. Kramer, *After Work*, 95 CALIF. L. REV. 627, 662 (2007) (mentioning that corroborating testimony from family members about plaintiff's distress, particularly loss of enjoyment of life, can be helpful in establishing a compensatory damage award for emotional distress).

160. See Cucuzza, *supra* note 158, at 416-17 (noting that plaintiffs asserting claims for emotional harm tend to choose to corroborate their testimony through a spouse or coworker).

161. Courts in the Second Circuit follow a three-tiered approach to intangible harm claims. So-called "garden variety" emotional distress claims, which are based solely on the testimony of the plaintiff and not supported by any medical corroboration, qualify for one range of potential awards, while "significant" emotional distress claims, supported by evidence of treatment by a healthcare professional and testimony from corroborating witnesses, qualify for more substantial awards. Finally, "egregious" emotional stress claims involve either shocking and outrageous discriminatory conduct or a significant impact on plaintiff's health. *See* Olsen v. Cnty. of Nassau, 615 F. Supp. 2d 35, 46-47 (E.D.N.Y. 2009); Khan v. HIP Centralized Lab. Servs., Inc., No. CV-03-2411 (DGT), 2008 WL 4283348, at *10-12 (E.D.N.Y. Sept. 17, 2008); Lynch v. Town of Southampton, 492 F. Supp. 2d 197, 204-07 (E.D.N.Y. 2007) (reviewing cases to determine the proper range for a potential award for emotional distress damages).

162. 374 F.3d 93, 128-32 (2d Cir. 2004).

163. *Id*. at 97-98.

164. *Id*. at 107. According to plaintiff, he had just taken a shower and was on his way to the door wrapped in a towel when the door was forced open. He claimed that the door hit him in the head and knocked him to the floor, causing the towel to come off. He further contended that the force of the entry ruptured a plastic bag of used kitty litter that had been placed near the front door for disposal and strewed its contents across his foyer and his naked body. *Id*. at 98.

165. *Id*. at 100. During the search, plaintiff attempted to phone his doctor, but one of the officers seized plaintiff's cell phone and disconnected the call. *Id*. at 102.

where he was held overnight for observation and released the next day.[166]

Plaintiff brought suit against New York City and the police officers, asserting constitutional and state law claims that were tried before a jury.[167] The jury ruled for plaintiff on claims for unlawful seizure and detention under the Fourth Amendment and state law.[168] However, the jury refused to award compensatory damages, though plaintiff had submitted corroborating evidence, including expert testimony, on mental and emotional distress and injuries.[169]

On appeal, plaintiff contended that the nominal damages verdict should be set aside because he was entitled to compensatory damages as a matter of law or, alternatively, presumed damages for his intangible injuries.[170] The Second Circuit rejected the compensatory damages argument, stating that a jury's refusal to award compensatory damages can be set aside only where the fact of injury and causation are incontrovertible.[171] That standard, the court explained, frequently cannot be met in the intangible harm context, since the fact and extent of those types of injuries are usually sharply disputed, and a jury is always free to discredit the testimony of the plaintiff and his witnesses.[172]

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166. *Id*. at 98. The cops never found a gun but were concerned with plaintiff's emotional state. *Id*. at 98, 100. The plaintiff consented to being held overnight for evaluation. *Id*. at 127.

167. *Id*. at 98.

168. *Id*. at 106.

169. *Id*. at 106, 123-24. The jury did award plaintiff nominal damages "of one dollar or less." *Id*. at 106.

170. *Id*. at 121-22.

171. *Id*. at 122. *Compare* Wheatley v. Beetar, 637 F.2d 863, 867 (2d Cir. 1980) (holding an appellate court may order a new trial where the undisputed evidence demonstrates a compensable injury), *and* Atkins v. New York City, 143 F.3d 100, 103 (2d Cir. 1998) ("If it is clear from the undisputed evidence, however, that the plaintiff's injuries were caused by the use of excessive force, then the jury's failure to award some compensatory damages should be set aside and a new trial ordered."), *with* Amato v. City of Saratoga Springs, 170 F.3d 311, 314 (2d Cir. 1999) (finding a plaintiff is not entitled to compensatory damages as a matter of law where conflicting versions of an altercation permit a jury to find that plaintiff's injuries were sustained as a result of the use of reasonable force), *and* Haywood v. Koehler, 78 F.3d 101, 104 (2d Cir. 1996) (finding that when both justifiable force and excessive force were used, "any injuries—either physical or emotional—might have resulted only from the justifiable force, thereby supporting the denial of an award of compensatory damages") (internal citations omitted).

172. *See Kerman*, 374 F.3d at 123-24 ("As to whether Kerman experienced mental suffering or psychological injury, the jury was not required to credit Kerman's subjective representations or the testimony of Kerman's brother [or of his psychiatrist]."); Robinson v. Cattaraugus Cnty., 147 F.3d 153, 160 (2d Cir. 1998) (finding the fact that the jury credited plaintiffs' account on liability "did not require it to believe plaintiffs' evidence as to either the fact or the extent of their emotional suffering"); *Amato*, 170 F.3d at 314 (finding a jury can legitimately refuse to award

The majority, however, ordered a new trial on damages, concluding that plaintiff was entitled to presumed damages for having been unlawfully detained at his apartment and the hospital (at least until the time he consented to being there).[173] The court reasoned that presumed damages were appropriate because "damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering."[174] Dissenting from the panel's ruling on presumed damages, Judge Raggi took issue with the majority's conclusion that the "loss of liberty" was not subsumed within the concept of intangible harm that was evaluated by the jury.[175]

B. The Second Circuit's Flawed Approach

On a micro level, the *Kerman* majority's reasoning is difficult to accept. If a jury could rationally conclude that the plaintiff suffered no harm from the medical attention he received, which was fundamental to the court's holding that the plaintiff was not entitled to compensatory damages, why should any harm be presumed from a loss of liberty? The fact that the plaintiff consented to remaining overnight for observation certainly suggests that the experience was not altogether unpleasant for him, and the jury could easily have concluded that, while the policemen acted unlawfully, the plaintiff benefitted from the free medical and psychiatric care he received.[176]

The majority reasoned that the compensatory damages verdict covered only emotional ailments, not the loss of time that accompanies a wrongful detention.[177] There is some appeal to the distinction drawn by the majority. What if a plaintiff is not an emotional person? Why should she not recover for an illegal detention that wasted her time as much as any emotional person?

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damages "where a victim's claims of injury lack credibility") (internal citations omitted).

173. *Kerman*, 374 F.3d at 132.

174. *Id.* at 125 (internal citations omitted).

175. *Id.* at 136-37 (Raggi, J., concurring in part and dissenting in part). As Judge Raggi explained, the psychic injury that is "inherent" in situations of false imprisonment cases is the "interference with a person's ability to enjoy life" and is "recognized and compensated generally at common law . . . as a form of mental anguish," which was the very "injury charged by the court and rejected by the jury in Kerman's case." *Id.* at 136.

176. The jury's refusal to credit plaintiff's protestations of psychic and emotional injury was likely influenced by the incredible nature of his explanation as to how he came to be observed naked in his apartment and covered with dirty kitty litter. *See id.* at 98.

177. *See id.* at 125 ("The damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering . . . .").

The problem with this reasoning is that recoverable, intangible injuries include mental anguish as well as emotional distress.[178] Compensatory damages can cover amorphous concepts such as humiliation, degradation, anxiety, loss of enjoyment of life, frustration, helplessness, and loss of trust.[179] In this context, it is difficult to accept "loss of time" as a separate injury that is not encompassed by one of these conditions.

On a macro level, the majority's ruling is even more troubling. The Supreme Court in *Carey* and *Stachura* made clear that presumed damages should never be used as a supplement to compensatory damages.[180] Though the plaintiff in *Kerman* was not awarded compensatory damages, this was not due to the fact that he was incapable of proving them.[181] Indeed, he adduced evidence of his intangible harm and that evidence, if credited by the jury, would have been legally sufficient to support a compensatory damages award. However, the jury was unconvinced and awarded nothing, acting well within its prerogative.[182] According, to the majority's logic, even if the jury had awarded compensatory damages, the plaintiff would have been entitled to a further award of presumed damages because those were separable from compensatory damages. This clearly would result in presumed damages being used to supplement compensatory damages, contrary to the Supreme Court's teaching.

Furthermore, the doctrine of presumed damages as applied in *Kerman* cannot be reconciled with Seventh Amendment principles, even as they have come to be diluted in present day. The majority is essentially saying that a jury should be instructed that a plaintiff is entitled to an award of damages whenever he or she has been detained unlawfully.[183] Such a holding squarely conflicts with the right of a defendant to dispute the existence of intangible injury and to have the jury determine the issue. Under the Trial by Jury Clause, so long as Congress has not prescribed statutory damages that must be awarded, the jury is the ultimate arbiter on both the

178. *See supra* notes 146-59 and accompanying text. The trial court instructed the jury that compensatory damages should "fairly and reasonably compensate plaintiff for . . . the emotional and mental anguish that he claims he sustained as a consequence of the defendant's violation of his constitutional rights . . . ." *Kerman*, 374 F.3d at 105.

179. *See supra* notes 157-59 and accompanying text.

180. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) ("Presumed damages are a substitute for ordinary compensatory damages, not a supplement for an award that fully compensates the alleged injury."); Carey v. Piphus, 435 U.S. 247, 262-66 (1978).

181. *Kerman*, 374 F.3d at 106.

182. *See id.* at 123-24.

183. S*ee id.* at 124-26.

fact of injury and the extent of damages.[184] This is particularly so in cases involving intangible harm because those injuries can easily be fabricated and cannot objectively be disproved.[185]

To be fair, the *Kerman* ruling does give the jury discretion as to the amount of presumed damages to be awarded. However, the fact remains that the jury is denied the discretion to refuse to render any award. This would seem to violate a defendant's jury trial right in much the same way as if the jury were instructed by the court that it had to award punitive damages but could use its discretion to determine the amount of the award.[186] It is, moreover, unrealistic to view the jury as having discretion as to the amount of the award since if the court deems the amount to be inadequate, it is presumably free to order a retrial until the jury gets the amount "right."[187]

Furthermore, limiting presumed damages to situations where a jury has declined to award compensatory damages should not suffice for Seventh Amendment purposes. Where a plaintiff has had a full and fair opportunity to present evidence of her purported injuries and where the jury has evaluated that evidence and declined to award damages, a judicially mandated award of presumed damages would constitute a reexamination of the jury's factfinding. This conclusion cannot be obscured by the court categorizing its action as correcting an error of law. Determining whether damages are warranted requires that the court determine the nature and extent of the harm, which unquestionably requires an assessment of the facts. Where a jury has awarded no damages, it has determined that the plaintiff was not injured as a result of the wrong. When the court intervenes under the guise of implementing a principle of law (whether the court calls it "presumed damages" or something else), it does not mask the factual reassessment.[188] In the end, what the

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184. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 197-98 (1974) (allowing punitive damages); Ross v. Bernhard, 396 U.S. 531, 536-37 (1970) (allowing treble damages); St. Louis, Iron Mountain & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915) (holding the proper measure of damages "involves only a question of fact").

185. Robinson v. Cattaraugus Cnty., 147 F.3d 153, 160 (2d Cir. 1998) (noting that jury did not have to credit plaintiffs' evidence "as to either the fact or the extent of their emotional suffering."); Gibeau v. Nellis, 18 F.3d 107, 110 (2d Cir. 1994) (plaintiff could not "conclusively establish[]" that defendant's unconstitutional conduct "caused him pain, suffering, humiliation, or fear").

186. *See* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 437 (2001) (finding that court can review extent of punitive damages but the decision to award must be made by jury); *see also Robinson*, 147 F.3d at 160 (rejecting a contention that punitive damages can be awarded as a matter of law based on indisputable evidence).

187. For an example of an appeals court declining to enter a damages award itself but making it clear what type of award should be rendered on re-trial, see Johnson v. Hale, 13 F.3d 1351 (9th Cir. 1994).

188. *See* Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 460-61 (1996) (Scalia,

appellate court has done is to augment a jury verdict contrary to the Reexamination Clause.[189]

Aside from the Seventh Amendment, there are prudential reasons why presumed damages should not be applied in situations where a plaintiff is capable of proving intangible harm. As noted previously, federal courts have significantly expanded the types of ailments or afflictions that can be the subject of an actionable intangible injury and have substantially eased the evidentiary requirements for proving such harms.[190] Supplementing this recovery with presumed damages will certainly lead to duplicative recoveries and inflated awards.

One of the first reported cases where the *Kerman* presumed damages doctrine was applied provides a telling illustration of this point. In *Martinez v. Port Authority of New York & New Jersey*, presumed loss of liberty damages was used as a supplement to compensatory damages for intangible harm.[191] In this false arrest case brought under § 1983, the trial court instructed the jury that they could award damages for emotional and psychic injuries, and in accordance with the *Kerman* decision, further charged that the plaintiff was entitled to an award of damages for loss of liberty.[192] The verdict form did not require the jury to segregate the two awards, and the jury returned a single award for $1,000,000.[193]

The district court concluded that the amount awarded was grossly excessive and a new trial should be ordered unless the defendants would agree to a remittitur in the amount of $360,000.[194] That amount was arbitrarily divided into awards of $200,000 for emotional distress and $160,000 for loss of liberty.[195] The district court looked to jury verdicts and judicial remittiturs in other false

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J., dissenting); *see also id.* at 464 n.10 ("To suggest that every fact may be reviewed, because what may ensue from an erroneous factual determination is a 'legal error,' is to destroy the notion that there is a factfinding function reserved to the jury.").

189. *See* Campos-Orrego v. Rivera, 175 F.3d 89, 97 (1st Cir. 1999) ("[T]he Seventh Amendment flatly prohibits federal courts from augmenting jury verdicts . . . ."); *Robinson*, 147 F.3d at 162 ("[T]he Seventh Amendment generally prohibits a court from augmenting a jury's award of damages . . . ."); *accord* Hibma v. Odegaard, 769 F.2d 1147, 1154 (7th Cir. 1985) ("Under federal law, a court generally may not increase a jury's determination of damages by additur."); Lyon Dev. Co. v. Bus. Men's Assurance Co. of Am., 76 F.3d 1118, 1125 (10th Cir. 1996) ("[A]dditur cannot be used in the federal courts because it involves an unconstitutional reexamination of the jury verdict in violation of the Seventh Amendment.").

190. *See supra* text accompanying notes 146-58.

191. No. 01 Civ. 721 (PKC), 2005 WL 2143333, at *20-21 (S.D.N.Y. Sept. 2, 2005), *aff'd*, 445 F.3d 158, 161 (2d Cir. 2006).

192. *See id.* at *1.

193. *See id.* at *19.

194. *Id.* at *26.

195. *Id.* at *21-22.

arrest or imprisonment cases for guidance on appropriate awards.[196] This exercise was undertaken so that the court could ascertain the "highest" award that would not be "shocking to the judicial conscience," which is the Second Circuit standard for determining an appropriate remittitur amount.[197] Not only does this procedure tend to produce higher awards, it involves a not insignificant expenditure of judicial resources to eliminate the double counting of damages.[198]

The risk of duplication and inflated awards will be even more pronounced when claims are aggregated, as in the class action context. Because a presumption of damages is not based on a particularized assessment of harm, the doctrine effectively transforms the issue of damages from an individual to a common issue for purposes of the federal class action predomination analysis.[199] This transformation occurred in a case involving class action claims against a county for conducting strip searches on misdemeanor detainees.[200] The class action, seeking damages on behalf of all individuals who had been subjected to the policy, was brought after the county had discontinued the strip search policy based on a prior court ruling of unconstitutionality.[201] The district court initially refused to certify a class on the ground that, although liability was a common issue, individual issues of causation and damages predominated.[202] The district court, moreover, refused to

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196. *See id.* at *19-22. The awards that the court found "particularly helpful" each involved compensatory awards for intangible harm. *See id.* at *20; *see, e.g.*, Sulkowska v. City of New York, 129 F. Supp. 2d 274, 308 (S.D.N.Y. 2001) (allowing award for pain and suffering); Komlosi v. Fudenberg, No. 88 Civ.1792 (HBP), 2000 WL 351414, at *16 n.12 (S.D.N.Y. Mar. 31, 2000) (reviewing awards for post-traumatic stress disorder).

197. *Martinez*, 2005 WL 2143333, at *20 n.9. In light of this standard, allowing duplicative items of damages and then trying to correct for the duplication postverdict via remittitur will invariably result in inflated awards. The highest prior awards will usually determine "the highest . . . award that is not shocking to the judicial conscience." *Id*.

198. Indeed, on appeal, the Second Circuit noted that a mandatory presumed loss of liberty damages instruction presents a risk of double counting. *See Martinez*, 445 F.3d 158, 161 (2d Cir. 2006) (affirming and commenting that "it would have been preferable had the District Court specifically instructed the jury to avoid duplicative damage awards in this case").

199. FED. R. CIV. P. 23(b)(3) permits a class action to proceed where common issues predominate over individual ones.

200. *See In re* Nassau Cnty. Strip Search Cases, Nos. 99 CV 3126 (DRH), 99 CV 2844 (DRH), 99-4238 (DRH), 2008 WL 850268, at *1 (E.D.N.Y. Mar. 27, 2008).

201. *See* Shain v. Ellison, 53 F. Supp. 2d 564, 566 (E.D.N.Y. 1999), *aff'd in part and remanded in part*, 273 F.3d 56, 69 (2d Cir. 2001). That case is ironic. The plaintiff had sued for compensatory damages as well as declaratory relief, but the jury declined to award any. The Second Circuit rejected the plaintiff's contention on appeal that he was entitled to compensatory damages, emphasizing that a jury is always free to refuse to credit testimony asserting emotional trauma or injury. *Id.* at 67.

202. *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 222-24 (2d Cir. 2006).

certify a class limited to the issue of liability only because it concluded that such partial certifications were impermissible under Federal Rule of Civil Procedure 23.[203] The Second Circuit reversed, holding that Rule 23(c)(4) expressly authorizes partial certifications for liability determinations.[204]

On remand, the district court certified a class for purposes of not just liability but for damages as well, relying upon the intervening decision in *Kerman* to conclude that the class members had common claims for presumed damages for the "injury to human dignity" caused by the strip search.[205] The court held that consequential damages for intangible harm could also be recovered by individual members of the class in subsequent damages phases of the proceeding.[206] Here, again, presumed damages were being used as a supplement to compensatory damages.

The court held a trial on presumed damages, consisting of the testimony of multiple class members describing the strip searches.[207] The district court then proceeded to determine an appropriate award of presumed damages based on the "affront to human dignity necessarily entailed in being illegally strip searched."[208] Recognizing that he was venturing into "unchartered territory,"[209] the district judge reviewed cases involving illegal strip searches, virtually all of which involved awards for compensatory or nominal damages, and concluded that each class member should be awarded $500 per strip search.[210] He acknowledged that subsequent trials on compensatory damages would present a danger of double counting.[211]

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203. *Id*.

204. *Id*. at 226-27. The court further noted that the fact that the defendant had abandoned the strip search policy and would not be contesting liability in the case did not prevent that issue from predominating. *Id*. at 227-29.

205. *Strip Search Cases*, 2008 WL 850268, at *4.

206. *See In re* Nassau Cnty. Strip Search Cases, 742 F. Supp. 2d 304, 324-26 (E.D.N.Y. 2010).

207. *Id*. at 308.

208. *Id*. at 307-08. The legitimacy of using "trial by formula" procedures in class actions was recently questioned by the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (rejecting as impermissible the "novel" procedure of extrapolating from the testimony of a few sample class members to determine liability and monetary relief for the entire class).

209. In re *Nassau Cnty. Strip Search Cases*, 742 F. Supp. 2d at 322.

210. *Id*. at 329-31.

211. *Id*. at 322. The district court noted that the per victim amount of total damages that plaintiffs' counsel was seeking in the case "would have a 'potentially devastating impact' on the County." *Id*. at 325. Indeed, in an effort to persuade the court that the presumed damages award should be higher than $500 per search, plaintiffs' counsel dangled the following carrot: "[I]f the Court's [presumed] damages verdict is substantial enough to provide reasonable compensation to the class, plaintiffs are considering foregoing the next stage of the compensatory damages case in an effort to move this case more expeditiously to a conclusion . . . ." *Id*. at 322 n.20.

Providing a damages remedy to individuals who lack the ability to obtain damages or who would otherwise not pursue a damages remedy (because it is too costly or difficult) is not unreasonable. But allowing plaintiffs to simultaneously pursue compensatory and presumed damages in aggregated proceedings such that a local government is threatened with fiscal ruin is disturbing. The presumed damages doctrine, as applied so far in the Second Circuit, gives rise to serious concerns.

C. The Supposed Remedial Gap

Before dismissing presumed damages as an unnecessary redundancy, serious consideration should be given to arguments that extracompensatory damage remedies are essential to ensuring that constitutional rights are adequately enforced.

Some scholars have argued that monetary remedies should be more accessible and lucrative to reduce the gap between constitutional rights and remedies.[212] This gap supposedly exists because private litigants are inadequately incentivized by existing remedial alternatives to enforce constitutional rights.[213] Other commentators have argued that ineffective remedies dissuade courts from recognizing new constitutional rights.[214] Judges are reluctant to recognize a constitutional right where they cannot provide a vigorous and efficacious remedy to enforce it.[215]

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212. *See, e.g.*, Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 198 (1998) (arguing that remedial law "needs to systematically favor the plaintiff, in order to compensate for the systematic under-enforcement of constitutional rights"); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) (noting "[t]he structural interest in providing constitutional remedies [that are] . . . designed not [simply] to redress individual wrongs but to furnish incentives for officials generally to respect constitutional norms"); *see also* Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 666, 681-82 (1987) (setting forth an alternative analytical framework wherein "courts must begin with a presumption in favor of enforcement [of rights] that can be overcome only by an affirmative showing that the harm from enforcement is greater than the harm to the plaintiff from the denial of his rights").

213. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000) (observing that compensatory damages are not calibrated to redress the social costs of constitutional violations, such as the "expressive harms" inflicted on potential listeners of speech that have been unconstitutionally suppressed or other speakers that are chilled by that suppression).

214. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 874, 878-93 (1999) ("Rights are often shaped by the nature of the remedy that will follow if the right is violated."); Owen M. Fiss, Foreword, *The Forms of Justice*, 93 HARV. L. REV. 1, 55 (1979) (noting that judges tend to distort the true meaning of constitutional rights by tailoring them to fit what effective remedies are available).

215. *See* Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical*

There are, however, countervailing arguments; some scholars disagree that there must be a remedy for every constitutional violation. Excessive litigiousness can make the business of government unduly difficult as public officials are paralyzed by the fear of potential liability.[216] Other commentators have opined that a right-remedy gap in constitutional torts is beneficial because it facilitates the growth of constitutional law by reducing the costs associated with innovation.[217] The optimal remedial scheme, it is contended, is one that strives to "keep government within the bounds of law."[218]

Contrary to arguments that compensatory damages awards are not an effective deterrent, many jurists have acknowledged that damages awards do serve a systemic deterrent function.[219] Indeed, municipalities typically measure themselves by their success rate in § 1983 litigation and the aggregate amount of damages awards that have been assessed against them and their agents.[220] Courts have

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Analysis, 36 PEPP. L. REV. 667, 704 (2009) ("Acknowledging a constitutional injury while precluding recovery . . . create[s] intense internal discomfort for judges. Rather than tolerate this cognitive dissonance, judges may be subconsciously inclined to deny that a constitutional violation occurred at all.").

216. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 59-81 (1983).

217. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89-90 (2000). According to this argument, remedying each and every constitutional violation may actually discourage courts from innovating in the area of constitutional rights because they will fear that, by expanding the scope of constitutional rights, they will be increasing the costs of good government. The Court's 1976 decision in *Paul v. Davis*, 424 U.S. 693, 697-98 (1976), is frequently cited as an example of where the Court decided that reputation was not a constitutionally protected liberty interest, because it was concerned that recognizing a cause of action for reputational harm would federalize a large segment of state tort law. *See* Levinson, *supra* note 76, at 878-93 ("In all likelihood, *Paul* would have come out differently if the only available remedy had been an injunction.").

218. Fallon, Jr. & Meltzer, *supra* note 212, at 1736; Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (recognizing that constitutional remedies are inevitably "a jurisprudence of deficiency . . . between declaring a right and implementing a remedy").

219. Fallon, Jr. & Meltzer, *supra* note 212, at 1788 ("Though a damages award does not require discontinuation of such practices, it exerts significant pressure on government and its officials to respect constitutional bounds."); Owen v. City of Independence, 445 U.S. 622, 651-52 (1980) (discussing the deterrent effect of imposing § 1983 damages liability on municipalities). Akhil Amar has advocated that damages can be a sufficient deterrent to unconstitutional conduct provided that judicially-created immunities are abolished. Amar, *Of Sovereignty and Federalism*, *supra* note 20, at 1512-17.

220. This can be gleaned from a review of publicly available information on municipal law department websites. The City of Chicago, for example, lists all judgments against it, and settlements made by it, in litigation, including Section 1983 litigation, for a given year. *E.g.*, CITY OF CHI. DEP'T OF LAW - JUDGMENT/VERDICT & SETTLEMENT REPORT (2008), *available at* http://www.cityofchicago.org/content/dam/

recognized that even nominal damages awards against municipalities can prompt institutional change.[221]

Official immunity doctrines certainly reduce governmental exposure to civil damages awards, but their effect is frequently overstated.[222] Qualified immunity in § 1983 cases frequently turns on the question of objective reasonableness, and that usually requires a jury determination.[223] Officials will be deterred from violating constitutional rights if a determination of their immunity will have to await a full trial. Statistics produced by the New York City Corporation Counsel indicate that New York City infrequently obtains summary judgment or another form of pretrial dismissal in its § 1983 litigation; no more than fifteen to twenty percent of its cases were resolved of by this method.[224] One would expect a greater frequency of successful summary judgment motions in § 1983 cases if immunity were truly the determinative factor that critics claim.[225]

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city/depts/dol/JudgementAndSettlementRequests/2008expendituresthrough12312008.pdf. The City of New York provides an annual report, similar to those supplied by public companies, which touts its lawyers' successes in defending the City and its employees in civil rights litigation. N.Y. CITY LAW DEP'T, 2010 ANNUAL REPORT, *available at* http://www.nyc.gov/html/law/downloads/pdf/2010AR.pdf. The Los Angeles City Law Department compiles the various news releases prepared and disseminated by it during the year, many of which boast of the department's performance in defending against Section 1983 claims. *News from the City Attorney's Office*, L.A. CITY ATTORNEY'S OFFICE, http://atty.lacity.org/NEWS/index.htm (last visited Feb. 26, 2012).

221. Amato v. City of Saratoga Springs, 170 F.3d 311, 317-18 (2d Cir. 1999) (stating that a nominal damage award could "encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue"); Cadiz v. Kruger, No. 06 C 5463, 2007 WL 4293976, at *10 (N.D. Ill. Nov. 29, 2007) (discussing that a nominal damages verdict against the city resulting from "unconstitutional municipal policies, practices or customs could provide a greater incentive for change than . . . a damages award [against individual officers] that the City then could chalk up to aberrational conduct by . . . rogue [employees]").

222. Certain scholars have suggested that the success rate of the qualified immunity defense in § 1983 litigation is approximately eighty percent. *See* Gilles, *supra* note 111, at 852 (stating that courts sustain the defense of qualified immunity in eighty percent of cases); Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999) (stating that qualified immunity is denied in approximately twenty percent of cases).

223. *See, e.g.*, Green v. City of New York, 465 F.3d 65, 83-84 (2d Cir. 2006) (holding that existing factual issues precluded dismissal of the Fourth Amendment seizure claim on qualified immunity grounds); O'Bert *ex rel.* Estate of O'Bert v. Vargo, 331 F.3d 29, 37 (2d Cir. 2003) (stating that summary judgment is usually not appropriate for "qualified immunity premised on an assertion of objective reasonableness").

224. Data on file with author. The statistics cover a four year period from 2004 through 2007. The statistics were prepared by the Corporation Counsel's Office and distributed to the audience, including the author, at a presentation made by Michael Cardozo, Corporation Counsel to the City of New York.

225. Empirical studies show, however, that summary judgment is both filed and granted at a higher rate in civil rights cases in contrast with contract or traditional

Indeed, immunity should have no impact in garden variety constitutional tort cases. In those cases, it will be fairly easy to discern the "line between constitutional and unconstitutional conduct": "The guard who beat a prisoner should not have beaten him; the agent who searched without a warrant should have gotten one; and the immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes."[226] NYC Corporation Counsel statistics indicate that New York City settles a substantial portion (in excess of eighty percent) of its § 1983 cases and tries less than one percent of them.[227] If immunity doctrines virtually guaranteed success at trial, one would expect to see a large municipality like New York City trying more cases and settling fewer of them.

Federal case management statistics also reflect that federal civil rights cases have maintained a constant, sizable share of the national federal civil docket. Over the past four years, the total number of federal civil rights actions has represented a steady ten to twenty percent share of the entire federal civil docket.[228] This data does not suggest that there is any serious or growing deficiency concerning civil enforcement of constitutional rights.

Finally, arguments about the need for greater deterrence and enhanced constitutional enforcement have repeatedly been made but have not convinced the Supreme Court to expand or fortify remedies.

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tort actions. *See* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 884-85, 887 (2007) (Figures 3 and 6); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 15 (Figure 1) (Cornell Law School, Working Paper No. 08-22, 2008), available at http://ssrn.com/abstract=1138373.

226. Arar v. Ashcroft, 585 F.3d 559, 580 (2d Cir. 2009) (en banc).

227. The City tried between six and eleven cases, out of over the 700 § 1983 case dispositions each year, within the four-year period. Still, the existence of a potential immunity will likely impact the settlement amount that a civil rights plaintiff can negotiate with a governmental entity. Data on file with author.

228. 2010 ANN. REP. OF THE DIR. OF THE ADMIN. OFFICE OF THE U.S. CTS.,APP. TABLE C-2A, at 147-49, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02ASep10.pdf. I place the range at between ten and twenty percent, not because it fluctuates but because of potential variances in how one defines a "civil rights case." There is a "civil rights" category, but it includes employment cases, which would encompass cases brought against nongovernmental entities. There is a "civil rights" subcategory under "prisoner petitions," as well as a "prison conditions" subcategory. I would classify cases under these subcategories as "civil rights" cases. *See* Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 662 n.9 (2006) (observing that the categories "Other Civil Rights" and "Prisoner Civil Rights" are "likely to encompass *Bivens* actions and Section 1983 actions other than employment disputes"); Leong, *supra* note 215, at 694-95, 694 n.109 (including both prisoner civil rights and prison condition suits in civil rights category).

The Court has dismissed these arguments in refusing to authorize punitive damages awards against municipalities.[229] They similarly have rejected them in declining to imply new private rights of action for constitutional wrongs.[230] The arguments have fared no better in the presumed damages context.[231]

D. Is There a Statutory Alternative?

None of the above is intended to suggest that Congress could not constitutionally prescribe a scheme of statutory or presumed damages. Congress is free to enact a statutory damages scheme that would require juries to award damages for violations of constitutional rights.[232] This would, however, require Congress to perform the awkward and difficult political task of monetizing constitutional rights. Legislators would essentially have to price constitutional wrongs; for example, by setting the monetary remedy for an Establishment Clause violation at $15,000, an illegal search at $10,000 and an Equal Protection infringement at $5,000. Understandably, legislators may be reluctant to do this.

Congress could establish a presumed damages scheme with built-in flexibility, including broad ranges of liability, instead of specific amounts, and allowing plaintiffs to choose whether to pursue statutory or actual compensatory damages. This approach has been taken in the federal copyright statute, which permits a plaintiff to

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229. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) (explaining how the Court consistently declines to abolish traditional common law immunities afford to state officials).

230. Wilkie v. Robbins, 551 U.S. 537, 550 (2007) (stating that no new *Bivens* action was available for retaliating against the exercise of ownership rights); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70 (2001) (stating that no *Bivens* claim was available against a corporate defendant because the claim was designed to deter individual actors); Schweiker v. Chilicky, 487 U.S. 412, 425-27 (1988); Bush v. Lucas, 462 U.S. 367, 378, 380 (1983) (holding that Congress can more appropriately determine what legal liabilities are best for the public interest); Chappell v. Wallace, 462 U.S. 296, 304-05 (1983).

231. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) (finding compensatory damages suffice to deter constitutional violations); Carey v. Piphus, 435 U.S. 247, 256-57 (1978) (explaining that there is no need for a deterrent "more formidable than that inherent in the award of compensatory damages"). While some federal circuit courts will presume irreparable injury from unconstitutional conduct for purposes of issuing an injunction, the Supreme Court has not done so and has disapproved of the practice in the statutory context. Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757, 2759-60 (2010); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). For an analysis of why the practice of presuming irreparable injury for constitutional claims is unsupportable, see Anthony DiSarro, *A Farewell to Harms: Against Presuming Irreparable Injury in Constitutional Litigation*, 35 HARV. J. L. & PUB. POL. (forthcoming 2012).

232. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, *supra* note 22, at 43-44 (proposing legislative or administrative remedial schemes for Fourth Amendment violations involving presumed minimum damages).

elect to recover either actual damages or statutory damages.[233] Congress has set broad ranges of statutory copyright damages (e.g., "a sum of not less than $750 or more than $30,000"), which may be enhanced for "willful" infringers (up to $150,000) or ameliorated for "innocent" infringers (as low as $200).[234]

It can reasonably be argued that establishing such a scheme essentially replicates the current judicial practice where courts compare jury awards for intangible harms to those rendered in other cases to see if they are excessive.[235] A statutory scheme would regulate constitutional tort damage awards, helping to prevent excessive awards through the use of damage caps and reducing inadequate awards through damages floors. Such a scheme would pose interesting questions on which damage ranges to set for the various wrongs. Congress would be effectively ranking constitutional rights by affording higher ranges to one set of rights over another. Serious consideration must to be given to ensure that the scheme does not encourage the assertion of meritless claims. Nevertheless, this remains a potential alternative to the present ad hoc judicial system, and one that would comport with the Seventh Amendment.

IV. ATTORNEYS' FEES JURISPRUDENCE AND ITS IMPACT ON REMEDIES

If judicially imposed presumed damages are such a bad—indeed, unconstitutional—idea, why has the Second Circuit embraced them? The Supreme Court has instructed that the appropriate monetary remedy for a deprivation of constitutional rights that produces no compensable injury is nominal damages.[236] The Second Circuit, however, seems unsatisfied with the nominal damages remedy and the reason may be related to attorneys' fees.

A. Fees-Shifting and Farrar

Courts in § 1983 cases are statutorily authorized to require a defendant to pay the attorneys' fees incurred by the plaintiff when the plaintiff is the "prevailing party."[237] This represents a departure

233. 17 U.S.C. § 504(c) (2006) (stating that the plaintiff "may elect, at any time before final judgment is rendered, to recover, *instead of* actual damages and profits, an award of statutory damages") (emphasis added).

234. *Id.*

235. Lind, *supra* note 47, at 270 ("[C]omparability review is intimately tied to the procedure of remittitur.").

236. *See supra* text accompanying notes 135-38.

237. 42 U.S.C. § 1988(b) (2006). Other civil rights statutes have similar provisions. *See* 42 U.S.C. § 2000e-5(k) (2006) (Title VII); 29 U.S.C. § 216 (b) (2006) (Fair Labor Standards Act); 42 U.S.C. § 3613 (c)(2) (2006) (Fair Housing Act); 42 U.S.C. § 12205 (2006) (Americans with Disabilities Act). Courts have interpreted these nearly identically worded provisions consistently. *See, e.g.*, Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (quoting Northcross v. Memphis Bd. of Educ.,

from the so-called "American Rule" followed in federal courts where parties are required to bear their own attorneys' fees.[238] To recover attorneys' fees, a plaintiff need not prevail on all or most of her claims; she need only be successful on her § 1983 claim.[239] The Supreme Court has noted that the possibility that defendants would have to pay the plaintiff's attorneys' fees provides an "additional—and by no means inconsequential—" form of deterrence.[240]

It stands that, if nominal damages are supposed to reflect the overarching importance of constitutional compliance, plaintiffs who receive them should be treated no differently for attorneys' fees-shifting purposes than plaintiffs who receive compensatory damages. Most plaintiffs would be unwilling to pursue a nominal damages claim if they have to incur hundreds of thousands of dollars in attorneys' fees to recover a single dollar. But if claims for nominal damages are never brought, then how will society be reminded of the importance that constitutional obligations be observed? Unfortunately, due to a misguided Supreme Court ruling, this is the current situation.

In *Farrar v. Hobby*, the Court stated that a nominal damages verdict should produce no fees-shifting.[241] The plaintiff in *Farrar* sued state officials under § 1983, alleging a violation of due process and seeking compensatory damages.[242] The jury found that a due process violation had occurred but that it did not proximately cause any damages.[243] The plaintiff was awarded nominal damages of one dollar.[244]

The Supreme Court held that a plaintiff who is awarded nominal damages is technically a prevailing party but also stated that the degree of a plaintiff's success is "the most critical factor"[245] in

412 U.S. 427, 428 (1973)) (stating "that fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike"); Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983) (stating that if an attorney fee provision of a statute was patterned upon a provision contained in a different statute, the same standard generally applies).

238. *See* Key Tronic Corp. v. United States, 511 U.S. 809, 819 & n.13 (1994).

239. Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 790-93 (1989). Although the term "prevailing party" is facially neutral, it is interpreted and applied so that a losing plaintiff will rarely be liable for fees. Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 29 (1987). To recover attorneys' fees, a defendant must not only prevail on all of the claims asserted against it, but must also show that the claims were either frivolous or groundless. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

240. Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978).

241. 506 U.S. 103, 115-16 (1992).

242. *Id.* at 106.

243. *Id.*

244. *Id.* at 116 (O'Connor, J., concurring).

245. *Id.* at 114 (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)) (internal

assessing whether fees should be awarded, and the "de minimis nature" of the recovery in this case weighed heavily against awarding fees.[246] When a plaintiff recovers only nominal damages, the Court reasoned, "the only reasonable fee [will] usually [be] no fee at all."[247] Justice O'Connor joined in the majority opinion, but also filed a concurring opinion that attempted to soften the majority's holding. She noted that, in deciding whether to award fees, courts should also consider "the significance of the legal issue" decided and whether the decision "accomplished some public goal."[248]

Notwithstanding *Farrar*, most federal circuit courts have sustained awards of attorneys' fees in nominal damages cases.[249] Some courts have distinguished *Farrar* on the ground that the plaintiff was seeking $17,000,000 in compensatory damages in that case and thus the mere $1 recovery signified a lack of overall success.[250] Other courts have relied upon Justice O'Connor's concurring opinion.[251] The Second Circuit, in stark contrast, has rigidly adhered to *Farrar*'s holding[252] and has held that a nominal victory produces no fees-shifting.[253]

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quotation marks omitted).

246. *Id.* at 120-21 (O'Connor, J., concurring).

247. *Id.* at 115.

248. *Id.* at 121 (O'Connor, J., concurring) (positing that "an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved").

249. Cummings v. Connell, 402 F.3d 936, 946-47 (9th Cir. 2005); Phelps v. Hamilton, 120 F.3d 1126, 1131 (10th Cir. 1997); Johnson v. Lafayette Fire Fighters Ass'n Local 472, 51 F.3d 726, 731 (7th Cir. 1995); Jones v. Lockhart, 29 F.3d 422, 423-24 (8th Cir. 1994).

250. Jama v. Esmor Corr. Servs., Inc., 577 F.3d 169, 174-75 (3d Cir. 2009); Morales v. City of San Rafael, 96 F.3d 359, 362-63 (9th Cir. 1996).

251. Mercer v. Duke Univ., 401 F.3d 199, 206-09 (4th Cir. 2005) (holding female cut from the football team due to discrimination who was awarded only nominal damages was entitled to an award of $350,000 in attorneys' fees because the legal issue on which the plaintiff prevailed was significant and the litigation served a public purpose); Diaz-Rivera v. Rivera-Rodriguez, 377 F.3d 119, 124-25 (1st Cir. 2004) (holding municipal employees terminated as a result of their political affiliations in violation of the First Amendment who were awarded only nominal damages were entitled to an award of attorneys' fees since the determination represented a significant legal conclusion serving an important public purpose).

252. Reliance on Justice O'Connor's concurrence is a stretch. The majority opinion in *Farrar* had the support of five Justices including Justice O'Connor, who joined the opinion in full. A concurring opinion only represents the governing law when "no single rationale explaining the result enjoys the assent of five Justices." *See* Marks v. United States, 430 U.S. 188, 193 (1977).

253. *See* Pino v. Locascio, 101 F.3d 235, 238 (2d Cir. 1996) (noting that *Farrar* indicates that the award of fees in a nominal damages case will be rare); Amato v. City of Saratoga Springs, 170 F.3d 311, 317 n.5 (2d Cir. 1999) (noting a nominal damage award can be grounds for denying an attorney's fee award); Husain v. Springer, 494 F.3d 108, 135 n.17 (2d Cir. 2007) ("[C]ounsel for plaintiffs conceded that the only relief

It is not coincidental that the Second Circuit is the only circuit to recognize presumed damages and to disallow fees for nominal damages recoveries. The circuit's dogged adherence to *Farrar* incentivizes plaintiffs to press for presumed damages instead of nominal damages. It also prompts courts to award presumed damages so that plaintiffs' attorneys can get paid. In short, presumed damages are the means by which the Second Circuit can escape from the consequences of its reading of *Farrar*.

B. The Painless Default

Why doesn't the Second Circuit read *Farrar* as the other circuit courts do and retain the license to award fees to plaintiffs obtaining nominal damages recoveries? It appears that the Second Circuit finds the *Farrar* rule useful because it frequently refers to it in an effort to dissuade a plaintiff from pressing a constitutional claim that has little prospect for achieving a monetary recovery. The court also references the rule to entice government defendants into defaulting on such a claim. That is, the Circuit uses the *Farrar* ruling as a case management device.

An illustrative example is *Amato v. City of Saratoga Springs*, where plaintiff brought a § 1983 suit against a city and two police officers, claiming that the officers had used excessive force when they arrested and booked him on a disorderly conduct charge.[254] The district court bifurcated the case, trying the claims against the officers first and deferring trial on the *Monell* claim against the city.[255] The jury found the officers liable but awarded no compensatory damages.[256] The trial judge entered judgment for nominal damages and dismissed the *Monell* claim.[257]

On appeal, the plaintiff contended that dismissal of the *Monell* claim was improper.[258] The Second Circuit agreed that the plaintiff was entitled to pursue his claim against the city, even if the most he

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sought in this litigation is nominal damages. We do not decide at this time the significance of that concession with respect to the determination of attorney's fees . . . .").

254. 170 F.3d 311, 312-13 (2d Cir. 1999).

255. *Id.* at 316. Bifurcation is frequently used in cases involving official misconduct and potential *Monell* liability. It allows the court to avoid discovery on the municipality's customs and policies until it first determines whether the officials violated the Constitution. If the jury resolves this first question in the negative, there is no basis for *Monell* liability and the claim can be dismissed as a matter of law. *See* generally Cadiz v. Kruger, No. 06 C 5463, 2007 WL 4293976 (N.D. Ill. Nov. 29, 2007) (discussing pros and cons of bifurcation in this context).

256. *Amato*, 170 F.3d at 313.

257. *Id.* The jury did, however, award punitive damages of $20,000 against one of the officers, which the district court reduced to $15,000. *Id.* at 313 n.2.

258. *Id.* at 313.

could collect were nominal damages.[259] The court reasoned that dismissal of the claim was inconsistent with the Supreme Court's declaration in *Carey* that nominal damages serve an essential function in constitutional tort cases.[260] The court further explained that a verdict against a municipality based on the misconduct of its employees furthered the salutary objectives of encouraging the municipality to reform any customs or practices that led to the constitutional violations and of apprising the community of the illegality.[261]

The court then, not so subtly, remarked that the plaintiff was, "of course, under no compulsion to proceed" on his *Monell* claim and emphasized that a nominal damage award was grounds for denying an attorneys' fee award.[262] As for the city, the court observed that it could default and simply pay the nominal damages in order to avoid a costly second trial.[263] In a separate concurring opinion, Judge Dennis Jacobs was more explicit,[264] stating that a trial over one dollar would be "a wasteful imposition on the trial judge and on the taxpayers and veniremen of Saratoga Springs."[265] Judge Jacobs advised the city to simply default and pay the dollar, reasoning that it would not face any collateral consequences from the default because a nominal damages award will not support an attorneys' fees award.[266]

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259. As the court observed, the plaintiff was collaterally estopped from relitigating the jury's determination that there were no compensable injuries. *Id.* at 317 (citing Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998)). Further, the plaintiff could not obtain punitive damages against the city. *Id.* (citing City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259-71 (1981)).

260. *Id.* (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)).

261. *Id.* at 318.

262. *Id.* at 317 nn.5-6 (citing Farrar v. Hobby, 506 U.S. 103, 113-15 (1992)).

263. *Id.* at 321 n.11.

264. Chief Judge Jacobs, then a circuit judge, sat on the panel with Senior District Judge Leonard Sand and present Supreme Court Justice Sonia Sotomayor. *Id.* at 312.

265. *Id.* at 322 (Jacobs, J., concurring). Specifically, he observed that the trial

> judge would have to expend days of judicial labor, and the plaintiff's peers would be commanded to serve as jurors and set aside employment, family commitments, leisure and (more useful) volunteer activities. Many thousands of dollars would be expended to defend this one-dollar lawsuit, money that the citizens of Saratoga Springs may judge better spent on a school crossing-guard or a part-time music teacher.

Id. at 323 (Jacobs, J., concurring).

266. *Id.* Chief Judge Jacobs has not kept his distaste for nominal damages suits a secret. In another case involving constitutional claims for nominal damages arising from a dispute over a student-run newspaper at a city university, he raised eyebrows when he admitted to filing a dissenting opinion without having bothered to read the majority decision. He described the case as "about nothing" and a "silly thing" that should not "occupy the mind of a person who has anything consequential to do." Husain v. Springer, 494 F.3d 108, 136 (2d Cir. 2007) (Jacobs, C.J., dissenting).

Thus, the Second Circuit uses a rule against awarding fees in nominal damages cases to influence litigants in constitutional tort cases. The rule disincentivizes plaintiffs from pressing constitutional claims and entices defendants to default on them. Either way, the judicial dockets become less congested. The aspiration of recognizing the "importance to organized society that [constitutional] rights be scrupulously observed" is, however, discarded in the process.[267] The court imprudently denigrated the nominal damages recovery to such an extent that the recognition of presumed damages became inevitable.

In fairness to the Second Circuit, other circuits have tended to express displeasure at nominal damages claims in other respects. For instance, a few circuits have condoned the dismissal of a bifurcated *Monell* claim where a plaintiff has only recovered nominal damages against government employees. The reasoning employed by these courts is that a trial for nominal damages against a municipality accomplishes "little[,] if any[,] justice."[268]

These decisions are disturbing. Courts should not beat the drum about nominal damages being an important and adequate remedy and then treat the remedy as a wasteful and meaningless nuisance. Presumed damages are an unnecessary remedy if nominal damages awards are treated with the respect to which they are entitled.

V. CONCLUSION

The Second Circuit's experiment with presumed damages is still in its early stages, but early applications are troublesome. There is little reason to think that presumed damages are necessary in view of the ease with which compensatory damages can be attained. There is a real risk of duplicative and inflated recoveries. The doctrine restricts the jury's prerogative on damages.

It would not be surprising if other federal courts follow the Second Circuit's lead and reserve a place for presumed damages in certain categories of constitutional tort litigation. Courts often seem uncomfortable with the absence of a civil remedy for a constitutional violation and frequently strive to attach civil consequences to unconstitutional conduct. This behavior stands in sharp contrast with judicial attitudes towards constitutional infractions in criminal proceedings, which are frequently disregarded under the "harmless

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267. Carey v. Piphus, 435 U.S. 247, 266 (1978).

268. Manzanares v. City of Albuquerque, 628 F.3d 1237, 1242-43 (10th Cir. 2010); *see* Lippoldt v. Cole, 468 F.3d 1204, 1221-22 (10th Cir. 2006); *see also* George v. City of Long Beach, 973 F.2d 706, 709 (9th Cir. 1992) (upholding district court's dismissal of a *Monell* claim because any potential recovery would be limited to nominal damages); Parker v. Banner, 479 F. Supp. 2d 827, 830-34 (N.D. Ill. 2007) (questioning deterrent value of *Monell* claims for nominal damages).

error" rule or procedural bars.

If, however, courts should continue to eschew presumed damages, they should insure that nominal damages recoveries are respected in constitutional litigation. Plaintiffs obtaining such awards should be entitled to recover their attorneys' fees. Courts should not suggest that nominal damages cases are a waste of time or a reason for the defendants to default. These practices do not "recognize[] the importance to organized society that [the Constitution] be scrupulously observed."[269] Litigation costs today are likely to exceed the benefits regardless of whether a claim stands to collect $1 or $75,000, and there is thus no reason to attach privileged status to the latter.

Lastly, juries should be able to deny compensatory damages when they believe the plaintiff is fabricating a claimed mental or emotional injury. This is not a situation where the plaintiff is punished for bringing an unpopular claim. Nor is it one where a clear injury is being ignored because the plaintiff may have lied about other subjects. When a jury does not award damages for intangible harm, it is likely because the jury believes that the plaintiff has not been harmed at all. If that is the case, why should courts alter that determination? Juries are supposed to add plain common sense and provincial wisdom to the litigation process and should be allowed to bring those traits to bear in constitutional tort cases.

269. *See Carey*, 435 U.S. at 266.