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 insure 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 award presumed damages.[3] Although infringement of constitutional guarantees can frequently be excused as "harmless" in the criminal context, there is no similar rule in the civil arena. There, a constitutional violation is not allowed to be inconsequential.

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.[4] 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 will instruct juries that they must award damages in some amount to plaintiffs who have been subject to a "loss of liberty".[5] 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 closely be examined.

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 are be the primary means to obtain a monetary remedy for injuries sustained from constitutional violations, and that nominal damages should be awarded when no such damages are proved. Neither the importance of the right in question, nor the need for the

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[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (to have standing, a plaintiff must allege an injury in fact that is concrete and palpable, not abstract or conjectural); *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106 (1998) ("although 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] *Carey v. Piphus*, 435 U.S. 247 (1978).

[3] I used 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, 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] *Carey v. Piphus*, 435 U.S. 247 (1978); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299 (1986).

[5] *Kerman v. City of New York*, 374 F.3d 93 (2d Cir. 2004).

effective deterrence of constitutional misdoings, is sufficient justification, in the Supreme Court's view, for extra-compensatory damages.

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 what amount of, damages should be awarded for a constitutional infraction.[6] It also permits a court to disregard a jury's determination that no damages should be awarded to a plaintiff. The Re-examination Clause of the Seventh Amendment was designed to prevent a court from disturbing this finding.[7]

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 with monetary awards under existing compensatory damages law, presumed damages would appear to represent a gratuitous recovery. 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 uncorroborated testimony.[8] The supposed gap that the presumed damages remedy is intended to fill may no longer exist.

The few reported applications within the Second Circuit of presumed damages to date suggests that the remedy will be prone to producing duplicative recoveries and inflated awards. It is true that remedial excesses, such as the double-counting of injuries, can always be corrected through post-verdict judicial review. However, post-verdict correction of jury awards usually entails a significant expenditure of judicial resources that, in the end, might not eliminate award inflation.[9] In cases where constitutional tort claims can be aggregated through the class action procedure, presumed damages, particularly when used to supplement to a compensatory damage recovery, can threaten a municipality with fiscal ruin.[10]

With all these 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 fees' shifting statutes.[11] The Second Circuit, in contrast, has persistently declared that fees should not be awarded for nominal damages recoveries.[12] Indeed,

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[6] 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. 7.

[7] The Re-examination 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. 7.

[8] *See infra* text accompanying notes 128-40.

[9] *Martinez v. Port Auth.*, 2005 WL 2143333, at **20-21 (S.D.N.Y. Sept. 2, 2005), *aff'd*, 445 F.3d 158, 161 (2d Cir. 2006). *See infra* text accompanying notes 168-72.

[10] *In re Nassau Cty. Strip Search Cases*, 2010 WL 3781573 (E.D.N.Y. Sept. 22, 2010).

[11] *See infra* text accompanying notes 214-16.

[12] *See Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996); *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 n.5 (2d Cir. 1999); *Husain v. Springer*, 494 F.3d 108, 135 n.17 (2d Cir. 2007).

the Second Circuit appears to affirmatively use its "no attorneys' fees for nominal damages recoveries" policy to dissuade civil plaintiffs from pressing constitutional claims, or to convince government defendants to default on them. 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 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 recognizing 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.[13] The Framers firmly believed that the vindication of constitutional rights would require direct damages suits by individuals against the government.[14] This belief was grounded in the long-standing English law tradition of allowing suits against government officials by victims of illegal searches or seizures.[15] Civil damages

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

[14] *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."); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 422 (1793) (oral argument of Attorney General Edmund Randolph) ("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).

[15] Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 13, 40 (1997) (*citing Wilkes v. Wood*, 98 Eng. Rep. 489, 490 (C.P. 1763) and *Money v. Leach*, 97 Eng. Rep. 1075, 1087 (K.B. 1765)).

actions were also recognized in colonial legal systems as the prototypical means of redressing oppressive government conduct.[16]

This 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.[17] This 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.[18] Where a plaintiff failed to meet this exacting burden, he was foreclosed from equity.

In one of the more noteworthy constitutional cases of the Marshall Court Era, *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.[19] The state argued in that case 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. 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.[20] Certainly, the injunction was an important part of an effective judicial system.

The injunction, however, would 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."[21] The '"strong arm of equity … ought never to be extended, unless to cases of great injury where courts of law cannot afford an adequate or

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[16] *Id.* at 40; *see Essay of a Democratic Federalist*, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Storing ed. 1981); *Essays by Hampden*, reprinted in 4 THE COMPLETE ANTI-FEDERALIST at 198, 200; *Essays by a Farmer*, reprinted in 5 THE COMPLETE ANTI-FEDERALIST at 5, 14; *see also Bivens*, 403 U.S. at 395 ("Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.").

[17] The Judiciary Act of 1789, 1 Stat. 73. The first Judiciary Act was enacted by the same Congress that proposed the Bill of Rights and thus 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 (1985); *see Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 594 (1875) ("the venerable Judiciary Act of 1789 was …regarded as only slightly less sacred than the Constitution").

[18] *Harrison v. Rowan*, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819) (Washington, J.); *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*, 3 Wheat. [16 U. S.] 212).

[19] 22 U.S. 738, 840 (1824).

[20] *Id*. at 841-46.

[21] Joseph Story, EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 959b at 172 (11th ed. 1873).

commensurate remedy in damages.'"[22] Injunctions should be issued only in "clear" cases, where the right asserted was not "doubtful" and where the injury could not redressed except through prevention.[23] Clearly, injunctions would be subordinated to damages in the remedial hierarchy.[24]

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. The Framers were suspicious of chancellors and other judicial officers, since they were often too willing to assist the English Crown in the imposition of tyrannical measures.[25] They considered a jury to be less susceptible to a pro-government bias, and thus better suited to serve as a check on overreaching official power.[26]

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 government and the powerful.[27] Accordingly, the Framers imposed constitutional constraints on the authority of judges, including their ability to issue warrants,[28] their discretion to impose bail or punishment,[29] and their role in initiating criminal prosecutions.[30] The Constitution does not expressly impose any similar constraints upon the discretion of juries.[31]

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[22] *Id.* at 172 & n.1 (*quoting Bonaparte v. Camden & Amboy Railroad Co.*, 3 F. Cas. (Baldw. 205) 821, 827 (C.C.D.N.J. 1830).

[23] *Truly v. Wanzer*, 46 U.S. 141 (1847).

[24] Anthony DiSarro, Freeze *Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZAGA L. REV. __(2011).

[25] Akhil Reed Amar, THE BILL OF RIGHTS 87(1998) ("In England, judges had at times abetted government tyranny"); *Essays by a Farmer*, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 39 (Herbert J. Storing ed. 1981) ("Whenever 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 trial by jury." THE DECLARATION OF INDEPENDENCE, para. 20.

[26] Amar, *supra* note 25, at 84; *see, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317-19 (1st ed. 1765-69); FEDERAL FARMER NO. 4, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, s*upra* note 16, at 245, 249-51. Juries composed of twelve individuals who would not be identified prior to trial were seen as less corruptible than judges. *See, e.g.*, FEDERAL FARMER NO. 15, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, at 319-20; THE FEDERALIST NO. 83, at 563-64 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[27] *See, e.g.*, FEDERAL FARMER NO. 15, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, supra note 16, at 319-20; Thomas Jefferson, Letter to the Abbé Arnoux (July 19, 1979), *in* THE PAPERS OF THOMAS JEFFERSON 282-83 (Julian P. Boyd & William H. Gaines, Jr. eds., 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 judge").

[28] "[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 4.

[29] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., Amend 8.

In contrast to the perception of judges as pro-government sympathizers, juries were seen as a potent instrument to guard against an overzealous government. Many Framers were familiar with the English experience where civil juries had assessed "substantial," "heavy" or "ruinous" damages against government officials for conducting illegal searches or seizures.[32] In the Colonial Era, jurors blocked unpopular prosecutions that had been initiated by overreaching prosecutors.[33] The Framers saw the jury as essential to curb a variety of government abuses springing from the "insolence of office".[34]

Juries were also recognized as being uniquely suitable for determining damages.[35] This was particularly true in cases "where the amount of damages was uncertain" or involved a matter of discretion.[36] In these determinations, an in-depth knowledge of law was considered to be less

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[30] "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 5.

[31] With 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.

[32] *See, e.g.*, PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, at 154 (John B. McMaster & Frederick D. Stone eds., 1888) (the ability of a civil jury to assess heavy damages would be "safest resource" against unlawful government conduct); ESSAYS BY A FARMER (1788), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, at 9, 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, 744 (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*, 98 Eng. Rep. 489 (K.B. 1763), was extremely influential in the anti-federalist crusade for constitutional jury trial rights. See Amar, *supra* note 15, at 42; PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, at 781-82 (Robert Whitehill at Pennsylvania ratifying convention citing English jury trial's punitive award for unlawful search in *Wilkes v. Wood*, and arguing for stronger jury trial provisions); *cf.* 2 ELLIOT'S DEBATES, *supra* note 92, at 550 (committee at Maryland ratifying convention proposed amendment to Constitution that would require jury trial "in all cases of trespasses").

[33] Amar, *supra* note 25, 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.*

[34] ESSAYS BY HAMPDEN (1788), *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 11, at 198, 200 (civil jury is crucial to afford effective relief "against the High Officers of State for abuse of private citizens"); LUTHER MARTIN, THE GENUINE INFORMATION (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, 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*").

[35] *Lord Townshend v. Hughes,* 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677); *see Duke of York v. Pilkington,* 2 Show. 246, 89 Eng. Rep. 918 (K.B.1760) (jury award in a slander action); *Wilkes v. Wood,* Lofft 1, 19, 98 Eng. Rep. 489, 499 (C.P.1763) (jury award of in an action of trespass); *Huckle v. Money,* 2 Wils. 205, 95 Eng. Rep. 768 (C.P.1763) (upholding jury award in an action for trespass, assault and imprisonment); *Genay v. Norris,* 1 S.C.L. 6, 7 (1784) (jury award).

[36] *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); *see also* K. Redden,

helpful than the ability to tap the varying experiences and common sense perceptions of twelve individuals.[37] 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 considered to be the safe route.[38]

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 representatives in the House whom they would elect, they 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.[39]

Because of their role in determining damages, juries were expected to be the primary enforcer of Fourth Amendment rights.[40] In the free speech context, the Framers' acceptance of *ex post* civil suits for libel or sedition and prohibition of *ex ante* prior restraints was also predicated on the preference for the jury over the chancellor.[41] Civil juries also determined the "just compensation" to be paid to the former owner of taken property.[42]

Some among the Framers were so enamored with juries that they advocated a central role for them in deciding issues of law.[43] That is, jury would be charged with saying what the law is as well as determining whether the law is constitutional. Indeed, several state constitutions in the

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PUNITIVE DAMAGES § 2.2, p. 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 jurors.").

[37] Murphy, *supra* note 32, at 745.

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

[39] THE FEDERALIST NO. 83, at 563-64 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); FEDERAL FARMER NO. 15, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 16, at 316, 319-20; Thomas Jefferson, Letter to the Abbé Arnoux (July 19, 1979), *in* THE PAPERS OF THOMAS JEFFERSON 282-83 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958).

[40] Amar, supra note 16, at 73-75; Genuine information of Luther Martin, reprinted in 2 THE COMPLETE ANTI-FEDERALIST at 70-71 (emphasizing the importance of juries in civil suits by citizens against government); Notes of Samuel Chase, reprinted in 5 THE COMPLETE ANTI-FEDERALIST at 82 (civil juries needed for suits against government officials).

[41] Amar, BILL OF RIGHTS at 23-24; *see* 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 150-153 (Clarendon, 1765); 3Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1879 (Hilliard Gray, 1833).

[42] Amar, BILL OF RIGHTS 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.").

[43] Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 239-42 (2006) (recounting that in the Founding Era that many viewed jury review as a supplement to judicial review); Murphy, *supra* note 32, 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.")

Founding Era empowered juries to assess both factual and legal matters.[44] 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,[45] and that "it is emphatically the province and the duty of the judicial department to say what the law is."[46]

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.[47] The Clause was interpreted in the Marshall Court Era as preserving the right to a jury trial as it existed under pre-revolutionary English law.[48] The federal courts would follow the practices of 18th Century English law and chancery courts which provided juries for claims at law but not for claims in equity or admiralty.[49]

The primary focus in this analysis is on the nature of the remedy being sought.[50] If the remedy is one that English law courts were authorized to award, then a jury right existed. Thus, because juries assessed damages for copyright infringement in 18th Century English practice, the parties to a current copyright infringement case can insist that a jury determine actual or statutory damages.[51] 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.[52]

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[44] Ga. Const. of 1777, art. XLI; Amar, BILL at 101-02.

[45] *United States v. Callender*, 25 F. Cas. 239, 253 (C.C.D. Va. 1800).

[46] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[47] As one commentator has recounted, "the 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 32, at 744.

[48] *United States v. Wonson ,* 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (Story, J); *Bains v. The James and Catherine*, 2 F. Cas. 410, 418 (C.C.D. Pa 1832) (Baldwin, J.); *see Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 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"); *see also* Amar, *supra* note 43, at 233.

[49] DiSarro, *supra* note 24, at .

[50] *Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (in determining whether a right to a jury trial exists, the remedy being sought has a greater impact on the ultimate conclusion than the type of claim being asserted); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42 (1989).

[51] *Feltner v. Columbia Pictures Tel., Inc*., 523 U.S. 340, 353-55 (1998).

[52] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 443 (1975) (Rehnquist, J., concurring) (decision to award backpay is an equitable determination that a jury cannot make); *Markman v. Westview Instruments, Inc*., 517 U.S. 370, 379-84 (1996) (the construction of the patent claim should not be relegated to the jury); *Tull v. United States*, 481 U.S. 412, 422-25 (1987) (jury does not determine amount of civil fines for environmental law infractions). The omission 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 the "hallmark of equity has been wide-ranging discretion." Murphy, *supra* note , at n. 146. As Alexander Hamilton explained, equity courts act in "extraordinary cases, which are exceptions to general rules." THE FEDERALIST No. 83, *supra* note , at 145 (footnote omitted).

The Seventh Amendment's other clause, the Re-examination Clause,[53] was adopted to protect the jury's determinations from being disturbed by federal appellate courts.[54] The Clause was construed to prohibit federal courts from disturbing fact-findings made by juries, except to the extent permitted under 18th Century English law, which was limited to allowing the correction of errors of law or the granting of a new trial.[55] 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 authority of the Supreme Court to disturb fact-findings on appeals from state courts. [56]

The existence of injury and the measure of damages are matters that are subject to the prohibitions of the Re-examination Clause.[57] 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.[58] 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 "shocks the conscience".[59] An appellate court can review that decision but only under a deferential abuse of discretion standard.[60] These limitations serve to protect the integrity of the jury's findings on injury and damages.[61]

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

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[53] 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. 7.

[54] Amar, CONSTITUTION at 233-34.

[55] *Parsons*, 28 U.S. at 447-48; *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812); see generally Murphy, supra note 17, at 746 ("with 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.").

[56] Amar, CONSTITUTION at 235.

[57] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 437 (2001); *see, e.g., St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648 (1915).

[58] *Hetzel v. Prince William Cty*., 523 U.S. 208 (1998); *Gasoline Prods. Co. v. Champlin Refining Co*., 283 U.S. 494 (1931) (court can't enter judgment notwithstanding a verdict on damages but is limited to ordering a new trial); *Slocum v. New York Life Ins. Co*., 228 U. S. 364 (the Seventh Amendment does not permit the entry of judgment for an amount other than that awarded by the verdict of the jury).

[59] *Tortu v. Las Vegas Met. Police Dep't,* 556 F.3d 1075 (9th Cir. 2009); *Marcano Rivera v. Turabo Med. Ctr.*, 415 F.3d 162 (1st Cir. 2005); *Dossett v. First State Bank*, 399 F.3d 940 (8th Cir. 2005). 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", has "no rational connection" to the evidence, or "appears to be the result of passion and prejudice." 11 Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2807 (Civil 2d. 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).

[60] *Gasperini v. Center for Humanities, Inc*., 518 U.S. 415, 435 (1996).

[61] In much the same way, the Double Jeopardy Clause serves to protect the jury's determination on guilt or innocence in criminal cases. Amar, BILL at 96.

threaten to order a new trial unless the plaintiff agrees to a reduced verdict.[62] 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 tactic against a defendant. The Re-examination 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.[63]

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 counter-majoritarian constitutional rights than populist juries,[64] and 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.[65] Injunctions, in turn, became the primary remedial device to effectuate rights under the Equal Protection Clause in segregated public schools, the Eighth Amendment in inhumane prisons, and the Fourteenth Amendment in mal-apportioned electoral districts.[66]

Federal courts replaced state courts as the primary forum for resolving federal constitutional claims and those claims would be asserted directly against officials, instead of arising as a defense to a state tort claim.[67] The federal courts, however, were mostly inhospitable to the damages 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

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[62] This practice is known as *remittitur* and is permissible under the Re-examination 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 (8th Cir. 2002); *Thorne v. Welk Investment, Inc.*, 197 F.3d 1205 (8th Cir. 1999); *In re First Alliance Mtg. Co*., 471 F.3d 977 (9th Cir. 2006). *But see* Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003).

[63] *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935); *see Hattaway v. McMillian*, 903 F.2d 1440, 1451 (11th Cir. 1990) ("the 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*); *De Pinto v. Provident Security Life Ins. Co*., 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964).

[64] *See* Henry Monaghan, *First Amendment "Due Process*," 83 HARV. L. REV. 518, 526-32 (1970) (as the First Amendment evolved to protect unpopular, minority speech, 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, 1169 (1995) (arguing for a revival of the use of juries in assessing Fourth Amendment reasonableness).

[65] *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by unconstitutional search is inadmissible in criminal case); *Stunk 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) (same).

[66] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 878-93 (1999); *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).

[67] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1485, 1506-10 (1987).

damages against government officials[68] or counties and municipalities.[69] It was not until the last quarter of that Century that a plaintiff could obtain punitive damages from government officials in federal court.[70]

Federal courts recognized or created a variety of immunity and fault doctrines that hindered the prospects for a damages claim to succeed. State governments were deemed to have sovereign immunity from damages suits,[71] and government officials had either absolute or qualified immunity.[72] Municipalities were insulated from liability for constitutional torts unless its employees' misconduct was produced by a custom or policy.[73]

Furthermore, many constitutional violations, such a denial of expressive rights, illegal searches and unlawful detentions, or deprivations of due process produced only psychic and intangible injuries.[74] Plaintiffs were often denied standing to assert such claims.[75] Federal courts

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[68] *Monroe v. Pape*, 365 U.S. 167 (1961); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[69] *Monell v. Department of Soc. Servs. of N.Y.,* 436 U.S. 658 (1978).

[70] *Smith v. Wade*, 461 U.S. 30 (1983).

[71] *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

[72] *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors); *Bogan v. Scott Harris*, 523 U.S. 44 (1998) (absolute immunity for legislators); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity for executive officials). These doctrines have no application to claims seeking prospective injunctive relief. *Edelman v. Jordan*, 415 U.S. 651 (1974) (sovereign immunity not a bar to claims for prospective injunctive relief); *Pulliam v. Allen*, 466 U.S. 522 (1984) (official immunity does not preclude injunctive relief).

[73] *Monell v. Department of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978). The Supreme Court recently held that the fault requirement applies to claims for injunctive relief. *Los Angeles Co. v. Humphries*, 562 U. S. ____, __ S. Ct. __ (2010).

[74] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2000).

[75] *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc*., 454 U.S. 464, 485 (1982) (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 B.Y.U. L. REV. 115, 158-59 (2008) (visual or aural exposure to a constitutional wrong, such as observing at a courthouse patently unfair trials, blatant acts of racial discrimination, or cruel and unusual punishments, does not constitute a cognizable injury).

initially refused to recognize damages claims for intangible harms,[76] and then did so only where the plaintiff submitted expert medical or psychiatric testimony or other corroborative evidence.[77]

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 its own inferences from the facts.[78] 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.[79]

Specifically with respect to damages, courts held it was within their powers to review, *de novo*, punitive damages awards to see if they are "unconstitutionally excessive".[80] They significantly expanded their ability to review and make determinations on factually-laden damages questions by classifying them as questions of law.[81] Federal courts also imposed

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[76] Prior to being recoverable as compensatory damages, intangible harms could only be redressed through an award of punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting) (punitive damages arose "at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury" and "filled this gap"); *see Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (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* K. Redden, PUNITIVE DAMAGES § 2.3(A) (1980); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519-20 (1957).

[77] *See, e.g., Rowlett v. Anheuser- Busch*, 832 F.2d 194, 204-05 (1st Cir. 1987) (affirming emotional damage award based on testimony from psychiatrist); *Cowan v. Prudential Ins. Co. of America*, 852 F.2d 688, 690-91 (2d Cir. 1988) (affirming emotional damage award based on corroborating testimony); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986) (same).

[78] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995) (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, Inc.*, 466 U.S. 485, 499, 510-11 (1984); *Tenafly Eruv Assoc., Inc. v. Borough of Tenafly*, 309 F.3d 144, 156-57 (3d Cir. 2002) ("we examine independently the facts in the record and 'draw our own inferences' from them") (*quoting Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir. 1998)).

[79] *Brown v. California Dep't of Trans.*, 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*"); *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002) (*en banc*).

[80] *Cooper Indus.*, 532 U.S. at 437 (claiming the right to conduct a de novo review of punitive damages, notwithstanding the Re-examination Clause, on the purported ground that "the level of punitive damages is not really a 'fact' 'tried' by the jury") (*quoting Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

[81] *Haywood v. Koehler*, 78 F.3d 101, 104 (2d Cir. 1996) (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, 104 (2d Cir. 1998) (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).

stringent corroborative evidence requirements that served to overturn jury verdicts for compensatory damages in intangible harm cases.[82]

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 non-jury tribunals.[83] Essentially, Congress could 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.[84] Administrative agencies can, therefore, adjudicate constitutional claims and, although Section 1983 has been interpreted as not requiring utilization of those administrative remedies, that judicial ruling is a matter of statutory interpretation that can be altered by congressional action at any time.[85] 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.[86] These decisions serve to reduce the jury's role in redressing constitutional wrongs.

Even where juries are still used, the Court has recognized that Congress can prescribe the damages to be awarded for unlawful conduct and a jury is required to abide by that

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[82] *See Fitzgerald v. Mountain States Tel. & Tel. Co*., 68 F.3d 1257, 1265 (10th Cir. 1995) (emotional damage award vacated where award was based solely on the testimony of the plaintiff); *Gunby v. Pennsylvania Elec. Co*., 840 F.2d 1108, 1121 (3d Cir. 1988) (reversing an emotional distress award based on the lack of corroborating evidence), *cert. denied*, 492 U.S. 905 (1989); *Erebia v. Chrysler Plastic Prod. Corp*., 772 F.2d 1250, 1259 (6th Cir. 1985) (reversing an emotional damage award and remanding with instructions to award nominal damages because plaintiff offered only his own testimony), *cert. denied*, 475 U.S. 1015 (1986); *Vance v. Southern Bell Tel. & Teleg. Co*., 863 F.2d 1503 (11th Cir. 1989) (agreeing that jury award for emotional distress should be vacated where it was based solely on plaintiff's testimony), *cert. denied*, 513 U.S. 1155 (1995); *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 277 n. 28 (5th Cir. 1997) (plaintiff's testimony did not sufficiently support an award of damages for emotional harm), *cert. denied*, 522 U.S. 1068 (1998); *Annis v. County of Westchester*, 136 F.3d 239 (2d Cir. 1998) (plaintiff's testimony that she was humiliated is insufficient to warrant an award of compensatory damages).

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

[84] *Id*. at 51-52, 54.

[85] *Compare Patsy v. Board of Regents*, 457 U.S. 496 (1982) (exhaustion of administrative remedies is not a condition precedent to filing a Section 1983 action) *and Wilder v. Virginia Hospital Assoc*. v. 496 U.S. 498 (1990) (same) *with Woodford v. Ngo*, 548 U.S. 81 (2006) (Prison Litigation Reform Act, 42 U.S.C. §§ 1997*e et seq.*, requires prisoner to exhaust available administrative remedies); *Smith v. Robinson*, 468 U.S. 992 (1984)(Congress, in enacting the Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.*, intended to exclude from Section 1983's coverage duplicative claims brought under the Equal Protection Clause).

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

prescription.[87] This development would likely not disturb the Founders since legislative action represents implementation of the sovereign will that the jury determination is intended to supply.[88] Thus, jury awards may be subject to statutory caps or floors (or both).[89] 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.[90]

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.[91] 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.[92] Federal courts have further assumed the authority to vacate jury verdicts that are against the weight of the evidence and to have the matters re-tried.[93]

Thus, contemporary Seventh Amendment jurisprudence has come to permit judges to assume functions that traditionally were reserved to juries.[94]

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[87] *Curtis v. Loether*, 415 U.S. 189 (1974) (Seventh Amendment guarantees right to a jury trial to determine statutory damages under the housing discrimination provisions of the Civil Rights Act of 1968).

[88] Amar, BILL at 94 (noting that analogies between legislatures and juries "abounded" in the Founding Era literature.

[89] *Feltner v. Columbia Pictures Tel., Inc*., 523 U.S. 340, 353-55 (1998) (statutory damages for copyright infringement).

[90] 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 a state constitutional challenge. *See* Matthew W. Light, *Note, Who's the Boss? Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 318 n.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, 80 (2002).

[91] Amar, CONSTITUTION at 241 ("judges increasing 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.")

[92] *See* FED. R. CIV. P. 56(c) (the court may enter judgment in favor of a moving party where there is "no genuine issue as to any material fact"); FED. R. CIV. P. 50(a) ("[I]f …there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law.). The Supreme Court has upheld against Seventh Amendment challenge the summary judgment, directed verdict, and judgment notwithstanding the verdict devices. *See, e.g., Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) (judgment n.o.v.); *Galloway v. United States*, 319 U.S. 372, 396 (1943) (directed verdict); *Fidelity & Dep. Co. v. United States*, 187 U.S. 315, 320-21 (1902) (summary judgment).

[93] 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).

[94] Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 744 (1993) (observing that many of these modern procedural devices had no analogs under 18th Century English practice); JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability*

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."[95] The injunction was the principle tool used by federal courts to enforce constitutional values in segregated public schools, overcrowded prisons, and mal-apportioned electoral districts.[96]

The injunctive remedy was accorded favored status over damages when it came to giving effect to constitutional prescriptions.[97] In contrast to damages, injunctive relief against state officials was not barred by the constitutional doctrine of state sovereign immunity.[98] 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.[99] Courts could issue injunctions to remedy constitutional violations without having to address complex questions of official immunity.[100]

Injunctions were often considered the desideratum because damages awards were perceived as too difficult to obtain or too minute to justify a lawsuit.[101] Some questioned the "deterrent effect" of damages, contending that governments, unlike private parties, do not care

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Review, BUFF. L. REV. 251, 258 (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").

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

[96] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 878-93 (1999); *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).

[97] Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1134 (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).

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

[99] *Edelman v. Jordan*, 415 U.S. 651, 663-69 (1974).

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

[101] 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."); 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).

about paying damages.[102] Others echoed a similar theme regarding suits against government officials, opining that indemnification eliminates any deterrent effect that a damages award would have.[103]

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 supposedly will provide a level of assurance that the proscribed conduct will not be repeated.[104] 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.[105] 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. Enjoined parties are prone to construe ambiguous language in an injunctive order expansively to avoid the risk of being held in contempt of court. [106]

These considerations have not prompted courts to dispense with the traditional requirements for obtaining injunctions.[107] Indeed, if anything, courts have imposed additional constraints on the ability of plaintiffs to secure injunctive relief in constitutional cases. The

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[102] Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1998); Akhil Reed Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 42-43 (1997) (injuries from violations of the Fourth Amendment are mostly dignitary and out-of-pocket losses are "small or non-existent").

[103] Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76 (1999) (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.").

[104] Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 677-80 (1983) (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 Porphylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief* , 52 BUFF. L. REV. 301, 330 (2004) (prophylactic relief sweeps broadly to include legal conduct and such breadth is the core of its effectiveness).

[105] 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 CAL. L. REV. 1121 (1996) (arguing that prophylactic injunctions violate principles of judicial restraint).

[106] Anthony DiSarro, *Six Decrees of Separation: Consent Orders and Settlement Agreements in Federal Civil Litigation*, 60 AM. L. REV. 276, 284 (2010).

[107] Dombroski v. Pfister, 380 U.S. 479, 485-86 (1965) (plaintiff seeking to restrain unconstitutional conduct must show irreparable injury); Steffel v. Thompson, 415 U.S. 452, 463 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) (irreparable injury is required 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").

federalism-based abstention doctrine of *Younger v. Harris*, for example, precludes federal courts from enjoining pending or immanent state judicial or administrative proceedings. [108] A rigorous standing limitation further requires a plaintiff to show, not just that unconstitutional conduct causing injury has occurred, but that both the conduct and the injury will likely occur again in the future.[109]

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 in that it is consistent with the historical preference for damages as the remedy for constitutional violations, but is contrary to the jury's traditional role as the ultimate arbiter of damages in 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. [110] The Court answered the question by dividing the defamation claim into separate components based on the nature of the relief sought. The Court

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[108] 401 U.S.37 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc*., 477 U.S. 619 (1986) state administrative proceedings that are "judicial in nature" and in which plaintiff will have a full and fair opportunity to present constitutional claims qualify for Younger abstention).

[109] *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (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) (plaintiff seeking injunctive 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) (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 (2000).

[110] 418 U.S. 323 (1974). In *New York Times Co. v. Sullivan*, 376 U.S. 254, at 279-280, (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 disregard of whether it was false. The Court extended the malice requirement to defamatory criticism of public figures other than government officials. Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967). *Gertz* involved a non-public figure.

held that to the extent the plaintiff sought actual, provable damages—*i.e*., compensatory damages—he did not have to prove malice. However, malice would have to be shown for punitive damages because they were extra-compensatory.[111]

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 non-cognizable.[112] Compensatory damages law, however, had evolved to the point that it encompassed the "customary types of actual harm inflicted by defamatory falsehood, including impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[113] Because a defamation plaintiff would be able to recover for those injuries without presumed damages, awarding them on top of compensatory damages would, much like an award of punitive damages, be wholly "gratuitous."[114]

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,*[115] and again in *Memphis Community Sch. Dist. v. Stachura.*[116] These cases established four critical principles concerning damages in constitutional tort cases. First, although Section 1983 is modeled on state tort law, not all of that law should be applied to Section 1983 actions. Tort concepts should not be incorporated into Section 1983 litigation unless they comport with the overarching rule that a plaintiff be compensated only for actual injuries sustained as a result of the defendant's unconstitutional conduct.[117] Thus, the fact that some states recognized presumed damages for certain tort claims did not justify incorporating the concept into tort claims under Section 1983.

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[111] 418 U.S. at 349. The Court noted that punitive damage awards were often "unpredictable" and bore "no necessary relation to the actual harm caused." 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.* at 350.

[112] *Id*. at 349.

[113] *Id.* ("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.")

[114] *Id.* ("the 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.")

[115] 435 U.S. 247 (1978).

[116] 477 U.S. 299 (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. 477 U.S. at 300-01. Consequently, the Court reiterated the conclusion in *Stachura* where the violation pertained to First Amendment rights.

[117] 477 U.S. at 307-11; 435 U.S. at 255-58.

Second, the concept of compensatory damages under Section 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"[118] or "'impairment of reputation ..., personal humiliation, and mental anguish and suffering,'" but those injuries cannot be presumed.[119] 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."[120] 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.[121]

Third, nominal damages are "the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."[122] Such an award, the Court reasoned, shows the "importance to organized society that [constitutional] rights be scrupulously observed."[123] In cases involving a malicious deprivation of rights, exemplary or punitive damages can also be awarded.[124] The availability of these remedies, plus the risk that compensatory damages might be awarded, are sufficient to deter the contravention of constitutional guarantees.[125]

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 damages.[126] In *Stachura*, the plaintiff requested compensatory damages for intangible harms and the jury was instructed that it could award such damages. Consequently, "[n]o rough substitute for compensatory damages was required".[127] In *Carey*, the plaintiff made

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[118] 435 U.S. at 264 ("mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983").

[119] 477 U.S. at 307 (quoting *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 350 (1974)).

[120] 435 U.S. at 264.

[121] 477 U.S. at 309-10. The Court acknowledged that deterrence is an important objective underlying Section 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." 435 U.S. at 256-57.

[122] 477 U.S.at 308 n.11.

[123] 435 U.S. at 266.

[124] 477 U.S.at 306 n.9.

[125] *Stachura*, 477 U.S.at 310 ("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations. *Carey*, 435 U.S., at 256-257 ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages").

[126] *Id*. at 311 n.14. 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."

[127] *Id.* at 303, 311-12. 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 it rendered, a new trial on damages was necessary. *Id*. at 312.

no attempt to prove damages, but it could have attempted to do so.[128] 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.[129]

The Court left harldly any room for presumed damages. Consequently, it is not surprising that virtually all of the federal circuit courts have eschewed the concept of presumed damages in constitutional litigation.[130] As the Eighth Circuit remarked in one case, "[a]ny door left open by [*Stachura*] is not for plaintiffs …whose damages are readily measurable."[131] 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.[132]

B. Expansion of the Consequential Damage Remedy

Carey and *Stachura* initially had a significant impact on a plaintiffs' 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.[133] The demanding nature of federal courts with respect to the evidentiary support

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[128] 435 U.S. at 251-52. *Id.* at 252-53 ("we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself").

[129] Presumed damages do not simply involve the type of evidentiary presumption authorized under the Federal Rules of Evidence. *See* FED. R. EVID. 301. Those presumptions merely shift the burden of production (*i.e*., of going forward with evidence) from the plaintiff to the defendant. They do 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. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11(1993). By contrast, a presumption of damages is irrebuttable; it conclusively resolves an issue in the case.

[130] *Azimi v. Jordan's Meats, Inc*., 456 F.3d 228, 234-35 (1st Cir. 2006) (no presumed damages for victim of racial and religious discrimination); *Randall v. Prince George's Co*., 302 F.3d 188, 207-09 (4th Cir. 2002) (no presumed damages for unlawful seizure); *Norwood v. Bain*, 143 F.3d 843, 855-56 (4th Cir. 1998) (no presumed damages for illegal search), *panel opinion adopted en banc*, 166 F.3d 243 (4th Cir.) (*en banc*), *cert. denied*, 119 S. Ct. 2342 (1999); *Baumgartner v. Secretary, U.S. Dep't of Housing & Urban Devel*., 960 F.2d 572, 581-83 (6th Cir. 1992) (no presumed damages for gender discrimination in housing); *Horina v. City of Granite*, 538 F.3d 624, 637-38 (7th Cir. 2008) (no presumed damages for impermissible restriction of First Amendment right to distribute handbills); *Lewis v. Harrison Sch. Dist*., 805 F.2d 310, 317-318 (8th Cir. 1987) (no presumed damages for violation of free speech rights); *Phillips v. Hust*, 477 F.3d 1070, 1080-81(9th Cir. 2007) (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) (free exercise rights); *Slicker v. Jackson*, 215 F.3d 1225, 1229-32 (11th Cir. 2000) (excessive force claim under 4th and 14th Amendments); *Kelly v. Curtis*, 21 F.3d 1544,1557 (11th Cir. 1994) (false arrest, malicious prosecution, and illegal detention claims).

[131] *Lewis v. Harrison Sch. Dist*., 805 F.2d 310, 317-318 (8th Cir. 1987).

[132] Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67 (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").

[133] *See infra* notes 77, 82 and accompanying text.

for 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.[134]

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 workplace.[135] 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 her, caused her mental anguish and forced her to endure a great deal of familial discord."[136] 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."[137]

Barely a few months later, the court abruptly changed course, upholding a jury award of compensatory damages based solely on the testimony of the plaintiff that, as a result of workplace discrimination, she felt "embarrassed," "belittled," "disgusted," and "hopeless."[138] The Circuit also upheld a compensatory damages award for non-pecuniary harm that was based solely on the uncorroborated testimony of the plaintiff that she experienced feelings of "low self-esteem" and "discomfort[]," and suffered from bouts of "crying" and "sleeplessness."[139] The

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[134] *Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996).

[135] *Patterson v. P.H.P. Healthcare Corp*., 90 F.3d 927, 939-40 (5th Cir.1996).

[136] *Id.* at 939.

[137] 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 Section 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 POLICY GUIDANCE NO. 915.002 § II(A)(2), at 10-12 (July 14, 1992) ("The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations").

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

[139] *Migis v. Pearle Vision, Inc*., 135 F.3d 1041, 1046 (5th Cir. 1998).

court rejected the assertion that that mental anguish damages requires supporting medical evidence or other corroborating testimony.[140]

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.[141] When considering the propriety of compensatory damages awards in Section 1983 cases, today's federal courts have refused to impose strict evidentiary requirements, even where they are mandated by tort law of the state in which they sit.[142] The days when courts insisted on "objective" evidence of intangible harm are gone.[143]

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 made the investment prudent.

Moreover, courts broadened the types of ailments that were compensable in litigation.[144] Many of those afflictions were susceptible to credible proof simply through the testimony of the plaintiff or could be corroborated by family members, such as loss of appetite, crying, loneliness

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[140] *Id*. at 1047.

[141] *See Zhang v. American 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 based on testimony of plaintiff); *Randall v. Prince George's Co*., 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."); *Oden v. Oktibbeha Co.*, 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*, 181 N.J. 70, 853 A.2d 921 N.J. Sup Ct. 2004) (noting that New Jersey law and federal law rejects the notion that an award for emotional distress must be supported by expert testimony or objective corroboration); *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413 (10th Cir. 1997) (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].").

[142] *Chatman v. Slagle*, 107 F.3d 380, 385 (6th Cir. 1997).

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

[144] Michelle Cucuzza, *Evaluating Emotional Distress Damage Awards To Promote Settlement Of Employment Discrimination Claims In The Second Circuit*, 65 BROOK. L. REV. 393, 417 (1999) (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 also* Robert S. Mantell, *The Range of Emotional Distress Compensable Under Anti-Discriminations Laws*, available at http://www.theemploymentlawyers.com/Articles/Emotional%20distress%20damages.htm (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).

or sleeplessness. This development is also significant since many plaintiffs are reluctant to share their pains with outside professionals.[145] 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,[146] that court broke rank with all other circuits and recognized presumed damages in *Kerman v. City of New York*.[147] The case arose when New York City policemen forcibly entered plaintiff's apartment after a 911 call had been placed by the plaintiff's girlfriend stating that plaintiff was in a highly emotional state and possibly had a gun. When the police forced open the door, they found the plaintiff lying naked on his floor and covered in cat feces.[148] Plaintiff became angry at the officers, complaining about the search and referring to the cops as "goons".[149] The cops eventually handcuffed plaintiff and took him to a hospital where he was held overnight for observation and released the next day.[150]

Plaintiff brought suit against the City and the police officers, asserting constitutional and state law claims that were tried before a jury. The jury ruled for plaintiff on claims for unlawful seizure and detention under the Fourth Amendment and state law. However, the jury refused to award compensatory damages, though plaintiff had submitted corroborating evidence, including expert testimony, on mental and emotional distress and injuries.[151]

On appeal, the plaintiff contended that damages verdict should be set aside because he was entitled to compensatory damages for his intangible injuries. The Second Circuit rejected

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[145] Cucuzza, *supra* note 144, at 417 (noting that plaintiffs asserting claims for emotional harm tend to choose to corroborate their testimony through a spouse or family member).

[146] Courts in the Second Circuit follow a two-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. *See Olsen v. County of Nassau*, 615 F.Supp.2d 35, 46-47 (E.D.N.Y. 2009); *Khan v. HIP Centralized Lab Services, Inc.*, 2008 WL 4283348, at *10 (E.D.N.Y. Sept. 17, 2008); *Lynch v. Town of Southampton*, 492 F.Supp.2d 197, 207 (E.D.N.Y.2007).

[147] 374 F.3d 93 (2d Cir. 2004).

[148] *Id.* at 98. 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. The door hit him in the head and knocked him to the floor, causing the towel to come off. He further averred 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.* The cops never found a gun but were concerned with plaintiff's emotional state.

[149] While the search was being conducted, plaintiff phoned his doctor. One of the cops seized plaintiff's cellphone and disconnected the call.

[150] *Id.* The plaintiff consented to being held overnight for evaluation.

[151] *Id.* at 106. The jury did award plaintiff nominal damages.

the 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.[152] 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 plaintiff and his witnesses.[153]

The majority nonetheless 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).[154] 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."[155] In her dissent, Judge Raggi disagreed 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.[156]

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 plaintiff suffered no harm from the medical attention he received, which was fundamental to the court's holding that plaintiff was not entitled to compensatory damages, why should any harm be presumed from a loss of liberty? The fact that plaintiff consented to remaining overnight for observation certainly suggests that the experience was not altogether

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[152] *Compare Haywood v. Koehler*, 78 F.3d 101, 104 (2d Cir. 1996) (appellate court can order a new trial where the undisputed evidence demonstrates a compensable injury); *Atkins v. New York City*, 143 F.3d 100, 104 (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) (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); *Gibeau v. Nellis*, 18 F.3d 107, 110 (2d Cir. 1994) (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").

[153] 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"); *see Robinson v. Cattaraugus County*, 147 F.3d 153, 160 (2d Cir.1998) (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 v. City of Saratoga Springs*, 170 F.3d 311, 314 (2d Cir.1999) (a jury can legitimately refuse to award damages "where a victim's claims of injury lack credibility").

[154] The majority noted that plaintiff could not seek presumed damages for the time spent at the hospital after he consented to remaining there for observation. 374 F.3d at 127. Judge Reena Raggi dissented from this aspect of the panel's ruling. *Id.* at 136 (Raggi, J., concurring in part and dissenting in part).

[155] *Id*. at 125.

[156] 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 (Raggi, J., concurring in part and dissenting in part).

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.[157]

The majority reasoned that the compensatory damages verdict covered only emotional ailments, not the loss of time that accompanies a wrongful detention.[158] There is some appeal to the distinction drawn by the majority. What if a plaintiff is not an emotional person? Why shouldn't she recover for an illegal detention that wasted her time as much as the emotional one? The problem with this reasoning is that recoverable intangible injuries include mental anguish as well as emotional distress.[159] Compensatory damages can cover amorphous concepts such as humiliation, degradation, anxiety, loss of enjoyment of life, frustration, helplessness, and loss of trust.[160] In this context, it is hard 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. Though the plaintiff in *Kerman* was not awarded compensatory damages, this was not due to the fact that he was incapable of proving them. 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. 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. 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

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[157] 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.

[158] 374 F.3d 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").

[159] *See supra* notes 133-45 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." *Id*. at 105.

[160] *See supra* notes 144-45 and accompanying text.

fact of injury and the extent of damages.[161] This is particularly so in cases involving intangible harm, because those injuries can easily be fabricated and cannot objectively be disproved.[162]

To be fair, the *Kerman* ruling does give the jury discretion as to the amount of presumed damages to be awarded. The fact, however, remains that the jury is denied to 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.[163] 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 re-trial until the jury gets the amount "right".[164]

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 re-examination of the jury's fact-finding. 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 plaintiff was not injured as a result of the wrong. That the court intervenes under the guise of implemented a principle of law (whether the court calls it "presumed damages" or something else) does not mask the factual re-assessment.[165] In the end, what the appellate court has done is to augment a jury verdict contrary to the Re-examination Clause.[166]

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[161] *Curtis v. Loether*, 415 U.S. 189, 197 (1974) (punitive damages); *Ross v. Bernhard*, 396 U.S. 531, 537 (1970) (treble damages); *see St. Louis, I.M. & S.R. Co. v. Craft*, 237 U.S. 648, 661(1915) (the proper measure of damages "involves only a question of fact").

[162] *Robinson v. Cattaraugus Co.*, 147 F.3d 153, 160 (2d Cir.1998) (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").

[163] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 437 (2001) (court can review extent of punitive damages but the decision to award must be made by jury); *see Robinson v. Cattaraugus Co.*, 147 F.3d 153, 160 (2d Cir.1998) (rejecting a contention that punitive damages can be awarded as a matter of law based on indisputable evidence).

[164] 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).

[165] *Gasparini*, 518 U.S. 460-61 (Scalia, J., dissenting); see 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 fact-finding function reserved to the jury.")

[166] *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 v. Cattaraugus Co*., 147 F.3d 153, 162 (2d Cir. 1998) ("the Seventh Amendment generally prohibits a court from augmenting a jury's award of damages"); *accord Hibma*

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.[167] 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. City of New York*, presumed loss of liberty damages were used as a supplement to compensatory damages for intangible harm.[168] In this false arrest case brought under Section 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. The verdict form did not require the jury to segregate the two awards, and the jury returned a single award for $1 million.[169]

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. That amount was arbitrarily divided into awards of $200,000 for emotional distress and $160,000 for loss of liberty, which awards the district court obtained by canvassing jury verdicts and judicial *remittiturs* in other false arrest or imprisonment cases.[170] This exercise was undertaken so that the court could ascertain the "highest" award that would not be "shocking to the judicial conscience," which is what a district court is obligated to do in the Second Circuit to determine an appropriate *remittitur* amount.[171] 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.[172]

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v. Odegaard, 769 F.2d 1147, 1154 (7th Cir. 1985); *Lyon Devel. Co. v. Business Men's Assur. Co*., 76 F.3d 1118, 1125 (10th Cir. 1996).

[167] *See infra* at text accompanying notes 133-45.

[168] *Martinez v. Port Auth.*, 2005 WL 2143333, at **20-21 (S.D.N.Y. Sept. 2, 2005), *aff'd*, 445 F.3d 158, 161 (2d Cir. 2006).

[169] *Id.* at *2-3.

[170] *Id*. at *19-22. The awards that the court found "particularly helpful" each involved compensatory awards for intangible harm. *Id*. at *20; *see Sulkowska v. City of New York*, 129 F.Supp.2d 274, 308 (S.D.N.Y. 2001) (pain and suffering); *Komlosi v. Fudenberg*, 2000 WL 351414, at *16 n.12 (S.D.N.Y. 2000) (award for post-traumatic stress disorder).

[171] *Id*. at *20 n.9. In light of this standard, allowing duplicative items of damages and then trying to correct for the duplication post-verdict 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."

[172] Indeed, on appeal, the Second Circuit noted that a mandatory "presumed loss of liberty damages" instruction presents a risk of double counting. 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").

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.[173] This occurred in a case involving a class action against a county for conducting strip searches on misdemeanor detainees.[174] 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 court ruling of unconstitutionality.[175] 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.[176] The district court, moreover, refused to certify a class limited to the issue of liability only because it concluded that such partial certifications were impermissible under Federal Rule 23. The Second Circuit reversed, holding that Rule 23(c) (4) expressly authorizes partial certifications for liability determinations.[177]

On remand, the district court certified a class for purposes of liability and damages, 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.[178] 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.[179] 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. 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."[180] Recognizing that he was venturing into

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

[174] *In re Nassau Cty. Strip Search Cases*, 2008 WL 850268 (E.D.N.Y. Mar. 27, 2008).

[175] *Shain v. Ellison*, 53 F.Supp.2d 564 (E.D.N.Y.1999), *aff'd in part, remanded in part*, 273 F.3d 56 (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. 273 F.3d at 67.

[176] *In re Nassau County Strip Search Cases*, 461 F.3d 219, 222-24 (2d Cir. 2006).

[177] 461 F.3d 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.

[178] 2008 WL 850268 *6 (E.D.N.Y. Mar. 27, 2008).

[179] 2010 WL 3781573 at *1 (E.D.N.Y. Sept. 22, 2010).

[180] *Id*. 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*, 564 U. S. ____ , No. 10–277, Slip Op. at 27(Jun. 20, 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).

"unchartered territory,"[181] 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. He acknowledged that subsequent trials on compensatory damages would present a danger of double counting.[182]

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 simultaneously to 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 extra-compensatory 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.[183] This gap supposedly exists because private litigants are inadequately incentivized by existing remedial alternatives to enforce constitutional rights.[184] Other commentators have argued that ineffective remedies

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[181] 2010 WL 3781573 at *1 at 25.

[182] *Id* at 16. 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 19. 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 16 n.20

[183] Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (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 the 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).

[184] Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 372 (2002) (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 has been unconstitutionally suppressed or other speakers that are chilled by that suppression).

dissuade courts from recognizing new constitutional rights.[185] Judges are reluctant to recognize a constitutional right where they cannot provide a vigorous and efficacious remedy to enforce it.[186]

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.[187] 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.[188] The optimal remedial scheme, it is contended, is one that strives to "keep government within the bounds of law."[189]

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.[190] Indeed, municipalities typically measure themselves by their success rate in Section 1983 litigation and the aggregate amount of damages awards that have been assessed against them and

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

[186] Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 704 (2009).

[187] Peter H. Schuck, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 59-81 (1983).

[188] John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89-90 (1999). 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. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 878-93 (1999) ("In all likelihood, *Paul* would have come out differently if the only available remedy had been an injunction.").

[189] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 587 (1983) (recognizing that constitutional remedies is inevitably "a jurisprudence of deficiency" between "declaring a right and implementing a remedy").

[190] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991) ("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. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512-17 (1987).

their agents.[191] Courts have recognized that even nominal damages awards against municipalities can prompt institutional change.[192]

Official immunity doctrines certainly reduce governmental exposure to civil litigation, but their effect is frequently overstated.[193] Qualified immunity in Section 1983 cases frequently turns on the question of objective reasonableness and that usually requires a jury determination.[194] 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 the City infrequently obtains summary judgment or another form of pre-trial dismissal in its Section 1983 litigation, no higher than between fifteen and twenty percent of its cases were disposed of by this method.[195] One would expect a greater frequency of successful summary judgment motions in Section 1983 cases if immunity were truly the determinative factor that critics claim.[196]

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[191] This can be gleaned from a review of annual reports and other publicly available materials prepared and distributed by municipal law departments. *See, e.g.,* City of Chicago Law Department statistics available at http://www.cityofchicago.org/content/dam/city/depts/dol/JudgementAndSettlementRequests/2010_expenditures_through_12312010.pdf; New York City Corporation Counsel reports available at http://www.nyc.gov/html/law/downloads/pdf/2010AR.pdf; Los Angeles City Law Department news releases available at http://atty.lacity.org/NEWS/index.htm.

[192] *Amato v. City of Saratoga Springs*, 170 F. 3d 311, 317-18 (2d Cir. 1999) (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 the citizenry to the issue"); *Cadiz v. Kruger*, 2007 WL 4293976 at *10 (N.D. Ill. Nov. 29, 2007) (a nominal damages verdict against the city that misconduct stemmed from unconstitutional municipal policies, practices or customs could provide a greater incentive for change than a damages award against individual officers that the City could dismiss as the product of aberrational conduct by rogue employees).

[193] Certain scholars have suggested that the success rate of the qualified immunity defense in Section 1983 litigation is approximately 80%. See Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 852 (2001) (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) (qualified immunity is denied in approximately 20% of cases).

[194] *Green v. City of New York*, 465 F.3d 65, 83-84 (2d Cir. 2006) (factual issues existed precluding dismissal of Fourth Amendment seizure claim on qualified immunity grounds); *O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) (summary judgment is usually not appropriate for qualified immunity premised on an assertion of objective reasonableness).

[195] Data on file with author. The statistics cover a four year period from 2004 through 2007 and 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.

[196] Empirical studies do show, however, that summary judgment are both filed and granted at a higher rate in civil rights cases as opposed to contract or traditional tort actions. See Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. Empirical Legal Stud. 861, 865 n.10 (2007) (Figures 3 and 6); *see also* Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, available at ssrn.com/abstract=1138373 (May 28, 2008) (Figure 1).

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.[197]

NYC Corporation Counsel statistics indicate that the City settles a substantial portion (in excess of 80%) of its Section 1983 cases and tries less than one percent of them.[198] 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 less 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. [199] This data does not suggest that there is any serious or growing deficiency when it comes to civil enforcement of constitutional rights.

Finally, arguments about the need for greater deterrence and enhanced constitutional remedies have been made before and have not succeeded in convincing the Court to authorize punitive damages against municipalities.[200] Nor have they persuaded the Court to imply new private rights of action for constitutional wrongs.[201] The Court has similarly rejected those

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[197] *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009) (en banc).

[198] Data on file. The city tried between 6 and 11 cases out of the between 700 and 800 Section 1983 case dispositions each year within the four year period. Of course, the existence of a potential immunity will likely impact the settlement amount that a civil rights plaintiff can negotiate with a governmental entity.

[199] Data available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02ASep10.pdf. I place the range at between 10 and 20% not because it fluctuates but because of potential variances in how one defines a "civil rights case." There is a category "civil rights" but it includes employment cases, which would include cases brought against non-governmental entities. There is also a subcategory "civil rights" under "prisoner petitions", as well as other potential relevant subcategories like "prison condition". At a minimum, I would count the cases under the "other civil rights" subcategory under "civil rights" and the "civil rights" subcategory under "prisoner petitions". *See* Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 661-62 & 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); Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 694 n.109 (2009).

[200] *City of Newport v. Fact Concerts, Inc*., 453 U.S. 247, 258 (1981).

[201] *Correction Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Schweiker v. Chilicky*, 487 U.S. 412, 425-27 (1988); *Bush v. Lucas*, 462 U.S. 367, 378 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

arguments as insufficiently compelling or weighty to justify a presumption of damages in constitutional cases.[202]

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.[203] This would, however, require it to perform the awkward and politically-difficult task of monetizing constitutional rights. Legislators would essentially have to price constitutional wrongs by, for example, 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. Legislators may understandably be reluctant to do this.

Congress could, however, 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. It has taken this approach in the federal copyright statute, which permits a plaintiff to elect to recover either actual damages or statutory damages"[204] Congress has set broad ranges of statutory copyright damages (*i.e.*, "a sum of not less than $750 or more than $30,000"), that are enhanced for "willful" infringers ("a sum of not more than $150,000"), and ameliorated for "innocent" infringers ("a sum of not less than $200").[205]

It can reasonably be argued that establishing such a scheme essential replicates the current judicial scheme where courts have set implicit damages ranges by comparing monetary awards for intangible harms to those rendered in other cases to see if they are excessive or adequate.[206] A statutory scheme would regulate constitutional tort damage awards, helping to prevent excessive awards through caps and reducing inadequate awards through damages floors. It would pose interesting questions on what ranges to set for the various wrongs. Congress would effectively be ranking constitutional rights by affording higher ranges to one set of rights over another. Serious consideration would also have to be given to ensuring that the scheme does not encourage the assertion of meritless claims. Nevertheless, this remains a potential option to the present *ad hoc* judicial system and one that would comport with the Seventh Amendment.

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[202] *Stachura*, 477 U.S.at 310 (compensatory damages suffice to deter constitutional violations); *Carey*, 435 U.S., at 256-257 (there is no need for a deterrent "more formidable than that inherent in the award of compensatory damages").

[203] Amar, FIRST PRINCIPLES, *supra* note at, at 42-43 (proposing legislative or administrative remedial schemes for Fourth Amendment violations involving presumed minimum damages).

[204] 17 U.S.C. § 504(c) (2006) (providing 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").

[205] *Id*.

[206] Lind, *supra* note , at 270 ("comparability review is intimately tied to the procedure of remittitur").

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.[207] The Second Circuit is seemingly unsatisfied with the nominal damages remedy and the reason may have something to do with attorneys' fees.

A. Fees-Shifting and Farrar

Courts in Section 1983 cases are statutorily authorized to require a defendant to pay the attorneys' fees incurred by the plaintiff where the plaintiff is the "prevailing party." [208] This represents a departure from the so-called "American Rule" followed in federal courts where parties are required to bear their own attorneys' fees.[209] To recover attorneys' fees, a plaintiff need not prevail on all or most of her claims; she must only obtain a monetary recovery on the Section 1983 claim.[210] 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.[211]

It stands to reason that, if nominal damages are supposed to reflect the over-arching importance of constitutional compliance, then plaintiffs who are awarded 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 where they have to incur hundreds of thousands of dollars in attorneys' fees to recover that single dollar. 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 precisely where we are.

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[207] *See infra* text accompanying notes 59-60.

[208] 42 U.S.C. § 1988. Other civil rights statutes have similar provisions. See 42 U.S.C. § 2000e-5(k) (Title VII); 42 U.S.C. § 1973*l*(e) (Voting Rights Act); 29 U.S.C. § 216 (b) (fee shifting provision incorporated into the Age Discrimination in Employment Act); 42 U.S.C. § 3613(c)(2) (Fair Housing Act); 42 U.S.C. § 12205 (Americans With Disabilities Act). Courts have interpreted these nearly-identically worded provisions consistently. *Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

[209] *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994).

[210] *Texas State Teachers Assoc. 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, it must show that the claims were either frivolous or groundless. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

[211] *Carey*, 435 U.S. at 257 n.11.

In *Farrar v. Hobby*,[212] the Court stated that a nominal damages verdict should produce no fees-shifting. The plaintiff in that case sued state officials under Section 1983, alleging violations of due process and seeking compensatory damages. The jury found that a due process violation had occurred, but that it did not proximately cause any damages. The plaintiff was awarded nominal damages of $1.

The Supreme Court held that a plaintiff who is awarded nominal damages is technically a prevailing party, but that that the degree of a plaintiff's success is the "most critical factor" in assessing whether fees should be awarded and the "*de minimis*" nature of the recovery in this case weighed heavily against awarding fees.[213] Where a plaintiff recovers only nominal damages, the Court reasoned, the "only reasonable fee" will "usually [be] no fee at all."[214] 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."[215]

Notwithstanding *Farrar*, most federal circuit courts have sustained awards of attorneys' fees in nominal damages cases.[216] Some have distinguished Farrar on the ground that the plaintiff in that case was seeking $17 million in compensatory damages and thus the mere one dollar recovery signified a lack of overall success.[217] Other courts have tended to rely upon Justice O'Connor's concurring opinion.[218] The Second Circuit, in stark contrast, has remained faithful to *Farrar*'s holding[219] and held that a nominal victory produces no fees-shifting.[220]

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[212] 506 U.S. 103 (1992).

[213] *Id*. at 114 (*quoting Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

[214] *Id*. at 115.

[215] *Id*. at 121-22 (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").

[216] *Cummings v. Connell*, 402 F.3d 936, 947 (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).

[217] *Jama v. Esmor Correctional Services, 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).

[218] *Mercer v. Duke University*, 401 F.3d 199, 206-09 (4th Cir. 2005) (female cut from the football team due to discrimination was awarded only nominal damages yet was awarded $350,000 in attorney 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, 121 (1st Cir. 2004) (municipal employees terminated as a result of their political affiliations in violation of the First Amendment were awarded only nominal damages but were awarded fees since the determination represented a significant legal conclusion serving an important public purpose).

[219] 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).

[220] *See Pino v. Locascio*, 101 F.3d 235, 238 (2d Cir. 1996) (*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) (nominal damage award can be grounds for denying an attorney's fee award); *Husain v. Springer*, 494 F.3d 108, 135 n.17 (2d

It is not purely coincidental that the Second Circuit is the only circuit to both recognize presumed damages and to routinely disallow fees for nominal damages recoveries. The Circuit's rigid 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 is a way for the Second Circuit to live with the unsettling reality that a rigid reading of *Farrar* dictates.

B. The Painless Default

Why doesn't the Second Circuit simply 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. It frequently refers to the rule against awarding fees in nominal damages cases in an effort to dissuade a plaintiff from pressing a constitutional claim that has little prospect for achieving a monetary recovery. It also references the rule to entice a government defendant 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*,[221] where plaintiff brought a Section 1983 suit against a city and two police officers, claiming that the cops had used excessive force when they arrested and booked him on a disorderly conduct charge. The district court bifurcated the case, trying the claims against the officers first, and deferring trial on the *Monell* claim against the city.[222] The jury found the officers liable, but awarded no compensatory damages. The trial judge entered judgment for nominal damages and dismissed the *Monell* claim.[223]

On appeal, the plaintiff contended that dismissal of the *Monell* claim was improper. The Second Circuit agreed that plaintiff was entitled to pursue his claim against the city, even if the most he could collect was nominal damages.[224] 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.[225] The court further explained that a verdict against

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Cir. 2007) (noting effect of counsel's concession that the only relief that will be sought is nominal damages on his ability to recover attorneys' fees).

[221] 170 F.3d 311 (2d Cir. 1999).

[222] 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 is first determined 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 Cadiz v. Kruger*, 2007 WL 4293976 (N.D. Ill. Nov. 29, 2007) (discussing pros and cons of bifurcation).

[223] 170 F.3d at 313. The jury did award punitive damages of $20,000 against one of the officers, which the district court reduced to $15,000. *Id.* at n.2.

[224] As the court observed, the plaintiff was collaterally estopped from relitigating the jury's determination that they were no compensable injuries, *id*. at 313 (*citing Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998)), and could not obtain punitive damages against the city. *Id*. (*citing City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-71(1981)).

[225] *Id*. at 317 (*citing Carey*, 435 U.S. at 266).

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.[226]

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 attorney's fee award.[227] 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.[228] In a separate concurring opinion, Judge Dennis Jacobs was more explicit,[229] 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."[230] 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.[231]

Thus, the Second Circuit uses a rule against awarding fees in nominal damages cases to influence litigants in constitutional tort cases. The rule dis-incentivizes plaintiffs from pressing constitutional claims and entices defendants to default on them. Either way, the judicial dockets become less congested. The aspiration about the recognizing the "importance to organized society that [constitutional] rights be scrupulously observed" is, however, discarded in the process. 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

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[226] *Id*. at 318.

[227] *Id*. at 317 n.5 &n.6 (*citing Farrar v. Hobby*, 506 U.S. 103,113-15 (1992)).

[228] *Id*. at 321 n.11.

[229] Chief Judge Jacobs, then a circuit judge, sat on the panel with Senior District Judge Leonard Sand and present Supreme Court Justice Sonia Sotomayor.

[230] *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).

[231] *Id*. at 323. 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).

against government employees. The reasoning employed by these courts is that a trial for nominal damages against a municipality accomplishes "little, if any, justice."[232]

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, according to the Supreme Court, they are entitled.

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 to see 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 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." Litigation costs are likely to exceed its benefits regardless of whether a claim stands to collect $1 or $75,000 and, thus, there is no reason to attach privileged status to the latter.

Lastly, juries should be free to award no compensatory damages when they believe the plaintiff is fabricating a claimed mental or emotional injury. This is not a situation where the plaintiff is being 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 awards no 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 were

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[232] *See George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992); *Lippoldt v. Cole*, 468 F.3d 1204 1221–22 (10th Cir. 2006); *Manzanares v. City Of Albuquerque*, 628 F.3d 1237, 1242-43 (10th Cir. 2010); *see also Parker v. Banner*, 479 F. Supp.2d 827, 830-34 (N.D. Ill. 2007) (questioning deterrent value of *Monell* claims for nominal damages).

supposed to add plain common sense and provincial wisdom to the litigation process. They should be allowed to bring those traits to bear in constitutional tort cases.