

ARTICLE

COMPENSATORY DAMAGES AND DIGNITARY HARM IN THE UPCOMING RESTATEMENT OF CONSTITUTIONAL TORTS

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ABSTRACT

A new Restatement of Constitutional Torts, just getting underway, and the Restatement (Third) Torts (Remedies) now in draft, provide an opportunity to revisit issues that have lain dormant for decades. In particular, federal courts typically require constitutional tort plaintiffs to prove physical or emotional harm in order to obtain damages. That doctrine deserves re-examination, if only because the Supreme Court's principal compensatory damages case dates from 1978, and its most recent ruling on the topic came in 1986.

The new Tort Remedies Restatement offers an opportunity to consider modification of that approach. It includes a new section on the emerging importance of "dignitary" harm. That section provides the American Law Institute's first systematic account of recovery for dignitary harm in common-law torts. This Article argues that the same dignitary harm principle should apply to constitutional torts: When the plaintiff proves a violation of constitutional rights, recovery for dignitary harm should include the distinctive injury caused by the constitutional violation in addition to the physical injury, economic loss, emotional distress, and other harms inflicted by ordinary torts.

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TABLE OF CONTENTS

I.	INTRODUCTION.....	117
II.	CONSTITUTIONAL TORT DAMAGES DOCTRINE.....	125
	A. <i>Supreme Court Cases</i>	126
	1. <i>Carey v. Piphus and the</i> <i>“Principle of Compensation.”</i>	126
	2. <i>Stachura and the “Abstract</i> <i>Value” of Constitutional Rights</i>	129
	B. <i>Carey and Stachura in the Lower Courts</i>	129
III.	CONSTITUTIONAL RIGHTS AND DIGNITARY HARM.....	132
	A. <i>The Compensation Principle</i>	133
	1. <i>Carey’s “Principle of Compensation”:</i> <i>Making the Plaintiff Whole</i> <i>for a Constitutional Violation</i>	134
	2. <i>The Task of Adaptation</i>	136
	3. <i>Procedural Due Process</i>	140
	B. <i>Common-Law Torts and</i> <i>Constitutional Torts</i>	141
	1. <i>Differences Among</i> <i>the Interests Protected</i>	142
	2. <i>Constitutional Harm and</i> <i>Common-Law Emotional Distress</i>	143
	3. <i>Dignitary Torts, Dignitary Harm,</i> <i>and Violations of</i> <i>Constitutional Rights</i>	145
	C. <i>Presumed Damages</i>	146
	D. <i>Abstract Value of Constitutional Rights</i>	148
IV.	CONSTITUTIONAL REMEDIES AND CONSTITUTIONAL HARM.....	150
	A. <i>Constitutional Remedies and Their Costs</i>	151
	1. <i>Prospective Remedies:</i> <i>“Justiciability” Costs</i>	152
	2. <i>Habeas Corpus: “Finality” Costs</i>	153
	3. <i>Constitutional Tort:</i> <i>“Overdeterrence” Costs</i>	154
	4. <i>Constitutional Torts and</i> <i>Governmental Liability</i>	155
	5. <i>Distinctions Among Costs</i>	156

2024] *COMPENSATORY DAMAGES AND HARM* 117

<i>B. The Benefits of Remediating Constitutional Harm</i>	158
1. <i>Incentives and Deterrence</i>	159
2. <i>Vindication of Constitutional Rights</i>	160
3. <i>The Specific Benefit of a Jury Instruction on Constitutional Harm</i>	162
V. CONCLUSION	163

I. INTRODUCTION

A new Restatement of Constitutional Torts, just getting underway,¹ and the Restatement (Third) Torts (Remedies) now in draft,² provide an opportunity to revisit issues that have lain dormant for decades. In particular, federal courts typically require constitutional tort plaintiffs to prove physical or emotional harm in order to obtain damages.³ That doctrine deserves re-examination, if only because the Supreme Court’s principal

1. See AM. L. INST., 2022–2023 ANNUAL REPORT 18 (2023), https://www.ali.org/media/filer_public/20/87/2087bca3-5578-42d6-b982-3baff929410/2022-2023_annual_report.pdf [<https://perma.cc/N3PQ-KBXP>] (describing the project). The Author is an associate reporter for this project. The views expressed here are solely his own.

2. RESTATEMENT (THIRD) OF TORTS: REMEDIES (AM. L. INST., Tentative Draft No. 2, 2023) [hereinafter RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2]. Although this draft has not yet been published, much of it, including § 22 on dignitary harm (the section that figures most prominently in this Article) has been approved by both the Council of the ALI and the membership. See 2022–2023 ANNUAL REPORT, *supra* note 1, at 21; Pauline Toboulidis, *January 2023 Council Meeting Updates*, ALI ADVISER (Jan. 25, 2023), <https://www.thealiadviser.org/conflict-of-laws/january-2023-council-meeting-updates/> [<https://perma.cc/SHK6-3ZD6>].

3. The leading case is *Carey v. Piphus*, 435 U.S. 247, 260–64 (rejecting the proposition that a plaintiff is entitled to damages for “the injury which is ‘inherent in the nature of the wrong’”). *Carey* directs juries to follow common-law principles. See *id.* at 257–58; see also Survey of Jury Instructions in the Circuit Courts (Sept. 2023) (on file with the Author). See also *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021), in which the Court and all parties proceeded on the assumption that the plaintiff could obtain nominal damages at most without showing some injury beyond the constitutional violation. See also *Brown v. Brown*, 46 F. App’x 324, 325 (6th Cir. 2002) (denying plaintiff award for compensatory damages because plaintiff failed to prove that he suffered actual injury). For a recent illustration of lower court practice, see *Harris v. Rives*, No. 22-5490/5834/5838, 2023 WL 7538305, at *1, *3 (3d Cir. Nov. 9, 2023), involving mistreatment of a prisoner. See *infra* note 20 and accompanying text. See also *Norwood v. Bain*, 143 F.3d 843, 855 (4th Cir. 1998) (“[I]ndignity from the very violation of a constitutional right . . . is not a compensable harm in § 1983 litigation.”).

compensatory damages case dates from 1978,⁴ and its most recent ruling on the topic came in 1986.⁵

The new damages restatement offers an opportunity to consider modification of that approach. It includes a new section on the emerging importance of “dignitary” harm. That section provides the American Law Institute’s (ALI) first systematic account of recovery for dignitary harm in common law torts.⁶ This Article argues that the same dignitary harm principle should apply to constitutional torts: When the plaintiff proves a violation of constitutional rights, recovery for dignitary harm should include the distinctive injury caused by the constitutional violation in addition to the physical injury, economic loss, emotional distress, and other harms inflicted by ordinary torts. Throughout this Article I use the term “constitutional harm” to refer to the dignitary harm caused by a constitutional violation. In practical terms, my point is that the jury instructions on dignitary damages in a constitutional tort case should include a reference to this distinctive type of dignitary harm.

The current practice in the lower federal courts is to apply the common law negligence damages rules to constitutional tort cases. A key feature of the negligence tort in many jurisdictions is that the plaintiff must prove physical or emotional injury as a consequence of the violation.⁷ By itself, the breach of duty is not sufficient for liability.⁸ As for constitutional torts, the leading case is *Carey v. Piphus*, decided in 1978.⁹ *Carey* involved a denial of procedural due process. The issue was whether proof of the constitutional violation would suffice for an award of compensatory damages.¹⁰ Following the common law negligence approach, the Court ruled that a plaintiff could recover damages for violations of procedural due process only by proving mental or emotional distress as a result of the violation.¹¹ Since the deprivation inflicted on

4. *Carey*, 435 U.S. at 254–55.

5. The most recent case is *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986) (disapproving a jury instruction that would have allowed recovery for the “abstract value” of constitutional rights).

6. RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. a.

7. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. c (AM. L. INST. 2010) [hereinafter RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM]; see also John C. P. Goldberg & Benjamin C. Zipursky, *The Supreme Court’s Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 441–42 (2016). Thus, the Restatement explicitly limits liability for most torts to circumstances in which the tort causes physical or emotional harm. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, *supra*, § 6 cmt. f.

8. See RESTATEMENT (THIRD) TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, *supra* note 7, § 6 cmt. b.

9. *Carey*, 435 U.S. at 258–59.

10. As the Seventh Circuit had held. See *Piphus v. Carey*, 545 F.2d 30, 31–32 (7th Cir. 1976).

11. *Carey*, 435 U.S. at 263–64.

the plaintiff may be justified even if the procedure is faulty, “whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.”¹² Standing alone, the constitutional violation would not suffice.¹³

Eight years later, in *Memphis Community School District v. Stachura*, the Court ruled that “principles derived from the common law of torts” also govern damages for violations of substantive constitutional rights.¹⁴ Lower courts have treated *Carey* as a broad directive to apply negligence-based damages principles not only to procedural due process but across the range of constitutional torts. They do not charge the jury that the damages may include a recovery for the dignitary harm produced by the violation of the plaintiff’s constitutional right.¹⁵ No Supreme Court case and very few lower court cases have considered whether the plaintiff might recover for dignitary injury caused by the constitutional violation.

Consider, for example, the course of the litigation in *Uzuegbunam v. Preczewski*.¹⁶ Chika Uzuegbunam, a student at a public college, attempted to hand out religious materials and speak about religion in a public forum. The campus police told him to stop, and he complied. Uzuegbunam then brought a § 1983 suit to challenge the campus’s regulation of speech and religion, but his request for prospective relief was mooted when the school changed its rules.¹⁷ The outcome of the litigation then hinged on whether Article III allowed Uzuegbunam to sue for *nominal* damages, an issue on which he succeeded. Throughout the litigation, it was taken for granted that Uzuegbunam had no claim for *compensatory* damages, even though the campus police had

12. *Id.* at 263.

13. *Id.* at 262–63. *See, e.g.*, *Vincent v. Annucci*, 63 F.4th 145, 151 (2d Cir. 2023) (demanding proof of “actual injury,” apart from the constitutional violation itself). *See also* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1258–60 (1979); Note, *Damage Awards for Constitutional Torts: A Reconsideration After Carey v. Phipus*, 93 HARV. L. REV. 966, 967–68 (1980).

14. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

15. *See, e.g.*, *Harris v. Rives*, No. 22-5490/5834/5838, 2023 WL 7538305, at *1–3 (6th Cir. Nov. 9, 2023) (defendant used excessive force against a prisoner while the prisoner was confined to a restraint chair; plaintiff could not prove compensatory damages under the current regime); *Price v. City of Charlotte*, 93 F.3d 1241, 1254–55, 1257 (4th Cir. 1996) (appellees statements about how the constitutional violation caused him emotional distress and embarrassment insufficient for an award of compensatory damages). *See also* Survey of Jury Instructions in the Circuit Courts (Sept. 2023) (on file with the Author).

16. *See generally* *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

17. *Id.* at 796–97.

violated his constitutional rights, because he had not alleged any consequential injury such as emotional distress.¹⁸

This Article argues that, if the police violated Chika Uzuegbunam's First Amendment rights, then he had a cognizable claim for compensatory damages due to the dignitary harm produced by the constitutional violation, and the jury should have been so charged, perhaps in an instruction along the following lines:

You may, if the evidence warrants doing so, make an award for dignitary harm in addition to pecuniary loss and emotional distress. Dignitary harms are those that interfere with the liberty or personal autonomy of the plaintiff, or that embarrass, humiliate, or show blatant disrespect for the plaintiff. In determining dignitary harm, you should consider the indignity inherent in the violation of the plaintiff's constitutional right. You should focus on the violation of the plaintiff's right and should not consider such general factors as the importance of the constitutional right in our system of government or your perception of the importance of the constitutional right as an abstract matter.¹⁹

Trial judges and appellate courts would review awards for constitutional harm for excessiveness or inadequacy, as they do with other elements of damages. It does not follow that Chika Uzuegbunam would necessarily persuade a jury of dignitary harm.

In some cases, however, the dignitary injury seems manifest. Compare *Harris v. Rives*, in which Harris, an inmate, was maced and attached to a "restraint chair" for several hours, such that he could not defend himself.²⁰ Harris testified that Rives, a jail officer, "told him to tilt his head back and poured water over his nose and mouth,

18. *Id.* at 797–802. Though the Court upheld Uzuegbunam's complaint against the Article III challenge, Chief Justice Roberts dissented. In his dissent, Chief Justice Roberts suggested that a defendant may nonetheless avoid a ruling on the merits by depositing \$1 in nominal damages into an account designated for the plaintiff. *See id.* at 808 (Roberts, C.J., dissenting). For an argument against the Chief Justice's suggestion, see Michael L. Wells, Uzuegbunam v. Preczewski, *Nominal Damages, and the Roberts Stratagem*, 56 GA. L. REV. 1127, 1134 (2022) [hereinafter Wells, *Nominal Damages*].

19. This proposal borrows the language of RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. b. The last sentence borrows from the Supreme Court's opinion in *Stachura*, in which the Supreme Court disapproved an instruction that authorized such a recovery. *See generally Stachura*, 477 U.S. 299. *See infra* Section III.D. I offer this language only as a tentative starting point, in order to clarify my proposal. I am certain that it can be improved.

20. *See Harris*, 2023 WL 7538305, at *1, *2. The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), (e), if invoked, may well preclude compensatory damages for any harm other than physical harm on the facts of *Harris*, but the court's opinion makes no reference to that statute. *See generally id.*

causing him to yell for help.”²¹ Harris, proceeding pro se when he was denied state-provided counsel, won a verdict against Rives (but not other participating officers) for excessive force, but was unable to prove physical or emotional harm.²² Under the current damages regime, Harris received only nominal damages, yet it is hard to contest the existence of dignitary injury in such a case.²³

In almost four decades since *Stachura*, the Supreme Court has not revisited this aspect of § 1983 litigation. The ALI’s current Restatement of Constitutional Torts and Restatement (Third) Torts: Remedies projects—the former just beginning and the latter much further along—provide an opportunity to reconsider the scope of *Carey* and its application by lower courts.²⁴ These projects should include recognition that violation of a constitutional right produces a distinctive form of dignitary injury. Juries should be instructed on two types of compensatory damages for constitutional torts. In accordance with the Restatement of Torts: Remedies, constitutional tort juries should be instructed, as they are now, on the conventional elements of damages for all tort cases, including emotional harm. Second, the instruction on dignitary harm authorized by the new Restatement provision should include the distinctive dignitary injury produced by a constitutional tort.²⁵

In *Carey*, the Supreme Court adopted the common law “principle of compensation,” and noted that “over the centuries the common law of torts has developed a set of rules to implement” that principle.”²⁶ The problem with the current approach is not *Carey*’s reliance on

21. *Harris*, 2023 WL 7538305, at *1.

22. *See id.* at *1, *2–3, *5 (rejecting Harris’s argument that the denial was an abuse of discretion). Perhaps because Harris had no lawyer, the facts are somewhat obscure. For example, Rives evidently maintained that he was merely washing the mace off of Harris’s face, but the jury evidently disbelieved that explanation, since it ruled in favor of Harris. *See id.* at *1–2.

23. *See id.* at *1, *3–5. This case illustrates an important general principle: Nominal damages can serve to declare and vindicate rights, but they cannot compensate for dignitary injury, nor are they intended to do so. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 38 cmt. b (AM. L. INST., Tentative Draft No. 3, 2024) [hereinafter RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 3].

24. *See Restatement of the Law, Constitutional Torts*, AM. L. INST., <https://www.ali.org/projects/show/constitutional-torts/> [https://perma.cc/LWF8-TQRM] (last visited Oct. 22, 2024); *Restatement of the Law Third, Torts: Remedies*, AM. L. INST., <https://www.ali.org/projects/show/torts-remedies/> [https://perma.cc/T8MF-JV25] (last visited Oct. 22, 2024).

25. RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22. A distinct issue, which I do not address here, is whether instructions on damages should differ depending on the constitutional violation at issue in the case. *Cf.* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 280 (2000) (recommending such disaggregation in the context of official immunity doctrine).

26. *Carey v. Phipus*, 435 U.S. 247, 257 (1978).

common law principles, which are integral to the law of constitutional remedies.²⁷ It is that, by obsessively focusing on negligence doctrine, courts have chosen the wrong tort as their model. Liability for negligence requires a showing of emotional or physical harm, but “dignitary” torts such as battery and false imprisonment do not.²⁸ These torts furnish a more appropriate model for constitutional tort. Thus, the current tentative draft of the Restatement of Torts (Third) Remedies contains a new section on dignitary harm, which provides that a plaintiff “may recover reasonable compensation for dignitary harm if the factfinder infers significant dignitary harm and its value from the facts and circumstances of the tort itself.”²⁹

27. See *Health & Hosp. Corp. Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1454 (2023) (“Congress’s failure to displace firmly rooted common-law principles generally indicates that it incorporated those established principles into § 1983.”) (emphasis omitted). While the common law rule proposed by the defendant in *Talevski* did not meet the “firmly rooted” test, see *id.* (emphasis omitted), many common law principles carry substantial weight in § 1983 litigation. See, e.g., *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797–800 (2021); *Torres v. Madrid*, 141 S. Ct. 989, 994–96 (2021). See also Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 80 (1997) (arguing that “much of the Supreme Court’s development of independent federal rights and remedies took place . . . under the rubric of diversity jurisdiction”).

28. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS §§ 1, 7. (AM. L. INST., Tentative Draft No. 4, 2019) [hereinafter RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS Draft No. 4]; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, *supra* note 7, §§ 6 cmt. b, 47–48 (AM. L. INST. 2005); see also KENNETH S. ABRAHAM & G. EDWARD WHITE, *TORT LAW AND THE CONSTRUCTION OF CHANGE 99–100* (2022) (discussing these torts).

29. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 (punctuation omitted). The tentative draft of this section is as follows:

§ 22. Dignitary Harm

(a) A plaintiff who establishes a defendant’s liability for a tort that causes dignitary harm may recover reasonable compensation for:

- (1) dignitary harm if the factfinder infers significant dignitary harm and its value from the facts and circumstances of the tort itself;
- (2) emotional harm under the rules in §§ 20 and 21;
- (3) harm to reputation or loss of privacy under the rules in Restatement Third, Torts: Defamation and Privacy § ___; and
- (4) any other harms caused by the tort, such as lost earnings or earning capacity (§ 18), lost profits (§ 33), or medical expenses (§ 19).

(b) Plaintiff may rely on inferences of dignitary harm from the facts and circumstances under Subsection (a)(1) and also offer direct evidence of emotional or reputational harm under Subsections (a)(2) and (a)(3). Factfinders may consider both types of evidence and make a single award for emotional and dignitary harm. But factfinders generally should not make separate awards for emotional harm and inferred dignitary harm.

(c) Damages awarded under this Section must be compensatory and not punitive. The amount of damages awarded under Subsection (a)(1), (a)(2), or (a)(3) may be examined by a reviewing court only for gross excessiveness or gross inadequacy under § 17. The amount of damages awarded under Subsection (a)(4) is subject to

Violations of constitutional rights *ipso facto* impose a dignitary injury because they offend particularly fundamental interests, communicate a form of expulsion from one's status among "We the People," and carry with them a built-in characterization of the victim as someone who is unworthy of core rights.³⁰ Under this approach the plaintiff would recover damages for the constitutional violation if the factfinder infers significant constitutional harm from the facts and circumstances of the tort itself, as an element of the dignitary harm instruction. The broad rationale for such an instruction on constitutional harm is that it would serve the goals of constitutional tort damages—vindication of constitutional rights and deterrence of violations—more effectively than the current practice, as illustrated by Chika Uziegbunam's struggle to recover anything at all.³¹

Current practice results in systematic undervaluation of constitutional claims. The root of the problem is that courts treat constitutional torts as if they were common law negligence cases. Negligence is an area in which, according to the common-law tradition, liability for physical and emotional harm suffices to protect the plaintiff's interests.³² Constitutional tort should not follow the negligence model, because the constitutional violation *by itself* may produce a dignitary injury. Thus, the dignitary torts such as offensive battery and false imprisonment provide a better

review under § 17 and also must be proved with reasonable certainty under the standards in § 5.

(d) A plaintiff who establishes a defendant's liability for a tort that causes dignitary harm but who does not prove damages under Subsection (a) is entitled to nominal damages under § 38.

In comment b to this section, the draft defines "dignitary harms" as "those that interfere with the liberty or personal autonomy of the plaintiff, or that embarrass, humiliate, or show blatant disrespect for the plaintiff." *Id.* § 22 cmt. b.

30. Cf. Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. TORT L. 101, 105 (2021) (claiming that dignitary torts affect one's sense of self-worth and autonomy); U.S. CONST. pmb.; Denise G. Réaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEEN'S L.J. 61, 87 (2002) (arguing that "the concept of dignity" centers on respect for a person's "intrinsic worth"). These sources are cited in RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. b. Whether the dignitary injury is sufficiently serious to justify an award of damages is a distinct issue. Compare the discussion above of *Uziegbunam* and *Harris*. See *supra* note 20 and accompanying text.

31. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 809, 814 (1982); *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980); *Robertson v. Wegmann*, 436 U.S. 584, 590–92 (1978); see *supra* notes 16–18 and accompanying text.

32. See, e.g., *Carey v. Phipus*, 435 U.S. 247, 257–58 (1978). In some common-law areas, the scope of protection is even narrower. For example, emotional distress is not an element of damages for breach of contract. See *Cummings v. Premier Rehab Keller, P.L.L.C.*, 948 F.3d 673, 677–78 (5th Cir. 2020) (discussing this rule and exceptions to it).

common-law analogue.³³ Failure to recognize important differences between negligence law and constitutional torts means that victorious constitutional tort plaintiffs are often denied an adequate compensatory damages remedy.

It is true that constitutional harm cannot be measured in money, but this is not a powerful objection to the proposed instruction. Neither can other harms for which there is no market, such as pain and suffering, emotional distress, or reputational injury.³⁴ Yet awards for such nonpecuniary damages are routine.³⁵ Courts—even in negligence cases—long ago rejected the objection that damages should be easily capable of quantification in order to be recoverable. Instead, courts chose to “use[] money . . . as a means of recognizing the worth of non-economic . . . goods,” including by allowing awards for wholly nonpecuniary injuries.³⁶ The proposed instruction would not upset settled damages doctrine. It would add constitutional harm to the existing list of nonpecuniary harm for which the jury may make a monetary award.

The focus of this Article is the § 1983 doctrine on *compensatory* damages. My argument is that compensatory damages for a constitutional tort may include not only pecuniary loss, emotional distress, and dignitary harm, but also dignitary harm resulting from violation of the plaintiff’s constitutional right. A plaintiff who can prove an officer’s egregious misconduct may obtain punitive damages from the officer.³⁷ But the set of cases in which punitive damages may be awarded is too small to treat that possibility as sufficient to fill the gap left by inadequate compensatory damages. Punitive damages serve the special function of providing especially strong deterrence of especially outrageous constitutional violations. They can supplement (in certain cases) inadequate compensatory damages, but their principal purpose is not to make up for compensatory shortfalls.³⁸

33. For a general discussion of dignitary torts, see Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 335–40 (2019).

34. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ’S TORTS: CASES AND MATERIALS 596 (14th ed. 2020) (“Since pain, suffering and mental anguish are not capable of being reduced to any precise equivalent in money, there can be no fixed standard by which damages for them can be measured. The best that can be done is to leave the question to the jury, subject to control by the court, to fix a reasonable amount as compensation.”).

35. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, §§ 20, 21.

36. Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224–25 (1953); see also SCHWARTZ ET AL., *supra* note 34, at 596.

37. See *Smith v. Wade*, 461 U.S. 30, 55–56 (1983); see also *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (holding local governments may not be sued for such punitive damages). See generally Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841 (1996) [hereinafter Wells, *Punitive Damages*].

38. Love, *supra* note 13, at 1274–79.

Another form of redress that surfaces in constitutional tort cases is nominal damages. In some cases, a plaintiff who cannot prove compensatory damages may be awarded such damages, typically one dollar.³⁹ Nominal damages may vindicate the plaintiff's rights when the proof of constitutional harm is insufficient to support a compensatory award. But they are—very precisely because they serve only a symbolic non-compensatory purpose—an obviously inadequate substitute for compensatory damages when the evidence supports an award for the dignitary harm caused by a constitutional violation.

Part II describes the Supreme Court cases and lower court application of them. Part III explains that the dignitary harm resulting from violation of a constitutional right is distinct from the elements of damages available in ordinary negligence cases, and should be addressed under § 22, the new Restatement section on dignitary harm. Part IV argues that the benefits of the proposed addition to jury instructions outweigh the costs.

II. CONSTITUTIONAL TORT DAMAGES DOCTRINE

The front of constitutional tort law is 42 U.S.C. § 1983. Although this statute was enacted as part of the Civil Rights Act of 1871, it was originally viewed as providing only a narrow cause of action for constitutional violations that were affirmatively authorized by state governments.⁴⁰ As a result, § 1983 was seldom used outside the voting context until the 1960s.⁴¹ In 1961, however, the Supreme Court handed down its landmark ruling in *Monroe v. Pape*, which dramatically lowered the hurdles to constitutional tort suits brought under § 1983.⁴² Of particular importance to the subject of the of remedies under investigation here, the Court sharply distinguished constitutional tort law from state tort law. According to the Court, “[i]t is no answer that the State has a law which if enforced would give relief. The federal

39. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 3, *supra* note 23, § 38. The leading constitutional tort case on nominal damages is *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800–02 (2021). See generally Wells, *Nominal Damages*, *supra* note 18.

40. For a discussion of the history of the statute and the reasons for the narrow reading, see Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 737–41 (1991).

41. See *id.* at 751–52.

42. See *Monroe v. Pape*, 365 U.S. 167, 168, 183 (1961) (holding that a plaintiff need not pursue state law remedies before bringing a § 1983 suit). See generally Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965) (discussing *Monroe*, its background, and later developments).

remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”⁴³ Having highlighted this difference, the Court also made clear that ordinary tort law was not wholly beside the point with regard to the operation of § 1983. In particular, the Court observed that the statute “should be read against the background of tort liability,”⁴⁴ a phrase that foreshadowed later rulings that have applied a variety of common law principles to constitutional tort cases,⁴⁵ including common law damages doctrine.⁴⁶

A. *Supreme Court Cases*

In the six decades since *Monroe*, the Supreme Court has addressed the rules for determining compensatory damages only twice. In 1978, *Carey v. Piphus* cited a torts treatise for the proposition that the amount of the award for a procedural due process violation should be determined by “the principle of compensation.”⁴⁷ Eight years later, the Court in *Memphis Community School District v. Stachura* cited *Carey*’s “principle of compensation” in disapproving a jury instruction that allowed an award for the “abstract value” of constitutional rights.⁴⁸

1. *Carey v. Piphus and the “Principle of Compensation.”* The leading case on compensatory damages for constitutional torts is *Carey v. Piphus*.⁴⁹ Piphus, a high-school student, was caught smoking marijuana and suspended from public school without a proper hearing.⁵⁰ An earlier case had held that students may have a

43. *Monroe*, 365 U.S. at 183.

44. *See id.* at 187. The context in which the Court made this point suggests that the Court did not necessarily intend to set forth a general rule in favor of importing common-law tort doctrine into § 1983. In drafting § 1983, Congress borrowed some language from earlier criminal statutes, in which liability depended on proof of intent to violate federal rights. *See id.* at 183–85 (discussing the 1866 and 1870 criminal statutes on which § 1983 was modeled). Justice Douglas’s opinion for the Court in *Monroe* referred to tort principles in the course of ruling that the criminal state-of-mind requirement did not apply to the statutes § 1983 was modeled after. *See id.* at 187.

45. *See, e.g.,* *Torres v. Madrid*, 141 S. Ct. 989, 996–98 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797–800 (2021). *See also* Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 158 & nn.2, 4–5 (1998) [hereinafter Wells, *Constitutional Remedies*] (citing cases).

46. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797–800 (nominal damages); *Smith v. Wade*, 461 U.S. 30, 34–36 (1983) (punitive damages); *Carey v. Piphus*, 435 U.S. 247, 254–57 (1978) (compensatory damages).

47. *See Carey*, 435 U.S. at 255 & n.9, 257.

48. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–08 (1986).

49. *See Carey*, 435 U.S. at 254–57; Love, *supra* note 13, at 1258; Note, *supra* note 13, at 971–72.

50. *Carey*, 435 U.S. at 248–49.

“property” interest in access to public education.⁵¹ Citing the lack of a hearing, Piphus brought a § 1983 suit, seeking damages for deprivation of property in violation of his right to procedural due process. But he was evidently unable to show that a hearing would have resulted in a different outcome. Even so, the Seventh Circuit ruled in his favor, finding that substantial damages could be awarded “simply because [Piphus] had been denied procedural due process,” without proof that a hearing would have made a difference.⁵²

The Supreme Court reversed. It said that § 1983 “was intended to create a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution.”⁵³ Following the tort model, it reasoned that “the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.”⁵⁴ Under this rule, a plaintiff who establishes a procedural due process violation must show either that the procedural violation caused emotional distress,⁵⁵ or that the substantive deprivation (here lack of access to schooling) would not have occurred but for the procedural violation.⁵⁶

It appears that the latter alternative was not available to Piphus, as the evidence of marijuana use was strong, thus indicating that his suspension would have occurred even if he had received a fully adequate pre-suspension hearing.⁵⁷ On the emotional distress issue, a problem for Piphus was that, in ordinary tort negligence litigation, liability for emotional harm does not automatically result from the defendant’s breach of duty. Thus, it is not enough to simply assert that the violation caused emotional harm. Compensation ordinarily requires proof of both emotional harm and a causal link between the defendant’s tort and the occurrence of emotional harm.⁵⁸

51. See *Goss v. Lopez*, 419 U.S. 565, 573–76 (1975).

52. *Carey*, 435 U.S. at 249–52.

53. *Id.* at 248, 253 (internal quotation marks, editorial marks, and citations omitted).

54. *Id.* at 254.

55. See *id.* at 261–63.

56. Recent applications of this principle include *Vincent v. Annucci*, 63 F.4th 145, 149, 152 (2d Cir. 2023) and *Human Rights Defense Center v. Baxter County*, 999 F.3d 1160, 1168 (8th Cir. 2021).

57. The evidence was that the principal “saw Piphus and another student . . . passing back and forth what the principal described as an irregularly shaped cigarette . . . and smelled what he believed was the strong odor of burning [marijuana].” See *Carey*, 435 U.S. at 247–48. Upon becoming aware of the principal’s presence, the students “threw the cigarette into a nearby hedge.” *Id.* at 249.

58. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, *supra* note 7, §§ 6 cmt. b, 47, 48. Compare *Bogle v. McClure*, 332 F.3d 1347, 1355, 1358–59 (11th Cir. 2003) (upholding substantial awards for emotional distress to city librarians who were transferred to more mundane jobs on account of race), with *Price v.*

Piphus drew an analogy to an oddity of the tort of defamation, in which the “presumed damages” doctrine authorizes juries to award damages without proof of loss, despite the general rule to the contrary.⁵⁹ The Court rejected the analogy, however, by highlighting three differences between defamation and a deprivation of procedural due process. First, the rationale for presumed damages in defamation is that the plaintiff may be unable to identify persons who have read or heard the defamatory statements and are dissuaded from relations with him. By contrast, “it is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, inherently is as likely to cause distress as the publication of defamation *per se* is to cause injury to reputation.”⁶⁰ Second, defamation is different from procedural due process because there exists an “ambiguity in causation” in procedural due process cases. The premise for presumed damages for defamation is that the reputational harm results from the defamation. In the procedural due process context, in contrast, “where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure[s].”⁶¹ Third, the specific difficulty faced by a defamation plaintiff—inability to identify persons who otherwise would deal with him if not for the defamation—is not present in procedural due process cases. The Court could “foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself.”⁶² For these reasons the Court rejected the application of the presumed damages principle to procedural due process.⁶³ Following *Carey*, courts award only nominal damages for procedural due process violations,⁶⁴ unless the plaintiff can show that the procedural violation caused some other traditional harm.⁶⁵

City of Charlotte, 93 F.3d 1241, 1255 (4th Cir. 1996) (finding the plaintiffs’ testimony insufficient to support an award of damages for emotional distress).

59. See *Carey*, 435 U.S. at 261–62.

60. See *id.* at 262–63.

61. *Id.* at 263.

62. See *id.* at 263–64.

63. *Id.* at 264.

64. See, e.g., *Tercero v. Tex. Southmost Coll. Dist.*, 989 F.3d 291, 299–301 (5th Cir. 2021).

65. See, e.g., *Vincent v. Annucci*, 63 F.4th 145, 151 (2d Cir. 2023). In *Vincent*, for example, the constitutional violation may have led to unlawful incarceration. See *id.* at 148, 152.

2. *Stachura and the “Abstract Value” of Constitutional Rights.* In the years since *Carey*, the court has revisited constitutional tort compensatory damages principles only once. In *Memphis Community School District v. Stachura*, a public-school teacher sued for violation of First Amendment rights when he was suspended with pay for his choice of teaching materials.⁶⁶ The jury awarded substantial compensatory damages after the trial judge instructed that it may award damages to reflect the “importance in our society” of constitutional rights.⁶⁷ The Court, however, emphatically rejected this theory of remediation. It ruled that the instruction’s focus on the general value of rights could “[not] be squared with *Carey*, or with the principles of tort damages on which *Carey* and § 1983 are grounded.”⁶⁸ The focus of the instruction was “not on compensation for provable injury, but on the jury’s subjective perception of the importance of constitutional rights as an abstract matter.”⁶⁹ For this reason, the instruction violated *Carey*’s compensation principle.⁷⁰

B. *Carey and Stachura in the Lower Courts*

Since 1986 the Court has ignored compensatory damages issues. Relying on *Carey* and *Stachura*, however, most lower courts have applied traditional—and recovery-limiting—common-law damages rules in constitutional tort cases.⁷¹ Put another way, they have mechanically applied the “principle of compensation,” as though a constitutional tort were analogous to a car accident, without looking closely at important features of the *Carey* opinion. As a doctrinal matter, post-*Carey* developments rely on the Court’s references to common-law principles. As a policy matter, they seem to take it for granted that any differences between constitutional torts and common-law torts do not outweigh the similarities, that the two areas raise more or less the same remedial issues, and that they should be governed by more or less the same doctrine.

The post-*Carey* lower court case law is wrong, however, as both a doctrinal and a policy matter. The cases ignore key elements of the *Carey* opinion, in which the Supreme Court recognizes that constitutional tort remedial issues differ in fundamental ways from

66. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 300–02 (1986).

67. *Id.* at 302–03.

68. *Id.* at 308.

69. *Id.*

70. *Id.*

71. *See, e.g.*, *Graham v. Satkoski*, 51 F.3d 710, 713–14 (7th Cir. 1995). *See also supra* note 3.

the issues raised by common-law torts. That being so, courts should undertake the “task . . . of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.”⁷² The typical lower court opinion does not ask whether traditional tort-law rules actually satisfy the principle of compensation and does not undertake the task of adapting tort damages doctrine to the constitutional tort context. A fair summary of lower-court practice after *Carey* is that (1) all of the principles covered in torts casebooks and contained in the Restatement (Third) of Torts: Remedies §§ 18–28 on “injury to the person” apply to constitutional torts;⁷³ and (2) there are no special damages rules of any kind in constitutional tort cases.⁷⁴

The pattern of results has been one that, in effect, favors some types of constitutional claims over others, depending on how closely the constitutional tort resembles a common-law negligence case. Exclusive reliance on the presence of physical and emotional harm that is ordinarily at stake in such cases has—however unintentionally—produced a hierarchy of constitutional harms, pursuant to which the ranking of a particular plaintiff’s claim depends on factors that have no relation to the value of the abridged constitutional right. This approach attaches little or no significance to any distinctive constitutional harm produced by the violation. For example, a business defendant is systematically favored over an individual, since lost profits are an uncontroversial element of damages. Thus, the size of an award may hinge on whether the violation took place in a commercial or quasi-commercial setting.⁷⁵

72. *Carey v. Phipus*, 435 U.S. 247, 258 (1978).

73. These include, for example, lost income, medical and rehabilitation expenses, loss or damage to property, loss of use of property, pain and suffering, emotional distress, and loss of enjoyment of life. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, §§ 18–21, 25. The following are illustrative constitutional tort cases. See, e.g., *Herzog v. Vill. of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002) (physical injuries); *Malloy v. Monahan*, 73 F.3d 1012, 1015–17 (10th Cir. 1996) (lost profits); *Bogle v. McClure*, 332 F.3d 1347, 1358–59 (11th Cir. 2003) (emotional distress); *Tri Cnty. Indus., Inc., v. District of Columbia*, 200 F.3d 836, 839–41 (D.C. Cir. 2000) (use of property).

74. For discussion of many lower court cases on compensatory damages, see SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 601, 608, 610–19 (5th ed. 2020).

75. See *Greisen v. Hanken*, 925 F.3d 1097, 1104, 1107, 1111, 1113 (9th Cir. 2019) (\$1,117,488 economic damages for unconstitutional employment dismissal); *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1230, 1265 (11th Cir. 2012) (\$3.55 million for commerce clause violation); *Int’l Ground Transp. v. Mayor & City Council of Ocean City*, 475 F.3d 214, 214, 221–22 (4th Cir. 2007) (\$250,000 for unconstitutional revocation of a business license); *Borges Colón v. Román-Abreu*, 438 F.3d 1, 6 (1st Cir. 2006) (\$915,497 for unconstitutional employee termination); *Tri Cnty. Indus.*, 200 F.3d at 836, 842 (\$5 million, mainly for lost profits); *Blanche Rd. Corp. v. Benslem Twp.*, 57 F.3d 253, 265 (3d Cir. 1995)

Especially vulnerable plaintiffs may receive high jury awards, as they often do in common-law tort litigation.⁷⁶ High-profile cases may result in large settlements, especially when the defendant is a municipality.⁷⁷ But payments vary widely on grounds that have little to do with the constitutional aspect of the case.⁷⁸ Illustrations of small compensatory awards for seemingly serious constitutional violations include *Taylor v. Howe* (denial of the right to vote),⁷⁹ *Cowart v. Erwin* (severe beating),⁸⁰ *Williams v. Kaufman County* (illegal strip searches),⁸¹ *Stevens v. McHan* (illegal solitary confinement),⁸² and

(reversing a lower court's decision precluding plaintiffs for seeking damages regarding developing unpurchased lots); *Standley v. Chilhowee R-IV Sch. Dist.*, 5 F.3d 319, 321 n.3 (8th Cir. 1993) (\$272,865.59 for unconstitutionally terminating teachers' employments).

76. See *Green v. Howser*, 942 F.3d 772, 772, 781 (7th Cir. 2019) (upholding \$350,000 compensatory damages to a mother for emotional distress in a child custody case); *J.K.J. v. Polk Cnty.*, 928 F.3d 576, 576, 586, 603 (7th Cir. 2019) (upholding \$2 million in compensatory damages for guard's sexual assault of prisoners); *Adams v. City of Chicago*, 798 F.3d 539, 539, 543–44 (7th Cir. 2015) (upholding \$2.4 million for false arrest, excessive force, denial of equal protection, and malicious prosecution); *G.G. v. Grindle*, 665 F.3d 795, 797–800 (7th Cir. 2011) (seven plaintiffs collectively received over \$3 million for school authorities' failure to prevent sexual abuse).

77. See Frances Robles, *An Ex-Detective's Overturned Murder Cases Have Cost New York \$110 Million*, N.Y. TIMES (Nov. 20, 2023), <https://www.nytimes.com/2023/11/20/nyregion/louis-scarcella-nypd-settlements.html> [https://perma.cc/VEE2-RQXK]; Neil Vidgor & Azi Paybarah, *County Reaches \$10 Million Settlement in Jailed Black Man's Death*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/26/us/jamal-sutherland-south-carolina-settlement.html> [https://perma.cc/5PGF-8MX7]; Nicholas Bogel-Burroughs, *George Floyd's Family Settles Suit Against Minneapolis for \$27 Million*, N.Y. TIMES (Mar. 12, 2021, 2:00 PM), <https://www.nytimes.com/2021/03/12/us/george-floyd-minneapolis-settlement.html> [https://perma.cc/KM9T-UXZ6]; Rukmini Callimachi, *Breonna Taylor's Family to Receive \$12 Million Settlement from City of Louisville*, N.Y. TIMES, <https://www.nytimes.com/2020/09/15/us/breonna-taylor-settlement-louisville.html> [https://perma.cc/49VE-JDSH] (last updated Oct. 2, 2020); David W. Chen & Al Baker, *New York to Pay \$7 Million for Sean Bell Shooting*, N.Y. TIMES (July 27, 2010), <https://www.nytimes.com/2010/07/28/nyregion/28bell.html> [https://perma.cc/UBS4-UKLL].

78. See Timothy Williams & Mitch Smith, *\$16 Million vs. \$4: In Fatal Police Shootings, Payouts Vary Widely*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/police-shootings-payouts.html> [https://perma.cc/SFX9-A56P] (surveying a number of police shooting cases and noting that payments are far less when the facts are “in line with typical police shootings: murky, complex and disputed”).

79. *Taylor v. Howe*, 280 F.3d 1210, 1211 (8th Cir. 2002) (seven voters who were denied the right to vote on account of race recovered “between \$500 and \$2,000 to each”).

80. *Cowart v. Erwin*, 837 F.3d 444, 449–50 (5th Cir. 2016) (a handcuffed detainee recovered \$10,000 when two guards held him in position, while a third punched him twice in the face; then a “swarm” of officers threw Cowart to the ground, beat him, sprayed him with mace, and rendered him unconscious).

81. *Williams v. Kaufman Cnty.*, 352 F.3d 994, 1001 (5th Cir. 2003) (plaintiffs received \$100 for illegal strip searches).

82. See *Stevens v. McHan*, 3 F.3d 1204, 1207 (8th Cir. 1993) (\$4,000 award for eight days of “arbitrary and excessive” administrative segregation in prison, in violation of plaintiff's Eighth Amendment rights).

Zinna v. Congrove (First Amendment retaliation).⁸³ Many plaintiffs who win on the constitutional merits and overcome official immunity nonetheless receive only nominal damages or small compensatory awards.⁸⁴ In *Hazle v. Crofoot*, the plaintiff spent 100 days in prison on account of a violation of his First Amendment rights, yet the jury awarded no damages.⁸⁵ The Ninth Circuit reversed, ruling that “the award of compensatory damages is mandatory when the existence of actual injury is beyond dispute.”⁸⁶ But it did not specify how big the award must be.⁸⁷

III. CONSTITUTIONAL RIGHTS AND DIGNITARY HARM

Carey was the Supreme Court’s first case on compensatory damages for constitutional torts, and—of critical importance here—it provides the Court’s only serious treatment of the broad issues raised by the intersection of constitutional tort and common law damages doctrine. After stating that the “compensation principle” should govern constitutional torts and that common law damages principles should be adapted to the constitutional tort context, the Court in *Carey* devoted most of its attention to the damages for violations of procedural due process issue.⁸⁸ It did not set forth a comprehensive approach to constitutional tort damages. But what about *Stachura*? In fact, that case produced an even narrower holding than *Carey*. At bottom, it did nothing more than reject the “abstract value” jury instruction at issue in that case. But that instruction was patently objectionable—including under the theory of remedies set forth here—because, in effect, it did nothing more than permit the jury to issue any award it might like to grant based on its own “abstract” theory of justice.⁸⁹

83. *Zinna v. Congrove*, 680 F.3d 1236, 1238–39 (10th Cir. 2012) (First Amendment retaliation plaintiff recovered \$1,791).

84. *See, e.g.*, *Thurairajah v. City of Fort Smith*, 3 F.4th 1017, 1025–27 (8th Cir. 2021) (illegal arrest); *Hoever v. Marks*, 993 F.3d 1353, 1355 (11th Cir. 2021) (First Amendment); *Kidis v. Reid*, 976 F.3d 708, 714 (6th Cir. 2020) (excessive force); *Martin v. Marinez*, 934 F.3d 594, 605 (7th Cir. 2019) (illegal seizure); *De Jesús Nazario v. Rodríguez*, 554 F.3d 196, 198 (1st Cir. 2009) (nominal damages awarded to plaintiff’s estate when jury found that defendants’ discharge of seventeen rounds at the plaintiff, who was lying on the ground, was excessive force); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 824 (5th Cir. 1999) (no compensatory damages when a school district allowed religious instruction in public schools, in violation of the Establishment Clause). *See also* Wells, *Nominal Damages*, *supra* note 18, at 1132–33 & n.16.

85. *See Hazle v. Crofoot*, 727 F.3d 983, 986 (9th Cir. 2013).

86. *Id.* at 991.

87. *Id.* at 991–92.

88. *See Carey v. Piphus*, 435 U.S. 247, 254–55, 258–65 (1978).

89. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

The core problem is this: Damages issues arise in a wide variety of constitutional tort contexts. But neither *Carey* nor *Stachura* discuss the implications of their holdings for remedial matters that reach beyond the particularized issues those cases presented. More specifically—and of critical importance here—neither opinion purports to reject the idea that a violation of the plaintiff’s constitutional right produces dignitary harm. For lower courts, the lesson taught by these cases is that they must use the damages principles that apply in common-law negligence cases.

This approach, however, does not honor the Supreme Court’s teaching because it wholly ignores *Carey*’s focus on the requisite “task of adaptation” of common-law damages principles to the constitutional tort context.⁹⁰ In dealing with *Carey*, lower courts have focused myopically on the Court’s damages-denying resolution of the procedural due process damages issue, while paying no serious attention to other key parts of the opinion. They have not taken account of developments in general tort law over the four decades since *Carey*, notably the increasing recognition of dignitary injury, as reflected in the draft Restatement (Third) of Tort: Remedies.⁹¹ At bottom, *Carey* stands for both a “compensation principle” and an “adaptation agenda.” And on close inspection, both of these principles support recognition of a specialized entitlement to a money-damages remedy for the dignitary harm inherent in the violation of many, if not all, constitutional rights. This recognition of the plaintiff’s interest in recovery of dignitary harm can be achieved without disturbing the narrow holding of *Carey*, by instructing the jury both that dignitary harm is compensable and that, procedural due process aside, the constitutional violation may produce a distinctive type of dignitary harm that is sufficiently serious to deserve compensation.

A. *The Compensation Principle*

In *Carey*, the Court decided three issues, not one. First, *Carey* held that “damages awards under § 1983 should be governed by the principle of compensation.”⁹² Second, the Court recognized that implementation of the compensation principle in the § 1983 context, a task “of some delicacy,” would require that courts pay close attention to differences between ordinary torts and constitutional torts.⁹³ Third, on the narrow

90. *Carey*, 435 U.S. at 258.

91. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22. See *supra* note 29.

92. *Carey*, 435 U.S. at 257.

93. *Id.* at 258.

issue before it, the Court ruled that a procedural due process plaintiff must prove harm as a result of the denial of due process, not merely harm as a result of the deprivation.⁹⁴ Viewed in context, the procedural due process holding is best understood as an exception to a general principle that damages should be available for constitutional harm.

1. *Carey's "Principle of Compensation": Making the Plaintiff Whole for a Constitutional Violation.* Contrary to the assumption of most lower courts in constitutional tort litigation, the compensation principle is not a rule that damages are limited to lost income, medical expenses, pain and suffering, and other forms of emotional distress. It is the means by which common-law damages doctrine attempts to achieve the more basic norm that a plaintiff who wins on the merits is entitled to "make-whole relief." As the Restatement puts it, "[a] plaintiff who establishes a defendant's liability in tort generally is entitled to a remedy or remedies that will place that plaintiff, as nearly as possible, in the position the plaintiff would have occupied if the tort had not been committed."⁹⁵ In negligence law, this "basic principle" is enforced by damages for physical harm and emotional distress, which serve the goal of coming "as nearly as possible" to make-whole relief.⁹⁶

But some torts produce dignitary harm,⁹⁷ and the Restatement (Third) of Torts recognizes that a distinct recovery should be available for that harm.⁹⁸ The question considered here is whether juries should be instructed to make an award for violation of the plaintiff's constitutional right as part of the instruction on dignitary harm. The giving of this proposed instruction would accomplish the goal of making the plaintiff whole "as nearly as possible" in constitutional tort actions. It would, in particular, draw the jury's attention to the special feature of constitutional torts—that the defendant has inflicted an injury that is distinct from the damages that may be recovered in ordinary tort litigation, or even in common-law dignitary tort litigation.

94. *Id.* at 259.

95. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 2 (AM. L. INST., Tentative Draft No. 1, 2022).

96. *Id.* See also *id.* § 2 cmt. c.

97. See Abraham & White, *supra* note 33, at 335–36.

98. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22.

The effort to weave the idea of a distinct constitutional harm injury into jury instructions on damages is not—as some might think—a newfangled notion designed merely to end-run the core principles of *Carey* and *Stachura*. To the contrary, this idea has deep roots in the law that reach back to rulings that predate those cases by many years. In *Nixon v. Herndon*, L.A. Nixon, a black man, was stopped from voting and sued the culpable officials for damages.⁹⁹ The Court, in an opinion by Justice Holmes, reversed a dismissal of Nixon’s complaint, in which the plaintiff sought \$5,000 in damages for the violation of his Fourteenth Amendment right to equal protection—full stop.¹⁰⁰ In the view of the defendants, there was no basis for monetary relief because the plaintiff’s injury was only “political” in nature.¹⁰¹ Writing for a unanimous Court, however, Justice Holmes rejected the defendants’ assertion that, for this reason, “the subject matter of the suit was . . . not within the jurisdiction of the Court.”¹⁰² Put simply, the Court authorized a monetary recovery because of the constitutional nature of the plaintiff’s injury, in the face of the defendants’ claim that the constitutional injury was too abstract or indefinite because it was “political.”

Nixon squarely supports the distinction drawn in this Article between constitutional harm and other forms of intangible harm. Mr. Nixon did not assert, and may not have suffered, any emotional harm or even any subjectively experienced affront to his dignity. And the Court made no reference to any such harm in upholding the damages award.¹⁰³ To put the key point another way: Assume that negligent denial of the vote had been a state law tort at the time *Nixon* was decided. Assume further that the state court had held that (even while injunctive relief was available to remedy that state-tort-law violation) no money damages were recoverable because the plaintiff had failed to prove any emotional or dignitary harm. The critical point is that none of this would have mattered, or did matter, to the Supreme Court. For it, the constitutional violation in and of itself entitled Mr. Nixon to money damages.

99. *Nixon v. Herndon*, 273 U.S. 536, 539–41 (1927). For a recent application of *Nixon*, see *Taylor v. Howe*, 280 F.3d 1210, 1211 (8th Cir. 2002).

100. See *Nixon*, 273 U.S. at 539–41. Adjusted for inflation, this would amount to more than \$87,000 in 2023 dollars, according to the inflation calculator at the website of the Federal Reserve Bank of Minneapolis. *Inflation Calculator*, FED. RSRV. BANK MINNEAPOLIS, <https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator> [https://perma.cc/ZWF4-GQVV] (last visited Sept. 18, 2024).

101. *Nixon*, 273 U.S. at 540. The “political” objection was based on earlier case law. See Note, *Voting Wrongs and Remedial Gaps*, 137 HARV. L. REV. 1182, 1188–90 (2024).

102. *Nixon*, 273 U.S. at 540–41.

103. See generally *id.*

The modern Supreme Court has largely forgotten *Nixon*. *Carey* barely mentions the case.¹⁰⁴ In *Stachura*, the Court mentioned *Nixon* albeit only in passing.¹⁰⁵ In particular, the Supreme Court described *Nixon* as a “right to vote” ruling and compared it to other cases in which compensatory damages were authorized for denial of the vote on Fifteenth Amendment grounds.¹⁰⁶ *Stachura* did state, with accuracy, that “*Nixon* followed a long line of cases . . . authorizing substantial money damages as compensation for persons deprived of their right to vote in particular elections.”¹⁰⁷ So understood, *Nixon* might be distinguished from cases seeking damages for violations of other constitutional rights. But *Nixon* cannot, on any fair reading of the opinion, be cabined in this way. Nor should it be. The Court in *Nixon* ruled that taking away the right to vote was the means by which equal protection was denied.¹⁰⁸ But in doing so, it did not indicate there was anything special about that means, as opposed to other means, by which constitutional rights were abridged. The *Nixon* opinion contains no ambiguity on the point. Indeed, the Court found it “unnecessary to reach” the Fifteenth Amendment issue. The denial of the right to vote was a violation of the Equal Protection Clause of the Fourteenth Amendment, and it was that violation—not the specific voting-rights-related violation of that clause—that supported the plaintiff’s monetary recovery.¹⁰⁹

2. *The Task of Adaptation.* The underlying principle of tort damages is that the award should, as best as possible, make the plaintiff whole.¹¹⁰ In ordinary negligence litigation, the application of this principle typically involves an award for lost income, medical expenses, and an array of nonpecuniary harms under the

104. *Carey v. Phipus*, 435 U.S. 247, 264 n.22 (1978).

105. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311 n.14 (1986).

106. *See, e.g., Lane v. Wilson*, 307 U.S. 268, 274 (1939).

107. *Stachura*, 477 U.S. at 311 n.14.

108. *Nixon*, 273 U.S. at 541.

109. *See id.* at 540–41 (“[F]ind[ing] it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth.”). One part of the footnote in *Stachura* seems to recognize that *Nixon* is not merely a voting case. After referring to the right to vote, the Court goes on to characterize *Nixon* and similar rulings in more general terms, as cases “involv[ing] nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified.” *Stachura*, 477 U.S. at 311 n.14. The Court does not explain its assertion that the damages were “presumed” in *Nixon*. For an argument that damages for constitutional harm may be awarded without resort to the concept of presumed damages, see *infra* notes 183–89 and accompanying text.

110. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 2.

general heading of pain and suffering.¹¹¹ What matters most about *Carey* here is that Justice Powell’s opinion for the Court in that case did *not* adopt this approach for measuring damages for constitutional torts. On the contrary, the opinion questioned whether “common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case.”¹¹² The Court noted that “[i]n some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right,” and “it may be appropriate to apply the tort rules of damages directly to the § 1983 action.” But this element of the Court’s reasoning was, by its own terms, made applicable only to “some cases.” Thus, “[i]n other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts.”¹¹³ And when this was so, “the task will be the more difficult one of *adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.*”¹¹⁴

Carey, in short, specifically recognizes that the negligence model does not provide an appropriate template for fixing constitutional tort damages. Moreover, the soundness of this view of things becomes especially clear when one recalls that common-law tort is not limited to negligence. The underlying common-law principle—fully endorsed by *Carey*—is that tort damages should make the plaintiff whole and should be adapted to context in order to achieve that goal. The Court recognized that, in order to achieve the aims of constitutional tort, “the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.”¹¹⁵ Those purposes, which include the vindication of constitutional rights and deterrence of violations,¹¹⁶ “would be defeated if injuries caused by the

111. *Id.* §§ 18–21. Among other things, the award may include damages for “fright at the time of the injury, apprehension as to its effects, nervousness, or humiliation at disfigurement.” W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 362–63 (5th ed. 1984).

112. *Carey v. Phipus*, 435 U.S. 247, 248, 258 (1978).

113. *Id.*

114. *Id.* (emphasis added).

115. *Id.* at 255–59.

116. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980); *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.”¹¹⁷ No single case could resolve all of the issues related to the determination of damages for constitutional tort. The “task of adaptation” of common-law damages principles to constitutional tort suits was one of too much “delicacy.”¹¹⁸

Carey’s reasoning follows the common law by recognizing that the “principle of compensation” is not monolithic. Its content varies from tort to tort. In *Carey*, the Court relied on a highly regarded torts treatise,¹¹⁹ which states that “[t]he cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant’s breach of duty.”¹²⁰ As identified in the Restatement (Third) of Torts: Remedies, in negligence cases the elements of compensation include such items as lost income, medical expenses, pain and suffering, and emotional distress.¹²¹ An important feature of the negligence tort is that proof of physical or emotional damages is a necessary element of the plaintiff’s cause of action.¹²² Put another way, there is no tort at all unless the negligence causes lost income, medical expenses, or emotional distress, for which plaintiffs can, at least in theory, be made whole, or at least be returned as nearly as possible to their pre-tort status. In this context, “compensation” is generally understood as a recovery that makes up for physical and emotional harms or does so “as nearly as possible.”¹²³ Without proof of such harms, the plaintiff loses on the merits.

But—to repeat—tort law does not establish a “one-size-fits-all” remedial regime.¹²⁴ Constitutional torts aside, the common law of tort includes not only the “negligence that causes physical or emotional harm” tort, but also strict liability torts involving dangerous products, dangerous animals, and abnormally dangerous activities,¹²⁵ as well as a variety of intentional torts, for which the

117. *Carey*, 435 U.S. at 258.

118. *Id.*

119. 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25.1 (1956).

120. *Carey*, 435 U.S. at 254–55 (emphasis in original) (citing HARPER & JAMES, *supra* note 119).

121. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2 *supra* note 2, §§ 18–21.

122. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, *supra* note 7, §§ 6 cmt. b, 47–48.

123. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2 *supra* note 2, § 2 cmt. c.

124. See Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 943 (2017) (arguing that the search is doomed to failure); James Goudkamp & John Murphy, *The Failure of Universal Theories of Tort Law*, 21 LEGAL THEORY 47, 50–51 (2015) (similar).

125. See, e.g., RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 553–791 (12th ed. 2020) (collecting cases and materials relevant to these strict liability torts).

plaintiff recovers on the merits without a showing of harm.¹²⁶ Even in the negligence context, special rules control recovery for purely economic torts such as negligent misrepresentation¹²⁷ or negligently caused pure economic loss.¹²⁸ In the end, there are few, if any, universal principles of tort damages law.¹²⁹

In the tort realm, making the plaintiff whole is a task that requires flexibility. Because the variety of torts gives rise to a variety of tort damages rules, the application of the “cardinal principle” of compensation depends on the context in which it is applied. The rules on “make-whole” recovery in the negligence context do not apply to all torts. Just as some dignitary torts recognized by the common law, such as battery and false imprisonment, do not require proof of physical or emotional harm,¹³⁰ the plaintiff may win a constitutional tort case on the merits without showing physical or emotional harm.¹³¹

Constitutional tort is a type of dignitary tort. In the context of both dignitary torts and constitutional torts, “make-whole” recovery includes physical and emotional harms but is not limited to them. In line with the principle that the remedy should be tailored to the tort, many courts have recognized that the award for a dignitary tort should make up for the offense to dignity.¹³² That is why Restatement (Third) of Torts: Remedies § 22 allows the jury to infer dignitary harm, whether or not physical or emotional consequences can be proven.¹³³ Applying that principle to constitutional torts, the remedy in a § 1983 case should include a recovery for the constitutional wrong. This can be accomplished by explaining to the jury that a constitutional violation produces a distinctive form of dignitary harm, because it means that officials have used the power of the state to take away one of the plaintiff’s fundamental rights—such as speech, religion, privacy, property, or equality.

126. See, e.g., RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS Draft No. 4, *supra* note 28, §§ 1, 7 (battery and false imprisonment).

127. See, e.g., *Ultramares Corp. v. Touche*, 174 N.E. 441, 444–48 (N.Y. 1931).

128. See, e.g., *S. Cal. Gas Co. v. Super. Ct. of L.A. Cnty.*, 441 P.3d 881, 886–90 (Cal. 2019).

129. See *Hershovitz*, *supra* note 124, at 969.

130. See, e.g., RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS Draft No. 4, *supra* note 28, §§ 1, 7; see also *ABRAHAM & WHITE*, *supra* note 28, at 99–100.

131. See *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800–02 (2021); see also *Carey v. Piphus*, 435 U.S. 247, 266 (recognizing that plaintiffs may recover nominal damages for violations of constitutional rights); *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988) (“A violation of constitutional rights is never *de minimis*, a phrase meaning so small or trifling that the law takes no account of it.”).

132. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 nn.b–d.

133. See *id.* § 22. This is a new section. See *id.* § 22 cmt. a.

3. *Procedural Due Process*. In *Carey*, the Court repudiated a lower court's ruling that a plaintiff could recover compensatory damages for a procedural due process violation, without proof of emotional distress or some other harmful consequence.¹³⁴ Lower courts have generally reasoned that the same requirement applies to other constitutional violations.¹³⁵ On that view of *Carey*, an instruction regarding the remediability of constitutional harm would be forbidden.

The principle of compensation is hard to square with the Court's ruling that the plaintiff could recover nothing for the procedural due process violation.¹³⁶ The basis for "adaptation" is that "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action."¹³⁷ There is no common-law analogue to procedural due process. The violation is a constitutional wrong and gives rise to constitutional harm that is not covered by common-law damages principles, whether or not it produces any emotional distress or other harm.

The procedural due process ruling nonetheless may be reconciled with the rest of the *Carey* opinion by treating that ruling as based on the recognition of an exception to the general rule of "make-whole recovery" and on the need for adaptation of common-law principles to the constitutional tort context. The narrow issue in *Carey* was whether damages could be awarded for a procedural due process violation, without proof of harm.¹³⁸ The Seventh Circuit had held that plaintiffs who prove violations of procedural due process "would be entitled to recover substantial 'nonpunitive' damages simply because they had been denied procedural due process."¹³⁹ In rejecting that position, *Carey* recognized that procedural due process differs from other constitutional rights in the sense that it guarantees only a fair *process* and does not provide the holder of the right with any *substantive* benefit.¹⁴⁰

134. *Carey*, 435 U.S. at 248.

135. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 n.i.

136. *Carey*, 435 U.S. at 266–67.

137. *Id.* at 258.

138. *Id.* at 253.

139. *Id.* at 252.

140. See *id.* at 259–64. See also *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992) (recognizing that, despite *Carey*, "if your home is illegally invaded or if you are illegally

This feature of procedural due process means that the emotional harm that may result from a deprivation may be caused either by the substantive deprivation or the process by which it was brought about. In requiring “evidence that mental and emotional distress actually was caused by the denial of procedural due process itself,” the Court sought to avoid confusion over the cause of the emotional distress—whether it was due to the (unjustified) procedural violation or to the (justified) substantive deprivation.¹⁴¹ The “ambiguity in causation” could result in an unjustified recovery for the emotional distress that was actually caused by the justified substantive violation.¹⁴² In addition, the dignitary injury from a procedural due process violation will likely be small when the substantive deprivation is justified anyway.

Viewed in this way, the Court’s ruling seems to rest on a pragmatic judgment that any meaningful harm the plaintiff suffers will more likely be traceable to the substantive deprivation than the procedural violation. And accordingly, the Court endorsed a bright-line rule to guard against what might be thought of as (an unjustified) spill-over remediation for the (constitutionally valid) substantive deprivation when, in actuality, only a procedural violation had occurred.¹⁴³ While the Court’s procedural/substantive distinction may be somewhat arbitrary, this is because “under-” and “over-inclusiveness” are characteristic of all bright-line rules.¹⁴⁴

B. Common-Law Torts and Constitutional Torts

An objection to the proposed instruction on recovery when the jury finds that the constitutional violation produces dignitary harm—one that is rarely articulated but that may be implicit in the reasoning of *Carey*, *Stachura*, and some lower court rulings—is that the common-law rules on damages serve well enough, without more, to compensate plaintiffs for constitutional harms.¹⁴⁵ Any such

prevented from voting or speaking you can seek substantial compensatory damages without laying any proof of injury before the jury, provided that you do not ask for heavy damages on the ground that the constitutional right invaded was ‘important.’” (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986)).

141. *Carey*, 435 U.S. at 263.

142. *Id.* at 263–64.

143. *Id.* at 263–64, 266.

144. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31–33 (1991).

145. See *Carey*, 435 U.S. at 258–59; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

defense of the common-law regime, however, ignores conceptual and practical differences between constitutional torts and common-law torts. Daryl Levinson has pointed out that “[p]rivate law models cannot . . . be superimposed without modification onto constitutional law.”¹⁴⁶ Because ordinary tort remedies are not designed to remedy constitutional harm, the damages rules for common-law torts will often fail to provide an effective constitutional tort remedy.¹⁴⁷

This section rebuts two versions of the “serve well enough” rationale for rejecting the recoverability of constitutional damages: (1) the notion that the interests protected by the Constitution and by the common law are similar and (2) that the emotional distress damages available in common-law cases are adequate to compensate for constitutional harm. A third common-law principle—that damages may be awarded for dignitary harm—furnishes a more promising vehicle for enforcement of constitutional norms. That proposition is discussed in subsection 3.

1. *Differences Among the Interests Protected.* Many constitutional rights—for example, those recognized by the First Amendment’s speech, press, and religion clauses, and those recognized by the Fourteenth Amendment’s Equal Protection Clause—have no common-law correlates. Even when the constitutional right resembles the interest protected by ordinary tort law, the similarity is superficial. Consider, for example, the Supreme Court’s discussion of the differences between the common-law tort of trespass to land and the constitutional tort of unreasonable search under the Fourth Amendment. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, federal agents searched and then arrested the plaintiff, who sued for Fourth Amendment violations.¹⁴⁸ The United States sought dismissal on the ground that a state-law trespass suit would suffice to protect the plaintiff’s privacy interests.¹⁴⁹ The Court rejected that argument, explaining that the Fourth Amendment does much more than track state tort law.¹⁵⁰ For example, wiretapping may violate the Fourth Amendment even if it is not a common-law trespass.¹⁵¹

146. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 859 (1999).

147. See Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1319–20 (2023) [hereinafter Fallon, *Constitutional Remedies*].

148. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). For present purposes, it is not necessary to consider the limits placed on *Bivens* by *Egbert v. Boule*, 142 S. Ct. 1792 (2022).

149. *Bivens*, 403 U.S. at 390–91.

150. *Id.* at 390–92.

151. See *Katz v. United States*, 389 U.S. 347, 353 (1967).

Indeed, the Court explained, “[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment’s guarantee against unreasonable searches and seizures, may be inconsistent or even hostile.”¹⁵² As an example, the *Bivens* Court cited the common-law consent principle, which is a defense to common-law trespass.¹⁵³ The premise of that defense is that the plaintiff has freely chosen to allow the entry. When federal officers seek entry, the Court reasoned, that premise is not necessarily applicable, because “[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry.”¹⁵⁴

The bottom line is clear: The interests protected by the Bill of Rights are sometimes at odds with the common law, sometimes supplementary to the common law, and sometimes merely different from the rights protected by the common law. They are not identical to, or even necessarily similar to, common-law interests.¹⁵⁵

2. *Constitutional Harm and Common-Law Emotional Distress.* Courts that apply common-law damages principles to constitutional torts may rely on another premise: Common-law principles suffice because they allow recovery for nonpecuniary damages for emotional distress and affronts to dignity.¹⁵⁶ According to this line of reasoning, even if the interests protected by constitutional rights differ from those protected by the common law, these traditional forms of nonpecuniary damages can and do serve as a surrogate for nonpecuniary constitutional harm. This premise is faulty to the extent the focus is on damages for emotional distress. There is, however, a plausible case to be made that constitutional harm may, with a proper reference to it, be folded into the instruction on dignitary harm.¹⁵⁷

Put somewhat differently, there is a worry that permitting a distinct recovery for constitutional harm might provide duplicative relief if the jury also awards damages for emotional or dignitary injuries, and in common-law cases courts sometimes reject jury instructions that seem to allow a double recovery for non-pecuniary losses.¹⁵⁸ The Restatement (Third) of Torts: Remedies recognizes this problem and

152. *Bivens*, 403 U.S. at 394.

153. *Id.*

154. *Id.*

155. See *Carey v. Phipus*, 435 U.S. 247, 258 (1978).

156. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, §§ 20–22.

157. See discussion *infra* Section III.B.

158. *Rounds v. Rush Trucking Corp.*, 211 F.3d 185, 187–190 (2d Cir. 2000).

advises that juries should be instructed not to award duplicative relief.¹⁵⁹ Courts follow that practice in constitutional tort litigation. In *Rounds v. Rush Trucking Co.*, for example, the court erred by instructing the jury that it could award damages for both “mental suffering” and “emotional distress.”¹⁶⁰ The same principle applies when the plaintiff asserts two constitutional violations that seem to produce a single injury.¹⁶¹ For example, constitutional tort might follow the damages principles developed in the common law of dignitary torts, such as battery, false imprisonment, assault, defamation, and violation of privacy. These torts aim “not only to protect against and compensate for bodily injury, damage to property, emotional distress, and economic loss, but also to protect individual dignity of various sorts.”¹⁶² Unlike negligence, these torts do not require proof of physical or emotional harm in order to establish liability.¹⁶³

For the purpose of compensating for constitutional harm, it does not matter whether a constitutional tort plaintiff can prove emotional harm. The constitutional harm exists even if they cannot do so. Some lower courts have recognized this distinction but nonetheless denied recovery for the constitutional wrong. In *Norwood v. Bain*, for example, the police stopped the plaintiffs at a checkpoint at the entrance to a biker rally and conducted warrantless searches of their clothing, saddlebags and motorcycles.¹⁶⁴ Though the riders proved violations of their Fourth Amendment rights, they received no compensatory damages. In affirming the award, the court said that the plaintiffs offered insufficient evidence of emotional distress: “None testified that their emotional upset was caused by oppressive or threatening conduct by the checkpoint officers.”¹⁶⁵ According to *Norwood*, the

159. RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. e (“[F]actfinders should generally make a single award for one, the other, or both combined, rather than separate awards for emotional distress and dignitary harm.”).

160. *Rounds*, 211 F.3d at 187.

161. *See, e.g.*, *Bogan v. City of Boston*, 489 F.3d 417, 425–26 (1st Cir. 2007). Here, the plaintiff asserted both Fourth and Fourteenth Amendment violations when officials inspected their property without good reasons. *Id.* at 421–22. They were entitled to only one award because “the Bogans’ trial presentation of their Fourth and Fourteenth Amendment theories was identical.” *Id.* at 425–26.

162. *See Abraham & White, supra* note 33, at 319.

163. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS Draft No. 4, *supra* note 28, §§ 1, 5, 7 (discussing proposed elements of battery, assault, and false imprisonment). *See also* ABRAHAM & WHITE, *supra* note 28, at 99–100 (discussing the history and elements of some dignitary torts); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, *supra* note 7, § 6 cmts. c, f, (discussing liability for physical and emotional damage in negligence actions).

164. *Norwood v. Bain*, 143 F.3d 843, 847, 850 (4th Cir. 1998).

165. *Id.* at 855.

plaintiffs’ “sense of indignity from the very violation of [a] constitutional right . . . is not a compensable harm in § 1983 litigation.”¹⁶⁶ The point of instructing the jury on constitutional harm is to repudiate *Norwood’s* holding.

3. *Dignitary Torts, Dignitary Harm, and Violations of Constitutional Rights.* A radical alternative to the current focus on negligence as the model for constitutional tort damages would be to create a new category of damages for constitutional harm. But the notion of free-standing “constitutional harm,” untethered to settled concepts, would probably encounter considerable resistance, and is in any event unnecessary. Means are at hand to vindicate constitutional rights without any such invention. As in other contexts, constitutional tort principles should be developed “against the background of tort liability that makes a man responsible for the natural consequences of his actions.”¹⁶⁷ In line with the common law tradition, which favors incremental over disruptive change,¹⁶⁸ the “task of adaptation” can be accomplished by assimilating constitutional tort into the provisions on remedies for dignitary torts in the Restatement (Third) of Torts: Remedies.¹⁶⁹

That section authorizes a recovery when the factfinder infers significant dignitary harm from the facts and circumstances of the tort itself.¹⁷⁰ Dignitary tort, rather than negligence, is the better analogue to many constitutional torts. “[D]ignitary torts protect . . . a diversity of values,” including “protections against interferences with liberty and personal autonomy.”¹⁷¹ A constitutional violation produces a particularly serious interference with liberty or personal autonomy, as it involves the misuse of government power. *Carey’s* call for the adaptation of common-law rules for the constitutional tort context can

166. *Id.*

167. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). *Cf. Wells, Constitutional Remedies*, *supra* note 45, at 158–60, 163, 176 (discussing the role of common law concepts in constitutional torts).

168. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 428–29 (1960) (noting that “[c]autious-minded men play situations in the main closer to their chests,” in order to avoid unforeseen bad consequences of bold common-law rulings). *See also* CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (a book-length defense of judicial minimalism).

169. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22.

170. According to the draft, “[t]he typical torts in which plaintiffs may suffer dignitary harms are assault, battery, false imprisonment, defamation, invasion of privacy, malicious prosecution, intentional infliction of emotional distress, and negligent infliction of emotional distress,” but “[t]his is not an exhaustive list.” *Id.* § 22 cmt. c.

171. ABRAHAM & WHITE, *supra* note 28, at 122–23. *See also* RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. b. (discussing the meaning of dignitary harm).

be addressed by instructing juries that a constitutional violation produces a type of dignitary harm, and that they may consider the violation of a constitutional right in determining the award for dignitary harm.¹⁷² In this way, litigants like Chika Uzuegbunam may win or lose their claim for compensatory damages, depending on the jury's judgment. The important point is that they would not be limited to recovery of nominal damages.

A quite different objection to allowing recovery for constitutional violations and common-law nonpecuniary harm is that the jury may confuse the two categories and award damages twice for the same injury. But this is a common problem in tort litigation. As in other tort contexts, cautionary jury instructions should be formulated to address this risk, and verdicts should be reviewed to ensure the avoidance of double recoveries.¹⁷³

C. Presumed Damages

Both *Carey* and *Stachura* rejected efforts by the plaintiffs to obtain “presumed” damages.¹⁷⁴ In particular, the plaintiffs in *Carey* pointedly sought to leverage the common law of defamation, under which damages are sometimes “presumed,” without the need of proof of harm to reputation.¹⁷⁵ The reasoning behind this rule appears to be (1) that publication of the defamatory matter is an element of the tort, (2) that the defamatory nature of the statement will almost always be evident to many people, both known and unknown, and (3) that plaintiffs nonetheless often cannot identify those many people, including persons who are dissuaded from having relations with them in the future.¹⁷⁶ When these conditions are met, the courts have held,

172. *Carey v. Phipus*, 435 U.S. 247, 258 (1978).

173. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 17. The Restatement (Third) of Torts: Remedies recognizes that factfinders generally should not make separate awards for emotional harm and inferred dignitary harm. See *id.* § 22 cmt. a. That principle should apply when the plaintiff claims constitutional harm as well as dignitary or emotional harm.

174. *Carey*, 435 U.S. at 247; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311–13 (1986).

175. *Carey*, 435 U.S. at 260–61.

176. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985). Even within the defamation context, the Supreme Court has limited the availability of punitive damages in favor of First Amendment protection of speech regarding public officials, public figures, and matters of public concern. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 262–63, 279–80, 283–84 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring) (stating the legal principle that would control future cases); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346–47 (1974). See also RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. a (curbing the role of presumed damages in defamation cases).

presumed damages are recoverable because actual damages are distinctly “difficult to establish.”¹⁷⁷

The Court in *Carey* rejected the analogy to defamation, because “it is not reasonable to assume that every departure from procedural due process, no matter what the circumstances or how minor, inherently is as likely to cause distress as the publication of defamation *per se* is to cause injury to reputation and distress.”¹⁷⁸ Similarly, in *Stachura* the Court characterized the awarding of damages based on the societal importance of constitutional rights as a form of presumed damages, because “the instructions . . . called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values,” which is “wholly divorced from any compensatory purpose.”¹⁷⁹

Others have argued in favor of awarding presumed damages for constitutional torts.¹⁸⁰ Even so, the Court’s reasoning in *Carey* was unassailable insofar as it posited that the defamation-context “unknown recipient of defamatory matter” rationale did not apply to constitutional tort cases at a high level of specificity.¹⁸¹ In the § 1983 context, the rationale for presumed damages rests instead on the hard-to-measure intangible nature of the injury.¹⁸² But it is not necessary to resort to presumed damages in order to make an award for intangible harm.¹⁸³ That same insight is the basis for

177. *Stachura*, 477 U.S. at 310–11.

178. *Carey*, 435 U.S. at 262–63.

179. *Stachura*, 477 U.S. at 308–11.

180. See Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 79–80 (1992). Though the opinions in *Carey* and *Stachura* express skepticism, these cases do not definitively reject presumed damages. *Id.* Some lower courts have awarded presumed damages or acknowledged that they are recoverable in constitutional violations. See, e.g., *King v. Zamiara*, 788 F.3d 207, 212–15 (6th Cir. 2015) (upholding an award of presumed damages for a deprivation of First Amendment rights); *Siebert v. Severino*, 256 F.3d 648, 655 (7th Cir. 2001) (“The law recognizes that law-abiding citizens can sue and recover general (or presumed) damages for a Fourth Amendment violation, even without proof of injury.”); *Trevino v. Gates*, 99 F.3d 911, 921–22 (9th Cir. 1996) (approving denial of a presumed damages instruction, but citing *Carey* for the proposition that “[p]resumed damages are appropriate when there is a great likelihood of injury coupled with great difficulty in proving damages”); see also Anthony DiSarro, *When a Jury Can’t Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. 333 (2012) (also arguing against presumed damages); cf. *Norwood v. Bain*, 143 F.3d 843, 855–56 (4th Cir. 1998) (rejecting presumed damages in a Fourth Amendment case).

181. *Carey*, 435 U.S. at 262–63.

182. See *id.* at 258–59, 261–64.

183. General tort principles may also disfavor presumed damages. Consider the view of the ALI reporters working on the current draft of the Restatement (Third) of Torts: Remedies. They are skeptical that presumed damages should be available for constitutional torts. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. i.

the provision, in the Restatement (Third) of Torts: Remedies, that *non-presumed* damages may be awarded for dignitary harm based on the circumstances of the tort.¹⁸⁴

Following that approach, the proposal offered here is simply that juries be instructed on the dignitary harm caused by a constitutional violation. This proposal does not adopt presumed damages. The distinction is significant because presumed damages require no proof.¹⁸⁵ A constitutional harm instruction would adopt the Restatement's approach to dignitary torts.¹⁸⁶ As with dignitary harm, the plaintiff would offer proof—albeit proof only in the form of the objective character of the circumstances giving rise to the particular constitutional violation—from which the finder of fact could infer (or not infer) a measure of damages attributable to the nature of the constitutional wrong.¹⁸⁷ This approach is supported by the early voting rights cases. Before *Nixon*, courts had left it up to the jury to determine damages for denial of the right to vote on the ground that damages in such a case are “peculiarly appropriate for the determination of a jury.”¹⁸⁸ In other words, the damages calculation based on the particular character of the constitutional violation was properly assigned to the factfinder because “each member of the jury has personal knowledge of *the value of the right*.”¹⁸⁹ This reasoning applies beyond the voting context, to the extent jurors have personal knowledge of the value of the other constitutional rights asserted in constitutional tort suits, such as free speech, free exercise of religion, and the privacy interests protected by the Fourth Amendment.

D. Abstract Value of Constitutional Rights

In *Memphis Community School District v. Stachura*, the Court ruled that constitutional tort damages could not be awarded based on the “abstract value” of constitutional rights.¹⁹⁰ Stachura

184. See *id.* § 22, § 22 cmt. d.

185. *Carey*, 435 U.S. at 262.

186. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22 cmt. a (distinguishing between presumed damages and dignitary damages).

187. See *id.* § 22.

188. *Wiley v. Sinkler*, 179 U.S. 58, 64–65 (1900).

189. *Wayne v. Venable*, 260 F. 64, 66 (8th Cir. 1919) (emphasis added). *Wayne* refers to the recovery as “presumed,” but the court’s reasoning is that the damages depend on evidence submitted to the trier of fact, and not, as in defamation, damages that depend on a presumption that harm has occurred and should be “presumed” because it is unknowable. See *Carey*, 435 U.S. at 262.

190. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308–10 (1986). See *supra* notes 68–69 and accompanying text.

won a jury verdict of \$266,750 in compensatory damages and \$36,000 in punitive damages.¹⁹¹ The Supreme Court reversed the compensatory award on account of error in the judge’s charge to the jury. In addition to a standard instruction on compensatory damages, the judge had told the jurors that they could

[C]onsider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right.¹⁹²

This instruction violated *Carey*’s “compensation principle” because “[t]hese factors focus, not on compensation . . . but on the jury’s subjective perception of the importance of constitutional rights as an abstract matter.”¹⁹³

In some areas of constitutional litigation, the identity of the plaintiff is more or less incidental, and the aim is, in fact, to achieve a somewhat “abstract” goal. This is especially so when the requested remedy is an injunction that will act prospectively to regulate government conduct affecting many people.¹⁹⁴ Constitutional tort is different. It focuses on individual plaintiffs and their requests for redress. *Stachura* rightly ruled that the appropriate role for constitutional torts is to vindicate the plaintiff’s personal rights.¹⁹⁵ Including the indignity caused by a constitutional violation in a dignitary harm instruction would not run afoul of that limited, but vital, role for suits for damages.

The award authorized by the proposed constitutional-right component of a dignitary harm instruction is quite unlike the type of award disapproved in *Stachura*. In contrast to the trial judge’s faulty instruction in *Stachura*, a constitutional harm instruction would focus *solely* on the particular circumstances of the violation of the plaintiff’s constitutional right. Recognition of constitutional harm, through a properly worded jury instruction, directs the attention to the specific circumstances of the violation of this plaintiff’s constitutional rights—as opposed to purely “abstract” matters, including the “importance of the right in our system of government”

191. *Stachura*, 477 U.S. at 303. See *supra* Section II.A. for a discussion of the facts of this case.

192. *Stachura*, 477 U.S. at 302–04.

193. *Id.* at 308.

194. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74–75 (7th ed. 2015) (discussing the “law declaration model” of public law litigation).

195. See *Stachura*, 477 U.S. at 306–10.

and “the role which this right has played in the history of our republic.”¹⁹⁶ The sample instruction suggested in the introduction to this Article makes this explicit.¹⁹⁷

The unanimous Court in *Stachura* acted properly in forbidding the juries from formulating damages measures from ruminations about such ethereal matters.¹⁹⁸ This same concern about wholly “abstract” philosophizing is not present, however, when a jury places value on a constitutional harm tied, and tied only, to the concrete and objective factual features of the case before it. And, of course, even in *Uzuegbunam*’s case, a jury would not be *obliged* to award damages for constitutional harm.

IV. CONSTITUTIONAL REMEDIES AND CONSTITUTIONAL HARM

This part of the Article takes a step back from the details of constitutional tort law and examines the constitutional tort damages issue from the perspective of the general principles governing constitutional remedies. My aim is to show that those general principles bolster the case for the proposed instruction that the violation of a constitutional right can support an award for dignitary harm.

In *Marbury v. Madison*, Chief Justice Marshall declared “that every right, when withheld, must have a remedy.”¹⁹⁹ If that were so, no one could reasonably object to a jury instruction on constitutional harm. And yet, throughout our post-*Marbury* history, “rights to remedies have always had a precarious constitutional status.”²⁰⁰ All remedies for constitutional violations, including damages, are limited in a variety of ways, often for good reasons.²⁰¹ As Professor Fallon puts the point, “[o]ne

196. *Id.* at 302–03 (quoting the jury instructions).

197. *See supra* note 19 and accompanying text.

198. *Stachura*, 477 U.S. at 310, 313.

199. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

200. Fallon, *Constitutional Remedies*, *supra* note 147, at 1301. Fallon’s thesis is that “the Supreme Court has lately subjected [constitutional remedies] to multifaceted subversion.” *Id.* *See also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 937–38 (2019) [hereinafter Fallon, *Bidding Farewell*] (noting that, contrary to the *Marbury* dictum, “our tradition has never held out such a promise”); David A. Strauss, *Rights, Remedies, and Texas’s S.B. 8*, 2022 SUP. CT. REV. 81, 82–83 (2023) (“[T]he government, to further its legitimate interests, may limit or shape the remedies that are available for alleged violations, with the result that there may be no remedy in some categories of cases.”) (“[C]ourts should, to the extent that other values permit, shape constitutional remedies to protect constitutional rights.”).

201. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006) [hereinafter Fallon, *The Linkage*]. In this article, Professor Fallon introduced “the Equilibration Thesis,

cannot deduce entitlements to particular remedies directly from the concept of a right without reliance on other premises and consideration of multiple contingent factors.”²⁰²

The “multiple contingent factors” that bear on the availability of a constitutional remedy include a variety of costs and benefits. Notwithstanding *Marbury*, a remedy may be denied if the costs are too great.²⁰³ A constitutional harm instruction is justified only if its benefits outweigh the costs. This part of the Article identifies the principal “contingent factors” that favor limits on constitutional remedies and explains why allowing recovery for constitutional harm is justified despite the costs that recognizing that remedy would bring about.

Section A identifies, in broad terms, the types of factors that may justify limits on the availability of constitutional remedies. Placing the “constitutional harm” instruction in this larger context helps to show that the costs of allowing recoveries for constitutional harm are comparatively small. Section B discusses the benefits of authorizing such recoveries.

A. *Constitutional Remedies and Their Costs*

Oftentimes, a constitutional right can be asserted defensively, as grounds for avoiding criminal or civil liability. In this situation, the right is a kind of shield against imposition of civil liability or criminal prosecution. First Amendment rights, for example, provide defenses to civil causes of action such as defamation,²⁰⁴ “outrageousness,”²⁰⁵ and invasion of privacy suits,²⁰⁶ and against criminal prosecution for non-obscene adult pornography and advocacy (as opposed to incitement) of violent revolution.²⁰⁷ The “opportunity to be heard” is a traditional feature of criminal and civil

[which] holds that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies.” *Id.*

202. Fallon, *Constitutional Remedies*, *supra* note 147, at 1308. Fallon traces the “classic development of this thesis” to Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953). *Id.* at 1308 n.50.

203. See, e.g., Fallon, *Bidding Farewell*, *supra* note 200, at 938; Fallon, *The Linkage*, *supra* note 201, at 686.

204. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–43 (1974).

205. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53–55 (1988).

206. *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967).

207. *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (advocacy); *Roth v. United States*, 354 U.S. 476, 487 (1957) (pornography).

procedure and is ordinarily required as a matter of due process before a final deprivation.²⁰⁸ The “cost” issue rarely arises in this context.²⁰⁹

But constitutional rights do not exist solely as defenses against liability. Three other constitutional remedies may be available: prospective relief, habeas corpus, and damages. Each produce both costs and benefits and the costs justify limits on all three of them. A brief overview will help to make the point that the costs that justify limits on remedies provide no grounds for rejecting awards of damages for “constitutional harm,” even if such costs weigh heavily against recognizing other forms of remediation for constitutional wrongs.

1. *Prospective Remedies: “Justiciability” Costs.* Prospective remedies include (1) injunctions that order officers or others to adhere to constitutional norms and (2) declaratory judgments that set forth an officer’s duties and, in effect, require that person’s compliance with the declaration or risk being punished for contempt.²¹⁰ Many constitutional rights owe their real-world force to the existence of prospective remedies, because violations of these rights occur outside the context of enforcement proceedings in which rights can be raised as shields. These include, among others, challenges to institutional practices like segregated schools, malapportioned legislative districts, and inhumane prison conditions.²¹¹

But prospective remedies are not always available for constitutional violations. Many of the obstacles to relief fall under the general heading of “lack of justiciability or standing.” One cost of prospective relief is that federal judicial intervention intrudes on the democratic branches of government. Another is that judges

208. See, e.g., *Londoner v. City of Denver*, 210 U.S. 373, 385–86 (1908). The Court has distinguished between temporary and final deprivations. See *Gilbert v. Homar*, 520 U.S. 924, 930–31 (1997) (holding that a temporary deprivation does not necessarily require an opportunity to be heard). See also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 592, 596, 598 (4th ed. 2011). As Chemerinsky goes on to explain, the requirements of due process vary depending on the circumstances. See *id.* at 593–619.

209. *But cf.* *Yakus v. United States*, 321 U.S. 414, 431–43 (1944) (upholding a statute that required that a constitutional challenge to the application of a World War II price control statute be raised in a special court, not as a defense to a criminal prosecution). A later case casts doubt on the vitality of *Yakus*, absent the special circumstances of World War II. See *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987).

210. See Fallon, *Constitutional Remedies*, *supra* note 147, at 1315–17 (discussing injunctions). The Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 authorizes suits for declaratory relief.

211. *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (racial segregation in public schools); *Reynolds v. Sims*, 377 U.S. 533 (1964) (malapportioned districts); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (prison conditions); see Fallon, *Constitutional Remedies*, *supra* note 147, at 1306.

can easily make mistakes if they lack sufficient information, a concern that may weigh heavily against granting relief that will operate in the future. For these reasons, the federal courts should intervene only when there is a pressing need to do so, the parties are sufficiently adverse, and the issues are narrowly defined.²¹² By way of example, a court will dismiss the plaintiff's case for lack of ripeness when the interaction between the official and the plaintiff is not sufficiently far along to permit effective adjudication of the legal issues.²¹³ When the conflict has lost its urgency, either because one of the parties has changed that party's position or because events have intervened, a court will dismiss the case for mootness.²¹⁴ A plaintiff who lacks a sufficient stake in the legal issues will be blocked by lack of standing.²¹⁵

2. *Habeas Corpus: "Finality" Costs.* A person convicted of a crime in state court may obtain federal court review of the constitutional validity of the conviction by filing a petition for habeas corpus.²¹⁶ In practice, however, both Congress and the Supreme Court have severely restricted access to habeas, so much so that the habeas court typically does not reach the constitutional merits. For example, a lawyer's failure to raise the federal claim correctly in state court will often block federal review on account of "procedural default."²¹⁷ Absent exceptional circumstances, a habeas petitioner may not obtain relief by relying on "new law"—meaning anything other than a claim that the sentencing court violated the Supreme Court's black letter doctrine at the time of conviction.²¹⁸ The main reason for these and other restrictions on access to habeas is that finality is an important value. Deference to an earlier court's rulings is said to be necessary in order to maintain public confidence in judicial decisions and to avoid the costly relitigation of already-decided matters.²¹⁹

212. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751–61 (1984); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–22 (1974). See also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72 (1978) (advancing the thesis that effective adjudication requires adverseness and concreteness).

213. See, e.g., *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891–92 (1990).

214. See, e.g., *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020).

215. See, e.g., *Dep't of Educ. v. Brown*, 143 S. Ct. 2343, 2350–51 (2023).

216. 28 U.S.C. § 2241. See FALLON ET AL., *supra* note 194, at 1193–98, 1203, 1265–66 (discussing federal habeas corpus).

217. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 485 (1986).

218. See, e.g., *White v. Woodall*, 572 U.S. 415, 419–20 (2014).

219. See FALLON ET AL., *supra* note 194, at 1283.

3. *Constitutional Tort: “Overdeterrence” Costs.* When the violation of a constitutional right has already taken place, is unlikely to recur, and is not ongoing, injunctive and declaratory relief are typically unavailable, as the plaintiff makes the showing necessary to obtain these remedies. In *City of Los Angeles v. Lyons*, for example, the police had stopped a motorist and used a chokehold.²²⁰ He sued for both damages and an injunction. The Supreme Court rejected his suit for prospective relief because he could not “establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”²²¹ In such a case, the aggrieved person has no alternative other than a suit for constitutional tort.²²² To the extent the tort remedy is denied or limited, the right will not be enforced. In constitutional tort suits, the costs associated with prospective relief and habeas corpus rarely come into play. The plaintiff must prove an earlier injury, which allays standing and ripeness concerns. Mootness is not a problem, because the request for damages keeps the parties adverse. In the typical constitutional tort case, finality is not an issue either, because no earlier adjudication has occurred.

According to the Supreme Court, the main objection to suits for damages is that the litigation will impose “social costs.” These “include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.”²²³ In addition, “there is the danger that fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”²²⁴ These social costs are grounds for

220. *City of Los Angeles v. Lyons*, 461 U.S. 95, 97–98 (1983).

221. *Id.* at 97, 105.

222. In appropriate circumstances, the holder of a right may seek both an offensive and a defensive remedy. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 91–92 (1980) (illustrating a situation in which a person’s property was searched for incriminating evidence and he raised Fourth Amendment rights as grounds for excluding the evidence in a criminal case and as grounds for a constitutional tort recovery). For both a prospective and retrospective offensive remedy, *see, for example, Lane v. Franks*, 573 U.S. 228, 234 (2014) (illustrating a situation in which a person fired from a government job sued for both retrospective and prospective relief). For diverse reasons, the plaintiffs in these cases did not fully succeed.

223. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

224. *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). A related concern is that absent official immunity for damages, courts would define constitutional rights narrowly in order to minimize the social costs of constitutional tort litigation. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89–90 (1999) (“Put simply, limiting money damages for constitutional violations fosters the development of constitutional law.”). *See also* Fallon, *Bidding Farewell*, *supra* note 200, at

“official immunity,” which takes two forms. “Absolute” immunity protects officers exercising judicial, prosecutorial, and legislative functions, in many circumstances, from liability for damages, no matter how egregiously they may have violated constitutional rights.²²⁵ Otherwise, “qualified” immunity applies. And when it does, “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²²⁶ A shorthand way of describing the policy behind both versions of official immunity is that broader liability would result in “overdeterrence” of bold and effective government action.²²⁷ The doctrine implements the Supreme Court’s judgment that suits against some officers must be barred altogether, and suits against other officers require a heightened showing of culpability.²²⁸ There is, however, a point at which the overdeterrence concern gives way to the victim’s interest in a remedy. In particular, a plaintiff who overcomes the official immunity hurdle has shown that, in the case at hand, the benefits of a remedy outweigh the costs that block many other litigants.

Social costs may account for official immunity doctrine. But they do not justify denial of a recovery for constitutional harm for the plaintiff who has (necessarily) overcome the immunity defense. In such instances, the case for relief is especially strong because the officer’s action is especially culpable.

4. *Constitutional Torts and Governmental Liability.* In *Monell v. Department of Social Services*, the Court ruled that local governments cannot be sued on a respondeat superior basis for constitutional tort committed by their employees.²²⁹ The plaintiff must show that the violation was caused by a municipal policy or custom.²³⁰ *Monell* does not justify this limit on liability by identifying a “cost” of broader municipal liability. Writing for the Court, Justice Brennan

938 (“[T]he availability of damages remedies for all constitutional violations would likely result in a shrinking of constitutional rights.”).

225. See Michael L. Wells, *Absolute Official Immunity in Constitutional Litigation*, 57 GA. L. REV. 919, 929 (2023) [hereinafter Wells, *Absolute Official Immunity*] (discussing the scope of absolute immunity and its rationale).

226. *Harlow*, 457 U.S. at 818–19.

227. Whether this argument is convincing is a separate issue. For an argument (one among many) that it is not, see Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1808–13 (2018) (discussing Professor Schwartz’s empirical work, in which she questions the “social costs” thesis).

228. *Harlow*, 457 U.S. at 807–08.

229. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978).

230. See *id.* at 694.

found support for the “no vicarious liability” holding in the legislative history of § 1983.²³¹ Nonetheless, *Monell* can be understood as a holding that *Congress* deemed respondeat superior to be an unfair burden on local governments. The underlying idea is that liability is appropriate only where the government is responsible for the violation.²³² In many cases, the denial of vicarious liability means that governments are liable only when they are at fault. As with officers, the case for a remedy is especially strong in such cases.²³³

5. *Distinctions Among Costs.* The cost of adding a “constitutional harm” instruction to the jury’s charge (or including it in the instruction on dignitary harm) in § 1983 cases is that juries would, by and large, make higher awards against governments and officers. They would do so, however, only for plaintiffs who have proven violations of their constitutional rights, and only when plaintiffs have overcome other obstacles to recovery, including the hurdles posed by official immunity and by *Monell*. This means that the “overdeterrence” and “vicarious liability” costs have already received due consideration. There is no good reason to “gild the lily” by giving constitutional-tort defendants yet another form of protection from money damages awards.

The objection to a “constitutional violation” component of a dignitary harm instruction may be that the jury will systematically and inappropriately favor plaintiffs in determining constitutional harm awards with the result that defendants will be made to pay too much. The argument, in other words, is that excessive awards should be avoided by not allowing any such awards at all.²³⁴ This concern echoes similar complaints in ordinary tort litigation. Jury awards for nonpecuniary damages like pain and suffering and emotional distress, it is sometimes

231. See *id.* at 660, 664, 679, 687, 691.

232. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479–80 (1986). When the defendant is a *state* government, the “cost” of governmental liability is deemed sufficiently great to justify a complete defense. See *Alden v. Maine*, 527 U.S. 706, 748, 750 (1999). That rule is based on the policies underlying state sovereign immunity, including the states’ “financial integrity,” their dignitary interest, their interest in “order[ing] the processes of [their] own governance,” and their “ability to govern in accordance with the will of their citizens.” *Id.* at 748–52. *Alden* distinguished local governments and officers, who do not share the states’ sovereign immunity, and who may be sued for damages under § 1983. See *id.* at 756.

233. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (when officers violate constitutional rights, municipal liability for failure to train them depends on showing policymakers’ “deliberate indifference” to constitutional rights). See also Michael L. Wells, *The Role of Fault in § 1983 Municipal Liability*, 71 S.C. L. REV. 293, 301–02, 305–07, 309–10, 312 (2019) [hereinafter Wells, *The Role of Fault*].

234. Cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260–63, 265–67, 270–71 (1981) (disallowing punitive damages against local governments).

said, are too often too large.²³⁵ As we have seen, there are significant differences between common-law and constitutional-tort actions. There is no difference at all, however, with regard to the problems with assessing damages for nonpecuniary harm. The danger is that juries may award too much when they are not constrained by the hard evidence that supports recovery for pecuniary losses like forgone income and out-of-pocket costs for medical care.²³⁶

In the common-law tort context, courts have not—to say the least—blocked the recovery of nonpecuniary damages. To be sure, state legislatures have (whether wisely or not) addressed the risk of excessive jury awards by capping recoveries for nonpecuniary damages.²³⁷ But that is not the ordinary approach of the common law. Instead, the courts have addressed problems presented by runaway juries by subjecting monetary awards to judicial review for excessiveness—and this tool is as fully available for courts to use in policing awards in constitutional tort cases as it is in policing common-law-tort-action recoveries.²³⁸

In any case, the analogy between common law torts and constitutional torts is inexact. The typical victim of an ordinary tort with large nonpecuniary damages has been grievously injured by a negligent defendant (often a large corporation) and understandably elicits the jury's sympathy.²³⁹ Typically, the constitutional tort plaintiff seeking damages for constitutional harm has not suffered much physical harm and often sues a police officer, an administrative officer, or a local government. In fact, some juries seem to be rather skeptical of the damages claims of constitutional tort plaintiffs,²⁴⁰ and appellate courts in these cases have shown little reluctance to evaluate the evidence

235. See, e.g., Robert Pear, *Reagan Seeks Cap in Liability of U.S. for Damage Cases*, N.Y. TIMES (Apr. 5, 1986), <http://www.nytimes.com/1986/04/05/us/reagan-seeks-cap-in-liability-of-us-for-damage-cases.html> [https://perma.cc/5TDQ-8NTY] (last visited Aug. 25, 2024). See also Joseph Sanders & Craig Joyce, “Off to the Races”: *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 243–44, 247–49, 251–55 (1990) (discussing the rise in tort damage awards).

236. See Pear, *supra* note 235.

237. See SCHWARTZ ET AL., *supra* note 34, at 601.

238. See NAHMOD ET AL., *supra* note 74, at 612 (citing cases). For a discussion of the common law context, see SCHWARTZ ET AL., *supra* note 34, at 682–83.

239. See, e.g., *Duncan v. Kan. City S. Ry. Co.*, 773 So. 2d 670, 682–83 (La. 2000).

240. See NAHMOD ET AL., *supra* note 74, at 615–16. In *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999), for example, the plaintiff produced video evidence showing that the police beat him; yet the jury awarded only \$1 in nominal damages and \$20,000 in punitive damages (reduced by the judge to \$15,000). *Id.* at 313–14, 313 n.2. The Second Circuit panel upheld the jury's decision to deny compensatory damages, citing, among other things, the fact that after the beating, “Amato can be seen standing at the booking counter, with a casual demeanor, appearing fairly alert, and not showing signs of experiencing pain.” *Id.* at 314.

bearing on large emotional distress awards.²⁴¹ For all these reasons, it seems both wrongly speculative and unduly draconian to deny nonpecuniary damages—including for constitutional harms—in constitutional tort simply on the theory that in some unidentified number of cases juries might issue damages awards that are too high.²⁴²

B. The Benefits of Remediating Constitutional Harm

The distinctive benefit of constitutional tort law is that it may provide a remedy for constitutional wrongs when defensive remedies, habeas corpus, and prospective relief are unavailable. Backward-looking relief is the domain of constitutional tort. This brand of litigation involves situations in which a constitutional violation has occurred in the past and is unlikely to recur. These cases include such matters as past encounters with police officers, in which plaintiffs complain of excessive force and illegal searches and arrests,²⁴³ past dismissals from government employment,²⁴⁴ past denials of government licenses,²⁴⁵ past school suspensions,²⁴⁶ and past attacks on prisoners.²⁴⁷ When such an event occurs repeatedly, the victim may sue for prospective relief. Often, however, these incidents occur more or less at random, which means that their future occurrence cannot be predicted with sufficient confidence to support prospective relief.²⁴⁸ Class actions are sometimes available,²⁴⁹ but important limits on class-based

241. See NAHMOD ET AL., *supra* note 74, at 612–13 (citing *Watson v. City of San Jose*, 800 F.3d 1135, 1137–41 (9th Cir. 2015)) (finding the jury’s \$1,250,000 compensatory award for emotional distress damages caused by the warrantless removal of three children from their parents excessive).

242. A separate objection is that, without hard evidence of monetary loss, awards will be inconsistent. But this does not distinguish constitutional harm from other kinds of nonpecuniary loss. Even under current constitutional tort practice, inconsistency plagues awards for emotional distress. In reviewing jury awards, many constitutional tort courts take a “comparability” approach, borrowed from the common law, in which they compare the jury’s award in the case at hand to awards in similar cases. See, e.g., *Disorbo v. Hoy*, 343 F.3d 172, 183 (2d Cir. 2003). See also J. Patrick Elsevier, Note, *Out-of-Line: Federal Courts Using Comparability to Review Damage Awards*, 33 GA. L. REV. 243, 251–55 (1998).

243. See, e.g., *Graham v. Connor*, 490 U.S. 386, 394–95 (1989).

244. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977).

245. See, e.g., *Wojcik v. City of Romulus*, 257 F.3d 600, 603 (6th Cir. 2001).

246. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 570–71 (1975).

247. *Farmer v. Brennan*, 511 U.S. 825, 830 (1994).

248. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–05 (1983).

249. See, e.g., *Melendres v. Arpaio*, 784 F.3d 1254, 1258, 1264 (9th Cir. 2015) (involving a class of Latino motorists who charged police harassment).

litigation exist,²⁵⁰ and many of these incidents differ too much on the facts to support class certification.²⁵¹

In these cases, victims cannot obtain forward-looking relief, because they cannot meet the Article III “standing” and “ripeness” requirements, no matter how strong a case these plaintiffs have on the merits.²⁵² In this set of cases, damages are the indispensable remedy. Absent constitutional tort suits, officials may commit this type of constitutional wrongdoing with impunity.

Throughout tort law, the point of the liability rules is to achieve a set of substantive goals, and damages doctrines should be aligned with those goals. The two broad purposes of tort liability are: (1) achieving fairness between the parties by obliging the defendant to compensate the plaintiff for injury caused by the defendant’s breach of duty, and (2) providing incentives to take cost-justified precautions to prevent similar injuries in the future.²⁵³ The Supreme Court has adopted a similar framework for constitutional torts.²⁵⁴ In the common law, damages must reflect the full loss in order to achieve those goals.²⁵⁵ The same is true in constitutional tort.²⁵⁶

1. *Incentives and Deterrence.* The “incentives” rationale starts from the premise that social welfare is served by tort rules that encourage cost-justified conduct by both those who injure and those who may be injured. On the assumption that both groups are rational and self-interested, liability rules are like prices for engaging in risk-creating conduct. Holding a defendant liable (or reducing a recovery to the plaintiff) when the actor failed to take a cost-justified precaution will help achieve optimal safety, largely because tort judgments send signals to

250. See FED. R. CIV. P. 23 for the basic guidelines for class actions in federal courts.

251. Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 616 (2012) (“Constitutional rights can impact large groups, yet most plaintiffs in civil rights cases bring individual claims. . . . The Court has defined certain constitutional rights to require highly individualized inquiries. For example, Fourth Amendment excessive force claims, the bread and butter of constitutional tort litigation, often require an individual analysis of the reasonableness of the search. As a result, courts may deny class certification citing to a lack of common issues. Other constitutional rights . . . similarly resist aggregate treatment.”). See, e.g., *Mitchell v. Barrios-Paoli*, 687 N.Y.S.2d 319, 325 (N.Y. App. Div. 1999) (stating that class certification is unworkable because it would require examining each person’s medical history and physical demands, thereby defeating “the class action’s goal of saving judicial time and resources”).

252. *Lyons*, 461 U.S. at 109–11.

253. See, e.g., Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1831 (1997).

254. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Owen v. City of Independence*, 445 U.S. 622, 650–52 (1980).

255. See, e.g., *DePass v. United States*, 721 F.2d 203, 210 (7th Cir. 1983) (Posner, J., dissenting).

256. See *Carey v. Piphus*, 435 U.S. 247, 257–58 (1978).

everyone as to costs and benefits of risk-avoidance, and thus provide guidance as to the proper level of safety.²⁵⁷ In constitutional tort law, the Supreme Court has rejected the notion that plaintiffs may be blameworthy for exposing themselves to unconstitutional conduct.²⁵⁸ The “incentives” provided by liability rules target only defendants’ conduct.²⁵⁹ But the general idea is the same, i.e., that the threat of liability will deter unconstitutional acts by making defendants pay for the resulting harm.²⁶⁰ Courts typically speak of “deterrence” rather than incentives,²⁶¹ which means that one point of imposing liability is that governments and officials are dissuaded from engaging in acts that threaten to give rise to constitutional violations by the prospect of liability.²⁶²

2. *Vindication of Constitutional Rights.* Certain distinctive features of constitutional tort emerge when the focus turns to the “fairness” goals of ordinary tort rules and their constitutional tort analogues. Broadly speaking, in ordinary tort theory, “fairness” justifies liability by identifying negligence, or intent, or some other ground as a necessary or a sufficient basis for finding that the defendant committed a wrong.²⁶³ Theorists describe the fairness rationale in a variety of ways. They argue, for example, that tort law provides civil recourse to the plaintiff to enforce the defendant’s obligation to redress the wrong, typically, but not necessarily, by an award that will “make the plaintiff whole.”²⁶⁴ Others assert that tort may be a substitute for revenge,²⁶⁵ or they may focus on tort as a means of correcting the injustice caused by the defendant’s breach of duty, without regard to the social consequences of doing so.²⁶⁶ The point here is merely that fairness is an important theme in ordinary tort law. For present purposes, it is not necessary to discuss debates over the fine points among partisans of these approaches.

Viewed from the perspective of fairness, the distinctive aim of constitutional tort is to vindicate constitutional rights by awarding

257. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33–32 (1972).

258. See *Pierson v. Ray*, 386 U.S. 547, 558 (1967).

259. See Posner, *supra* note 257, at 32.

260. See, e.g., *Memphis Indep. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986); *Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980).

261. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 256–57 (1978).

262. See, e.g., *Robertson v. Wegmann*, 436 U.S. 584, 591–92 (1978).

263. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, *supra* note 7, §§ 5, 6.

264. See, e.g., JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* 164–68 (2020).

265. See Scott Herschovitz, *Tort as a Substitute for Revenge*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 86, 98 (John Oberdiek ed., 2014).

266. See, e.g., ARTHUR RIPSTEIN, *PRIVATE WRONGS* 265–66 (2016).

damages for their violation.²⁶⁷ When the plaintiff can prove no harm, nominal damages can achieve vindication.²⁶⁸ In negligence litigation, vindication may be achieved by obliging the defendant to make the plaintiff whole in the traditional sense of paying damages equal to the wrong done.²⁶⁹ But vindication is not merely a synonym for the traditional elements of compensation and deterrence that are at issue in ordinary negligence law. Vindication may include a recovery that redresses the wrong, even if it does not fully “make the plaintiff whole” in the way compensatory damages for monetary losses can make the plaintiff whole.²⁷⁰ It is, nonetheless, a goal that is deeply rooted in the common law.

Tort theorists have made this point in the common-law context. As Professor Varuhas has explained, “vindication entails attesting to, affirming and reinforcing the importance of those interests that are the subject of the law’s protection and their inherent value, and by association the importance of the relevant legal rights.”²⁷¹ Professor Barker has added that “[c]ourts vindicate rights . . . when they provide an affirmative, institutional acknowledgment of the right.”²⁷² Vindicatory damages may not make the plaintiff whole, but they achieve that goal “as nearly as possible.”²⁷³ In some cases, nominal damages adequately serve the vindication goal, but not when the defendant has inflicted a dignitary harm.²⁷⁴

In ordinary negligence law focusing on accidents, vindication is often overshadowed by the goal of compensation-for-physical-and-emotional-injury²⁷⁵ and perhaps even the deterrence-of-careless-conduct goal.²⁷⁶ But other areas of ordinary tort furnish analogues to the role of vindication in constitutional tort. Vindication is often the plaintiff’s

267. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

268. See *supra* notes 16–23 and accompanying text (comparing *Uzuegbunam* with *Harris*).

269. See John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 445 (2006).

270. See *id.* at 437. See also Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1014 (2012) [hereinafter Wells, *Civil Recourse*] (applying this principle to constitutional torts).

271. Jason NE Varuhas, *The Concept of ‘Vindication’ in the Law of Torts: Rights, Interests and Damages*, 34 OXFORD J. LEGAL STUD. 253, 254 (2014).

272. Kit Barker, *Private and Public: The Mixed Concept of Vindication in Torts and Private Law*, in TORT LAW: CHALLENGING ORTHODOXY 59, 68 (Stephen GA Pitel et al. eds., 2013).

273. RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 2.

274. See *id.* § 38 cmt. b.

275. See Mark A. Geistfeld, *Compensation as a Tort Norm*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 265, at 78–79.

276. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 10 (1987); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26–27, 87, 312 (1970).

paramount aim in the dignitary torts, such as battery, assault, and false imprisonment.²⁷⁷ The Restatement (Third) of Torts: Remedies recognizes the growing importance of vindication. The reporters have added a new section discussing the emerging doctrine that the plaintiff may recover “dignitary harm” in such cases, “if the factfinder infers significant dignitary harm and its value from the facts and circumstances of the tort itself.”²⁷⁸ In this way, jury instructions on damages are directly linked to the value of vindication.

3. *The Specific Benefit of a Jury Instruction on Constitutional Harm.* Charging the jury that it may make an award for constitutional harm would address a systematic shortcoming of the traditional “compensable injury” principle in the constitutional tort setting. A feature of many constitutional violations is that they do not produce the physical and emotional injuries to person or property that characterize ordinary tort suits based on the negligence principle. When officials violate First Amendment rights by suppressing speech, or violate Fourth Amendment rights by warrantless searches or seizures, or deny equal protection by arbitrarily discriminating between applicants for business licenses, or abuse inmates without good reason, they do not necessarily inflict physical or emotional injury.

Even if they do, traditional tort damages for those injuries do not redress the constitutional violation. Traditional tort damage principles address the injuries to the interests in person and property protected by ordinary negligence law. They systematically fail to achieve constitutional tort goals, simply because they were not designed as remedies for constitutional violations.²⁷⁹ Constitutional rights are not vindicated by the damages traditionally available in negligence cases, and such traditional damages do not adequately deter the constitutional violation.²⁸⁰ Dignitary torts provide a more appropriate model. The proposed addition to the jury instructions on dignitary harm addresses the gap between traditional-tort-damages principles and the distinctive goals of constitutional tort.²⁸¹

277. See ABRAHAM & WHITE, *supra* note 28, at 101–02, 123–26 (2022) (discussing the interests protected by the dignitary torts, including “liberty and autonomy,” protection against “embarrassment, humiliation, and disrespect,” and recovery for the “diminished regard of others”). None of these harms necessarily, or even typically, involve a monetary loss.

278. See RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 22(a)(1).

279. See Wells, *Civil Recourse*, *supra* note 270, at 1012–13 (discussing differences between the damages issues raised by constitutional torts and ordinary torts).

280. See *id.* at 1013–15.

281. The scope of judicial review of the award for constitutional harm is a distinct issue. Like dignitary and emotional harm, the difficulty of measuring the amount of harm

V. CONCLUSION

After decades of neglect, the role of damages in constitutional torts deserves a fresh look. In *Carey*, the Supreme Court made a promising start by identifying the need to adapt to the constitutional tort context. Rightly or wrongly, the Court in the course of the *Carey* opinion then chose to reject any adaptation when the constitutional violation is procedural due process. Its more significant failing has been neglect. In the forty-six years since *Carey*, the Court has never returned to the “task of adaptation” of common-law rules to the constitutional tort context. Lacking guidance, lower courts have generally applied rules derived from common-law negligence litigation without attempting any adaptation at all. The result is that constitutional tort provides benefits mainly to those litigants who are able to prove that they suffered economic and emotional damages akin to the damages commonly seen in common law tort actions for negligence. The distinct constitutional aspect of the case—including the specialized concerns related to deterrence and fairness that operate in the constitutional context—is neglected at the damages stage.

Recent developments in general tort law—notably, the provisions on damages for dignitary torts in the Restatement (Third) of Torts: Remedies—yield insights that may prove useful in guiding the future development of constitutional tort damages doctrine. In addition, the American Law Institute has begun work on a Restatement of Constitutional Torts, a project that requires consideration of constitutional tort damages rules.²⁸² Adoption of a proposal that juries be instructed on the dignitary injury caused by violations of constitutional rights would help to put the focus of constitutional tort litigation where it belongs: on recovery for the *constitutional* tort.

raises an issue as to how an award should be reviewed. Here, the RESTATEMENT (THIRD) OF TORTS: REMEDIES Draft No. 2, *supra* note 2, § 5(b)(3) offers guidance, in its treatment of dignitary and emotional harm. Its position is that the “reasonable-certainty” standard applicable to ordinary tort damages should not govern these intangible injuries. *Id.* Such harm is:

[S]o inherently imprecise that the reasonable-certainty standard [for proof of tort damages] cannot meaningfully be applied. Courts may review the amount of such damages only after the factfinder has awarded them and only under the standards for judicial review of allegedly excessive or inadequate damages in [Restatement (Third) of Torts: Remedies] § 17.

Id.

282. *Restatement of the Law, Constitutional Torts, supra* note 24.