

UNWARRANTED PRESUMPTIONS: COMMON LAW, INJURY, AND PRESUMED DAMAGES FOR CONSTITUTIONAL TORTS

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ABSTRACT

This article explores the question of whether presumed damages are a good way to achieve the compensation function of constitutional torts. After the Supreme Court decided *Memphis Community School District v. Stachura*, circuit courts have split about whether presumed damages may be allowed, or are categorically barred.

The circuit split, along with the academic ongoing discussion about whether constitutional tort plaintiffs are being adequately compensated, warrants a second look at presumed damages.

This article first delineates the two conflicting interpretations of presumed damages—compensatory presumed damages, which approximate actual injury that has not been proven in court, and non-compensatory presumed damages, which approximate the value of the constitutional right that was violated. A way of harmonizing these concepts, and still compensating the plaintiff, is proposed: by formulating the constitutional violations themselves as injuries to the plaintiffs, as courts have done in historic right-to-vote cases.

When a defamation principles are examined alongside constitutional tort principles, it becomes clear that the reasons that make presumed damages appropriate for defamation are absent from the constitutional tort cases. Presumed damages are appropriate in defamation cases because (1) inference of injury, and (2) difficulty of proof. But while defamation cases raise the empirical problem of the cost of surveying witnesses, constitutional tort cases raise the legal problem of what values the courts should protect. Furthermore, any conception of constitutional torts that formulates violations as injuries would not require presumed damages because injuries are proven when violations are proven (i.e. would fail the difficulty-of-proof test). Any conception of constitutional torts that does not formulate violations as injuries would not imply that the plaintiff has actually been injured, given a violation (i.e. would fail the inference-of-injury test). Presumed damages are, therefore, rendered incompatible with constitutional torts.

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I. INTRODUCTION

One of the most important things about constitutional torts is that they provide a way for citizens to keep their government officials and employees accountable to them. The right of action to sue for constitutional torts against a state officer defendant was granted by Congress in 42 U.S.C. §1983; the right of action to sue for constitutional torts against a federal officer defendant was established in *Bivens v. Six Unknown Named Federal Narcotics Agents*.¹ Although some of the cases following *Bivens* seemed to affirm constitutional torts as a viable avenue for compensation for plaintiffs, courts became increasingly hostile towards *Bivens* starting in 1983.²

Damages have been a central issue in constitutional tort jurisprudence. In 1978, the Supreme Court established some of its most important principles on compensatory damages in *Carey v. Piphus* by establishing that “the basic purpose of a section 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights” as a “species of tort liability”.³ Furthermore, in *Carey*, the Court made it clear that the denial of procedural due process in and of itself is not sufficient to warrant an award of presumed damages.⁴ In reaching this conclusion, the Court emphasized the differences between the facts of the case and the factors typically common in common law defamation, where presumed damages have been allowed.⁵

¹ 403 U.S. 388 (1971). *Bivens* was not a unanimous decision. The outcome was endorsed by a five Justice majority (Justices Brennan, Douglas, Stewart, White, and Marshall) with one concurring opinion (Justice Harlan) and three dissents (Justices Burger, Black, and Blackmun).

² SHELDON H. NAHMOD, MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL TORTS 32 (2d ed. 2004).

³ 435 U.S. 247, 253 (1978) (citing *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

⁴ *Id.* at 259–64.

⁵ *See id.*

The Supreme Court did not pull back from its position in a following case, *Memphis Community School District v. Stachura*.⁶ In *Stachura*, the Supreme Court overturned trial court presumed damages instructions because the instructions allowed “the jury to award damages based on its own unguided estimation of the value” of constitutional rights.⁷ The Court emphasized that the “instructions plainly authorized. . . two distinct types of ‘compensatory’ damages: one based on respondent’s actual injury according to ordinary tort law standards, and another based on the ‘value’ of certain rights.”⁸ The latter type of damages was struck down as impermissible.⁹ After *Stachura*, circuit courts have split about whether presumed damages may be allowed, or are categorically barred.¹⁰

The circuit split—along with ongoing academic discussions about whether constitutional tort plaintiffs are being adequately compensated¹¹—suggests that a second look at presumed damages is warranted, especially because presumed damages has been suggested as a means of bringing “more consistency and equity” to damage awards for constitutional torts that not cause “substantial measurable pecuniary loss.”¹²

Presumed damages are compensatory damages that are rewarded without any actual evidence of injury.¹³ While some commentators have argued that the Court should not look to common law as a source of law for constitutional torts and should instead devise distinctive

⁶ 477 U.S. 299 (1986).

⁷ *Stachura*, 477 U.S. at 304–05.

⁸ *Id.* at 305 (“The damages instructions were divided into three distinct segments: (i) compensatory damages for harm to respondent, (ii) punitive damages, and (iii) additional ‘compensat[ory]’ damages for violations of constitutional rights. No sensible juror could read the third of these segments to modify the first.”).

⁹ *Id.*

¹⁰ See NAHMOD, WELLS & EATON, *supra* note 2, at 549.

¹¹ See, e.g., Michael L. Wells, *Punitive Damages for Constitutional Torts*, LA. L. REV. Vol. 56, No. 4 (1996), pp. 841–872.

¹² Comment, *Presumed Damages for Fourth Amendment Violations*, 129 U. Pa. L. Rev. 192, 193 (1980) [hereinafter *Fourth Amendment Violations*].

¹³ See *Dalton v. Meister*, 188 N.W.2d 494, cert. denied, 405 U.S. 934 (1971); *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967). See also David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 748 (1984).

rules,¹⁴ the Court has always analogized—and limited—constitutional tort damages to damages in the common law of torts.¹⁵

This raises the question of how the common law application of presumed damages—specifically in defamation cases—translates to the field of constitutional torts. In other words, the question is whether the reasons that courts find presumed damages to be appropriate remedial measures in defamation cases are also reasons for courts to award presumed damages in constitutional torts cases.

The contours of applying presumed damages in constitutional tort cases is further complicated by some ambiguity in the term ‘presumed damages’ in constitutional jurisprudence. There are two principal interpretations of ‘presumed damages,’ which I term ‘non-compensatory’ presumed damages and ‘compensatory’ presumed damages.¹⁶ The non-compensatory view of presumed damages is the view that presumed damages are awarded to the plaintiff because a wrong was inflicted upon him, independent of the amount of actual harm caused to him. The compensatory view of presumed damages is the view that presumed damages are awarded to the plaintiff to compensate for the actual harm inflicted upon him, but since that harm cannot be proven in court, the presumed damages approximate such harm.

Although some older cases concerning the infringement on the plaintiff’s right to vote seem to support the non-compensatory view of presumed damages,¹⁷ the non-compensatory interpretation of presumed damages has generally been rejected by the Supreme Court.¹⁸ The mere concept of non-compensation—but based on the value of an abstract right—has

¹⁴ Michael L. Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 Miss. L. J. 157, 160 (1998).

¹⁵ See, e.g., *Stachura*, 477 U.S. at 304–05; *Carey*, 435 U.S. 247, 253.

¹⁶ See *infra* Part V.A.

¹⁷ See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927).

¹⁸ See *Stachura*, 477 U.S. at 304–05.

emphatically been rejected by the Supreme Court.¹⁹ Compensatory presumed damages remain. But here, I argue that the compensatory view of presumed damages should not apply to constitutional torts because of the differences between constitutional torts and defamation.

Today, defamation is the only tort that applies the presumed damages doctrine, making it an “oddy” of tort law.²⁰ In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,²¹ the Supreme Court comments that the “rationale of the common law rules has been the experience and judgment of history that ‘proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.’”²²

Although presumed damages are conceptually linked to defamation, the current trend is that even in defamation, presumed damages have been limited in several ways. If the defamatory statements concern a “matter of public concern,” presumed damages may not be applied in cases where the defendant is merely negligent, but actual malice must be shown.²³ This holding has been softened somewhat by a subsequent case that held that for statements not concerning a “matter of public concern,” the First Amendment does not bar presumed damages even without

¹⁹ See, e.g., *Stachura*, 477 U.S. at 304–05.

²⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Commentators have also emphasized the uniqueness of defamation cases for allowing presumed damages:

As Justice Powell said in *Gertz v. Robert Welch, Inc.*, the presumed damage rule makes defamation an oddity of tort law. Trespass law permits presumed damages, for example, but the modern rule seems to be that the plaintiff may recover only nominal damages unless he proves that the trespass caused actual harm. The same is true of most constitutional torts. Courts also have employed something similar to the presumption of harm in cases involving the unconstitutional denial of the right to vote. The United States Supreme Court, however, has refused to adopt a general rule presuming harm in civil rights cases. Thus, a plaintiff who is deprived of procedural due process is entitled only to nominal damages unless he proves that he has suffered actual injury. In contrast, the presumed damages in defamation cases are not limited to nominal sums, and awards are often substantial.

Anderson, *supra* note 13, at 749.

²¹ 472 U.S. 749 (1985).

²² *Dun & Bradstreet, Inc.*, 472 U.S. at 760 (quoting WILLIAM PROSSER, LAW OF TORTS 765 §112 (4th ed. 1978)).

²³ See, e.g., *Gertz*, 418 U.S. at 324.

actual malice.²⁴ Courts also have placed some limitations on the amount of flexibility allowed by jurors in awarding damages.²⁵

The two main driving factors that make presumed damages appropriate in defamation are (1) inference of injury, given liability, and (2) difficulty of proof. This means that once it is established that a defendant is liable, it is extremely likely that the plaintiff did suffer some injury. If the defendant did circulate defamatory material, it is likely that individuals read it and that their perception of the plaintiff was influenced as a result. Furthermore, this injury is difficult to prove in court, because it would involve finding a large number of unidentified individuals—who read the defamatory material—and asking them whether they were deterred from associating with the plaintiff as a result. This would be an unreasonably onerous burden on the plaintiff. Therefore, presumed damages are appropriate in defamation cases.

This article examines how these principles apply to constitutional torts. It has been suggested that in 1983 actions, the “magnitude of damages may not easily be demonstrated... as is clear from *Stachura* and its common law predecessors,”²⁶ but there are some key differences between defamation and constitutional torts.

If a defamation plaintiff had unlimited money and time, he could hypothetically track down everyone who had read the defamatory material, and ask them whether or not the defamatory material deterred them from associating with him or otherwise affected them. But because this would cost the plaintiff too much time and money, presumed damages allow the jury to estimate the amount of actual harm that is presumed to exist.

²⁴ *Dun & Bradstreet Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–761 (1985).

²⁵ See, e.g., RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 9:17 (2d ed. 2011).

²⁶ Stephen Andrew Hess, *Presumed Damages and Constitutional Interests Under Section 1983*, 58 U. COLO. L. REV. 293, 302 (1987) noting, as an example, that *Stachura* expressly recognized and approved cases that permitted substantial presumed damages for voting right violations).

In contrast, in constitutional torts, the problem is not one of time and money. Recall that the first rationale for presumed damages in defamation is whether injury can be inferred from liability. As it turns out, whether or not injury can be inferred in constitutional torts depends on our legal conception of a violation of a constitutional right, and whether that in itself is an injury. Unlike in defamation, this is not a problem of time and money, it is a legal problem. Possibly because of this difference, the *Carey* court categorically differentiated constitutional torts from defamation by holding that “neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof such injury actually was caused.”²⁷

If, in the course of the constitutional tort, the defendant inflicted any actual physical, mental, emotional, or property harm to the plaintiff, the plaintiff can prove these damages in the common tort way—by proving them in court with testimony or affidavits.²⁸ Therefore, the only remaining cases where presumed damages may be useful are in cases where the defendant was liable for violating the plaintiff’s constitutional right, but where the plaintiff has no additional physical, mental, emotional, or property injury—whether presumed damages should be appropriate in those cases.

Unlike in the defamation case, these cases do not present a question of cost—even with unlimited money and time, the plaintiff could not depose witnesses in order to prove actual harm. Instead, presumed damages are supposed to do the work of compensating the plaintiff for some kinds of actual harm that cannot be proven empirically through testimony or affidavits. The most

²⁷ *Carey*, 435 U.S. at 264.

²⁸ *Id.* at 263–64 (“Finally, we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff. In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”).

common way to characterize such a harm is by calling it the harm inherent in a constitutional violation—the harm that arises from the existence of the wrong itself.

But this catapults us away from the empirical cost problem of proving defamation damages to a legal conceptual problem of whether the violation of the constitutional right in itself is a compensable actual harm. The Court in *Carey* ruled that it is not in procedural due process cases.²⁹ However, others have argued that at least for some constitutional torts, the violation itself should be thought of as injury to the plaintiff. For example, special interest theory suggests that substantive constitutional rights create special interests beyond those of normal common law torts.³⁰ Others have argued that consideration should be given to whether the right being violated protects “individual interests” rather than “societal interests.”³¹ But both of these arguments are not really arguments for presumed damages; instead, they are arguments that formulate the definition of injury in such a way that by proving the violation, the plaintiff has automatically proven the injury. But where the injury is proven, damages need not be presumed.

It may be within federal court jurisdiction to rule that the violation of a constitutional right itself *is* an injury. This is ostensibly what happened in the right-to-vote cases. However, this would *not* be an example of presumed damages because in such a case, because by proving the

²⁹ *Id.* at 266 (“By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.”).

³⁰ *See, e.g.,* *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978). For an explanation of how these cases discuss the special interests associated with substantive constitutional rights, see *infra* Part VI.A.

³¹ *See Hess, supra* note 26, at 302 (“Therefore, just as it is necessary to distinguish instrumental from substantive rights, it is also necessary to distinguish societal from individual rights. As a practical matter, the rules concerning standing serve as an important filter to preclude plaintiffs from recovering individually for harm to societal interests. Although rules governing standing and rules governing the compensability of deprivations under section 1983 rise out of different concerns, they are related insofar as each focuses on the existence of some cognizable injury to the plaintiff, which in turn determines the elements of damages one may plead or the grounds upon which one may base standing.”).

violation, the plaintiff has proven the injury. Therefore, presumed damages has no place in constitutional torts.

In other words, courts looking to common law doctrines in constitutional tort cases cannot therefore be justified in allowing presumed damages, because the plaintiff faces entirely different problems in constitutional torts that he does in defamation; in the latter, an empirical burden, in the former, a legal burden. Rather than asking whether a constitutional tort plaintiff can prove actual harm in a case is to ask whether a constitutional violation can be characterized to satisfy the two principles used in defamation: inference of harm and difficulty of proof. For the reasons discussed above, the answer to this question can be answered by determining whether a constitutional violation itself should be characterized as an injury.

With respect to public policy, we should consider whether there is a large number of constitutional tort plaintiffs who do not suffer provable bodily, mental, emotional or property damage, but need to resort to presumed damages in order to collect damages at all. If there are a large number of these plaintiffs, the next question is whether the legal system in society desires to compensate any or all of them. If we do, then the question is whether Congress or the courts should be addressing the problem. If we take Justice Harlan's concurring opinion in *Bivens* seriously,³² then courts do have the authority to "award damages for violation of 'constitutionally protected interests'".³³ Then we can conceptualize these constitutional violations as injuries to the plaintiffs, and they may be compensated without the burden of proving injury.³⁴

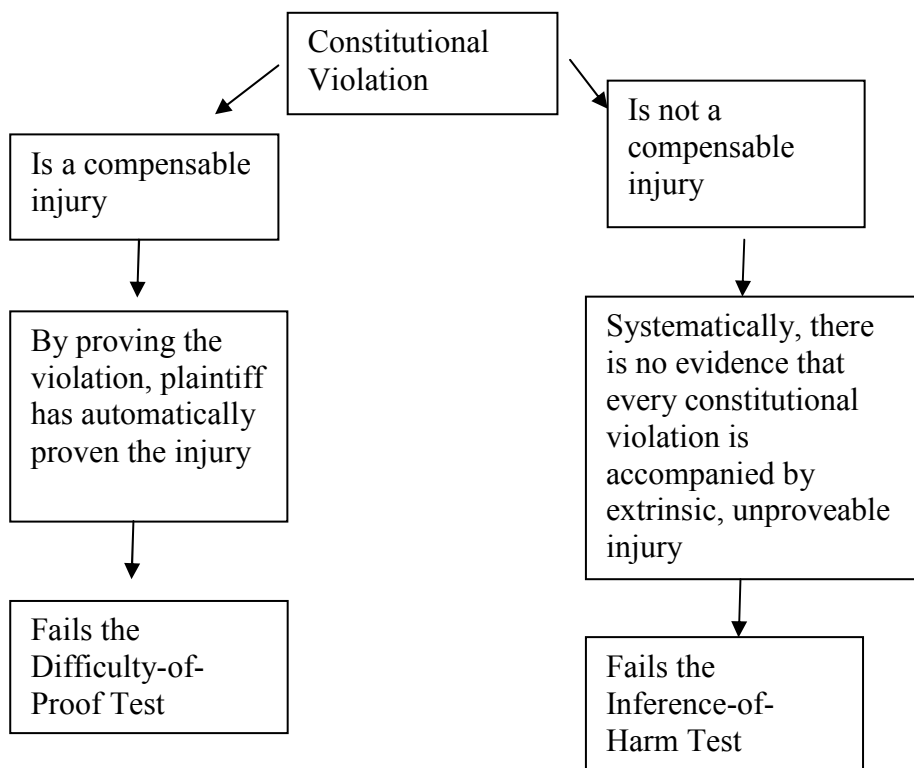
³² *Bivens*, 403 U.S. at 399.

³³ *Id.*

³⁴ This is a somewhat backwards approach, because it defines actual harm based on whether or not we want the plaintiff to be compensated, but conforms with much of defamation law. In defamation, plaintiffs find it difficult to prove their cases, but we have determined that at least some of their cases are meritorious and should not be categorically precluded. Therefore, we allowed presumed damages. If we decide that the constitutional tort cases are meritorious, then presumed damages may be necessary, but only if there is no other recourse for proving damages.

This approach does not imply that presumed damages are appropriate for constitutional torts. The specific reasons why defamation allows presumed damages are not applicable to constitutional torts, unless we characterize constitutional violations as injuries. But if we do, then presumed damages are not useful because by proving the violation, the plaintiff necessarily proves the injury. Where the injury is proven, damages need not be presumed.

Figure 1. Presumed Damages Are Not Appropriate for Constitutional Torts, Regardless of Whether or Not Constitutional Violations are Compensable Wrongs



II. CONSTITUTIONAL TORTS

A. The Role and Importance of Constitutional Torts

Tens of thousands of constitutional tort suits are filed every year in federal courts.³⁵

These suits are of considerable significance, both practical and theoretical. They often represent

³⁵ See generally Eisenberg and Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORN. L. REV. 641 (1987).

large sums of money—augmented by potential attorney’s fees to prevailing plaintiffs—and force courts to grapple with, *inter alia*, issues of employment,³⁶ police misconduct,³⁷ the treatment of prisoners,³⁸ and racial discrimination.³⁹ Other typical lawsuits concern “false arrest... malicious prosecution, wrongful confinement, illegal searches and seizures, retaliation for speech that displeases officials, arbitrary interference with property rights, ..., and restrictions on the speech of public employees and students.”⁴⁰

The importance of constitutional torts may often transcend the aggregation of burdens for each individual plaintiff because they deal with the way the government treats its citizens. The importance of constitutional torts derives from the way that they are, at heart, endeavors by citizens to keep their government and its officials and employees accountable to them.⁴¹

B. A Brief History of Constitutional Torts

1. Source of Law

Litigants may frame their grievances as breaches of the Constitution and sue for damages under 42 U.S. C. §1983 when the defendant is a state officer. If the defendant is a federal officer,

³⁶ See, e.g., *Stachura*, 477 U.S. at 299 (1986) (Plaintiff is a tenured public school teacher, who was suspended with pay for allegedly showing sexually explicit pictures in class, suing for deprivation of both liberty and property without due process of law, and also violation of his First Amendment rights).

³⁷ See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961) (“The complaint alleges that 13 Chicago police officers broke into petitioners’ home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on ‘open’ charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him.”).

³⁸ See, e.g., *Smith v. Wade*, 461 U.S. 30 (1983) (Defendant is a guard at a unit of the Missouri Division of Corrections for youthful first offenders, sued by an inmate for violating his Eighth Amendment rights).

³⁹ See, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (“In this action... it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority’s lessee.”).

⁴⁰ Michael L. Wells, *Civil Recourse, Damages-as-Redress, and Constitutional Torts* (draft) (on file with author).

⁴¹ Congress created constitutional torts as a section titled “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.” 17 Stat 13 (1871). The purpose of the act was to enforce the Constitution.

litigants may sue under federal common law established in *Bivens v. Six Unknown Named Federal Narcotics Agents*.⁴² 42 U.S.C. §1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.⁴³

2. Legislative Intent and Concerns

The purpose of the section “was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.”⁴⁴ The section was designed for the dual purposes of “prevent[ing] the states from violating the Fourteenth Amendment and certain federal statutes and [] compensate[ing] injured plaintiffs for deprivations of their federal rights.”⁴⁵

Because the Constitution “stands as the final barrier between government power and individual liberty,” Section 1983’s role in deterring constitutional violations “is an especially valued goal.”⁴⁶ On the other hand, the “Court has exhibited a policy preference to avoid what it perceives to be an excessive burdening of governmental conduct, both financially and

⁴² 403 U.S. 388 (1971).

⁴³ Congress also conferred original jurisdiction for these suits to federal district courts in 28 U.S.C. §1343(3)(a)(3), (b).

⁴⁴ NAHMOD, WELLS & EATON, *supra* note 2, at 3 (citing *Mitchum v. Foster*, 407 U.S. 225, 238–39, 242 (1972)).

⁴⁵ *Id.* (citing *Carey v. Piphus*, 435 U.S. 247 (1978)).

⁴⁶ Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 444 (1982).

otherwise.”⁴⁷ This excessive burdening includes the price of over-deterring governmental bodies and officials from efficiently pursuing their duties out of uncertainty or fear of monetary punishment, as well as federalism concerns. As “Constitutional torts necessarily affect the interplay between federal power and state prerogatives,” the Court “is reluctant to displace traditional prerogatives of state sovereignty.”⁴⁸

3. Historical Trends

Although Section 1983 was enacted in year 1871, the landmark decision bringing constitutional torts to the foreground was not decided until 1961 in *Monroe v. Pape*.⁴⁹ The ninety-year delay has been attributed to “the restrictive application of the state action doctrine,” “the narrow reading of the Fourteenth Amendment’s privileges and immunities clause and section 1983’s jurisdictional counterpart,” and “the Supreme Court’s initial refusal to incorporate completely the provisions of the Bill of Rights.”⁵⁰ *Monroe* warrants examination as not only the landmark decision for constitutional torts, but also because the opinion in *Monroe* offered the Supreme Court’s interpretation of the legislative intent behind the Section 1983.⁵¹

The plaintiff in *Monroe v. Pape* alleged, among other things, that Chicago police officers broke into his home, ransacked his rooms, roused him from bed, and detained him at the police station for ten hours. They had no search warrant and no arrest warrant, and they acted “under the color of the statutes, ordinances, regulations, customs and usages” of Illinois law.⁵² He sued

⁴⁷ *Id.* at 444–45.

⁴⁸ *Id.* at 445.

⁴⁹ See generally *Monroe*, 365 U.S. at 167.

⁵⁰ NAHMOD, WELLS & EATON, *supra* note 2, at 4 (“Although section 1983 was enacted in 1871, it was largely dormant for ninety years for various reasons.”).

⁵¹ *Monroe* was partially overruled by *Monell v. Dep’t of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 695–701 (1978), but only on the issue of whether municipalities and other local government units are included among those “persons” to whom the Civil Rights Act of 1871 applies. *Monroe* had held that they were not included, but *Monell* reversed this.

⁵² *Monroe*, 365 U.S. at 169.

the City of Chicago, as well as individual officers. Justice Douglas delivered the opinion of the court:

There can be no doubt... that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. The question with which we now deal is the narrower one of whether Congress, in enacting [the Section], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. We conclude that it did so intend.⁵³

Examining legislative history, Justice Douglas articulates the “three main aims” of the section, which he supports almost entirely based upon examining oppositional arguments made in the adoption of the Section.⁵⁴ First, the Section “might, of course, override certain kinds of state laws.”⁵⁵ Second, “it provided a remedy where state law was inadequate.”⁵⁶ The third aim was “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.”⁵⁷ As a response to the political climate at the time it was passed, the purpose of the Section was to solve a federalism problem:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.⁵⁸

⁵³ *Id.* at 171–72.

⁵⁴ *Id.* at 173.

⁵⁵ *Id.* (“Mr. Sloss of Alabama, in opposition, spoke of that object and emphasized that it was irrelevant because there were no such laws: ‘The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.’”).

⁵⁶ *Monroe*, 365 U.S. at 173–74 (“That aspect of the legislation was summed up as follows by Senator Sherman of Ohio: ‘... it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify.’”).

⁵⁷ *Id.* at 174 (“It was precisely that breadth of the remedy which the opposition emphasized.”).

⁵⁸ *Id.* at 180.

Furthermore, *Monroe* establishes that even where there is a state remedy, the plaintiff does not need to exhaust it: “[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”⁵⁹

Consistent with this reasoning, the Court in *Monroe* reversed the lower court’s dismissal of Monroe’s suit against the state officials. However, it affirmed the dismissal of the suit against the City of Chicago to be properly made because “Congress did not undertake to bring municipal corporations within the ambit of” the Section.⁶⁰ This part of the opinion—excluding municipalities and cities from liability—was later reversed.⁶¹

Monroe also establishes that there is no specific intent requirement, and that the “specific intent to deprive a person of a federal right” should not be imputed into a reading of the Section because the word “willfully” “does not appear” in the text.⁶² Instead, the Section should be interpreted against “a background of tort liability” that “makes a man responsible for the natural consequences of his actions”.⁶³ Commentators have noted that “the characterization ‘constitutional tort’ appears to give prominence to the noun ‘tort’ and to make the adjective ‘constitutional’ secondary.”⁶⁴

⁵⁹ *Id.* at 183.

⁶⁰ *Monroe*, 365 U.S. at 187–88 (examining legislative history, the Court notes that “[w]hen the bill that became the Act of April 20, 1981, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made ‘the inhabitants of the county, city, or parish’ in which certain acts of violence occurred liable ‘to pay full compensation’ to the person damaged or his widow or legal representation. The amendment was adopted by the Senate. The House, however, rejected it. The Conference Committee reported another version. The House rejected the Conference report... The objection to the Sherman amendment... was that ‘the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.’”).

⁶¹ *See Monell*, 436 U.S. at 695–701.

⁶² *Monroe*, 365 U.S. at 187. This differentiates the *Monroe* reading of constitutional torts from defamation law, where actual malice or mere negligence makes a difference in the outcome of the cases. *See infra* Part IV.C.

⁶³ *Id.*

⁶⁴ NAHMOD, WELLS & EATON, *supra* note 2, at 19. *See also* Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 324 (1965) (“It is not quite a private tort, yet contains tort

C. *Bivens* and Liability for Federal Officers

1. Facts and Outcome of *Bivens*

A Section 1983 remedy is not available when a federal—rather than state—officer violates a person’s Fourth Amendment rights, because the text of the statute addresses “[e]very person who under color of statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,” but does not address persons acting under color of federal law. However, in *Bivens v. Six Unknown Named Agents*, the Court held that violation of the Fourth Amendment “by federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.”⁶⁵

The petitioner in *Bivens* alleged that agents of the Federal Bureau of Narcotics acting under claim of federal authority “entered his apartment and arrested him”, “manacled” him in front of his family, “searched the apartment”, and had him “interrogated, booked, and subjected to a visual strip search.”⁶⁶ The Court decided “that damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”⁶⁷ The Court also notes that the “present case involves no special factors counseling hesitation in the absence of affirmative action by Congress.”⁶⁸

elements; it is not ‘constitutional law,’ but employs a constitutional test. Because of this interesting amalgam, serious questions arise about the measurement of the substantive right.”).

⁶⁵ *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971).

⁶⁶ *Id.* at 389.

⁶⁷ *Id.* at 395.

⁶⁸ *Id.* at 396–97 (Special factors include questions of federal fiscal policy and liability for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress).

Taking Congress's silence as consistent with the decision to award damages,⁶⁹ the Court allowed recovery.⁷⁰

It is possible that the Court was motivated in part by the defendant's litigation strategy—it was “the policy of the Department of Justice to remove all [similar] suits from the state to the federal courts for decision.”⁷¹ Then, in federal court, the Department of Justice would argue that the plaintiff may obtain money damages “only in an action in tort, under state law, in the state courts.”⁷²

2. Implications for Constitutional Torts

The *Bivens* majority opinion stands for the entitlement of the plaintiff “if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights” to “redress his injury through a particular remedial mechanism normally available in the federal courts.”⁷³ The Court uses the language of common law torts in the constitutional tort setting, seemingly applying common law principles and standards of proof.

The concurrence in *Bivens* is of particular noteworthiness as well. Justice Harlan concurred with the majority, emphasizing that “federal courts do have the power to award damages for violation of ‘constitutionally protected interests’.”⁷⁴ In his stronger view of federal court power, he notes that “damages as a traditional form of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result.”⁷⁵ Seeing the role of the Court to “stand

⁶⁹ *Bivens*, 403 U.S. at 397 (“For we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress.”).

⁷⁰ *Id.* at 389.

⁷¹ *Id.* at 391.

⁷² *Id.*

⁷³ *Bivens*, 403 U.S. at 397.

⁷⁴ *Id.* at 399.

⁷⁵ *Id.* at 408.

ready to afford a remedy” in cases of constitutional right violations, Harlan was not concerned by the prospect of litigation flooding the court system.⁷⁶

Bivens had three separate dissenting opinions. Chief Justice Burger dissented, accusing the majority of “creat[ing] a damage remedy not provided for by the Constitution and not enacted by Congress.”⁷⁷

Justice Black also dissented, arguing that while there “can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment,” and while it has “created such a federal cause of action against state officials,” it had not created “such a cause of action against federal officers.”⁷⁸ He cited the text of Section 1983.⁷⁹ Justice Black also expressed concern over the caseload that such lawsuits would bring to the court system.

Justice Blackmun, in his dissent, echoed Justice Black’s fear of an “avalanche of new federal cases.”⁸⁰ He also noted the availability of alternative remedies: “I had thought that for the truly aggrieved person other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.”⁸¹

D. The Aftermath of *Bivens*

1. Cases Applying *Bivens*

For the next decade, courts began applying the *Bivens* jurisprudence in more constitutional violation cases. For example, the Supreme Court ruled that an award of *Bivens* damages was appropriate in *Davis v. Passman*,⁸² a case that arose eight years after *Bivens*. In

⁷⁶ *Id.*

⁷⁷ *Bivens*, 403 U.S. at 411.

⁷⁸ *Id.* at 427.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Bivens*, 403 U.S. at 427.

⁸² 442 U.S. 228 (1979).

Davis, the plaintiff was a female employee of Congressman Otto Passman, who sued Congressman Passman for violating her constitutional right to be free from gender discrimination when she was fired from her job. The Court found that there were no “special concerns counseling hesitation” and that the Congressman’s words did not constitute protected speech.⁸³ The Court also addressed the “avalanche of new federal cases” concern expressed in Justices Black and Blackmun’s *Bivens* dissents by insisting that a damages remedy would not mean that the court would become deluged with claims.⁸⁴ The Court also quoted *Bivens* in noting that “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”⁸⁵ This solidified the *Bivens* interpretation of constitutional torts.

In the following year, the Supreme Court allowed a damages remedy for an Eighth Amendment action against federal prison officials in *Carlson v. Green*.⁸⁶ The Court ruled that the *Bivens* remedy was available even though the allegations could also support a lawsuit against the United States under the Federal Tort Claims Act.⁸⁷ The Court found that there were “no special factors counseling hesitation”, no explicit declaration against recovery by Congress, and nothing in the legislative history to indicate an intent to preclude recovery.⁸⁸ The Court also considered other factors, such as deterrence and differences between *Bivens* and the FTCA remedy, but decided to allow recovery.⁸⁹ Cases like *Passman* and *Carlson* served to solidify *Bivens*’ place in federal jurisprudence.

2. Cases Limiting *Bivens*

⁸³ *Id.* at 245–49.

⁸⁴ *Id.*

⁸⁵ *Id.* at 245 (citing *Bivens*, 403 U.S. at 395).

⁸⁶ 446 U.S. 14 (1980).

⁸⁷ *Id.* at 18–23.

⁸⁸ *Id.* at 18–20.

⁸⁹ *Carlson*, 446 U.S. at 21–23 (“First, the *Bivens* remedy... serves a deterrent purpose... Second, our decisions... indicate that punitive damages may be awarded in a *Bivens* suit... Third, a plaintiff cannot opt for a jury in an FTCA action... Fourth, an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward.”).

However, the “tide began to turn” against *Bivens* in 1983.⁹⁰ In *Chappell v. Wallace*, the Supreme Court unanimously ruled that enlisted military personnel could not maintain a suit to recover damages from a superior officer for alleged constitutional violations.⁹¹ The Court highlighted the “special concerns counseling hesitation” language from *Bivens*, and decided that special status of the military qualified as a special concern.⁹² Although the Court could have limited the *Chappell* ruling to constitutional tort cases relating to the military and preserved a stronger view of *Bivens*, subsequent cases demonstrated no such intention.⁹³

The Court continued to chip away at *Bivens* in the following years. In the First Amendment case *Bush v. Lucas*,⁹⁴ the Court held that because the petitioner’s claims arose from an employment relationship governed by “comprehensive procedural and substantive provisions giving meaningful remedies against the United States”, this constituted a special concern counseling hesitation, and consequently denied a damages remedy.⁹⁵ However, the Court still emphasizes its own power to “grant relief not expressly authorized by Congress” and its authority “to choose among available judicial remedies in order to vindicate constitutional rights.”⁹⁶

The Supreme Court continued to limit *Bivens* and extend *Bush v. Lucas* in a 1988 Social Security case.⁹⁷ The plaintiffs in *Schweiker* sued for the improper denial of Social Security disability benefits, allegedly resulting from due process violations by administrators of a

⁹⁰ NAHMOD, WELLS & EATON, *supra* note 2, at 32.

⁹¹ 462 U.S. 296 (1983).

⁹² *Id.* at 300 (“The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.”).

⁹³ *See, e.g.*, NAHMOD, WELLS & EATON, *supra* note 2, at 32 (“Significantly, even though *Chappell’s* refusal to extend *Bivens* could have been limited to the special situation of the military, it quickly became clear that this would not be the case.”).

⁹⁴ 462 U.S. 367 (1983).

⁹⁵ *Bush*, 462 U.S. at 368.

⁹⁶ *Id.* at 374.

⁹⁷ *See generally Schweiker v. Chilicky*, 487 U.S. 412 (1988).

“continuing disability review” (CDR) program.⁹⁸ The Court noted that the “administrative structure and procedures of the Social Security system, which affects virtually every American, ‘are of a size and extent difficult to comprehend.’”⁹⁹ Setting aside the language in *Monroe* allowing for recovery even with the existence of alternative means of relief, the Court emphasized that for the plaintiffs, Congress had “not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were.”¹⁰⁰

Thus, the Court ruled that it could “not reasonably be distinguished from *Bush v. Lucas*.”¹⁰¹ Considering the way the Court has expanded special concerns counseling hesitation in awarding damages, it is difficult to envision any case that could be reasonably distinguished from *Bush v. Lucas* and its progeny going forward, and the enduring viability of constitutional torts has become unclear.

III. DAMAGES UNDER CONSTITUTIONAL TORTS

Under common law, the typical remedy for torts is an award of damages paid to the plaintiff to make him whole for the harm caused by the defendant. Punitive damages are sometimes awarded if the behavior of the defendant is especially egregious. Damages may be a means for assigning losses to the most deserving party while deterring undesirable behavior (“loss allocation”), but also as “a means for empowering individuals to seek redress against those who have wronged them” (“civil recourse”).¹⁰² An interesting question is “whether and to what extent the principles of damages developed in ordinary tort law ought to govern recovery for constitutional wrongs as well.”¹⁰³

⁹⁸ *Id.* at 414–18.

⁹⁹ *Id.* at 424 (quoting *Richardson v. Perales*, 402 U.S. 389 (1971)).

¹⁰⁰ *Id.* at 425.

¹⁰¹ *Schweiker*, 487 U.S. at 425.

¹⁰² Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1770 (2009). *See also* John C. P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010).

¹⁰³ NAHMED, WELLS & EATON, *supra* note 2, at 527.

A. Constitutional Tort Damages Under *Carey*

1. Facts and Holding of *Carey*

In 1978, the Supreme Court established some of its most important principles about compensatory damages in *Carey v. Piphus* by establishing that “the basic purpose of a section 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights” as “a species of tort liability”.¹⁰⁴ In *Carey*, public school students brought an action against school officials under 42 U.S.C. § 1983 when they were suspended from school, and it was established that the suspension was enforced without procedural due process.¹⁰⁵

However, because the plaintiffs did not prove actual injury—that is, they did not prove that had their procedural due process rights not been violated, they would have avoided the suspension—the students were not allowed to recover money beyond nominal damages.¹⁰⁶

2. Implications for Constitutional Tort Damages

In *Carey*, the Court sets out several important principles. It reiterates that the basic purpose of a Section 1983 damages award is to compensate persons for injuries caused by the deprivation of constitutional rights.¹⁰⁷ Furthermore, “to further the purpose of Section 1983, the rules governing compensation” should be “tailored to the interests protected by the particular right in question,” just as the common law rules of damages were “defined by the interests

¹⁰⁴ 435 U.S. 247, 253 (1978) (citing *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

¹⁰⁵ *Id.* at 253–67. Under an earlier case, the Supreme Court had held that students have a state-created property interest in access to public education, and that suspension or expulsion constitutes a “deprivation” of such property within the scope of the 14th amendment. This means that the students are entitled to procedural due process. *See Goss v. Lopez*, 419 U.S. 565 (1975).

¹⁰⁶ *Carey*, 435 U.S. at 253–67 (“We therefore hold that if, upon remand, the District Court determines that respondents’ suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners.”).

¹⁰⁷ *Id.* at 254–57.

protected in the various branches of tort law.”¹⁰⁸ This is an important characterization of tort law damages, because it emphasizes the “interests protected” rather than the harm done, which will be a significant part of understanding the relationship between common law torts and constitutional torts.¹⁰⁹

The Court also makes it clear in *Carey* that injury cannot be presumed to automatically flow from the violation of procedural due process.¹¹⁰ The Supreme Court expressed agreement with the Court of Appeals that, if the school officials could prove on remand that the students would have been suspended even if there had been no violation of procedural due process—that is, if a proper hearing had been held—then the students would not be entitled to recover anything beyond nominal damages.¹¹¹ By ruling in this way, the Court makes it clear that—at least for cases of procedural due process—plaintiffs would be required to prove actual injury that was caused by the violation of their right. If the injury would have occurred even without the violation of their right, there would be no presumed damages.

The Court elaborates that although presumed damages may be awarded in common law defamation, cases like *Carey* differ from common law defamation.¹¹² In defamation cases, mental and emotion distress can be “presumed” to occur because of the high likelihood of injury

¹⁰⁸ *Id.* at 258–59. The Court proceeds to express agreement “with Mr. Justice Harlan that ‘the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights.’” *Id.* at 259 (citing *Bivens*, 403 U. S. 409 (Harlan, J., concurring in judgment)).

¹⁰⁹ See *infra* Part VI.

¹¹⁰ *Carey*, 435 U.S. at 259–64 (“In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”).

¹¹¹ *Id.* at 260 (“In this case, the Court of Appeals held that, if petitioners can prove on remand that ‘[respondents] would have been suspended even if a proper hearing had been held,’ 545 F.2d at 32, then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions. . . . The court suggested that, in such circumstances, an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to respondents. . . . We do not understand the parties to disagree with this conclusion. Nor do we.”).

¹¹² *Id.* at 259–64.

and the difficulty of proving such injury.¹¹³ Comparisons and contrasts between defamation and constitutional torts will be made in depth later in this article,¹¹⁴ but for now it is enough to say that the *Carey* court felt that it would “not [be] 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,” that “whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure,” and that there is “no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself.”¹¹⁵

The *Carey* Court ultimately rules that the “elements and prerequisites for recovery of damages” for the compensation of injuries caused by the violation of one constitutional right “are not necessarily appropriate to compensate injuries” caused by the deprivation of another constitutional right.¹¹⁶ The Court uses this reasoning to avoid reconciling *Carey* with previously decided cases dealing with damage awards for racial discrimination, the denial of voting rights, and the denial of Fourth Amendment rights, even though many of those cases also held that intangible injuries must be proven before the recovery of compensatory damages.¹¹⁷ Instead, the issues at hand “must be considered with reference to the nature of the interests protected by the particular constitutional right in question.”¹¹⁸

¹¹³ *Id.* at 262. (“As we have observed in another context, the doctrine of presumed damages in the common law of defamation *per se* ‘is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.’ *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 418 U. S. 349 (1974). The doctrine has been defended on the grounds that those forms of defamation that are actionable *per se* are virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove.”).

¹¹⁴ See *infra* Part VI.

¹¹⁵ *Carey*, 435 U.S. at 263.

¹¹⁶ *Carey*, 435 U.S. at 264–65.

¹¹⁷ *Id.* at 265.

¹¹⁸ *Id.* As a consequence, the Court indicated that *Carey* was not controlled by cases dealing with the awards of damages for injuries caused by the violation of constitutional rights other than the specific right to procedural due

The *Carey* Court—despite denying an award of presumed damages—does recognize that the plaintiff’s right was violated. They make this recognition with nominal damages, which do not require proof of actual injury.¹¹⁹ The Court notes that nominal damages are available because the right to procedural due process is an “absolute” right, for which “the law recognizes the importance to organized society” that it is a right “scrupulously observed.”¹²⁰ Thus, the determination of whether nominal damages are appropriate turns on the nature and importance of the actual right being vindicated—not in reference to the plaintiff, but in reference to society—and not to the degree of the injury at hand. Ironically, the same argument that constitutional rights are important to organized society and should be scrupulously observed have been used in favor of presumed damages *beyond* nominal damages as well, and the Court offered no clear distinction between the implication of either result.¹²¹

3. Alternative Approaches to Constitutional Torts

The *Carey* Court’s decision to model section 1983 cases after common law torts was an affirmative move by the Court that was by no means inevitable or natural. Although “constitutional torts” has “torts” in its name, the Court could have treated them differently as a branch of law because of the presence of special interests. The Court specifically characterized “constitutional tort” in such a way that “tort” is prominent and “constitutional” is secondary.¹²²

process. Although *Carey* distinguished its holding based on the procedural/substantive dichotomy, later substantive violation cases would follow *Carey* as precedent.

¹¹⁹ *Id.* at 266. (“Common law courts traditionally have vindicated deprivations of certain ‘absolute’ rights that are not shown to have caused actual injury through the award of a nominal sum of money.”).

¹²⁰ *Carey*, 435 U.S. at 266 (The Court also notes that “the right to procedural due process is ‘absolute’ in the sense that it does not depend upon the merits of a claimant’s substantive assertions”, so that “the denial of procedural due process should be actionable for nominal damages without proof of actual injury.”).

¹²¹ *See, e.g., Stachura*, 477 U.S. 299 at 302–03. The trial court judge in *Stachura* instructed the jury to award presumed damages based on the importance of the constitutional right. This was reversed by the Supreme Court.

¹²² NAHMOD, WELLS & EATON, *supra* note 2, at 19. *See also* Shapo, *supra* note 64, at 324 (“It is not quite a private tort, yet contains tort elements; it is not ‘constitutional law,’ but employs a constitutional test. Because of this interesting amalgam, serious questions arise about the measurement of the substantive right.”).

The Court’s categorization of constitutional torts into common law torts has been criticized. Professor Wells, for example, argues that while the “remedial questions raised by constitutional damages suits resemble common law tort issues,” “common law is not appropriately viewed as a ‘source of the law’ for constitutional tort rules.”¹²³ Instead, the Court “should devise rules that reflect the distinctive features of damage suits aimed at vindicating constitutional rights” and “conceive of the backward-looking relief available in constitutional tort as part of the system of constitutional remedies, serving as a vehicle for filling in gaps left by forward-looking injunctive and defensive remedies.”¹²⁴

Wells also notes that two key distinctions between constitutional torts and common law torts is (1) “the interest at stake on the plaintiff’s side of a constitutional tort case is systematically stronger than the plaintiff’s interest in common law torts” and (2) “constitutional tort suits serve a function in the law of constitutional remedies—supplementing defensive and prospective remedies—that is quite independent of the plaintiff’s interest in recovery.”¹²⁵

Other intuitive alternative systems of damages for constitutional torts have been proposed. For example, an alternative system could have “supplement[ed] the tort model with a system of bounties, under which plaintiffs who prove that their constitutional rights have been violated are awarded payments reflecting the jury’s view of the value of those rights, quite apart from whether the plaintiffs can show injury.”¹²⁶ Such a system would be reminiscent of *qui tam* actions, where the plaintiff receives a bounty for bringing a whistle-blowing suit.¹²⁷ *Qui tam* actions are designed this way in order to incentivize lawsuits to be brought, given the importance

¹²³ Michael L. Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L. J. 157, 160 (1998).

¹²⁴ *Id.* at 159.

¹²⁵ *Id.* at 222–23.

¹²⁶ *See, e.g.*, NAHMOD, WELLS & EATON, *supra* note 2, at 534.

¹²⁷ *See, e.g.*, Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341, 345 (1989).

of prosecuting defendants who would escape notice otherwise. Similar rationale could be used in the constitutional tort context—that constitutional rights are of paramount importance to society at large, not just to the plaintiff individually, and that society would benefit from revelations of constitutional violations.¹²⁸

B. Constitutional Tort Damages Under *Stachura*

1. Facts and Holding of *Stachura*

Despite academic criticism of *Carey*,¹²⁹ the Supreme Court solidified its *Carey* holding in *Memphis Community School District v. Stachura*.¹³⁰ Stachura was a tenured public school science teacher who showed students pictures and videos involving human reproduction, which elicited complaints from parents.¹³¹ After an open School Board meeting was held, Stachura was suspended without pay.¹³² His complaint sought compensatory and punitive damages, alleging that the suspension deprived him of both liberty and property without due process of law and violated his First Amendment right.¹³³

The Supreme Court granted certiorari limited to the question of whether the Court of Appeals had erred in affirming the damages award in light of the District Court’s instructions.¹³⁴ The instructions in question were given in three parts. First, the District Court instructed the jury to award in damages “a sufficient amount to compensate respondent for the injury caused by the petitioners’ unlawful actions”, including “lost earnings, loss of earning capacity; out-of-pocket

¹²⁸ See Wells, *supra* note 123, at 222–23 (“The interest at stake on the plaintiff’s side of a constitutional tort case is systematically stronger than the plaintiff’s interest in common law torts. . . . [C]onstitutional tort suits serve a function in the law of constitutional remedies—supplementing defensive and prospective remedies—that is quite independent of the plaintiff’s interest in recovery.”)

¹²⁹ See, e.g., Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979).

¹³⁰ 477 U.S. 299 (1986).

¹³¹ *Id.* at 300–301.

¹³² *Id.* at 301.

¹³³ *Id.* at 301–02.

¹³⁴ *Stachura*, 477 U.S. at 304.

expenses; and any mental anguish or emotional distress that. . . the Plaintiff [] suffered as a result of conduct by the Defendant depriving him of his civil rights.”¹³⁵ Second, the District Court explained that punitive damages could be awarded, and described the standards governing punitive awards.¹³⁶ Then, over the defendant’s objection, the District Court “charged that damages could also be awarded based on the value or importance”¹³⁷ of the constitutional right that the defendant violated, by instructing the jury:

If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property. There are no medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider 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.¹³⁸

The jury found in favor of the Plaintiff and awarded \$275,000 in compensatory damages and \$46,000 in punitive damages.¹³⁹ The District Court entered judgment notwithstanding verdict as to one of the defendants, reducing the total award to \$266,750 in compensatory damages and \$36,000 in punitive damages.¹⁴⁰

The Sixth Circuit Court of Appeals affirmed the damages, noting that “there was ample proof of actual injury to the plaintiff both in his effective discharge. . . and by the damage to his

¹³⁵ *Id.* at 302.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Stachura*, 477 U.S. at 302–03.

¹³⁹ *Id.* at 303.

¹⁴⁰ *Id.*

reputation and to his professional career as a teacher.”¹⁴¹ Thus, the Sixth Circuit distinguished *Stachura* from *Carey*, noting that “[c]ontrary to the situation in *Carey v. Piphus*. . . there was proof from which the injury could have found, as it did, actual and important damages.”¹⁴²

However, the Supreme Court disagreed with the Sixth Circuit, finding that the damages were inappropriate. The Supreme Court opinion characterized the trial court instructions as permitting “the jury to award damages based on its own unguided estimation of the value” of constitutional rights.¹⁴³ The Court emphasized that the “instructions plainly authorized. . . two distinct types of ‘compensatory’ damages: one based on respondent’s actual injury according to ordinary tort law standards, and another based on the ‘value’ of certain rights.”¹⁴⁴

The Supreme Court reiterated the common law tort framework behind Section 1983 cases by citing the *Carey* mantra that 42 U.S.C. 1983 creates “a species of tort liability” and holding that “when 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.”¹⁴⁵ The Court emphasizes the compensatory nature of tort damages, explaining that while deterrence “is also an important purpose” of the tort system, “it operates through the mechanism of damages that are Compensatory.”¹⁴⁶

The Court ruled that the instructions could not be squared with *Carey*, “or with the principles of tort damages on which *Carey* and 1983 are grounded.”¹⁴⁷ Because the jurors were

¹⁴¹ *Stachura v. Truskowski*, 763 F.2d 211 (6th Cir. 1985).

¹⁴² *Id.* at 214.

¹⁴³ *Stachura*, 477 U.S. at 304–05.

¹⁴⁴ *Id.* at 305 (“The damages instructions were divided into three distinct segments: (i) compensatory damages for harm to respondent, (ii) punitive damages, and (iii) additional ‘compensat[ory]’ damages for violations of constitutional rights. No sensible juror could read the third of these segments to modify the first.”).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (“Punitive damages aside, damages in tort cases are designed to provide ‘compensation for the injury caused to plaintiff by defendant’s breach of duty’”) (citing *Carey*, 435 U.S. at 255 (quoting 2 F. Harper, F. James, & O. Gray, *Law of Torts* 25.1, p. 490 (2d ed. 1986))).

¹⁴⁷ *Stachura*, 477 U.S. at 305.

told to determine the value of the constitutional right itself—rather than of the injury its deprivation cost the plaintiff, the instructions were impermissible.¹⁴⁸ The Court emphasizes that “no compensatory damages could be awarded for the violation of that right absent proof of actual injury” so that “the abstract value of a constitutional right may not form the basis of 1983 damages.”¹⁴⁹

2. Implications for Constitutional Tort Damages

Stachura gave the Court an important opportunity to interpret the procedural due process language in *Carey*. The Court held that *Carey* “does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than ‘mere’ procedural safeguards”.¹⁵⁰ Although the “elements and prerequisites for recovery of damages” could vary depending on the interests protected by the right, the damages must be designed “to compensate injuries caused by the [constitutional] deprivation.”¹⁵¹ The Court also notes that compensatory damages should be enough for deterrence, were intended by Congress, and more equitable to defendants.¹⁵²

The Supreme Court also clarified their conception of presumed damages. The Court held that presumed damages “are a substitute for ordinary compensatory damages, not a supplement for an award that fully compensates the alleged injury.”¹⁵³ Presumed damages are for injuries

¹⁴⁸ *Id.* at 308 (noting that the factors the jurors were asked to consider focused “not on compensation for provable injury, but on the jury’s subjective perception of the importance of constitutional rights as an abstract matter”).

¹⁴⁹ *Id.* at 308 (quoting *Carey*, 435 U.S. at 264).

¹⁵⁰ *Id.* at 309.

¹⁵¹ *Stachura*, 477 U.S. 299 at 309 (citing *Carey*, 435 U.S. at 265).

¹⁵² *Id.* at 309–10 (“Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations. *Carey*, *supra*, at 256-257 (“To the extent that Congress intended that awards under 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages”). Moreover, damages based on the “value” of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. . . Accordingly, were such damages available, juries would be free to award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants.”).

¹⁵³ *Id.* at 310.

that are “likely to have occurred but difficult to establish.”¹⁵⁴ Because the instructions “called on the jury to measure damages based on a subjective evaluation of the importance of particular constitutional values” instead of roughly approximating the harm the plaintiff suffered, the instructions were erroneous.¹⁵⁵

Neither *Carey* nor *Stachura* completely barred presumed damages in Section 1983 litigation. In both cases, however, the Supreme Court stated that presumed damages should be allowed only when the nature of the constitutional right was such that proof of injury resulting from its deprivation would be unusually difficult for the plaintiff to provide. This language is borrowed from defamation jurisprudence in common law. The only right that the Court explicitly acknowledged as systematically difficult to prove was the right to vote.¹⁵⁶

C. Presumed Damages After *Carey* and *Stachura*

1. Allowing Presumed Damages

Jean Love has suggested that “although the courts will not recognize presumed general damages for *abstract deprivations* of constitutional rights, the Court might be willing to allow the recovery of presumed general damages for certain *intangible injuries* caused by violations of constitutional rights.”¹⁵⁷ The question of how receptive courts are to presumed damage awards after *Carey* and *Stachura* difficult to answer, and cases have been decided with varying results.

After *Stachura*, “some courts remain receptive to presumed damages.”¹⁵⁸ However, these opinions—that speak favorably of presumed damages—seem to almost uniformly simultaneously emphasize the plaintiff’s adequate showing of injury, which weakens the

¹⁵⁴ *Id.* at 310–11.

¹⁵⁵ *Stachura*, 477 U.S. at 311–12 (“Moreover, no rough substitute for compensatory damages was required in this case, since the jury was fully authorized to compensate respondent for both monetary and nonmonetary harms caused by petitioners’ conduct.”).

¹⁵⁶ See *Stachura*, 477 U.S. at 311 n.14; *Carey*, 435 U.S. at 265 n.22.

¹⁵⁷ NAHMOD, WELLS & EATON, *supra* note 2, at 549 (quoting Jean Love, *Presumed General Damages in Constitutional Tort Litigation*, 49 WASH. & LEE L. REV. 67, 80 (1992)) (emphasis in original).

¹⁵⁸ NAHMOD, WELLS & EATON, *supra* note 2, at 549.

presumed damages support, because presumed damages should be awarded without proof of harm.

In *Walje v. City of Winchester*,¹⁵⁹ the Sixth Circuit affirmed an award of \$5000 in presumed damages to a fireman whose First Amendment rights were violated when he was suspended for a dispute over a radio station interview.¹⁶⁰ Although the *Walje* Court awarded presumed damages while the *Stachura* court did not, the Sixth Circuit was very careful to square its decision with *Stachura*, noting that *Stachura* “held that presumed damages are an appropriate substitute for ordinary compensatory damages in cases where the ‘plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish. . .’”¹⁶¹

Interpreting *Stachura* as holding that presumed damages “are appropriate for nonmonetary harm that cannot easily be quantified,”¹⁶² the Sixth Circuit found that presumed damages may be awarded where “specific elements of the damage were difficult to pinpoint because of the nature of the injury.”¹⁶³

The plaintiff in *Walje* seemed to have introduced evidence of actual injury, including testimony that at the time of his suspension, his wife was pregnant and that he had “never been under such pressure” and felt “close to a nervous breakdown.”¹⁶⁴ This is ironic because the crux of presumed damages is difficulty of proof, and yet the Court admits the plaintiff’s statements as evidence of injury, therefore, awarding damages because injury has been proven. Despite all the

¹⁵⁹ 827 F.2d 10 (6th Cir. 1987).

¹⁶⁰ *Walje*, 827 F.2d at 11 (*Stachura* was decided by the Supreme Court in the interim between the District Court’s decision in *Walje* on remand and this appeal to the Sixth Circuit).

¹⁶¹ *Id.* at 12 (citing *Stachura*, 106 S. Ct. 2537 at 2545).

¹⁶² *Id.*

¹⁶³ *Id.* at 13.

¹⁶⁴ *Walje*, 827 F.2d at 13 (“Mr. Walje was clearly injured by his unlawful suspension from the fire department. He was suspended from the department at a time when his wife was 8 1/2 months pregnant and was thereby placed in a position where he and his wife felt that his health insurance for the birth of his child would be jeopardized. The plaintiff testified that he had never been under such pressure in his life and that he felt close to a nervous breakdown due to the suspension. These facts are sufficient to support a \$5,000 award of general damages.”)

presumed damages language, the damages were not really presumed in *Walje*. Nonetheless, the Sixth Circuit’s language in *Walje* has been interpreted to signal receptiveness to presumed damages in Section 1983 actions.¹⁶⁵

The Seventh Circuit, like the Sixth Circuit, also indicated support of presumed damages in cases following *Stachura*. In *Siebert v. Severino*,¹⁶⁶ property owners brought a Section 1983 suit against a Department of Agriculture investigator who searched their property and seized their horses without a search warrant.¹⁶⁷ The Seventh Circuit Court of Appeals wrote:

Even if Severino nosed around in the Sieberts' barn, there appears to be little or no damage, so what's the harm? The harm is that Severino violated the Sieberts' constitutional rights. Had the Sieberts been doing something illegal in the barn and Severino's search uncovered evidence, the Supreme Court mandates that such evidence be excluded (unless, of course, there is some exception to the exclusionary rule). In the criminal context, the evidence is excluded even though it might otherwise be used to convict the accused. But the Fourth Amendment does not only protect people accused of crimes. 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. . . . In the end, it will be for the jury to decide the proper quantum of relief, if any, for Severino's violation of the Sieberts' Fourth Amendment rights.¹⁶⁸

However, even though the Seventh Circuit’s language supports presumed damages, but its emphasis differs from the Sixth Circuit’s language in *Walje*. Instead of emphasizing actual distress or injuries that the plaintiff suffered, the Seventh Circuit asked “so what's the harm? *The harm is that Severino violated the Sieberts' constitutional rights.*”¹⁶⁹ In other words, the *Siebert* Court is saying that the violation of the right itself was an injury to plaintiff. By proving the violation, the plaintiff proved the injury.

¹⁶⁵ See, e.g., NAHMOD, WELLS & EATON, *supra* note 2, at 549 (describing the *Walje* decision as “upholding a \$5,000 presumed damages award to a plaintiff government employee was suspended in violation of his first amendment rights.”)

¹⁶⁶ 256 F.3d 648 (7th Cir. 2001).

¹⁶⁷ *Siebert*, 256 F.3d at 651–53.

¹⁶⁸ *Id.* at 655.

¹⁶⁹ *Id.* (emphasis added).

The Ninth Circuit has also expressed support for the legitimacy of presumed damages, interpreting *Carey* as standing for the proposition that “[p]resumed damages are appropriate when there is a great likelihood of injury coupled with great difficulty in proving damages.”¹⁷⁰

Commentators have noted that *Carey*’s language does not *require* that courts bar presumed damages, and that the Court’s “considerations concerning proof of damages for mental or emotional distress may be wholly inapplicable to the presumption of damages for loss of reputation or for injury to one of the special constitutional interests which a court may find.”¹⁷¹ Furthermore, *Stachura* seems to explicitly allow presumed damages in voting right decisions.¹⁷² Perhaps, then, presumed damages may be allowed in constitutional torts when they “satisfy the common law rationale for presuming damages.”¹⁷³

2. Refusing Presumed Damages

Other courts have interpreted *Stachura* to bar presumed damages and require proof of actual injury for anything beyond nominal damages. In *Norwood v. Bain*,¹⁷⁴ the Fourth Circuit affirmed the district court’s refusal to award damages for a Fourth Amendment violation.¹⁷⁵ The Court interpreted *Carey* and *Stachura* as standing for the holding that damages may be only recovered “for any actual harms caused by the violation.”¹⁷⁶ If the plaintiff attempted to prove injury, but the Court found the proof inadequate:

¹⁷⁰ *Trevino v. Gates*, 99 F.3d 911, 921 (9th Cir. 1996).

¹⁷¹ See Hess, *supra* note 26, at 306 (“Some courts have read *Piphus* as barring the presumption of damages in all section 1983 cases, but such a result is not required by the reasoning above. Injuries associated with violations of different constitutional rights almost certainly will not present the problems of causation peculiar to due process violations.”)

¹⁷² *Stachura*, 477 U.S. at 311 n. 14 (noting that a voting right violation award “did not rest on the ‘value’ of the right to vote as an abstract matter; rather, the Court recognized that the plaintiff had suffered a particular injury—his inability to vote in a particular election—that might be compensated through substantial money damages.”)

¹⁷³ Hess, *supra* note 26, at 306.

¹⁷⁴ 143 F.3d 843 (4th Cir. 1998).

¹⁷⁵ *Norwood*, 143 F.3d at 858–59.

¹⁷⁶ *Id.* at 855.

The only evidence of emotional distress came in the form of testimony by Norwood and four other class members that they felt annoyance, humiliation, and indignity at being subjected to the searches. None testified that their emotional upset was caused by oppressive or threatening conduct by the checkpoint officers.... Under the circumstances, we agree with the district court that this testimony failed to prove emotional distress other than any that may have been experienced as a sense of indignity from the very violation of a constitutional right. And that, as indicated, is not a compensable harm in §1983 litigation.¹⁷⁷

Commentators have noted that “*Siebert* and *Norwood* seem irreconcilable.”¹⁷⁸ However, the *Norwood* holding still leaves room for presumed damages. The fact that the Court found the plaintiff’s evidence *inadequate* could mean that they thought adequate proof could have been presented had the plaintiff done a better job of testifying, like the plaintiff in *Walje* with his pregnant wife and nervous breakdown.¹⁷⁹ However, requiring such testimony would render presumed damages unnecessary because actual proof would have been presented.

IV. PRESUMED DAMAGES

Although the Supreme Court has grounded its analysis about presumed damages in constitutional torts in a discussion about defamation,¹⁸⁰ little analysis has been done about presumed damages with defamation as a starting point. This article sets out to harmonize the application of presumed damages in defamation cases with the prospects of presumed damages in constitutional torts.

A. Common Law Damages

The common law torts system recognizes three classes of damages: nominal, punitive, and compensatory.¹⁸¹ Nominal damages are a trifling sum, usually not to exceed one dollar, which serves as a symbolic declaration that the defendant has invaded a legally protected interest

¹⁷⁷ *Id.*

¹⁷⁸ NAHMOD, WELLS & EATON, *supra* note 2, at 549.

¹⁷⁹ *Walje*, 827 F.2d at 13.

¹⁸⁰ *See, e.g., Carey*, 435 U.S. at 260.

¹⁸¹ *See, e.g., D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES* §3.1 (1973); *RESTATEMENT (SECOND) OF TORTS* §§ 901–909 (1977).

of the plaintiff.¹⁸² They are awarded in cases where the plaintiff succeeds in proving the merits of his claim, but fails to prove actual injury. Punitive damages are awarded when the defendant's conduct has been egregious.¹⁸³ They are typically awarded to deter or punish the defendant for especially bad behavior.

Compensatory damages, on the other hand, are awarded to pay the costs of the harm suffered by the plaintiff in an attempt to make the plaintiff "whole", or to bring him back to his *ex ante* position before the tort occurred.¹⁸⁴ Types of harms that can be compensated include special damages such as medical bills, and general damages such as projected loss of income or emotional or physical suffering.¹⁸⁵

Compensatory damages are the default type of damages under the common law of torts, functioning to compensate injured plaintiffs while deterring defendants from undesirable conduct.¹⁸⁶ Compensatory damages, like other elements of the lawsuit, are the plaintiff's burden to prove to a preponderance of evidence.¹⁸⁷ In some cases, however, like where the cause of action is based on the invasion of certain "dignitary" interests, the plaintiff does not bear the burden of proof.¹⁸⁸ This is where presumed damages come in.

B. Common Law Presumed Damages

¹⁸² *See, e.g., Carey*, 435 U.S. at 266 (citing D. DOBBS, LAW OF REMEDIES § 3.8 (1973); C. MCCORMICK, LAW OF DAMAGES §§ 20-22 (1935); RESTATEMENT OF TORTS § 907 (1939)).

¹⁸³ D. DOBBS, *supra* note 181, at §3.8.

¹⁸⁴ *Id.* at §3.1.

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g., Stachura*, 477 U.S. at 307 ("To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation. . . personal humiliation, and mental anguish and suffering. . . Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory*—damages grounded in determinations of plaintiffs' actual losses.") (emphasis in original).

¹⁸⁷ The plaintiff does not need to prove compensatory damages to a level of mathematical precision, and usually the jury ultimately determines what it believes the appropriate amount of compensation is, but the plaintiff does bear the burden of proof.

¹⁸⁸ Dignitary invasions are "injuries to the personality. . . an intangible right." D. DOBBS, *supra* note 181, at §7.1. These include violations of privacy and violations of the right to vote. *See, e.g., Anderson*, *supra* note 13, at 749.

Presumed damages are compensatory damages that are awarded without any actual evidence of injury.¹⁸⁹ This means that the plaintiff “is relieved of the necessity of producing any proof whatsoever that he has been injured”, and the jury is allowed to “presume” that injury took place.¹⁹⁰ This doctrine “provides that substantial injury may be *presumed* to flow from certain tortuous acts, even though the plaintiff has presented no proof of actual loss, when the torts invade interests that are intangible, rather than physical or economic.”¹⁹¹

Today, defamation is the only tort that applies the presumed damages doctrine, making it an “odddity” of tort law.¹⁹² Commentators have summarized presumed damages in these cases as producing the result that:

The plaintiff is relieved from the necessity of producing any proof whatsoever that he has been injured. From the fact of the publication of the defamatory matter by the defendant, damage to the plaintiff is said to be “presumed,” and the jury, without any further data, is at liberty to assess substantial damages, upon the assumption that the plaintiff’s reputation has been injured and his feelings wounded.¹⁹³

Courts have been allowing juries to presume that damage occurs from defamatory utterances for centuries, and damages were presumed for libel from as early as 1670.¹⁹⁴

¹⁸⁹ See *Dalton v. Meister*, 188 N.W.2d 494, cert. denied, 405 U.S. 934 (1971); *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579 (5th Cir. 1967).

¹⁹⁰ Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 120, 127 (1934).

¹⁹¹ *Fourth Amendment Violations*, *supra* note 12, at 193.

¹⁹² *Gertz*, 418 U.S. at 349. See also Anderson, *supra* note 13, at 749 (noting the uniqueness of presumed damages for defamation cases:

As Justice Powell said in *Gertz v. Robert Welch, Inc.*, the presumed damage rule makes defamation an oddity of tort law. Trespass law permits presumed damages, for example, but the modern rule seems to be that the plaintiff may recover only nominal damages unless he proves that the trespass caused actual harm. The same is true of most constitutional torts. Courts also have employed something similar to the presumption of harm in cases involving the unconstitutional denial of the right to vote. The United States Supreme Court, however, has refused to adopt a general rule presuming harm in civil rights cases. Thus, a plaintiff who is deprived of procedural due process is entitled only to nominal damages unless he proves that he has suffered actual injury. In contrast, the presumed damages in defamation cases are not limited to nominal sums, and awards are often substantial.)

¹⁹³ McCormick, *supra* note 190, at 127.

¹⁹⁴ RESTATEMENT (SECOND) OF TORTS § 568 comment b (1938).

The presumption of harm is not only relevant in defamation *per se* cases, but “in the absence of a statutory limitation, presumed damages are potentially available in every libel or slander case.”¹⁹⁵ In non-*per se* cases, once the plaintiff is able to prove special damages, he is entitled not only to those damages, but also to presumed damages.¹⁹⁶

Presumed damages are useful because it is consistently difficult for plaintiffs in defamation cases to prove actual damages. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Supreme Court commented that the “rationale of the common law rules has been the experience and judgment of history that ‘proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.’”¹⁹⁷ Furthermore, the Court also notes that presumed damages help by “further[ing] the state interest in providing remedies for defamation by ensuring that those remedies are effective.”¹⁹⁸ One commentator has wryly noted that “[i]ndeed, it goes without saying that any remedy involving an award of damages without proof of injury is bound to be *quite* effective.”¹⁹⁹

However, there are two meaningful limits on presumed damages in defamation. First, presumed damages are constitutionally barred from being applied in cases where the defendant is merely negligent. In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that the common law of presumed damages is incompatible with the First Amendment freedoms—and therefore unconstitutional—where the action is based on negligence, rather than a “showing of knowledge of falsity or reckless disregard for the truth.”²⁰⁰

¹⁹⁵ Anderson, *supra* note 13, at 748.

¹⁹⁶ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 163 comment 3 (1976)).

¹⁹⁷ *Dun & Bradstreet, Inc.*, 472 U.S. at 760 (quoting WILLIAM PROSSER, LAW OF TORTS 765 §112 (4th ed. 1978)).

¹⁹⁸ *Id.* at 761.

¹⁹⁹ SMOLLA, *supra* note 25, at § 9:17 (emphasis in original).

²⁰⁰ *Gertz*, 418 U.S. at 324.

The most recent Restatement of the Law of Torts emphasizes this limitation by stating that defendants are only liable for the “proved, actual harm caused to the reputation of the person defamed.”²⁰¹ But the American Law Institute acknowledges the “traditional common law rule allowing recovery in the absence of proof of actual harm, for the harm that normally results from such a defamation” in its caveat.²⁰² The Institute also notes that the award “in the absence of proof, for harm to reputation that would normally be assumed to flow from a defamatory publication of the nature involved” affords “little control by the court over the jury in assessing the amount of damages.”²⁰³

Second, in cases where presumed damages are allowed, courts try to police the magnitude of the awards.²⁰⁴ While there is almost always a certain amount of flexibility involved when juries are given the task of awarding presumed damages, courts place limits and look to the social policy of compensation as a potential guiding principal. For example, in *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*,²⁰⁵ the Court noted that:

In a case lacking proof of economic injury and where the defamatory statements were publicized to a relatively limited audience. . . it would be inappropriate to award presumed damages that are exponentially greater than have been awarded in past cases. While we are mindful that under the doctrine of presumed damages a party is not required to show specific loss, there must be *some meaningful limit* on the magnitude of a jury award when it is arrived at by pure speculation. Presumed damages serve a compensatory function—when such an award is given in a substantial amount to a party who has not demonstrated evidence of concrete loss, it becomes questionable whether the award is serving a different purpose.²⁰⁶

²⁰¹ RESTATEMENT (SECOND) OF TORTS § 621 (1977).

²⁰² *Id.* (“The Institute takes no position on whether the traditional common law rule . . . may constitutionally be applied if the defendant knew of the falsity of the communication or acted in reckless disregard of its truth or falsity.”).

²⁰³ RESTATEMENT (SECOND) OF TORTS § 621 comment a (1977).

²⁰⁴ *See, e.g.*, SMOLLA, *supra* note 25, at § 9:17.

²⁰⁵ 381 F. 3d 717 (7th Cir. 2004).

²⁰⁶ *Id.* at 734–35(emphasis added) (the Court concluded that an “award of \$1 million is sizeable enough to compensate Republic for the damage that we presume was caused to its reputation in the tobacco industry and the harm that we presume was done to the business relationship it cultivated over the years, yet not so unsubstantial as to be out of line with other presumed damages awards allowed under Illinois law.”).

Although presumed damages may be limited by the courts, they cannot be said to be merely nominal. They are quite substantial at times. In *Republic Tobacco Co.*, the Court reduced the district court’s presumed damages award of \$3.36 million to \$1 million.²⁰⁷

C. Limitations on Presumed Damages

Presumed damages have been limited in very significant ways by constitutional interpretation. This type of limitation is worth bearing in mind because if the problem is that presumed damages award too much in constitutional torts, similar limitations could be outlined.

As the Supreme Court stated in *Gertz*, presumed damages are “an oddity in tort law” that “allows recovery of purportedly compensatory damages without evidence of actual loss.”²⁰⁸ The problem with presumed damages, which the Supreme Court had to address, was whether it would result in censorship by allowing juries to “punish unpopular opinion rather than to compensate for injury sustained” by the publication.²⁰⁹ A similar problem stands in constitutional torts, where there is the danger that an unfettered jury will award damages without regard to the injury sustained.²¹⁰

The Court decided that presumed damages doctrine had to comply with the standard set out in *New York Times Co. v. Sullivan*.²¹¹ This meant that presumed damages are “necessarily displaced” when the defendant is tried with a negligence standard.²¹² However, presumed damages themselves do not violate “fundamental notions of fairness”, but are allowed in cases

²⁰⁷ *Id.*

²⁰⁸ *Gertz*, 418 U.S. at 349.

²⁰⁹ *Id.* This also emphasizes the compensatory directive of presumed damages.

²¹⁰ *See, e.g., Stachura*, 477 U.S. at 304–305.

²¹¹ 376 U.S. 254 (1964). This was a case which established the actual malice standard. Proof of actual malice had to be produced before the press can be liable for defamation presumed damages when reporting about public figures. Actual malice requires proof of knowledge of falsity or reckless disregard of falsity. This is considered to be a very high burden of proof on the plaintiff.

²¹² *Gertz*, 418 U.S. at 349–50.

not barred by *New York Times*.²¹³ Furthermore, although presumed damages need to be reasonable, a jury instruction that allowed discretion by noting that there is no “fixed or mathematical rule” in assessing compensation did not constitute an unconstitutional use of presumed damages.²¹⁴ The Court in *Gertz* also made it clear that actual injury is not limited to special damages.²¹⁵

In a later case, *Dun & Bradstreet Inc.*, the Supreme Court limited the *Gertz* ruling to cases of public concern.²¹⁶ Because *Dun & Bradstreet Inc.* involved allegations that were not a matter of public concern, the Court found that the First Amendment interest was less important and that presumed damages could actually serve the state interest in compensation.²¹⁷ Hence, presumed damages may be allowed—even without a showing of constitutional malice—in private concern cases.²¹⁸

Going further, courts have also found that plaintiffs sometimes have a right to presumed damages. For example, the Seventh Circuit has overturned a district court holding, finding that the lower court erred in not allowing the corporate plaintiff to rely on the presumption of

²¹³ *Sleem v. Yale University*, 843 F. Supp. 57, 66–67 (M.D. N.C. 1993) (emphasizing the “perceived need to compensate victims of defamation whose reputation may be harmed even though specific proof of actual damages may be difficult.”). See, e.g., *Sprague v. American Bar Ass’n.*, 276 F. Supp. 2d 365, 373 (E.D. Pa 2003) (leaving “untouched” damages that were awarded where constitutional malice was actually proven); *Haskins v. Bayliss*, 440 F. Supp. 2d 455, 464 (D. Md. 2006) (emphasizing that presumed damages are not “constitutionally” barred in constitutional malice cases).

²¹⁴ *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009 (6th Dist. 1990). See also *Sommer v. Gabor*, 48 Cal. Rptr. 2d 235, 246–47 (2d Dist. 1995) (approving an instruction for presumed damages that told the jury to determine “those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feelings. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar”).

²¹⁵ *Gertz*, 418 U.S. at 350 (“Indeed, the more customary types of actual harm inflicted by a defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering . . . there need be no evidence which assigns an actual dollar value to the injury.”).

²¹⁶ See *Dun & Bradstreet Inc.*, 472 U.S. at 757–61.

²¹⁷ *Id.* at 761.

²¹⁸ *Id.*

damages authorized by state law because constitutional malice was actually proven.²¹⁹ Although presumed damages are compensatory, and should represent projected injury, courts have also confusingly indicated that proving actual losses does not preclude an additional award of presumed damages.²²⁰

D. The Rationale Behind Presumed Damages

In order to consider whether presumed damages make sense for constitutional torts, it makes sense to examine the reasons why presumed damages make sense for defamation. There are two main arguments for allowing presumed damages for the protection of the reputation of the plaintiff: (1) that it is often too difficult to prove harm to reputation, and (2) they are necessary to vindicate the reputation of the plaintiff.²²¹

1. Difficulty of Proof

In his dissent in *Gertz*, Justice White stated that the presumption of damage reflects “the judgment of experience that some publications are so inherently capable of injury, and actual *injury so difficult to prove*, that the risk of falsehood should be borne by the publisher.”²²² This proposition—that proving injury to reputation poses is extremely difficult for the plaintiff—is accepted by the Court in *Dun & Bradstreet*.²²³

However, commentators have noted that a problem with Justice White’s position is that it seems to:

²¹⁹ See *Brown & Williamson Tobacco Co. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987). The Court examined the evidence and concluded that the message in question was very powerful. This case was cited in *Republic Tobacco Co.*, where the Court declined to affirm presumed damages that it deemed “exponentially greater” than in prior cases, because it felt like the purpose went beyond compensatory. *Republic Tobacco Co.*, 381 F.3d at 734–35.

²²⁰ See *Weller v. American Broadcasting Companies, Inc.*, 283 Cal. Rptr. 644, 659 (1st Dist. 1991). See also *WJLA-TV v. Levin*, 564 S.E. 2d 383, 395–96 (2002) (upholding a finding of both presumed and actual damages for \$2 million in favor of a doctor accused of assaulting his patients because of the “grave nature” of the allegations and the “inevitable damage” to his reputation).

²²¹ These two arguments are found widely in the literature. See, e.g., DARIO MILO, *DEFAMATION AND FREEDOM OF SPEECH* 230 (Oxford University Press 2008) (laying out the two main arguments).

²²² *Gertz*, 418 U.S. at 376 (dissenting) (emphasis added).

²²³ See generally *Dun & Bradstreet*, 472 U.S. 749 (1985).

[F]ail[] to take account of the different position in other areas of the law protecting reputation, such as those cases of slander where the allegations are not actionable *per se*, injurious falsehood, passing-off, and damages for loss of reputation as a result of breach of contract. In these areas, the claimant will not succeed in recovering damages unless he tenders proof of special damage in the case of slander and injurious falsehood, damage to goodwill in the case of passing-off, and financial loss in the case of a breach of contract that impacts upon reputation. It has never been suggested that the difficulties of proving loss for these analogous actions render the claimant's right worthless. Indeed, historically the action for slander required proof of damage in all cases, and this appears not, at the time, to have stemmed the tide of slander actions. Furthermore, even in modern English defamation law, there are at least three areas from which it is implied that reputational harm is capable of proof.²²⁴

Commentators have identified four types of relational harm that defamation plaintiffs could seek to prove: interference with existing relationships (whether social, business, or family), interference with future relationships, destruction of a favorable public image, and creating a negative public image for someone who had no previous public image.²²⁵ It has been suggested that plaintiffs could prove these harms without “insurmountable difficulties,” so that presumed damages should not be allowed.²²⁶ Other commentators have noted that specific elements—for example—proof of mental distress, should be required to the extent that it allows cross-examination of the plaintiff.²²⁷

Another argument advanced against presumed damages is that juries may be either intentionally or unintentionally incorrect in estimating the cost of the damages. Presumed damages may lead “to the absurd position, one highly detrimental to free speech, that a claimant

²²⁴ See MILO, *supra* note 221, at 231.

²²⁵ See Anderson, *supra* note 13, at 765–67. However, Anderson's more recent article argues that presumed damages might actually be necessary! See generally David A. Anderson, *Rethinking Defamation*, 48 ARIZONA L. REV. 1047 (2006).

²²⁶ See Kevin P. Allen, *The Oddity and Odyssey of 'Presumed Damages' in Defamation Actions Under Pennsylvania Law*, 42 DUQUESNE L. REV. 495, 507 (2004) (making the argument in relation to Pennsylvania law specifically).

²²⁷ See MILO, *supra* note 221, at 233 (“The claimant should be required to aver that he has suffered mental distress and give evidence and be cross-examined in this regard. . . . There are, in any event, a number of torts where mental distress is recoverable although damage is not presumed, not least aspects of US defamation law.”)

may recover damages even where his reputation has demonstrably been unaffected by the publication.”²²⁸

2. Vindication of Reputation

Another argument for presumed damages, advanced internationally, is that they are necessary to properly vindicate the reputation before all of society.²²⁹ Commentators who disagree with this argument propose that “declarations of falsity and apology or correction remedies are much better suited to vindicating the reputation of the claimant.”²³⁰ Furthermore, even if we assume that damages “are of some relevance” in vindicating reputation, “harm to reputation should first be established” because it is “illogical to seek to vindicate a claimant’s reputation where the claimant has suffered no actual harm”.²³¹

However, presumed damages may be argued to be necessary “if one accepts the implications of the argument that reputation is based on dignity.”²³² Dignity transcends beyond the individual interest of the plaintiff; it is a part of a larger interest of society—that is, “society’s interest in its rules of civility.”²³³ Presumed damages contribute to the deterrence sanction aspect of defamation law.²³⁴ This is reminiscent of some of the language used in constitutional tort arguments about presumed damages—that they protect interests that transcend those of the plaintiff to the society at large.²³⁵

²²⁸ *Id.* The author cites *New York Times v. Sullivan*, where Justice Black commented that after the case Sullivan’s reputation might have actually improved in Alabama, but where he was awarded \$500,000 by the jury.

²²⁹ *Id.*

²³⁰ *Id.* at 233–34.

²³¹ *Id.* at 234 (“Stated differently, to the extent that the desire is to sanction a breach of civility rules, this is acceptable only in circumstances where the claimant is able to establish some harm to reputation. The vindication point, it is submitted, is parasitic on the ability of the claimant to show that he has suffered damage to reputation.”)

²³² MILO, *supra* note 221, at 234.

²³³ Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 711–173 (1986) (proposing that presumed damages help create a “license for juries to sanction defendants who trespass beyond the bounds of propriety”).

²³⁴ See, e.g., Jonathon Garret Erwin, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 675 (2000).

²³⁵ See, e.g., Hess, *supra* note 26, at 301.

However, in the defamation context, the Supreme Court has restricted the availability of presumed damages, which suggests that society’s interest in vindicating the rights of the defamed—at least according to the court—is limited. “If the subject matter of the defamation is of public concern, or the plaintiff is a public figure or public official, they may be awarded only upon a showing that the defendant knew the statement was false or acted with reckless disregard of its truth or falsity.”²³⁶

V. PRESUMED DAMAGES AS APPLIED TO CONSTITUTIONAL TORTS

Presumed damages has been suggested as a means of bringing “more consistency and equity” to damage awards for constitutional torts that do not cause “substantial measurable pecuniary loss.”²³⁷ In *Carey v. Phipus*, the Supreme Court entrusted the lower courts with the responsibility to fashion the federal rules of constitutional tort damages by adapting principles from the common law of torts.²³⁸ Although the Supreme Court has forbidden presumed damages in specific circumstances,²³⁹ it has determined that in general, “the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights.”²⁴⁰ However, this still leaves some room for questioning how much of presumed damages should be imported into constitutional torts—to what extent, and with what limitations. Before addressing this question, it

²³⁶ NAHMOD, WELLS, & EATON, *supra* note 2, at 551 (citing DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 201 (3d ed. 2002)).

²³⁷ *Fourth Amendment Violations*, *supra* note 12, at 193.

²³⁸ *Carey*, 435 U.S. at 257–59 (“[O]ver the centuries, the common law of torts has developed a set of rules to implement the principles that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under §1983 as well.”)

²³⁹ Specifically, in *Carey*, the Court does not allow presumed damages for mental and emotional distress caused by the denial of procedural due process. *Id.* at 259–64.

²⁴⁰ *Id.* at 259 (citing *Bivens*, 403 U.S. at 409 (Harlan, J., concurring in judgment)).

is also necessary to delineate conflicting uses of the term “presumed damages” in the constitutional torts jurisprudence.

A. Two Theories of Presumed Damages in Constitutional Torts

1. Non-Compensatory Presumed Damages

There has been some confusion in what presumed damages actually represent. Almost all agree that presumed damages are damages awarded without proof of actual injury, but there are at least two different interpretations of what the damages represent. On one hand, Professor Dobbs has suggested that “the wrong is said to be damage in and of itself.”²⁴¹ This approach can be squared with the one taken by the district court judge in *Stachura*, which was later ruled erroneous by the Supreme Court overturned. The district court judge allowed his jury to award presumed damages with the instructions:

The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider 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.²⁴²

Professor Dobbs’ interpretation could be squared with these jury instructions—both views of presumed damages center on paying the plaintiff *for the wrong done* without regard to the harm actually caused. Indeed, if the jury believes that the right violated is “of importance” in the United States, the wrong of violating such an important right is what Professor Dobbs addresses in his interpretation. The more important the right violated, the more damages the wrong calls for. I will refer to this as the “non-compensatory” interpretation of presumed damages, because the damages are meant to rectify the wrongs imposed, not the injuries sustained. This is to be contrasted with a “compensatory” interpretation of presumed

²⁴¹ DOBBS, *supra* note 181.

²⁴² *Stachura*, 477 U.S. at 303 (citing the lower court’s jury instructions at Ap. 94).

damages, where damages are awarded because there was actual injury, but this injury is just too difficult to prove. Therefore, the focus of non-compensatory presumed damages are on the wrong done; the focus of compensatory presumed damages are on the injuries sustained.

In the context of constitutional torts, the non-compensatory interpretation of presumed damages is inconsistent with defamation doctrine, and also rejected by two major constitutional tort cases, *Carey* and *Stachura*.²⁴³ The *Stachura* court chastised the district court's approach for focusing "not on compensation for provable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter. *Carey* establishes that such an approach is impermissible."²⁴⁴

2. Compensatory Presumed Damages

A rejection of the non-compensatory view of presumed damages does not necessarily imply a rejection of presumed damages in general. In compensatory presumed damage cases, presumed damages are not awarded because the wrong *is* the damage in and of itself. Damages are presumed to exist, *apart* from the wrong, but they are too difficult to prove, in a practical sense.

Compensatory presumed damages are the only explanation for presumed damages in defamation. In defamation, the Supreme Court has ruled that the "rationale of the common law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'"²⁴⁵ The

²⁴³ See *Stachura*, 477 U.S. at 307 (interpreting *Carey*, 435 U.S. at 255).

²⁴⁴ *Id.*

²⁴⁵ *Dun & Bradstreet, Inc.*, 472 U.S. at 760 (quoting WILLIAM PROSSER, LAW OF TORTS 765 §112 (4th ed. 1978)). See also *Carey*, 435 U.S. at 262 ("The doctrine [of presumed damages in defamation] has been defended on the grounds that those forms of defamation that are actionable *per se* are virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove. . . Moreover, statements that are defamatory

Supreme Court does not say that defamation is a wrong that needs to be compensated in and of itself. Instead, they assume that injury *did* flow from defamation, just as it would from any other tort, but that in the special case of defamation, damages are systematically difficult to prove. This differentiates it from the non-compensatory reading that the wrong *is* the injury.

The Court in *Carey* defends presumed damages on the grounds that in cases where they apply, the wrong is “virtually certain to cause serious injury” and “this kind of injury is extremely difficult to prove.”²⁴⁶ This is the criteria it uses to deny presumed damages for the plaintiff: “although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither *the likelihood of such injury* nor the *difficulty of proving* it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.”²⁴⁷

By adopting the defamation interpretation of presumed damages, which is that presumed damages should be allowed in lieu of compensatory damages when those damages are likely to have occurred but are difficult to prove, the *Carey* court rejects that idea that presumed damages are appropriate for wrongs that are injuries in and of itself. Instead, the injury is supposed to exist independent of the wrong—or at least is very likely to exist—but is just too difficult to prove.

The Court in *Stachura* reinforces the *Carey* interpretation of presumed damages. *Stachura* explicitly rejects the district court judge’s instruction that presumed damages could be awarded measured by the “importance” of the constitutional right, describing this as “noncompensatory.”²⁴⁸ The Court defines presumed damages as “a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged

per se, by their very nature, are likely to cause mental and emotional distress, as well as injury to reputation, so there arguably is little reason to require proof of this kind of injury either.”).

²⁴⁶ *Carey*, 435 at 262.

²⁴⁷ *Id.* at 264.

²⁴⁸ *Stachura*, 477 U.S. at 309.

injury”²⁴⁹—available for an injury that is “likely to have occurred, but difficult to establish.”²⁵⁰ Instead of being awarded for because the wrong itself is the injury, as the non-compensatory interpretation suggests, presumed damages are awarded to “roughly *approximate* the harm that the plaintiff” actually “*suffered*, and thereby compensate for harms that may be impossible to measure.”²⁵¹

The difference between the non-compensatory view of presumed damages and the compensatory view of presumed damages is that the compensatory view only calls for presumed damages under specific circumstances—where the injury probably *did* occur, but is difficult to prove.

B. Uniting the Two Interpretations of Presumed Damages

Although the Supreme Court seems to have rejected non-compensatory presumed damages and emphasized that damages need to be compensatory,²⁵² there is still a conceptual way to award presumed damages based on the violations of rights. If the Court chooses to consider a constitutional violation an injury in and of itself, then any constitutional violation would constitute an injury, which would be compensable. This way, the damages would be compensatory because they are compensating the plaintiff for an injury. This requires a legal recasting of injury to include the violation itself.

Such a recasting is not as improbable as it may appear. Jurisprudence for right-to-vote cases seem to perform exactly this type of recasting. In *Nixon v. Herndon*,²⁵³ the Court held that a plaintiff who was illegally deprived of his right to vote did suffer a compensable injury.²⁵⁴ The

²⁴⁹ *Id.* at 310.

²⁵⁰ *Id.* at 310–11 (citing *Carey*, 435 U.S. at 262).

²⁵¹ *Id.* at 311 (emphasis added).

²⁵² *See, e.g., supra* notes 243–244 and accompanying text.

²⁵³ *Nixon*, 273 U.S. at 536.

²⁵⁴ *See id.* *See also Lane v. Wilson*, 307 U.S. 268 (1939) (describing the Court’s holding in *Nixon*).

Court characterized the inability to vote in a particular election as an actual injury. It did not rest its holding on the “value” of the right to vote in the abstract, but found an injury that it felt could be compensated for.²⁵⁵ This seems to suggest that the Court is applying the compensatory view of presumed damages—the damages pay for the actual deprivation of the vote as an injury; it does not attempt to quantify the value of the right to vote in the abstract. However, it is also non-compensatory in the sense that the focus is on the deprivation of the right to vote, and not on any external or extrinsic injuries beyond the violation.

The line of cases preceding *Nixon* also reveals that Courts speaking of damages in terms of an injury that is the violation itself:

In the eyes of the law, [the] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right.²⁵⁶

Although the majority opinion in *Stachura* characterizes the right-to-vote cases as involving “nothing more than an award of presumed damages for a nonmonetary harm that cannot easily be quantified” despite speaking of “damages for the value of the right to vote,”²⁵⁷ this is not wholly consistent with the language in *Wayne* that presumed damages arise because the right to vote “is so valuable.”²⁵⁸

VI. PRESUMED DAMAGES: FROM DEFAMATION TO CONSTITUTIONAL TORTS

The motivation behind presumed damages in the defamation context is that harm done to the plaintiff’s reputation will likely be hard to trace or prove. It would be potentially impossible for the plaintiff to demonstrate who has read the defamatory material, and as a result, change

²⁵⁵ See *Nixon*, 273 U.S. at 540 (“the petition... seeks to recover for private damage.”).

²⁵⁶ *Wayne v. Venable*, 260 F.64, 66 (8th Cir. 1919).

²⁵⁷ *Stachura*, 477 U.S. 299 n.14.

²⁵⁸ *Wayne*, 260 F.64 at 66.

behavior with respect to the plaintiff. So in order to compensate injury at all, the Supreme Court has ruled that proof of actual harm is not required.²⁵⁹

“If violations of substantive constitutional rights do not produce harm by their insidious effects on unknown persons, it may be misleading to compare them to defamation.”²⁶⁰ But this does not mean that presumed damages are necessarily inappropriate. “Isn’t the harm resulting from a constitutional violation even more inchoate, even harder to prove, and consequently more deserving of presumed damages, than the harm to reputation produced by libel per se?”²⁶¹

This question brings up a noteworthy point: most advocates of applying presumed damages to constitutional torts do *not* begin from a defamation-type rationale of the empirical difficulty of proof. Instead, they focus on the importance of the rights being protected by constitutional torts.

A. Theories of Presumed Damages Not Based in Common Law

1. Special Interests

Carey and *Stachura* bar juries from awarding damages based on the abstract, inherent value of a constitutional right.²⁶² However, lower courts have sometimes understood substantive constitutional rights to create special interests beyond those of normal common law torts.²⁶³ In *Hobson v. Wilson*, the Court of Appeals for the District of Columbia Circuit listed the injuries compensated under common law to include emotional distress, loss of reputation, and diminished earning capacity.²⁶⁴ But in addition to this list, they added the injury of losing one’s rights to

²⁵⁹ *Dun & Bradstreet, Inc.*, 472 U.S. 749, 760–61. *See also* NAHMOD, WELLS, & EATON, *supra* note 2, at 550.

²⁶⁰ NAHMOD, WELLS, & EATON, *supra* note 2, at 550.

²⁶¹ *Id.*

²⁶² *See supra* Part III.B.

²⁶³ *See, e.g., Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978).

²⁶⁴ *Hobson*, 737 F.2d at 10.

“associational privacy” and to engage in political protest.²⁶⁵ This has been cited as an example of the special interests theory, where constitutional “rights create special interests apart from those recognized as compensable at common law.”²⁶⁶

Another example of the special interests theory is in *City of Watseka v. Illinois Public Action Council*,²⁶⁷ a First Amendment case where the Seventh Circuit Court of Appeals affirmed the lower court’s award of damages not only for the loss of solicitation revenue but also for the “deprivation of the group’s right to spread its political message through canvassing.”²⁶⁸

The special interests theory is consistent with Justice Marshall’s concurring opinion in *Stachura*, which he wrote to “emphasize that the violation of a constitutional right, in proper cases, may itself constitute a compensable injury.”²⁶⁹ This concurrence was joined by Justices Brennan, Blackmun, and Stevens.²⁷⁰

2. Individual/Societal Interests

The Court in *Carey v. Piphus* struck down the defendant’s argument that “damages should be presumed to flow from every deprivation of procedural due process.”²⁷¹ Instead, the Court found that if injury “caused by the denial of procedural due process itself is compensable under § 1983,” that “neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding” presumed damages—that is, “compensatory damages without proof that such injury actually was caused.”²⁷² This language “suggests strongly that procedural due process rights do not protect specially compensable injuries apart from the injuries compensable

²⁶⁵ *Id.*

²⁶⁶ See Hess, *supra* note 26, at 296–97.

²⁶⁷ 796 F.2d 1547 (7th Cir. 1986), *aff’d*, 479 U.S. 1048 (1987).

²⁶⁸ *Illinois Public Action Council*, 796 F.2d at 1547; Hess, *supra* note 26, at 298.

²⁶⁹ *Stachura*, 106 S. Ct. at 2546 (Marshall, J., concurring).

²⁷⁰ *Id.*

²⁷¹ *Carey*, 435 U.S. at 259–64.

²⁷² *Id.* at 264.

at common law,” but the “task of dividing rights into two groups based on whether they protect special compensable constitutional interests is not easy.”²⁷³

Commentators have noted that “the procedural/substantive distinction can only be a starting point in drawing a line between rights that do and rights that do not give rise to constitutional, compensable interests.”²⁷⁴ Furthermore, *Stachura* makes it clear that *Carey* “does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than ‘mere’ procedural safeguards.”²⁷⁵ Commentators have struggled to articulate the implications of *Stachura*.

Stephen Andrew Hess, for example, has suggested that the “threshold question in evaluating the interests protected by a particular right is whether the right is instrumental.”²⁷⁶ If the right is instrumental, then “the presumption of damages for its mere violation and the claim that the interests it protects” are specifically “barred” by *Carey*.²⁷⁷ This is because even when one’s instrumental rights are violated, the “ultimate interests such rights are designed to protect” still remain unharmed.²⁷⁸ As the Court says in *Carey*, “[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.”²⁷⁹

Hess—as well as the *Carey* court—considers all procedural due process rights as instrumental.²⁸⁰ But Hess notes that procedural due process rights “are not the only instrumental rights” that might be at issue in a Section 1983 action. For this, he gives the *Carey* example of

²⁷³ Hess, *supra* note 26, at 298.

²⁷⁴ *Id.*

²⁷⁵ *Stachura*, 477 U.S. at 309.

²⁷⁶ Hess, *supra* note 26, at 299.

²⁷⁷ *Id.* (“The heart of *Piphus*’s holding is that procedural due process rights are merely instrumental. . .”)

²⁷⁸ *Id.*

²⁷⁹ *Carey*, 435 U.S. at 254. *See also* Hess, *supra* note 26, at 299.

²⁸⁰ *Carey*, 435 U.S. at 254; Hess, *supra* note 26, at 299 (“It is easy to identify procedural due process rights as being instrumental.”)

students who are suspended without due process, but whom would have been suspended even if they did have due process, and also the hypothetical of a police search that was made on probable cause but violated the Fourth Amendment due to some flaw of the warranting process.²⁸¹ Hess also determines that equal protection rights are instrumental, because they “reply on external standards in determining what the law permits” and “only ensure that people are treated equally” but “set no independent standard for the substantive manner in which those people may be treated.”²⁸²

On the flip side, just because a right is substantive “should not by itself compel the conclusion that the interests it protects are compensable.”²⁸³ The next test should be whether the interests protected by the rights are “individual interests” rather than “societal interests.”²⁸⁴ A right protects an individual interest when the “violation of the right harms primarily an individual or a discrete group of people.”²⁸⁵ For example, the right not to be subjected to cruel and unusual punishment is a right that protects an individual interest.²⁸⁶ A right protects a societal interest when the right operates “to prohibit certain governmental activity which is harmful to society in general.”²⁸⁷ An example is the first amendment right to a religion-neutral government.²⁸⁸

The plaintiff should not be allowed to recover for harms to societal interests, according to Hess, because of two reasons—first, because the “class of victims is necessarily every citizen

²⁸¹ See Hess, *supra* note 26, at 299–300.

²⁸² *Id.* at 300 (“Although equal protection rights may not be considered procedural *per se*, the reasoning of *Piphus* implies that the injury suffered by the victim of an equal protection violation does not include any special constitutional interest, but only the loss of the privileges afforded others.”)

²⁸³ *Id.*

²⁸⁴ *Id.* at 302 (“Therefore, just as it is necessary to distinguish instrumental from substantive rights, it is also necessary to distinguish societal from individual rights. As a practical matter, the rules concerning standing serve as an important filter to preclude plaintiffs from recovering individually for harm to societal interests. Although rules governing standing and rules governing the compensability of deprivations under section 1983 rise out of different concerns, they are related insofar as each focuses on the existence of some cognizable injury to the plaintiff, which in turn determines the elements of damages one may plead or the grounds upon which one may base standing.”)

²⁸⁵ *Id.* at 300.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 300-301.

²⁸⁸ *Id.*

within the jurisdiction” of the United States, and second because “from an economic perspective the distribution of damages” does not actually compensate anyone, “it merely redistributes the loss by taking money from one of the public’s pockets and putting it into another.”²⁸⁹

However, the distinction between individual interests and societal interests would need to be determined on a case-by-case basis. For example, the First Amendment protects both the “individual, immediate, specific, and readily identifiable political interest embodied in the right to vote or to make open political speeches,” but also the different “public, removed, broad and uncertain political interest embodied in the Establishment Clause requirement that governments not assist or entangle themselves in the affairs of any religion.”²⁹⁰ However, the difference is not exactly clear, because the First Amendment right to public political speech might be considered societal under the argument that it allows the public intellectual discourse for the smooth governing democracy, and that it is not for the sake of the individual who wishes to speak.

B. Defamation Characteristics and Constitutional Torts

The theories of presumed damages based on special interests and societal interests both focus on the importance of the right being violated, either to the individual or to the society at large. However, these depart from the original questions associated with presumed damages—that is, the reasons why presumed damages are allowed at all in defamation.

Allowing presumed damages alleviates the burden for the plaintiff of having to prove the existence and the magnitude of his injuries. So presumed damages should only be awarded not

²⁸⁹ *Id.* at 301 (“Harm to such societal interests should be disallowed as separate elements of an individual’s damages. . .”).

²⁹⁰ *Id.* at 304 (criticizing the court’s decision in *Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985) for awarding substantial damages for violation of Establishment Clause rights when a public elementary school failed to prohibit the holding of religious meetings. The court compared the Establishment Clause to the First Amendment protection for freedom of speech, and then permitted presumed damages because precedent had allowed them for First Amendment violations. Hess argues that the analogy is tenuous because the Establishment Clause protects a societal interest, and the First Amendment an individual interest.) .

only when the injury is difficult to prove, but also where the injury is so likely to have occurred—given the constitutional violation—that its existence may be inferred.

The question of whether damages from the violation of a particular should be presumed depends on “whether harm to *some* compensable interest is likely to accompany the violation and, if so, whether the existence or magnitude of the injury is not readily susceptible to proof.”²⁹¹

1. Inference of Injury

When a right protects an individual interest, rather than a broad societal interest, it is more likely that the right cannot be violated without injuring the underlying interest with respect to the individual plaintiff. For example, the eighth amendment’s prohibition against cruel and unusual punishment and the fourth amendment’s prohibition against unreasonable searches and seizures are designed to protect individual interests rather than broad societal interests (to be contrasted with, for example, the first amendment’s prohibition against a religiously-oriented government. Because of this, the violation of cruel and unusual punishment or unreasonable search and seizure are cases where the existence of the violation might imply the existence of injury—and therefore, be better candidates for presumed damages may be awarded by a jury.²⁹²

Carey makes it clear that damages for mental distress cannot be presumed because the students whose due process rights were violated were not actually aware that their rights were

²⁹¹ *Id.* at 304–305 (“[B]y attempting to reason wholly by analogy, *Bell* circumvented consideration of the two factors important to presumed damages at common law: the likelihood that the injury would accompany all similar violations, and the difficulty of proving the existence or magnitude of such injuries.”).

²⁹² *See Hess, supra* note 26, at 308 (“The interests protected by the eighth amendment’s prohibition against cruel and unusual punishment, the fourth amendment’s prohibition against unreasonable searches and seizures, and the first amendment’s prohibition against restrictions on one’s right freely to exercise his religion cannot be violated in most cases without injuring the underlying interests. In those types of cases, since the violation itself is established by proving some injury to the protected interest, the jury satisfies the first branch of the presumed damages doctrine in being likely to accompany the violation.”)

being violated.²⁹³ However, this does not preclude all constitutional violations from being considered injuries in and of themselves.

If we consider the violation of the constitutional right to be the injury itself,²⁹⁴ then the inference of injury question is answered: *all* violations will imply injuries.

2. Difficulty of Proof

In common law defamation, the rationale behind presumed damages is that harm to reputation is systematically difficult to prove.²⁹⁵ In the context of constitutional torts, when courts are being hostile to presumed damages, they often emphasize the feasibility of proof for the plaintiff.²⁹⁶ The question is whether this common law principle should properly apply in the context of constitutional torts.

In 1983 actions, the “magnitude of damages may not easily be demonstrated... as is clear from *Stachura* and its common law predecessors.”²⁹⁷ No court has suggested how proper jury instructions should actually be worded to allow for presumed compensation to constitutional violations, or if there is a systematic way to differentiate adequate proof from inadequate proof.

²⁹³ *Carey*, 435 U.S. at 263.

²⁹⁴ See Part V.B, *supra*.

²⁹⁵ *Carey*, 435 U.S. at 262 (citing *Gertz*, 418 U. S. at 418) (“As we have observed in another context, the doctrine of presumed damages in the common law of defamation *per se* ‘is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.’ The doctrine has been defended on the grounds that those forms of defamation that are actionable *per se* are virtually certain to cause serious injury to reputation, and that this kind of injury is extremely difficult to prove.”)

²⁹⁶ *Id.* at 263–64 n. 19 (explaining that “we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.”)

²⁹⁷ *Hess*, *supra* note 26, at 309 (noting, as an example, that *Stachura* expressly recognized and approved cases that permitted substantial presumed damages for voting right violations).

Hess notes, with disapproval, that under *Carey*²⁹⁸ the “articulate plaintiff or one who is vocal about his feelings after the violation” may “fare much better” than an “inarticulate plaintiff who feels just as outraged by an identical violation, but who keeps his anger to himself.”²⁹⁹

While *Stachura* does not ban all presumed damages in constitutional torts (for example, it cites with approval cases involving voting rights violations), it does emphasize that the focus of the proof depends on the correct characterization of the right in question:

The instructions at issue here cannot be squared with *Carey*, or with the principles of tort damages on which *Carey* and § 1983 are grounded. The jurors in this case were told that, in determining how much was necessary to "compensate [respondent] for the deprivation" of his constitutional rights, they should place a money value on the "rights" themselves by considering such factors as the particular right's "importance . . . in our system of government," its role in American history, and its "significance . . . in the context of the activities" in which respondent was engaged. These factors focus, not on compensation for provable injury, but on the jury's subjective perception of the importance of constitutional rights as an abstract matter.³⁰⁰

The key is that juries need to focus on the systemized harm that the plaintiff was thought to have suffered, not to award based on the importance of the constitutional right. For example, the students in *Carey* would probably have been suspended even with due process, which implies a lowered likelihood that their injury was great. However, the importance of due process in our democracy is a great one. But this reasoning would shift the plaintiff’s burden from having to prove that he was *actually* injured to having to prove that (1) the particular type of constitutional deprivation systematically or is likely to injure, *and* (2) that the proof of actual injury is difficult. This seems like a substantial burden, not much better than having to prove actual damages. This is consistent with Hess’s idea that:

²⁹⁸ *Carey*, 435 U.S. at 264 n.20 (ruling that “[a]lthough essentially subjective, genuine injury in this respect may be evidenced by one’s conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury.”).

²⁹⁹ Hess, *supra* note 26, at 310.

³⁰⁰ *Stachura*, 477 U.S. at 308.

[P]erhaps the most important lesson is that the presumption of damages in any context is likely to depend on the plaintiff's ability to prove that the violation of his rights may be characterized in the proper way so as to invoke the doctrine of presumed damages. Yet by that time the victim's attorneys are able to clear all the barriers imposed by the courts to presumed damages they might well find that their time would have been better spent trying to prove the plaintiff's damages.³⁰¹

Case law shows that courts believe most constitutional tort plaintiffs have the ability to show injury.³⁰² Even where there is no physical harm, opinions have suggested that plaintiffs may provide medical affidavits to show emotional harm or personally testify. Unlike in defamation cases—where plaintiffs are trying to show harm to reputation, which cannot be verified with affidavits—in constitutional tort cases, actual harm suffered should be verifiable in most cases. This means that if we subscribe to compensatory presumed damages, plaintiffs should not need presumed damages in cases where they can prove injury.

Instead, if we consider the violation of the constitutional right to be the injury itself,³⁰³ then there really is no difficulty of proof because once liability is proven, so is injury. So there is no difficulty of proof, and presumed damages would not be needed, because plaintiffs can actually prove their injuries—simply by proving liability.

Even if we do this, it is unclear how damages are to be measured. Courts in both defamation and constitutional tort cases have found it unpalatable when presumed damages are based on the abstract value of the right being violated—judges that have tried to award damages based on the value of the right infringed have found themselves swiftly reversed.³⁰⁴ The thought of awarding damages based on the value of any constitutional rights seems to invite unfettered jury discretion. While jury discretion—that jury punishment of unpopular defendants—was also a fear in defamation cases, they were lessened to the extent that the juries were supposed to

³⁰¹ Hess, *supra* note 26, at 311.

³⁰² See, e.g., *Stachura*, 477 U.S. at 305.

³⁰³ See Part V.B., *supra*.

³⁰⁴ See, e.g., *Stachura*, 477 U.S. at 309.

estimate the amount of actual damage done to the plaintiff's reputation or business. They were not estimating the value of freedom from defamation as a right in and of itself.

Another approach—one that the courts in the right-to-vote cases implicitly took—is that the immense value of the constitutional right opens the door for applying presumed damages, but does not actually determine how large the presumed damages are. In other words, because the right to vote is so valuable, according to the *Wayne* court,³⁰⁵ presumed damages are warranted. But, as the *Stachura* court noted in its interpretation of *Wayne v. Venable*, the actual calculation for presumed damages accounts for the actual loss suffered by the plaintiff, not the abstract value of the right to vote.³⁰⁶

The reason for the strong judicial backlash against presumed damages is generally fear of the first scenario—an award of damages based on the abstract value of the right being violated. The magnitude of damages appears untenable. The second scenario—presenting an award of damages based not on the value of the right being violated, but on the harm done to the plaintiff in having such a right violated—may be more reasonable. The greatest difficulty would be calculating the harm, given the premise that every violation presents harm to the plaintiff.

Where the plaintiff knows that his constitutional rights have been violated, he can attain medical affidavits or testify about mental distress in the same way that a common law tort victim would. Presumed damages would be unnecessary here, because the plaintiff can be compensated—and the defendant deterred—through normal tort damages. In cases where the plaintiff did not know that his constitutional rights were violated, but learned afterwards, the question is whether the fact of violation was still an injury to the plaintiff, and whether it should be compensated in court. This might be an area where flooding the courts could be an actual

³⁰⁵ See *Wayne*, 260 F.64 at 66.

³⁰⁶ *Stachura*, 477 U.S. 299 n.14.

concern, although this is ultimately an empirical question on how frequently this type of violation happens—and just as importantly—what proportion of these are brought to court.

3. Contrasting Constitutional Torts and Defamation

The right to be free from defamation is a valuable right, but arguably not as valuable as most of the rights the constitutional tort actions protect. Instead, defamation presumed damages seem to circle around difficulty of proof. Unlike defamation, constitutional tort actions protect a varied number of rights that are so important that they are enshrined in the United States Constitution, as well as addressed by Congress in the statute for the cause of action. Presumed damages in constitutional torts then—to the extent that it is accepted—circles around not difficulty of proof, but on the importance of the rights being protected.

It is true that some injuries from the deprivation of constitutional rights are notoriously difficult to prove—for example, if a policeman illegally searches a citizen's home and finds nothing there. However, the language of the courts advocating presumed damages generally do not talk about burden of producing proof as much as they emphasize the importance of the constitutional rights at stake. This suggests that a blanket application of defamation-like presumed damages for constitutional torts would be incorrect, because the underlying motivations are incorrect.

There is also an argument to be made that each constitutional violation is harm in and of itself to the plaintiff; regardless of whether extra emotional or physical injury was made; that the fact that the plaintiff was wronged is a compensable injury in and of itself. This differs from the non-compensatory theory of presumed damages because the damages do not measure the value of the right being violated; but instead measures the amount of harm done to the plaintiff through the violation of the right. For example, the right to free speech—for society—might be very large

because of the importance of the marketplace of ideas in a democracy, academic growth, and debate. But in a specific case, the unconstitutional deprivation of the freedom of speech to an individual plaintiff might cause much less harm than the abstract value of the right. For example, if a protestor is unconstitutionally silenced in a specific situation, he may be harmed because his right was violated, but the magnitude of the harm would be limited to the value he would have received from speaking on that occasion.

C. Defamation as an Empirical Problem, Constitutional Torts as a Legal Problem

The main reason common law courts allowed for presumed damages in defamation cases was because in defamation cases, it was systematically difficult for plaintiffs to produce proof of injury. The “rationale of the common law rules has been the experience and judgment of history that ‘proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.’”³⁰⁷ Therefore, in order for defamation to be an actual tort, presumed damages ensured an actual remedy could be awarded.³⁰⁸

In constitutional torts, the language has suggested that presumed damages are used in two ways: non-compensatory and compensatory.³⁰⁹ The non-compensatory type of presumed damages seems to have nothing to do with the difficulty of proving harm or the defamation analogy. Instead, it seeks to replace the metric of damages. The *Stachura* court expressed an aversion to the trial court jury instructions that permitted “the jury to award damages based on its own unguided estimation of the value” of constitutional rights.³¹⁰ The Court emphasized that the

³⁰⁷ *Dun & Bradstreet, Inc.*, 472 U.S. at 760 (quoting WILLIAM PROSSER, LAW OF TORTS 765 §112 (4th ed. 1978)).

³⁰⁸ *Id.* at 761 (“further[ing] the state interest in providing remedies for defamation by ensuring that those remedies are effective.”).

³⁰⁹ *See supra* Part V.A.

³¹⁰ *Stachura*, 477 U.S. at 304–05.

“instructions plainly authorized. . . two distinct types of ‘compensatory’ damages: one based on respondent’s actual injury according to ordinary tort law standards, and another based on the ‘value’ of certain rights.”³¹¹ The latter right was struck down.

In contrast, the compensatory type of presumed damages seeks to approximate the amount of damages the plaintiff could receive if he could prove his injury. In defamation cases, the reason we do this is because the plaintiff cannot prove his injury because the injury involves a large number of unknown individuals who are not party to the lawsuit (people who allegedly are deterred from doing business with the plaintiff due to the defendant’s publications, for example.)

In contrast, in constitutional torts, the injury is hard to prove because the injury might be the violation of the right itself. Any actual physical, mental, or emotional harm done to the plaintiff can be verified by testimony or affidavit;³¹² the remaining work—which potentially calls for presumed damages—is not physical, mental, or emotional harm done to the plaintiff. What ostensibly remains is harm done by the violation itself. For example, in the right-to-vote cases, the harm done to the plaintiff is the deprivation of the right to vote in a particular election.³¹³

The need for presumed damages arises not from the difficulty of proof—as in the defamation cases—but from the absence of any method of proof. Hypothetically, if the plaintiff in a defamation case had unlimited time and resources, he could hire private detectives to track the circulation of the defamatory material, question the people who read the material about whether the material changed their willingness to deal with the plaintiff, and present these

³¹¹ *Id.* at 305 (“The damages instructions were divided into three distinct segments: (i) compensatory damages for harm to respondent, (ii) punitive damages, and (iii) additional ‘compensat[ory]’ damages for violations of constitutional rights. No sensible juror could read the third of these segments to modify the first.”).

³¹² *See id.* The Supreme Court has expressed the view that this type of damage could be proven through testimony or affidavit without undue hardship on the plaintiff.

³¹³ *See, e.g., Nixon*, 273 U.S. at 536.

surveys to a judge. But because plaintiffs typically do not have these resources; and because employing these resources would probably be an inefficient allocation of society's wealth, presumed damages are allowed in defamation cases.

In contrast, in constitutional torts cases, the issue is not the expense of proof to the plaintiff. Even if the plaintiff had unlimited funds, it is not at all clear how those resources could be directed in a way that proves he was harmed intrinsically. The problem is not a pragmatic one, but a conceptual one. If he can be compensated for the harm done to him, he must establish that there was a cognizable injury; but in order to do this, he must argue that the violation of the right in and of itself was a cognizable injury. This is a conceptual legal problem, not a pragmatic one. Compensatory presumed damages, then, play a different role in constitutional torts than they do in defamation, and need different support.

In the cases where compensatory presumed damages are approved, the language tends to focus on the importance of the rights being protected. For example, one court held that “[i]n the eyes of the law, [the] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss.”³¹⁴ In constitutional torts, presumed damages arise not from difficulty of proof, but from the importance of the right being violated, and the lack of alternative channels to remedy the right. In other words, in defamation, presumed damages are used because actual harm is difficult to prove. In constitutional torts, the existence of actual harm turns on whether the violation of a right can be characterized as actual harm—a legal question.

Allowing presumed damages for constitutional torts would raise two additional problems. First, the amount of damages is difficult. If the harm done is the violation of the right— independent of any bodily, mental, or emotional side effects—then the plaintiff has to be

³¹⁴ *Wayne v. Venable*, 260 F.64, 66 (8th Cir. 1919).

compensated for the harm. But it is difficult to measure what the harm actually is. For example, courts have clearly ruled against non-compensatory damages based on the importance of the right being violated.³¹⁵ If courts had allowed this type of valuation, then victims of infringements of more important rights would be awarded larger damages than victims of infringements of less important rights. Other alternatives are to charge the defendant a flat fee for any violation of constitutional rights regardless of the importance of the right being violated. But this would cause deterrence problems (a defendant would not be proportionately deterred from violating a proportionately more important right), as well as conceptual problems (a flat fee seems directly adverse to the idea of compensation to the plaintiff for actual harm.)

The magnitude of damages problem was noted in *Stachura*, where the Court did not want to allow juries to “award arbitrary amounts without any evidentiary basis, or to use their unbounded discretion to punish unpopular defendants.”³¹⁶ However, this is not a unique concern: as in common law torts, damage awards in constitutional cases are reviewable by the trial judge and appellate courts. If the court finds that the jury overcompensated the plaintiff, it may reduce the award; likewise, if it finds that the jury undercompensated the plaintiff, it may overturn the verdict for inadequacy.

This has been done. In the gender discrimination case *Knussman v. Maryland*, the Fourth Circuit Court of Appeals found that the plaintiff’s emotion distress damages of \$375,000 was excessive where the relationship between the constitutional violation and the distress was “attenuated.”³¹⁷ The Court emphasized that the plaintiff could only recover for damages

³¹⁵ See, e.g., *Stachura*, 477 U.S. at 304–05.

³¹⁶ *Stachura*, 477 U.S. at 310 (citing *Gertz*, 418 U.S. 323 (1974)).

³¹⁷ 272 F.3d 625 (4th Cir. 2001) (“Apart from this litigation-related stress, Knussman's evidence of emotional distress is insufficient to support an award of \$375,000. . . We conclude the award of \$375,000 is not proportional to the emotional distress caused by the constitutional violation, as opposed to the litigation of Knussman's claims, and is clearly against the weight of the evidence.”).

sustained by the constitutional violation itself, and not for litigation-related distress or for distress caused by the employment's general internal grievance process. The jury award was vacated and the case remanded to the district court to determine damages.

Courts should not underestimate their power to review jury awards. Awards may be not only limited, but also overturned for inadequacy in other cases. In *Preyer v. Slavic*,³¹⁸ the pro se plaintiff (a state prisoner) introduced evidence of significant injuries from several episodes of severe beating by prison guards.³¹⁹ Although the jury returned a verdict of liable for four of the prison guard defendants, they nonetheless only awarded nominal damages of \$1.00 and no compensatory or punitive damages for the plaintiff.³²⁰ The District Court, on its own motion, vacated the damages award and ordered a new trial for the issue of damages, holding that the damages was “against the weight of evidence” and “inadequate and legally erroneous.”³²¹ The Third Circuit noted that the “award for \$1.00 is not easy to reconcile with the uncontested evidence of injuries” introduced, and subsequently affirmed the District Court’s order for a new trial.³²²

Another way courts could limit presumed damages is to require some sort of threshold for the defendant, like the actual malice threshold in defamation.³²³ For example, courts could require that plaintiffs demonstrate that the defendant knowingly or intentionally violated his right. However, as Hess points out, this creates a paradox because by overcoming the

³¹⁸ 251 F.3d 448 (3d Cir. 2001).

³¹⁹ See generally *id.*

³²⁰ *Id.*

³²¹ *Id.* (“In his written opinion, the District Judge recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering.”).

³²² *Preyer*, 251 F.3d at 448.

³²³ See *supra* Part IV.C.

defendant's immunity defense, the plaintiff has already established that the right violated was one that a reasonable person would have known about.³²⁴

The second problem is that in a common law tort case where a defendant negligently hurts a plaintiff so that the plaintiff requires treatment at the hospital, the defendant has to pay the hospital bills. However, with the exception of punitive damages for cases of gross negligence and other specific instances, the defendant does not pay separate damages for the intrinsic violation of the plaintiff's right. It is not—on its face—obvious why constitutional torts should deviate from the common law on this point.

As a result, all of the reasons that make presumed damages appropriate in defamation cases are absent from constitutional tort cases. Courts looking to common law doctrines in constitutional tort cases cannot therefore be justified in allowing presumed damages, because the plaintiff faces entirely different problems in constitutional torts that he does in defamation; in the latter, an empirical burden, in the former, a legal burden. In all of tort law, defamation is an “oddity”—it is the only tort that does not require a showing of injury for damages. Unless constitutional torts can be justified in the same way, there should be no presumed damages, if we take seriously the application of tort law to the field of constitutional torts.

Rather than asking whether a constitutional tort plaintiff can prove actual harm in a case where there is no bodily, mental, emotional, or property damage, the more practical question is to ask whether there is a large number of constitutional tort plaintiffs who do not suffer provable bodily, mental, emotional or property damage, but need to resort to presumed damages in order

³²⁴ See Hess, *supra* note 26, at 308 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (noting that in most cases, public officials enjoy immunity from Section 1983 damages unless their actions “violate clearly established... constitutional rights of which a reasonable person would have known.” This means that if the plaintiff has already overcome the immunity bar, the plaintiff has already proven that a reasonable person would have known about the constitutional right that was violated. The plaintiff could argue that this implies a high likelihood that the plaintiff himself was aware that his right was violated, which caused mental distress.)

to collect damages at all. If there are a large number of these plaintiffs, the next question is whether the legal system in society desires to compensate any or all of them. If we do, then presumed damages may be appropriate in the constitutional tort setting.³²⁵

In *Carey v. Phipps* the Court wrote that, “to further the purpose of § 1983, the rules governing compensation” should be “tailored to the interests protected by the particular right in question”, just as the common law rules of damages were “defined by the interests protected in the various branches of tort law.”³²⁶ However, under tort law, damages are not typically defined by the *interests* protected, but by the *harm* imposed on the plaintiff. This is the essence of compensatory damages. So the Court here seems to mischaracterize the nature of tort law.

However, the Court proceeded to express agreement “with Mr. Justice Harlan that ‘the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights.’”³²⁷ Here, the Court tries to draw a direct analogy from traditional tort law to constitutional tort law: if the judges have experience dealing with enough private tort claims, then they should be able to determine the *causation* and *magnitude of injury* necessary to accord meaningful compensation. It is up to the judges to make conclusions about the injuries of the plaintiffs.

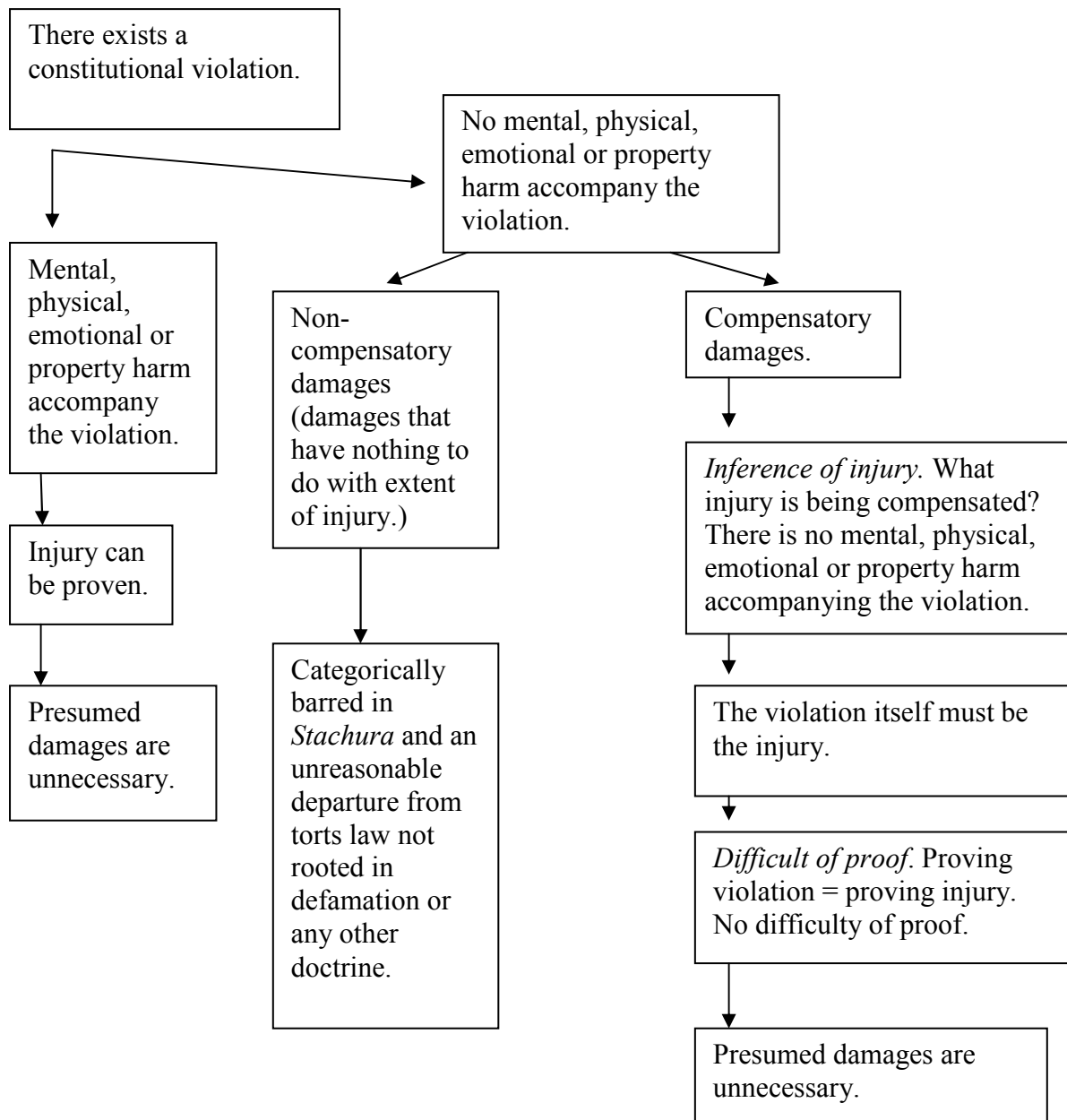
³²⁵ This is a somewhat backwards approach, because it defines actual harm based on whether or not we want the plaintiff to be compensated, but conforms with much of defamation law. In defamation, plaintiffs find it difficult to prove their cases, but we have determined that at least some of their cases are meritorious and should not be categorically precluded. Therefore, we allowed presumed damages. If we decide that the constitutional tort cases are meritorious, then presumed damages may be necessary, but only if there is no other recourse for proving damages.

³²⁶ *Carey*, 435 U.S. at 258–59. The Court proceeds to express agreement “with Mr. Justice Harlan that ‘the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights.’” *Id.* at 259 (citing *Bivens*, 403 U. S. 409 (Harlan, J., concurring in judgment)).

³²⁷ *Id.* at 259 (citing *Bivens*, 403 U. S. 409 (Harlan, J., concurring in judgment)).

It may be within their jurisdiction to decide that the pure violation of a constitutional right *is* an injury. This is ostensibly what happened in the right-to-vote cases. However, this would *not* be an example of presumed damages because in such a case, there would be a showing of an injury—the violation itself. If the violation itself is the injury, then injury has been proven and presumed damages are no longer needed.

D. Summary of the Inapplicability of Presumed Damages to Constitutional Torts



VII. CONCLUSION

Damages have been one of the most important and debated issues in constitutional tort jurisprudence. Constitutional torts were created for the purpose of compensating “persons for injuries caused by the deprivation of constitutional rights” as a “species of tort liability”.³²⁸ The question is whether presumed damages are a good way to achieve this compensation function of constitutional torts.

Stachura highlighted two types of concepts of presumed damages.³²⁹ In *Stachura*, the Court struck down trial instructions that “plainly authorized. . . two distinct types of ‘compensatory’ damages: one based on respondent’s actual injury according to ordinary tort law standards, and another based on the ‘value’ of certain rights.”³³⁰ After *Stachura*, circuit courts were split about whether presumed damages may be allowed, or are categorically barred.³³¹

Presumed damages have been suggested as a means of bringing “more consistency and equity” to damage awards for constitutional torts,³³² and many constitutional tort cases discuss defamation as the root of presumed damages, so this article set out to apply the principles of presumed damages in defamation to constitutional torts.

When a defamation analogy is examined, it becomes clear that the reasons that make presumed damages appropriate for defamation are absent from the constitutional tort cases. This is because in cases where there is injury beyond the violation itself, plaintiffs may attempt to show bodily, emotional, mental, or property harm through testimony, witnesses, and affidavits—in these cases, presumed damages are unnecessary. In cases where there is no injury beyond the

³²⁸ *Carey*, 435 U.S. at 253 (citing *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

³²⁹ 477 U.S. 299 (1986).

³³⁰ *Id.* at 305 (“The damages instructions were divided into three distinct segments: (i) compensatory damages for harm to respondent, (ii) punitive damages, and (iii) additional ‘compensat[ory]’ damages for violations of constitutional rights. No sensible juror could read the third of these segments to modify the first.”).

³³¹ NAHMOD, WELLS, & EATON, *supra* note 2 at 549.

³³² *Fourth Amendment Violations*, *supra* note 12 at 193.

violation itself, there is no clear reason arising from the common law of defamation to suggest that presumed damages are appropriate. There are simply too many differences between the defamation context and the constitutional tort context to justify using presumed damages.

The scholarship suggesting that presumed damages are appropriate for constitutional torts instead tend to argue about the importance of constitutional rights or the inherent harm of the violation. If this is correct, then courts should formulate the violation itself as an injury, as they have done in the right-to-vote cases. But whether or not violations are formulated as injuries, presumed damages are inappropriate. If violations are compensable injuries, then there is no difficulty of proof problem and regular damages, rather than presumed damages would be appropriate. If violations are not compensable injuries, then there is no reason to believe that showing a violation will merit an inference of injury. As a result, presumed damages would be, once more, unnecessary.