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Attorney's Fees, Nominal Damages, and Section 1983 Litigation

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ATTORNEY'S FEES, NOMINAL DAMAGES, AND SECTION 1983 LITIGATION

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Can plaintiffs recover attorney's fees under 42 U.S.C. § 1988 when they establish constitutional violations but recover only nominal damages or low compensatory damages? Some federal appellate courts have concluded that no fee, or a severely reduced fee, should be awarded in such circumstances. This position, which we call the "low award, low fee" approach, rests primarily on the Supreme Court's 1992 opinion in *Farrar v. Hobby.*

We argue that a "low award, low fee" approach is misguided for two main reasons. First, the majority opinion in *Farrar* is fragmented, and the factual record is opaque regarding what and how the plaintiff's constitutional rights were violated. These complexities render *Farrar* a poor case upon which to frame a rule regarding the relationship between damage awards and the proper calculation of attorney's fees. Second, the "low award, low fee" approach is inconsistent with congressional intent. When Congress enacted § 1988, it emphasized the public benefit of vindicating constitutional rights and deterring constitutional violations. No less important, it recognized that the harms caused by constitutional wrongs often are not easily measured in terms of traditional monetary remedies—a circumstance that would discourage attorneys from taking on the representation of plaintiffs in this important set of cases. The "low award, low fee" approach contravenes these purposes because it effectively discourages the bringing of a large quantity of highly meritorious cases involving the abridgement of constitutional rights. Indeed, the effect of this approach is perverse because it blocks the recovery of meaningful attorney's fees in the very set of low damages—serious constitutional-wrong cases in which the need to incentivize the provision of legal services is most pressing.

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INTRODUCTION

Under the "American Rule," each party pays his own attorney's fees.[1] The Civil Rights Attorney's Fees Awards Act of 1976, which is codified as 42 U.S.C. § 1988, carves out an exception to this rule. The statute provides that "[i]n any action or proceeding to enforce a provision of [certain specified civil rights statutes], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ."[2] The most important of the statutes specified in § 1988 is 42 U.S.C. § 1983, which authorizes suit against "every person" who violates constitutional rights "under color of" state law.[3]

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[1] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (repudiating lower court decisions that had ignored the "American Rule").

[2] 42 U.S.C. § 1988(b) (2012).

[3] *Id.* § 1983. Thus:

> 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 . . . person within the jurisdiction [of the United States] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

Section 1983 is a Reconstruction-era civil rights statute. Michael B. Brennan, Note, Okure v. Owens*: Choosing Among Personal Injury Statutes of Limitations for Section 1983*,

Application of the Attorney's Fees Awards Act to constitutional litigation under § 1983 raises a recurring issue on which lower courts are divided: If a prevailing plaintiff recovers only nominal damages, or nothing more than a small compensatory sum, should this circumstance bear on the calculation of a "reasonable" fee? The Supreme Court has declared that "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained."[4] But how does one measure success? Is it better to treat all "low award" cases alike, denying or severely restricting the fee award for all of them? Or should courts distinguish between fee applications depending on the reason for the low award? In one set of cases, the answer is clear. In *Farrar v. Hobby*,[5] the plaintiff proved that his constitutional right had been violated but failed to persuade the jury that the harm for which he sought redress was caused by the violation.[6] The Court held that fees should not be awarded.[7] In a second set of cases, the explanation for the low damages award lies in the interaction between the black letter rules on proof of tort damages—which apply to constitutional tort cases as well[8]—and the difficulty of assigning a monetary value to constitutional rights. Under these rules, plaintiffs may have great difficulty showing substantial damages from constitutional violations even though the factors that tripped up Farrar are not present. The issue that divides the Circuit Courts of Appeals is whether the level of damages should count against the plaintiff in such a case.

Two Supreme Court cases bear on this issue, though they point in different directions. In *Farrar v. Hobby*, the Supreme Court denied a fee to Farrar, who sought $17 million, based on a claim that a group of defendants had conspired to destroy the economic value of a school he owned.[9] Hobby, the Texas Lieutenant Governor,

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82 NW. U. L. REV. 1306, 1327 (1988). The other statutes from that era specified in § 1988 are: § 1981 (authorizing a cause of action for racial discrimination in making and enforcing contracts); § 1982 (guaranteeing, against racial discrimination, the right "to inherit, purchase, lease, sell, hold, and convey real and personal property"); § 1985 (forbidding conspiracies to interfere with civil rights); and § 1986 (authorizing suits against persons who know about conspiracies, have the power to stop them, and "neglect[ ] or refuse[ ] so to do").

Section 1988 also authorizes attorney's fees in litigation under certain modern civil rights statutes, including Title IX, which addresses sex discrimination in education, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs, and 42 U.S.C. § 13981, which prohibits gender-motivated crimes of violence. *See* § 1988.

In this Article, we are concerned solely with attorney's fees in § 1983 litigation.

[4] Hensley v. Eckerhart, 461 U.S. 424, 436 (1983).

[5] 506 U.S. 103 (1992).

[6] *Id.* at 106.

[7] *Id.* at 105.

[8] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986); *see also* Carey v. Piphus, 435 U.S. 247, 262 (1978) (rejecting the concept of "presumed damages" in the context of a violation of procedural due process).

[9] 506 U.S. at 106.

was one of the defendants.[10] Farrar prevailed on the merits of one claim against Hobby but received only nominal damages of one dollar.[11] Farrar's claim for a large award against Hobby failed for two reasons. First, the jury found that Hobby was not part of any conspiracy.[12] Second, although the jury found that Hobby "deprived . . . Farrar of a civil right," his conduct "was not a proximate cause of any damages."[13] Faced with this record, the Court concluded that Farrar failed "to prove an essential element of his claim for monetary relief."[14] The Court said that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."[15]

Several circuit courts recognize no distinction between *Farrar* and the "intangible harm" cases. They read *Farrar* broadly to stand for the general principle that monetary relief is the measure of success, so that an award of nominal or low compensatory damages gives rise to a strong presumption in favor of either no or a drastically reduced award of attorney's fees.[16] We will call this approach "low award, low fee." But *Farrar*, on its facts, is a weak case for establishing a general rule for attorney's fees on account of the scope of the litigation, the plaintiff's failure to prove any liability against all but one defendant, the jury's opaque finding of a violation of a "civil right" on Hobby's part, and the absence of a causal link between the large damages claimed and the constitutional violation found by the jury.[17]

Farrar has been read more narrowly by other circuit courts based on another Supreme Court case. Before *Farrar*, the plurality opinion in *City of Riverside v. Rivera*[18] had rejected "the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers."[19] Relying on this proposition, several circuit courts have held that a substantial fee may be awarded even when the plaintiff obtains only nominal damages.[20]

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[10] *Id.*

[11] *Id.* at 116.

[12] *Id.* at 106. Moreover, the "conspiracy was not a proximate cause of any injury suffered by the plaintiffs." *Id.*

[13] *Id.*

[14] *Id.* at 115.

[15] *Id.* (citation omitted).

[16] *See* Montanez v. Simon, 755 F.3d 547, 556–57 (7th Cir. 2014); Richardson v. City of Chicago, 740 F.3d 1099 (7th Cir. 2014); McAfee v. Boczar, 738 F.3d 81 (4th Cir. 2013); Aponte v. City of Chicago, 728 F.3d 724 (7th Cir. 2013); Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887 (11th Cir. 2013).

[17] 506 U.S. at 106.

[18] 477 U.S. 561 (1986) (plurality opinion).

[19] *Id.* at 574. *See* Davignon v. Hodgson, 524 F.3d 91, 114–15 (1st Cir. 2008). Taking this proposition as its premise, the First Circuit panel approved a fee award of $172,248.21, though the damages awarded were just $17,980. *Id.*

[20] *See, e.g.*, Hescott v. City of Saginaw, 757 F.3d 518, 527 (6th Cir. 2014); Matusick v. Erie Cty. Water Auth., 757 F.3d 31, 64 (2d Cir. 2014). In *Matusick*, the district court reduced the requested fee and the appellate court affirmed, but the reason for the reduction was a lack

On either side of the split, most of the opinions do not seem to recognize the existence of the other view.

This difference in approach is of great importance because it bears on the real-world availability of a key remedy for many prospective constitutional tort plaintiffs. It also raises major questions about constitutional tort theory, particularly as to whether courts should encourage the vindication of constitutional rights when the monetary recovery will probably be small. This Article argues that: (1) it is wrong to extrapolate a general principle from *Farrar* that plaintiffs who recover only nominal damages are presumptively foreclosed from securing attorney's fees under § 1988; and (2) in any event, such fees should remain recoverable—often in substantial amounts—whenever a plaintiff recovers some measure of compensatory damages, even if small in amount. At first blush, these matters may seem to involve nothing more than the economic well-being of attorneys, but far more than that is at stake. Congress enacted § 1988 in order to facilitate the vindication of constitutional rights and deter constitutional violations. The core idea behind the statute is that the meaningful enforcement of constitutional rights requires a sharp departure from the "American Rule" on attorney's fees. The "low award, low fee" rule implicitly assumes that constitutional enforcement deserves greater encouragement—through larger fee awards—in high compensatory damages cases than in low damages cases.

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of documentation by the attorney. 757 F.3d at 65. In earlier decisions, appellate courts approved substantial fee awards in cases although the plaintiff recovered either nominal compensatory damages or awards lower than they sought. *See, e.g.*, Zinna v. Congrove, 680 F.3d 1236, 1237 (10th Cir. 2012) (rejecting the broad "low award, low fee" principle in a case in which a plaintiff received $1,791 in compensatory damages); Mahach-Watkins v. Depee, 593 F.3d 1054, 1058 (9th Cir. 2010) (awarding more than $136,000 in attorney's fees and costs to a plaintiff who received nominal damages following a fatal shooting); Estate of Enoch *ex rel.* Enoch v. Tienor, 570 F.3d 821, 823 (7th Cir. 2009) ("In cases which involve more than a nominal award, we have rejected the notion that the fee award should be reduced because the damages were smaller than a plaintiff originally sought or that the fee award might, in fact, be more than the plaintiff's recovery."); McCown v. City of Fontana, 565 F.3d 1097, 1105 (9th Cir. 2009) (noting that a plaintiff may obtain an excellent result, even if the damages are low); Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752, 764 (8th Cir. 2008) ("In *Farrar*, private damages were the purpose of the litigation, and of the $17 million requested in that case . . . . Here, in contrast, the purpose of the litigation was not private damages."); Diaz-Rivera v. Rivera-Rodriguez, 377 F.3d 119, 125 (1st Cir. 2004) (holding, despite *Farrar*, that the plaintiff's victory on a procedural due process claim warranted a substantial fee based on "the determination that the municipality violated plaintiffs' constitutional rights represented a significant legal conclusion serving an important public purpose"); Murray v. City of Onawa, 323 F.3d 616, 617 (8th Cir. 2003) (awarding attorney's fees to a plaintiff who recovered nominal damages from a city that failed to protect her from sexual harassment); O'Connor v. Huard, 117 F.3d 12, 17 (1st Cir. 1997) (awarding attorney's fees to a pretrial detainee who recovered nominal damages from the defendant who denied her medical care). *Cf.* Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1225 (10th Cir. 2001) (remanding to the district court to consider awarding attorney's fees to a Title VII plaintiff who proved he was a victim of a hostile work environment but was awarded only nominal damages).

Yet, the need to assure attorney's fees for the establishment of constitutional wrongs will be especially great when provable damages are low. Thus, the effect of the "low award, low fee" rule is to subvert the essential purpose of § 1988 by discouraging § 1983 litigation in the very set of cases in which the greatest need exists to encourage suits to vindicate constitutional guarantees and deter their violation.

At the same time, a sweeping rule favoring a full attorney's fee for any plaintiff who qualifies as a "prevailing party" would be unrealistic and unwise. The statute, by its terms, accords the district court discretion to depart from the "American Rule" and authorizes only a "reasonable fee."[21] Moreover, prospect of recovery of attorney's fees carries with it social costs, especially by encouraging wasteful and even destructive litigation. In *Hensley v. Eckerhart*,[22] the Supreme Court recognized that a fee should not be awarded for time spent on separate unsuccessful claims, even if the plaintiff prevails on some issues.[23] Building on this idea, *Farrar* rightly recognizes that there are good reasons to deny fees to plaintiffs who obtain only "technical" victories. Even so, it is wrong to read *Farrar* as supporting a rigid "low award, low fee" rule. The reasonableness of the fee should be based on the extent to which the plaintiff has advanced § 1983's underlying goals, and courts should recognize that this determination has little to do with the size of the compensatory award.

This Article develops these ideas in three parts. Part I provides background information on attorney's fees in § 1983 litigation by laying out the holdings of *Farrar* and the cases that endorse the "low award, low fee" principle. Part II shows that the reliance by these courts on *Farrar* is misplaced because, in that case, a fragmented majority issued only an ambiguous ruling on a narrow issue in a peculiar fact pattern. Part III proposes an alternative framework for resolving attorney's fees issues in these "low award" cases. Starting from the premise that the amount of the fee should reflect the plaintiff's success at achieving the goals of § 1983 litigation, it shows that there is no correlation between the amount of the award and either the vindication of rights or the deterrence of violations. We focus on the application of § 1988 to constitutional litigation, as distinguished from the statutory rights to which the statute also applies. We do so because the Supreme Court has developed a distinctive body of remedial law for constitutional cases, and that body of law has a strong bearing on interpretation of the fee statute in the specific context of constitutional litigation brought under § 1983.[24]

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[21] However, "the judicial gloss on § 1988, and its legislative history, have constrained that discretion, in most cases converting the statute's 'may' into a 'must.'" Sanchez v. City of Austin, 774 F.3d 873, 880 (5th Cir. 2014) (collecting cases).

[22] 461 U.S. 424 (1983).

[23] *Id.* at 440.

[24] Because our analysis stresses constitutional litigation under § 1983, our conclusions do not necessarily apply to the application of the Attorney's Fees Awards Act to enforce rights created by federal statutes. For an argument (more ambitious than the one we advance) that fees should generally be available to plaintiffs who prevail on the merits across the whole

I. SECTION 1983 AND THE "LOW AWARD, LOW FEE" PRINCIPLE

Section 1983 provides that "every person" who violates federal constitutional rights while acting "under color of" state law may be held liable by the victim.[25] The statute was enacted as part of the Civil Rights Act of 1871 in order to enforce the Fourteenth Amendment, but it remained largely dormant until 1961 when the Court held in *Monroe v. Pape*[26] that officers can be sued even if there is a state-law remedy available.[27] In *Monell v. Department of Social Services*,[28] the Court interpreted the statute to mean that a local government is a "person" subject to suit under the statute.[29] It said in *Lugar v. Edmondson Oil Co.*[30] that the defendant usually acts "under color of" state law when his conduct meets the "state action" requirement of the Fourteenth Amendment.[31] Thus, not only local governments and state officers but, on occasion, private individuals doing the state's work may be sued.[32] Remedies include both forward-looking relief to stop ongoing or threatened violations and backward-looking relief through money damages for violations that took place in the past. Both compensatory[33] and punitive[34] damages may be awarded against officers and other individuals, but governments are not liable for punitive damages.[35]

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range of statutory causes of action to which § 1988 applies, see Lawrence D. Rosenthal, *Adding Insult to* No *Injury: The Denial of Attorney's Fees to "Victorious" Employment Discrimination and Other Civil Rights Plaintiffs*, 37 FLA. ST. U. L. REV. 49 (2009).

[25] 42 U.S.C. § 1983 (2012). Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .

Id.

[26] 365 U.S. 167 (1961). *Monroe* also held that cities were not "persons" under the statute and therefore could not be sued under § 1983. *Id.* at 191.

[27] *Id.* at 167.

[28] 436 U.S. 658 (1978). *Monell* thus reversed the contrary conclusion on this point that was reached in *Monroe*.

[29] *Id.* at 701.

[30] 457 U.S. 922 (1982).

[31] *Id.* at 928.

[32] In *Lugar*, for example, a private citizen who invoked a state prejudgment attachment procedure requiring significant aid from state officials was deemed to act under color of state law. *Id.* at 924. *See also* West v. Atkins, 487 U.S. 42, 43–44 (1988) (questioning whether an orthopedic surgeon hired by the state to treat prisoners acts "under color of state law").

[33] *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 301 (1986); Carey v. Piphus, 435 U.S. 247, 257–59 (1978).

[34] *See* Smith v. Wade, 461 U.S. 30, 31 (1983).

[35] *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

In order to win a constitutional tort case, the plaintiffs must do more than prove violations of their constitutional rights. When the defendant is an officer, he may raise a defense of "official immunity," which provides legislators,[36] judges,[37] prosecutors,[38] and witnesses[39] an absolute shield against liability for damages. All other defendants, such as police officers, are protected by "qualified immunity." They can be held liable for money damages only if their conduct violated clearly established constitutional law.[40] When the defendant is a local government, the plaintiff wins only if the violation was caused by an "official policy" or "custom" of that government.[41] Because of these obstacles, plaintiffs with good claims on the constitutional merits will nonetheless go without a remedy.[42] Unsurprisingly, the success rate for § 1983 plaintiffs is lower than for other kinds of litigation.[43] These hurdles and their consequences are relevant to the attorney's fee issue. Section 1983 is aimed at vindicating constitutional rights and deterring constitutional violations. Section 1988 is aimed at making § 1983 an effective remedy. These purposes justify a general principle for interpreting § 1988: unless there is some good reason for reading the statute otherwise, it should be interpreted in a way that encourages lawsuits by plaintiffs who can surmount the official immunity and "policy or custom" hurdles.

A. Attorney's Fees and Section 1983 Litigation

The general policy behind fee-shifting legislation like § 1988 is that "the prevailing party, having been adjudged to be in the right, should not suffer financially for having to prove the justice of his position."[44] In the context of § 1983 litigation, fee shifting serves other goals besides reimbursing the plaintiff for costs spent to secure his rights. The aims of § 1983 are to deter constitutional violations and vindicate

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[36] *See, e.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).

[37] *See, e.g.*, Stump v. Sparkman, 435 U.S. 349, 351, 364 (1978).

[38] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 410 (1976).

[39] *See, e.g.*, Rehberg v. Paulk, 132 S. Ct. 1497, 1500 (2012).

[40] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 640 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982).

[41] *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1359–60 (2011).

[42] *See, e.g.*, Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914 (2015); Stephen R. Reinhardt, Essay, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015).

[43] See Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation*, 12 J. EMPIRICAL LEGAL STUD. 4, 7 (2015).

[44] Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 654 (1982); *see also* Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301, 313 (1993) (arguing that limiting fee awards would "enable wrongdoers to escape liability for some of the costs [that] their misconduct entails and have the odd effect of requiring victims (or victims' lawyers) to subsidize wrongdoers by bearing unreimbursed costs").

constitutional rights. The attorney's fee award has systemic value in encouraging litigation that enforces constitutional norms that are shared by everyone.[45] Often, the § 1983 plaintiff lacks resources while the government or official defendant can depend on public funds to obtain legal services. Thus, § 1988 can somewhat redress the imbalance of litigation advantages. When the parties are on unequal footing, "holding out the prospect of reimbursement of fees can improve the position and stiffen the resolve of the relatively weaker side."[46]

1. Suing Officers and Local Governments for Constitutional Violations

Section 1983 is the main statutory authority for obtaining both backward-looking relief, in the form of damages, and forward-looking relief, in the form of injunctions and declaratory judgments, against municipal governments, their officials, and state officials for federal constitutional violations. Forward-looking relief presents few remedial obstacles once the plaintiff has established his standing to sue and met justiciability requirements such as ripeness and lack of mootness. But there are two big hurdles to recovering damages even when the plaintiff's constitutional rights have been violated. First, officers may assert "official" immunity from liability for damages. Those engaged in judicial, prosecutorial, and legislative functions are absolutely immune from damages.[47] Thus, a prosecutor who knowingly elicits false testimony would be shielded from liability.[48] Other officers receive "qualified"

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[45] *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1088 (2007) ("Congress explicitly noted that civil rights enforcement 'depend[s] heavily upon private enforcement,' and that 'fee awards' are essential 'if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.'" (alteration in original)); Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 309 (1990) (stating that Congress's aim was "[m]aking more lawyers available for private enforcement of the nation's public interest"); Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 465 (2014) ("For certain statutes [including 42 U.S.C. § 1983], the private enforcement of which Congress believes serves the public interest, Congress has created judicial authority to allow prevailing plaintiffs to receive full attorneys' fees from defendants. It is notable that Congress chose not only to encourage potential plaintiffs to enforce these statutes . . . but also specifically to foster representation by skilled attorneys through financial incentives." (footnote omitted)); Rowe, *supra* note 44, at 662 (discussing attorney's fees in connection with "right[s] deemed to have special social importance").

[46] Rowe, *supra* note 44, at 663–64.

[47] *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity); Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislative immunity).

[48] *See, e.g.*, *Imbler*, 424 U.S. at 439, 442. Actions taken in an administrative or investigative capacity, however, are protected by qualified—not absolute—immunity. *See, e.g.*, Burns v. Reed, 500 U.S. 478 (1991) (giving legal advice to police).

immunity, which protects them from paying damages unless they violate "clearly established" constitutional rights. Whatever the officer's motivation, he avoids liability so long as the right at issue is not so well-settled that a reasonable officer could not have believed he was acting properly.[49]

The second hurdle applies to local governments. Although they do not enjoy any immunity defense,[50] they cannot be held vicariously liable for constitutional violations committed by their officers and employees.[51] The plaintiff must show that the violation was caused by "official policy" or "custom," which generally requires either a formal legislative act by the municipal government, a widespread practice amounting to a custom, a ruling by the municipality's "final policy maker" on the issue at hand,[52] or training or hiring of officers that is so inadequate as to demonstrate "deliberate indifference" to the plaintiff's constitutional rights on the part of official policymakers.[53] The real world impact of these two hurdles is that many plaintiffs lose, even though they can prove that officers violated their constitutional rights. Few suits against local governments succeed, and plaintiffs suing officials only win when they can prove not only constitutional violations, but also that any reasonable official would know that the contested conduct would violate the plaintiff's constitutional rights.

2. The Civil Rights Attorney's Fees Awards Act of 1976

The Court's rulings in *Monroe* and *Monell* were emblematic of judicial and legislative expansions of civil rights and remedies in the 1960s and 1970s. The Court extended the reach of the Bill of Rights and the Fourteenth Amendment, while Congress enacted such statutes as the Civil Rights Act of 1964,[54] the Voting Rights Act of 1965,[55] and the Title IX protections against gender discrimination in 1972.[56] Some

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[49] *See, e.g.*, Wilson v. Layne, 526 U.S. 603 (1999). Allowing reporters to accompany police when they entered a private home to execute an arrest warrant was a violation of the Fourth Amendment; however, this right had not been "clearly established" at the time of the event, so the defendants were protected by qualified immunity. *Id.* at 605–06.

[50] *See* Owen v. City of Independence, 445 U.S. 622, 637–44 (1980).

[51] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692, 692–93 n.57, 707–08 (1978).

[52] The main Supreme Court cases on this point are Jett v. Dall. Indep. Sch. Dist., 491 U.S. 701 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988); and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

[53] The leading cases on "failure to train" are Connick v. Thompson, 563 U.S. 51 (2011), and City of Canton v. Harris, 489 U.S. 378 (1989). The hiring context is addressed in Bd. of the Cty. Comm'rs v. Brown, 520 U.S. 397 (1997), which suggests the possibility of application of the "deliberate indifference" standard to hiring, but denies it in this case.

[54] *See* Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000a *et. seq.* (2012)).

[55] *See* Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. §§ 10301-14, 10501-08, 10701-02 (2012)).

[56] *See* Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified as amended at 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9, 2000h-2 (2012)).

of these statutes, such as Title VII of the Civil Rights Act of 1964, authorized awards of attorney's fees to successful plaintiffs. There is no such authorization in § 1983.[57] But when plaintiffs sued to enforce § 1983 and other laws protecting broad public interests, lower courts, invoking principles of equity, began granting attorney's fees in these cases as well, despite the "American Rule" to the contrary and the absence of specific legislative language carving out an exception. In 1975, the Supreme Court put a stop to that practice. It said in *Alyeska Pipeline Service Co. v. Wilderness Society*[58] that fees could be shifted only if authorized by Congress.[59]

In response, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976,[60] which, according to the Senate Report on the legislation, "remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent."[61] Thus, the statute specifies that fees may be awarded to prevailing parties in § 1983 cases and in litigation under other civil rights statutes. The Senate Report indicates that "the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act,"[62] and the courts have generally followed that guidance.[63] Thus, the statute is read in light of the case law preceding its enactment and its remedial purposes. For example, despite the statutory language authorizing an award to a "prevailing party," defendants are typically granted fees only in frivolous lawsuits, as neither prior practice nor the statutory purpose support such awards.[64]

The most important Supreme Court case bearing on what constitutes a "reasonable" fee award under the statute is *Hensley v. Eckerhart*, a case in which there were multiple defendants and multiple theories.[65] The plaintiff prevailed on some claims and lost on others. The Court set out guidelines for determining an appropriate fee.

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[57] 42 U.S.C. § 1983 (2012).

[58] 421 U.S. 240 (1975).

[59] *See id.* at 271 ("[I]t is not for us to invade the legislature's province by redistributing litigation costs . . . .").

[60] *See* 42 U.S.C. § 1988.

[61] S. REP. NO. 94-1011, at 5 (1976).

[62] *Id.*

[63] One notable instance in which "legislative intent" has trumped "plain language" in guiding the Court's interpretation of the fee statute involves fees awarded to prevailing defendants. The statute itself authorizes a fee award to "the prevailing party" without distinguishing between plaintiffs and defendants. 42 U.S.C. § 1988(b). The Senate Report explicitly states, however, that prevailing defendants should be awarded fees only when the plaintiff's suit was "frivolous" or brought in "bad faith." S. REP. NO. 94-1011, at 5. The Supreme Court has construed § 1988 to authorize an award of attorney's fees to a prevailing defendant "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983).

[64] *See, e.g.*, Cooney v. Casady, 735 F.3d 514, 521 (7th Cir. 2013).

[65] 461 U.S. at 426. *See generally* Dan B. Dobbs, *Reducing Attorneys' Fees for Partial Success: A Comment on* Hensley *and* Blum, 1986 WIS. L. REV. 835 (1986) (discussing *Hensley* and the issues it raised).

It said that courts should begin by calculating the "lodestar," which consists of determining the reasonable number of hours spent on the litigation by the plaintiff's lawyers and multiplying that by a reasonable hourly fee.[66] The lawyers should keep records of their time and how it was spent, and hours spent on unsuccessful unrelated or irrelevant claims (such as time spent exclusively on state law issues) should be excluded.[67] When plaintiffs win on some constitutional claims and lose on others, time spent on the unsuccessful theories of recovery should not be included in the fee award if the unsuccessful theories are unrelated to the claims on which the plaintiff did prevail.[68] The reasonable hourly fee is one that reflects what lawyers of similar skill and experience would charge on matters of similar difficulty, whether in the civil rights context or some other type of litigation.[69] In a later case, the Court reversed a fee award in which the district court increased the award above the lodestar on account of the extraordinary success achieved by the litigant.[70]

II. *FARRAR V. HOBBY* AND THE "NO/LOW DAMAGES" PROBLEM

In *Hensley*, the Court said that falling short of complete success is a legitimate reason to deduct from the lodestar in calculating the fee award.[71] Questions then arose as to how that principle should be applied when the plaintiff won on the merits of his constitutional claim but obtained less in damages than he had sought. The Supreme Court addressed this issue in *Farrar v. Hobby*.[72] Farrar, the owner of a private school, was investigated by state officials, including Lieutenant Governor William Hobby.[73] The school went bankrupt, and Farrar sued under § 1983 seeking $17 million in compensatory damages.[74] He charged that the investigation violated his constitutional rights and led to the bankruptcy.[75] A jury found that some of the officials had conspired against Farrar, but that Hobby was not one of the conspirators, and, in any event, the conspiracy was not a proximate cause of Farrar's injury.[76]

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[66] *Hensley*, 461 U.S. at 433.

[67] *Id.* at 434–35, 440.

[68] *Id.* at 435. What claims are and are not related is often a matter of judgment. *See, e.g.*, Lenard v. Argento, 808 F.2d 1242, 1246–47 (7th Cir. 1987) (holding that the equal protection and excessive force claims were "related," as they pertained to a single event (an arrest), and that the equal protection claim was not "related" to the malicious prosecution claim because the prosecution took place at a later point in time).

[69] *See, e.g.*, Gonzalez v. City of Maywood, 729 F.3d 1196, 1206, 1209 (9th Cir. 2013) (applying *Hensley*).

[70] *See* Perdue v. Kenny A., 559 U.S. 542, 546 (2010).

[71] *Hensley*, 461 U.S. at 435–37.

[72] 506 U.S. 103 (1992). For a discussion of *Farrar*, see Joel H. Trotter, Note, *The Catalyst Theory of Civil Rights Fee Shifting After* Farrar v. Hobby, 80 VA. L. REV. 1429 (1994).

[73] *Farrar*, 506 U.S. at 105–06.

[74] *Id.* at 106.

[75] *Id.*

[76] *Id.*

It also found that Hobby violated Farrar's civil rights, but that Hobby's conduct was not "a proximate cause of any damages" suffered by Farrar.[77] The district court entered a judgment that Farrar take nothing and that the action be dismissed with each party bearing his own costs.[78] On an initial appeal, the Fifth Circuit held that Farrar was entitled to a judgment for nominal damages.[79] The district court subsequently entered such a judgment and then awarded Farrar over $300,000 in attorney's fees and expenses.[80] The Fifth Circuit reversed the fee award, ruling that Farrar was not a "prevailing party," despite the entry of judgment in his favor for nominal damages.[81] Because § 1988 authorizes attorney's fees only to prevailing parties, he was not entitled to fees.[82]

The Supreme Court granted certiorari to decide whether a plaintiff who recovers nominal damages is a prevailing party for purposes of awarding attorney's fees.[83] In an opinion by Justice Thomas, the Court reversed the Fifth Circuit, with all nine Justices agreeing that Farrar was indeed a prevailing party.[84] After examining its precedents, the Court said that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[85] An award of nominal damages, by requiring the defendant to pay one dollar to the plaintiff, satisfies this test.[86]

The Court went on to address an issue not presented by the petition for certiorari—the calculation of a "reasonable" fee for a plaintiff like Farrar.[87] On this "reasonable fee" issue, or rather on the question of whether the issue should have been addressed at all, the Court split 5–4.[88] Justice Thomas, writing for the majority, concluded that the only reasonable fee in this case was no fee at all.[89] The starting point of his analysis was the proposition established in *Hensley* that "'the degree of the plaintiff's overall success goes to the reasonableness' of a fee award."[90] Under this test, Justice Thomas reasoned, *Hensley* calls not only for a reduction in the fee award, but for "no attorney's fee at all."[91] The problem was that Farrar and his associates "received nominal damages instead of the $17 million in compensatory

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[77] *Id.*
[78] *Id.* at 106–07.
[79] *Id.* at 107.
[80] *Id.*
[81] *Id.* at 107–08.
[82] *Id.*
[83] *Id.* at 105.
[84] *Id.* at 112–13.
[85] *Id.* at 111–12.
[86] *Id.* at 112–13.
[87] *Id.* at 114.
[88] *Id.* at 123 (White, J., concurring in part and dissenting in part).
[89] *Id.* at 115–16 (majority opinion).
[90] *Id.* at 114 (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 793 (1989)).
[91] *Id.* at 115.

damages that they sought."[92] In addition, "[t]his litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way."[93] Farrar had attempted, and failed, "to prove actual, compensable injury" caused by the unspecified constitutional violation.[94] Note that these reasons center on the circumstances of this particular litigation—Farrar's ambitions in the litigation, the gap between his aspirations and his level of success, and the reason for that gap. Despite the focus on the distinctive features of Farrar's lawsuit, Justice Thomas concluded by abstracting away from the facts of the case, stating a seemingly general principle for "low award, low fee" cases: "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all."[95]

But this broad principle cannot fairly be treated as a black letter rule stating the current law. It has not earned universal, or even general, endorsement by the lower courts, and the Supreme Court has never reversed any of the cases that reject it. There are four reasons to doubt the sturdiness of this sweeping principle. One is that the Court's own articulation of it contains seeds of uncertainty. Thus, it is not in every case that nominal damages get no fee, but only when the reason for the nominal award is "failure to prove an essential element . . . for monetary relief."[96] Are there cases in which the reason is something other than this failure of proof? If not, what is the point of this clause? If so, what are those situations? Moreover, the principle does not even apply to every case in which nominal damages are awarded on account of failure to prove "an essential element." Rather, no fee is "usually" the appropriate award. What are the exceptions, and why?

Second, Justice O'Connor concurred and provided the decisive fifth vote. She joined the majority opinion in *Farrar* but wrote separately to provide partial answers, at least the ones she would give, to the questions raised by the majority's general principle.[97] She pointed out that "not . . . *all* nominal damages awards are *de minimus*."[98] Thus, nominal damages would sometimes support a fee. For Justice O'Connor, relevant factors included "the significance of the legal issue on which the plaintiff claims to have prevailed," and whether the litigation "accomplished some public goal other than occupying the time and energy of counsel, court, and client."[99] Bringing these factors to bear on the issue before the Court in *Farrar*, "one searches these facts in vain for the public purpose this litigation might have served."[100]

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[92] *Id.* at 114.
[93] *Id.* (alteration in original).
[94] *Id.* at 115.
[95] *Id.* (citation omitted).
[96] *Id.*
[97] *Id.* at 116 (O'Connor, J., concurring).
[98] *Id.* at 121.
[99] *Id.* at 121–22.
[100] *Id.* at 122.

Third, four Justices dissented in part.[101] They agreed that by securing an award of nominal damages, Farrar was a prevailing party.[102] In their view, prevailing party status was the only issue before the Court.[103] The court of appeals did not address what fee would be reasonable if Farrar was deemed to be a prevailing party, nor was that issue raised in the petition for certiorari or briefed by the parties.[104] Consequently, the dissenters wrote that the Court should not address that question. In their view, the case should be remanded to the Fifth Circuit for its consideration of how the *Hensley* factors should bear on the amount of the fee award.[105]

Fourth, the view taken by the dissenters is validated by the circumstances of the *Farrar* litigation. The record in *Farrar* was not such to allow for a thoughtful consideration of the broad question of what is a reasonable fee when the plaintiff prevails but is awarded only nominal damages. The record was deficient in two respects. First, the jury findings were not clear.[106] The complaint alleged that Lieutenant Governor Hobby deprived Farrar of liberty and property without due process by means of conspiracy and malicious prosecution.[107] In response to special interrogatories, the jury found that Hobby was the only defendant who did not conspire against Farrar.[108] Yet, it also found that Hobby did deprive Farrar of an unspecified "civil right."[109] Finally, the jury found that Hobby's conduct was not the proximate cause of any damages.[110] What does all this mean? What "civil right" did Hobby deprive Farrar? If others, but not Hobby, conspired to harm Farrar, exactly how did Hobby violate Farrar's constitutional rights?[111] Given the vagueness of these jury findings, *Farrar* is a poor vehicle through which to declare a broad rule regarding fee awards in nominal damages cases.

The second deficiency is the obvious one pointed out by the dissenting Justices in *Farrar*. The sole issue presented to the Court was whether a plaintiff who secures a judgment for nominal damages is a prevailing party within the meaning of the attorney's fees statute.[112] The question of what fee would be reasonable under the facts of this case was not addressed by the Court of Appeals, was not presented in the petition for certiorari, and was not briefed by the petitioners.[113] If the case had

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[101] *See generally id.* at 122 (White, J., concurring in part and dissenting in part).

[102] *Id.* at 123.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 124.

[106] *Id.* at 106 (majority opinion).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] These questions were not addressed in Farrar's initial appeal. The Fifth Circuit held that, given a finding that Hobby violated a "civil right" of Farrar, an award of nominal damages was required. Farrar v. Cain, 756 F.2d 1148, 1149 (5th Cir. 1985).

[112] *Farrar*, 506 U.S. at 105.

[113] *Id.* at 123 (White, J., concurring in part and dissenting in part).

been remanded for further proceedings as suggested by the dissent, the district court would have been given the first opportunity to pass on what would be a reasonable fee, if any. The parties would have been given the opportunity to fully brief and argue their positions. The district court would ultimately have ruled on the fee application and provided an explanation for its decision. Quite possibly, the district court's ruling would have been appealed to the circuit court. Clearly, such a procedure would have produced a more fully developed record than the record before the Court in *Farrar* and would have provided a firmer basis for proclaiming a general principle governing fee awards in nominal damages cases.

A. Farrar*'s Progeny*

After *Farrar*, the question facing the lower courts was how broadly or narrowly to read the Court's opinion. Does the case stand for a broad, general rule against awarding attorney's fees when the plaintiff prevails but recovers only nominal and low compensatory damages? Or is it better understood as a narrower rule applicable only to cases factually similar to *Farrar*, in which the plaintiff is unable to show a causal link between the violation and the harm for which he seeks redress? Although lower courts have divided on the answer to this question in the two decades since *Farrar*,[114] several recent circuit court opinions suggest a trend toward the broader reading. We focus our analysis on this set of cases rather than those that take our side, because they require a response, and the cases which award fees in such circumstances do not provide one.

Undeterred by the problems with a broad reading of *Farrar*, the "low award, low fee" cases merely cite *Farrar* as authority without pausing over the gaps in the Court's reasoning. *Gray ex rel. Alexander v. Bostic* provides the best recent illustration of this approach.[115] The incident giving rise to this § 1983 suit began when Gray, a nine-year-old student in a physical education class, quarreled with her instructor over her efforts at performing jumping jacks.[116] Bostic, a deputy sheriff serving as a school resource officer, was present at the time.[117] He intervened and handcuffed Gray, whom the opinion describes at one point as "arguably compliant" and, at another point, as "compliant."[118] The handcuffs were on for "less than 60 seconds," according to Bostic's testimony.[119] Gray sued on a variety of constitutional, statutory, and state law grounds, naming Bostic and ten other officers as defendants.[120] In earlier

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[114] *See supra* notes 17–18 and accompanying text.

[115] 720 F.3d 887, 893–94 (11th Cir. 2013).

[116] *Id.* at 889.

[117] *Id.*

[118] *Id.* at 890, 896.

[119] *Id.* at 890. A discussion of the incident giving rise to the litigation is found at Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1300–02 (11th Cir. 2006).

[120] *Gray*, 720 F.3d at 890.

proceedings, the claims against all but Bostic and one other defendant were quickly dismissed.[121] Gray ultimately prevailed against Bostic, showing that he violated her Fourth Amendment right against unreasonable seizure.[122] Moreover, it was found that Bostic was not entitled to qualified immunity, as it was clearly established at the time of this incident that an officer "who handcuffs a compliant nine-year-old child for purely punitive purposes has unreasonably seized the child in violation of the Fourth Amendment."[123] The jury awarded nominal damages of one dollar.[124]

The district court ultimately granted Gray $39,900 in attorney's fees and expenses.[125] By a 2–1 vote, a panel of the Eleventh Circuit reversed, holding that no fee should have been awarded.[126] The majority said that, under *Farrar*, "the most critical factor in determining the reasonableness of an attorney's fee award is the degree of success obtained," and nominal damages are sufficient to establish the "*de minimis* nature of Gray's victory."[127] Evidently, Gray had asked for $25,000 in compensatory damages.[128] The court compared the case to *Farrar*: "True, she did not seek $17 million. But the difference remains substantial between the $25,000 that she sought and the nominal award she received."[129] The court then addressed the additional two factors suggested by Justice O'Connor.[130] On the "significance of the legal issue," it treated the fact that immunity was not available as a ground for minimizing the significance of the ruling in Gray's favor: "[S]ince every objectively reasonable officer would have known that Bostic's conduct violated the Constitution, then the significance of the case as a precedential example is greatly diminished."[131] The "public purpose served" factor "principally relates to whether the victory vindicates important rights and deters future violations."[132] Gray's case failed this test because "it is clear that Gray commenced the litigation to redress private injury, and [that] it does not serve a public purpose," because "Gray was unable to establish that she suffered actual injury," and because she "specifically sought, but failed to obtain, punitive damages" and injunctive relief.[133]

Several other recent cases manifest the same reluctance to award a significant fee when the compensatory damages fall short of what the plaintiff sought. The plaintiff

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[121] *Id.*
[122] *Id.* at 891 (citing *Gray*, 458 F.3d at 1306–07).
[123] *Id.* at 892.
[124] *Id.* at 891.
[125] *Id.* at 893.
[126] *Id.* at 899–900.
[127] *Id.* at 894.
[128] *Id.* at 895.
[129] *Id.*
[130] *Id.* at 894.
[131] *Id.* at 896.
[132] *Id.* at 897.
[133] *Id.* at 899.

in *Aponte v. City of Chicago*[134] successfully sued for illegal search and seizure and asked for $25,000 in compensatory damages and $100,000 in punitive damages, but recovered only $100 against one of eight defendants.[135] He sought $116,437.50 in fees.[136] In affirming the district court's rejection of his fee, the Seventh Circuit panel relied on what it called *Farrar*'s "aiming high and fell far short" factor.[137] In *McAfee v. Boczar*,[138] the plaintiff sued Boczar, an animal control officer, for false arrest in violation of her Fourth Amendment rights and obtained a compensatory award of $2,943.60 that covered her out-of-pocket expenses but nothing more.[139] The district court authorized attorney's fees of $322,340.50.[140] Noting that the plaintiff had suggested to the jury that a $500,000 compensatory award would be appropriate and had sought punitive damages as well, the Fourth Circuit reduced the fee award to $100,000 on account of the gap between what was sought and what was obtained.[141]

Richardson v. City of Chicago[142] adds another wrinkle to the doctrine. Plaintiff sued for being shot at by an off-duty officer.[143] He recovered one dollar in nominal damages but also received $3,000 in punitive damages.[144] Though small, the punitive award made a big difference in the court's attorney's fee determination.[145] Using the "lodestar," his lawyer sought $675,000 in fees, but the district judge reduced this to $123,000.[146] The Seventh Circuit affirmed, stressing the $3,000 in punitive damages.[147] Absent punitive damages, "under *Farrar* an award of attorneys' fees would be un-warranted."[148] This statement implies there is a virtually categorical rule prohibiting an award of attorney's fees when a civil rights plaintiff succeeds in establishing a constitutional violation but receives only nominal damages.

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[134] 728 F.3d 724 (7th Cir. 2013).

[135] *Id.* at 726.

[136] *Id.*

[137] *Id.* at 729.

[138] 738 F.3d 81 (4th Cir. 2013).

[139] *Id.* at 84–85.

[140] *Id.* at 86.

[141] *Id.* at 93, 95.

[142] 740 F.3d 1099 (7th Cir. 2014).

[143] *Id.* at 1101.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 1103–04.

[148] *Id.* at 1101. *See also* Winston v. O'Brien, 773 F.3d 809, 811 (7th Cir. 2014) (granting a fee award of $187,467 supported by a judgment of $1 in nominal damages and $7,500 in punitive damages); De Jesus Nazario v. Morris Rodriguez, 554 F.3d 196, 202 (1st Cir. 2009) (noting that a punitive damage award will support attorney's fees); Mendez v. County of San Bernardino, 540 F.3d 1109, 1126 (9th Cir. 2008) ("When, as here, the plaintiff wins punitive damages, the 'award of punitive damages alone is sufficient to take it out of the nominal category.'" (quoting Thomas v. City of Tacoma, 410 F.3d 644, 648 (9th Cir. 2005)), *overruled in part by* Arizona v. ASARCO LLC, 773 F.3d 1050 (9th Cir. 2014).

1. The Case Against "Low Award, Low Fee"

Gray, *Aponte*, *McAfee*, and *Richardson* all start from the premise that the primary, if not exclusive, test for determining a "reasonable" attorney's fee in a § 1983 suit for damages is the size of the compensatory award. Although it is not implausible to read *Farrar* as standing for this "low award, low fee" principle, these cases belie the continuing division among lower courts on how *Farrar* should be applied.[149] The split among lower courts is hardly surprising, as Justice Thomas's opinion in *Farrar* is hardly unambiguous. The "award/fee" issue was poorly framed in the Supreme Court because the lower courts had not adjudicated it. Perhaps for that reason, the Court's reasoning on the damages/fee relationship is terse and fragmentary.

In *Farrar*, the Court dealt with a distinctive set of facts and justified its ruling by reasons that focused solely on those facts.[150] The opinion does not address the broader questions of when and why a low award may justify a reduced fee in a § 1983 case.[151] *Gray*, *Aponte*, *McAfee*, and *Richardson* put too much weight on a single adverb by emphasizing the Court's assertion that nominal damages "usually" warrant no fee. Even on its facts, the "low award, low fee" holding won only five votes,[152] and it was accompanied by a concurring opinion from Justice O'Connor that rejected an unqualified endorsement of the "low fee, low award" holding.[153] In sum, *Farrar* is susceptible to a narrower reading, one that focuses less on the disparity between damages sought and those awarded and more on the reasons why nominal or low damages were awarded. The general issue of the relation between the award and the fee deserves greater attention than it received either in *Farrar* or in the lower court cases that attempted to apply it.

In our view, *Gray*, *Aponte*, *McAfee*, and *Richardson* go too far in the direction of limiting fees when they adopt the "low award, low fee" reading of *Farrar* as a general guide for resolving attorney's fee issues in nominal and low damages cases. Our point is not that every plaintiff who achieves even a minimal victory is entitled to a full fee. Futile, spiteful, and wasteful litigation imposes costs on the judicial system and the larger society. It may subtly undermine effective enforcement of constitutional rights by diverting resources from meritorious constitutional litigation.[154] The Attorney's Fees Awards Act provides means for taking these costs into account. It accords some discretion to the district judge, who "may" award a fee, and it authorizes only a "reasonable" fee.[155] The social costs of misguided litigation are

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[149] For cases on the other side of the split, see *supra* note 21 and accompanying text.

[150] 506 U.S. 103, 114–16 (1992).

[151] *See id.*

[152] *Id.* at 104.

[153] *Id.* at 120–22 (O'Connor, J., concurring).

[154] *See* Laura E. Flenniken, Comment, *No More Plain Meaning:* Farrar v. Hobby, 71 DENV. U. L. REV. 477, 488–89 (1994).

[155] Justice O'Connor understood the Court as holding that the "*de minimis* or technical

illustrated by the Court's impatience with the *Farrar* plaintiffs, who obliged the Court and their adversaries to devote huge resources to litigating a doomed theory. It does not follow from *Farrar* that *no* nominal or low award deserves a substantial fee. There are differences among constitutional tort cases that result in nominal damages. Some of them do achieve worthy goals, even if the *Farrar* litigation did not.

Our argument, in a nutshell, is that *Gray*, *Aponte*, *McAfee*, and *Richardson* draw an illusory distinction between nominal and low award cases on the one hand and substantial compensatory damages cases on the other. These courts make a mistake when they use the *Hensley/Farrar* discussion of "success" as their test for determining a reasonable fee in nominal and low damages cases. Whether the plaintiff deserves a fee depends on whether the outcome of the litigation achieves the purposes of constitutional tort law under § 1983. Those goals are vindication of constitutional rights and deterrence of constitutional violations. A "technical" victory like the one in *Farrar* does not further those goals. Nor are vindication and deterrence promoted by a loss against one of several defendants or on one of several unrelated theories, even if accompanied by victory on others. That is the point of *Hensley*.[156] But vindication and deterrence are served, at least to some extent, by suits in which plaintiffs win on the merits and obtain small or nominal damages merely because they cannot prove substantial compensatory damages.

Subsection A gives reasons for rejecting the premise that "success," as measured by the amount awarded, should be the legal test for whether an attorney's fee is justified under the Civil Rights Attorney's Fees Awards Act. "Success" is not a statutory norm for determining when a fee award is justified. As used in *Hensley* and *Farrar*, it is descriptive. "Lack of success" describes what the plaintiff achieved in *Farrar*,[157] and partial success describes the outcome in *Hensley*.[158] But *Gray*, *Aponte*, *McAfee*, and *Richardson* attempt to draw from those cases a general principle that fees depend on success, and that success depends on amount received. In doing so, they ignore the vindication and deterrence aims of the statute. Those aims ought to guide its interpretation and application.

Subsection B turns to those aims. It demonstrates that in the universe of cases in which the plaintiff's only shortcoming is failure to prove substantial compensatory damages, constitutional rights are, at least to some extent, vindicated by nominal damages and that constitutional violations may be deterred. If the deterrent impact is not as great as in the case of a substantial award, it is not inconsequential. As for vindication, it is a mistake to focus solely on the amount of the award and rush to the conclusion that rights have not been vindicated, even though the plaintiff prevailed on the merits. That may be true in a case like *Farrar*, in which the plaintiff cannot

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victory exclusion . . . is part of the determination of what constitutes a reasonable fee." *See Farrar*, 506 U.S. at 117 (O'Connor, J. concurring).

[156] *See generally* 461 U.S. 424 (1982).

[157] *Farrar*, 506 U.S. at 116–17.

[158] *Hensley*, 461 U.S. at 440.

show that the large loss for which he seeks redress was not caused by the violation he is able to establish. But, in cases like *Gray*, *Aponte*, *McAfee*, and *Richardson*, the explanation for the low fee is more likely the Court's rules on damages for constitutional torts, which require juries to adhere to principles drawn from the common law of torts and forbid an award for the value of constitutional rights. In this regime, a nominal award may vindicate the right as much as one can realistically expect.

Subsection C compares the attorney's fee issue for nominal damages cases with the Court's approach to attorney's fees for other constitutional remedies. Denying a fee for nominal damages is at odds with the Court's attorney's fee doctrine in suits for prospective relief for constitutional violations. In that context, plaintiffs who win on the merits, obtain fees without any further inquiry into the significance of their victories, in contrast to the approach followed by *Gray*, *Aponte*, *McAfee*, and *Richardson* in damages cases. Yet, the underlying aim of § 1983 is to provide effective remedies for constitutional violations, both past and future. These cases draw an arbitrary distinction between attorney's fees for prospective and retrospective relief, as there is no justification for such a gap between the two sets of plaintiffs.

Subsection D connects the discussion of constitutional remedies and their purposes to the issue of statutory interpretation raised by low damages cases. The ultimate issue is the proper reading of the Attorney's Fees Awards Act of 1976, a broadly worded and brief statute that provides no internal guidance as to what counts as a "reasonable" fee. All of the foregoing three considerations have force if, and to the extent, they help in arriving at the best interpretation of that statute. Neither the disregard for vindication and deterrence as goals of constitutional tort nor the implicit distinction between past and future violations is compatible with the stated aim of that statute, which is to encourage lawyers to take these cases, so as to better enforce constitutional and other federal rights.[159]

a. "Success"

The fee statute authorizes a "reasonable attorney's fee" to a prevailing plaintiff.[160] In determining the reasonableness of an award in *Hensley*, the issue was how this statutory term should be applied to cases in which the plaintiff sued more than one defendant or raised more than one claim.[161] The Court said that "the most critical factor is the degree of success obtained."[162] The Court also said that the plaintiff's attorney should keep detailed records of time spent on different claims.[163] To the extent that hours spent on the winning issue are unrelated to those devoted to the losing

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[159] *See* S. REP. NO. 94-1011, at 2 (1976).

[160] 42 U.S.C. § 1988(b) (2012).

[161] 461 U.S. at 426.

[162] *Id.* at 436.

[163] *Id.* at 437.

issue, a plaintiff should receive a fee for the former, but not the latter.[164] In *Farrar*, the plaintiff sued several defendants for $17 million, claiming that their actions had destroyed the economic value of a school he owned.[165] The jury found that one of the defendants had violated Farrar's unspecified "civil right," but it also found that the violation did not cause the loss.[166] For this reason, Farrar was awarded only nominal damages. Applying *Hensley*'s "success" factor, the Court denied an attorney's fee.[167]

Both cases are plausible interpretations of the Attorney's Fees Awards Act. The fee statute's goal of encouraging litigation to enforce constitutional rights is not served by authorizing a fee for the unrelated losing claims. Thus, an amount that excludes those claims seems to satisfy the statute's directive that a "reasonable" fee may be awarded.[168] Few would deny that lack of success is an accurate way to describe a loss on the constitutional merits or on failure to show a causal connection between the constitutional violation and the damage incurred. *Farrar* is typical of much contemporary tort litigation, in which the main point of dispute is often the amount of damages. Thus, "[w]hen liability is clear, both sides will judge their success by the size of the verdict."[169] Typically, lack of clarity about liability will encourage both sides to pursue settlement, again putting the focus on the amount of damages the uncertain claim is worth. Clarity about liability will often be lacking because the case is governed by the jury's decision as to reasonableness under negligence law or the jury's evaluation of "defect" in a product liability case, the preemptive impact of federal law will be hard to assess, or for some other reason. At the same time, the complexity of much tort litigation assures that no lawyer will undertake the case, especially on a contingency fee basis, unless the potential liability is substantial, once again putting the focus on the amount of damages.

Taking *Hensley* and *Farrar* as their starting point, courts denying fees for nominal damages have reasoned that these plaintiffs, like Farrar, have achieved little success. This definition of success drives the courts' reasoning in *Gray*, *McAfee*, and other similar cases. These courts' focus on "success" is understandable. Litigation consumes resources that could have gone to other uses. Futile or pointless litigation wastes resources and should not be encouraged. It would be fatuous to read the Attorney's Fees Awards Act in a way that pays no attention to whether a given expenditure of

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[164] *Id.* at 434–35.

[165] Farrar v. Hobby, 506 U.S. 103, 106 (1992).

[166] *Id.*

[167] *Id.* at 114–16.

[168] The only quibble on this point is that, in *Farrar*, there is a case for an attorney's fee for the time spent on the victorious claim against Hobby if that claim can be identified and if the hours spent on it can be segregated. *Id.* at 114. The record seems to be murky, and the dissent has a valid point in arguing that the case should have been sent back for further proceedings on that issue. *Id.* at 123–24 (White, J., dissenting).

[169] RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 843 (10th ed. 2012).

lawyer time and energy was constructive or not. The "success/failure" distinction can measure the utility of a given piece of litigation.

But there is a difference between the question of whether "success" counts and the question of how "success" should be defined. The danger lies in putting too much emphasis on litigation "success," and then measuring success by the amount of money awarded, as though constitutional torts were like any other type of tort litigation. Unless courts pay attention to the distinctive features of constitutional tort law, they will give short shrift to the issues of statutory interpretation and application presented by requests for attorney's fees in § 1983 cases. On account of the prominence given toward "success" in *Hensley* and *Farrar*, the term will probably continue to figure in attorney's fees litigation. That is all the more reason to take care in defining it. Success, or the lack of it, always depends on what one is trying to achieve. In applying the standards of § 1988 to decide fee issues in § 1983 litigation, the relevant question is how well the plaintiff's lawsuit furthered the goals of constitutional tort law. In any given case, the inquiry ought to be whether the vindication and deterrence goals of constitutional tort law were served by the litigation. If they were, then the plaintiff has "succeeded" and a fee is justified, even if the damages are nominal.

In making that inquiry, it is important to pay attention to the distinctive features of most nominal damages cases for constitutional torts. There are differences between *Hensley*, *Farrar*, and much contemporary tort litigation on the one hand and our set of constitutional tort nominal damages cases on the other. We are concerned with cases in which the objection to a fee is not lack of causal connection between violation and legally recognized damage but solely that the plaintiff has failed to offer sufficient proof of an injury susceptible to monetary valuation. By contrast, in *Hensley*, winning and losing is the focus of attention. The Court sharply distinguishes between time spent on the two sets of unrelated claims.[170] In *Farrar*, the objective fact that the plaintiff could not connect the harm to the one unspecified violation found by the jury is the salient feature.[171] But in many constitutional tort cases, the plaintiff wins on the merits without qualification and obtains nominal damages only because he cannot prove compensatory damages.

In order to understand the significance of these differences for the attorney's fee issue, it is necessary to bear in mind that success is a complex concept, consisting of both objective and subjective elements. We can clarify the issues raised in the nominal damages cases by untangling these themes and examining them one at a time. The key question is what *kind* of success justifies an attorney's fee. On the objective dimension, there are external manifestations of success and failure in litigation, as in sports and career and every other endeavor. In constitutional litigation, there are two distinct objective measures—winning on the merits and obtaining

[170] Hensley v. Eckerhart, 461 U.S. 424, 434–35 (1983).

[171] *Farrar*, 506 U.S. at 106–07.

damages.[172] Our plaintiffs have met one of these. Success and failure are also subjective experiences that cannot necessarily be discerned by a judge or any other outside observer. The rich man who sees himself as a failure is a common theme, as is the poor man who takes to heart the admonition that "the best things in life are free." Though courts seem to consider the subjective side of success in attorney's fee litigation, there are reasons to doubt whether it provides a workable standard.

i. Two Objective Measures of Success

The first difference between *Hensley/Farrar* and the nominal damages cases is that the objective measure of success sends mixed signals in nominal damage cases. The common law analogue to cases like *Gray* is not products liability but dignitary tort litigation, such as offensive battery, false imprisonment, or invasion of privacy.[173] As in those dignitary tort cases, victory on the merits may not produce a significant monetary award. On the one hand, the plaintiff has won a complete victory on the merits. On the other, he has not proven any compensatory damages. Seen in this light, *Gray* seems to hold that success is distinct from victory on the merits and is wholly a matter of monetary recovery.[174] But this holding entails a value judgment as to what success should mean, a judgment that the court does not defend or even acknowledge. Nor can that value judgment fairly be attributed to the Supreme Court, as neither *Hensley* nor *Farrar* involved a fact pattern like that of *Gray*.[175]

A judgment that money matters more than victory on the merits seems to reflect a lack of realism with respect to the constitutional tort context. For one thing, the victorious constitutional tort plaintiff has overcome a special set of hurdles. These obstacles include "official immunity," which precludes suits against some officers and allows recovery against others only on a showing that they not only committed constitutional violations but violated "clearly established" rights.[176] Another obstacle is the Court's ruling in *Monell v. Department of Social Services*,[177] precluding municipal liability based on respondeat superior in constitutional torts.[178] As a result, the plaintiff must navigate a complex body of doctrine merely in order to establish liability.

Even then, victorious plaintiffs encounter a systematic problem that directly affects the amount of the award. The Court has, in its cases on damages, barred plaintiffs

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[172] *See* Dobbs, *supra* note 65, at 843 (distinguishing between these two measures of success).

[173] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) (drawing this analogy). *Cf.* Jason NE Varuhas, *The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages*, 34 OXFORD J. LEGAL STUD. 253 (2014) (discussing vindication in English tort law).

[174] Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 893 (11th Cir. 2013).

[175] *Compare Gray*, 720 F.3d 887 (involving a minor student detained and handcuffed at school), *with Hensley*, 461 U.S. 424 (involving dangerous patient involuntarily confined in hospitals), *and Farrar*, 506 U.S. 103 (involving the closure of a school).

[176] *See* Huff v. Reichert, 744 F.3d 999, 1003–04 (7th Cir. 2014).

[177] 436 U.S. 658 (1977).

[178] *Id.* at 691.

from recovering for the "value or importance" of constitutional rights.[179] Under the Court's decisions, damages in § 1983 actions are calculated using principles borrowed from ordinary tort law. In *Carey v. Piphus*,[180] the Court said that § 1983 creates "a species of tort liability."[181] Damages are governed by the "principle of compensation,"[182] under which the plaintiff must prove that he suffered a "compensable injury."[183] Piphus, a junior high school student who was suspended without being afforded a hearing, was said to have been denied procedural due process.[184] But he was not entitled to recover compensatory damages if his suspension was ultimately justified, unless he could prove emotional distress as a consequence of the procedural violation.[185] The Court expressly rejected Piphus's argument that damages should be "presumed" when the plaintiff is denied procedural due process.[186]

Carey involved a procedural due process violation, and its holding might have been confined to procedural rights. Several years later, the Court rejected any such limit. In *Memphis Community School District v. Stachura*,[187] the plaintiff was a school teacher who had been suspended with pay in violation of his substantive First Amendment rights.[188] Instructed by the trial judge that it could base damages on the inherent value of free speech,[189] the jury awarded $275,000 compensatory and $46,000 punitive damages.[190] The Court ruled that the instruction was improper, reiterating the principle it had announced in *Carey*: damage awards "must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.' That conclusion simply leaves no room for noncompensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right."[191]

Since many constitutional rights have no easily discernible monetary value, the *Carey/Stachura* rule ensures that many plaintiffs will generally recover substantial damages only by proving consequential harm from the violation. For this reason

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[179] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309–10 (1986).

[180] 435 U.S. 247 (1978).

[181] *Id.* at 253.

[182] *Id.* at 257.

[183] *Id.* at 255.

[184] *Id.* at 250.

[185] *Id.* at 263. *See, e.g.*, Harden v. Pataki, 320 F.3d 1289, 1300 (11th Cir. 2003) (applying *Carey*); Alston v. King, 157 F.3d 1113, 1118 (7th Cir. 1998) (applying *Carey*).

[186] *Carey*, 435 U.S. at 264.

[187] 477 U.S. 299 (1986).

[188] *Id.* at 300–03.

[189] The gist of the instruction is captured in the following two sentences: "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 . . . .'" *Id.* at 302–03.

[190] The judge ordered a remittitur, reducing the compensatory award to $266,750 and the punitive award to $36,000. *Id.* at 303.

[191] *Id.* at 309–10 (quoting *Carey*, 435 U.S. at 265) (alteration in original) (citations omitted).

alone, some constitutional claims will receive more favorable treatment than others—for reasons that have nothing to do with the merits. The teacher who is fired or suspended without pay can obtain significant damages, but it is less likely that someone in Stachura's situation can do so. The constitutional rights of business enterprises, which will typically involve economic interests, will receive systematically higher protection than those of other plaintiffs.[192] Two plaintiffs, both of whom are beaten by the police without justification, can each make a Fourth Amendment claim, but only the one whose beating results in injuries requiring significant medical treatment may obtain especially large damages. Others, like the handcuffed nine-year-old girl in *Gray*, who incur no physical injuries or out-of-pocket expenses, are unlikely to obtain much more than nominal damages. Some rights, such as the taxpayer's First Amendment right to block the State's support of religion even though success will not affect his tax bill,[193] or a high school student's right to express his opinions by the words on a T-shirt,[194] or the right not to be discriminated against on the basis of race in the conduct of local elections,[195] simply do not have an economic dimension. Thus, there is a significant difference between cases like *Farrar*, in which the problem is the plaintiff's inability to show a causal connection between the violation and harms that have a recognized monetary value,[196] and cases like *Gray*, in which the plaintiff's problem is the difficulty of placing a monetary value on the constitutional injury.[197] In cases like *Gray*, the lack of damages does not correspond to lack of "success," and the victory is not "technical," as it was in *Farrar*.

Quite apart from the damages rules, another feature of the constitutional tort context has a bearing on success. Many constitutional torts arise out of conflicts

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[192] *See, e.g.*, Fla. Transp. Servs. v. Miami-Dade Cty., 703 F.3d 1230 (11th Cir. 2012) (upholding jury award of $3.55 million for Commerce Clause violations involving city's application of stevedore permitting ordinance); Tri Cty. Indus. v. District of Columbia, 200 F.3d 836 (D.C. Cir. 2000) (awarding lost profits); Samaritan Inns v. District of Columbia, 114 F.3d 1227 (D.C. Cir. 1997) (awarding punitive damages and other business losses). Such economic loss was precisely the type of injury for which Farrar sought redress. Farrar v. Hobby, 506 U.S. 103, 106 (1992). Farrar did not prove, however, that his economic loss was caused by the defendant's violation of an unspecified civil right. *Id.*

[193] *See* Pelphrey v. Cobb Cty., 547 F.3d 1263 (11th Cir. 2008) (awarding nominal damages in an Establishment Clause case).

[194] Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 881 (7th Cir. 2011) (approving an award of $25 in damages to a plaintiff whose "desire to wear the T-shirt on multiple occasions in 2007 was thwarted by fear of punishment"); *see also* Corder v. Lewis Palmer Sch. Dist., 566 F.3d 1219, 1224–25 (10th Cir. 2009) (considering nominal damages when student's diploma was withheld in violation of free speech rights); Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752 (8th Cir. 2008) (awarding nominal damages to students who were disciplined for wearing black armbands in violation of school policy).

[195] Taylor v. Howe, 280 F.3d 1210 (8th Cir. 2002) (approving awards of between $500 and $2,000 in compensatory damages to each of seven plaintiffs who established racial discrimination against them with respect to their right to vote).

[196] *Farrar*, 506 U.S. 103.

[197] Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887 (11th Cir. 2013).

between the plaintiff and some government official, such as a police officer or a jailor. The plaintiffs in these cases will often be unsympathetic or unpopular. For that reason alone, damage awards may be systematically lower than for ordinary torts.[198] Taken together, the combined effect of the damages rules and lack of sympathy for some plaintiffs is that for many constitutional tort plaintiffs, small or nominal damages are the most realistic outcome. That fact should be taken into account in measuring the plaintiff's "success" for purposes of attorney's fees. Indeed, the Court has already recognized the importance of context in evaluating the plaintiff's success. In *Perdue v. Kenny A.*,[199] the issue was whether a fee should be *increased* to reflect the plaintiff's exceptional success.[200] The Court ruled that this should generally be avoided because exceptional results may be due to such contextual features as "an unexpectedly sympathetic jury, or simple luck."[201] There is a tension between *Farrar* and

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[198] Whether this is so in a particular case is hard to determine from reading appellate opinions, yet the dispositions of some cases are suggestive of a lack of sympathy for certain types of plaintiffs. *See, e.g.*, Guzman v. City of Chicago, 689 F.3d 740, 748 (7th Cir. 2012) (urging caution in giving a nominal damages instruction in an unlawful search case because "an unlawful search or seizure will often produce, at a minimum, a compensable claim for loss of time," and, by implication, a nominal damages instruction may improperly influence a jury to award no compensatory damages); Horina v. Granite City, 538 F.3d 624, 637–38 (7th Cir. 2008) (reversing, for lack of evidence, district court's award of $2,100 for "humiliation, emotional distress, and loss of First Amendment rights" to a plaintiff who had been arrested for protected speech); Corpus v. Bennett, 430 F.3d 912, 917 (8th Cir. 2005) (affirming the district judge's reduction of nominal damages to $1 from the jury's award of $75,000 for an arrestee who won an excessive force claim); Park v. Shiflett, 250 F.3d 843 (4th Cir. 2001) (affirming an award of nominal damages for a plaintiff who was thrown against a wall, whose legs were kicked apart, and who was handcuffed, all in violation of his Fourth Amendment rights); Slicker v. Jackson, 215 F.3d 1225 (11th Cir. 2000) (reversing a district court's judgment as a matter of law for the defendant police officers in an excessive force case, which the district judge had issued despite evidence that the police officers had brutalized the plaintiff); Kyle v. Patterson, 196 F.3d 695, 697 (7th Cir. 1999) (holding that damages were non-existent when plaintiff was held without a probable cause hearing for sixty-one hours, even though the due process limit is forty-eight hours); Amato v. City of Saratoga Springs, 170 F.3d 311, 314 (2d Cir. 1999) ("In certain circumstances, a jury could reasonably determine that compensatory damages are inappropriate even where excessive force was used, [including] . . . where the injuries lack monetary value." (citation omitted)); Robinson v. Cattaraugus Cty., 147 F.3d 153, 160 (2d Cir. 1998) (upholding the jury's denial of compensatory damages for a Fourth Amendment violation, and stating that "the fact that the jury credited plaintiffs' accounts of the officers' invasion of Robinson's home in January 1989 did not require it to believe plaintiffs' evidence as to either the fact or the extent of their emotional suffering"); Norwood v. Bain, 143 F.3d 843 (4th Cir. 1998) (upholding an award of only nominal damages to motorcyclists at a charity motorcycle rally who were stopped and searched in violation of their Fourth Amendment rights, even though they testified that they suffered emotional distress).

[199] 559 U.S. 542 (2010).

[200] *Id.* at 546.

[201] *Id.* at 554.

Kenny A. If simple luck or a sympathetic jury are grounds for discounting a plaintiff's exceptional success, then features of the context that hinder recovery should also count, as grounds for excusing his failure to do better, when the award is small.

ii. The Difficulty of Measuring Subjective Success

In everyday life, success, or the lack of it, is as much a subjective experience as an objective fact. "The quest for success always begins with a target,"[202] and one person's aim will often differ from another's.[203] The same is true of tort litigation generally and constitutional tort litigation in particular. Most tort litigation involves efforts to obtain large damages for physical and emotional injuries, but, for centuries, common law courts have recognized that a plaintiff suing for dignitary torts may genuinely aim for vindication of his rights rather than a large award, even if an award would also be welcome.[204] The Court explicitly recognized the application of this principle to constitutional torts in *Carey v. Piphus*.[205] Conversely, a plaintiff who asks for a great deal and obtains an amount that seems impressive to an outside observer may actually be disappointed with the outcome.

Whether courts should take plaintiffs' subjective attitudes into account in determining attorney's fees is a different matter. The basic problem is that, in order for courts to consider this factor, they must have a means for determining the plaintiff's state of mind. In practice it is hard to know what motivates the plaintiff. Even if he knows he cannot prove a large monetary loss the plaintiff (or his lawyer) may pursue the litigation because he believes that a large award can be obtained under the heading of emotional distress. But he may (also) invest his time, energy, money, and emotional resources simply for the sake of vindicating his rights or trying to establish a legal principle that will influence official actions in the future. Many fact

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[202] TOM MORRIS, TRUE SUCCESS: A NEW PHILOSOPHY OF EXCELLENCE 35 (1994).

[203] In one study, for example, social class significantly affected children's ambitions. *See* F.M. Katz, *The Meaning of Success: Some Differences in Value Systems of Social Classes*, 62 J. SOC. PSYCHOL. 141, 147 (1964) (finding that children whose fathers are white collar professionals are more likely to view success as the achievement of a certain status, while children whose fathers work in unskilled manual labor more often define success in terms of earning possessions).

[204] CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES §§ 20–22 (1935); *see also* 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 99 (9th ed. 1912).

[205] 435 U.S. 247, 266–67 (1978) ("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. 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 . . . . Because the right to procedural due process is 'absolute' . . . and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury." (footnotes omitted) (citations omitted)).

patterns, especially ones that involve unpleasant encounters with the police, suggest that money may not be a primary goal.[206] Succeeding on the merits but obtaining no damages counts as success for such a plaintiff, regardless of whether the external observer concerned only with money would perceive it as such. On the other hand, these plaintiffs may really be interested in money and can fairly be said to have failed if they do not get it. Yet, it is impossible to know whether they perceive the outcome as a success or not. A further question is whether the plaintiff's attitude toward the litigation should be measured at the outset or at the end. Someone who set out with the aim of obtaining a large award may ultimately be happy with a largely symbolic victory.

Despite these difficulties, some courts put considerable emphasis on the subjective inquiry. They dodge the problems by looking at what plaintiffs asked for and comparing that figure to what they obtained.[207] Their reasoning evidently is that the amount asked for is objective evidence of the plaintiff's subjective motivation. *Farrar*'s emphasis on the fact that the plaintiff asked for $17 million and received only nominal damages seems to support this approach.[208] In our view, it is a mistake to rely on *Farrar* for inquiry into a plaintiff's subjective attitude, because *Farrar* is better understood as a case in which the *objective* manifestations of success were absent. The plaintiff failed to prove a causal link between the wrong and the harm for which he sought redress. Taken together, the objective facts of the *Farrar* litigation certainly support an inference that the plaintiff fell far short of what he subjectively sought and, therefore, failed.[209] But the Court's ability to draw that inference in *Farrar* does not support the proposition that we can do so with confidence in other cases. For example, it would not be at all surprising to find that the nine-year-old girl and her parents in *Gray* were subjectively satisfied with a formal judicial declaration that the constitution clearly prohibits the handcuffing of a child

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[206] *See, e.g.*, Sandoval v. Las Vegas Metro. Police Dep't, 756 F.3d 1154 (9th Cir. 2014) (police officers entered home under the incorrect belief that a burglary was in progress, shot the family dog, and held a gun to the head of an unarmed boy); Green v. City of San Francisco, 751 F.3d 1039 (9th Cir. 2014) (officer arrested plaintiff after mistakenly identifying plaintiff's car as a stolen vehicle); Huff v. Reichert, 744 F.3d 999 (7th Cir. 2014) (police stopped plaintiff's car in a high-crime area and conducted pat-down search without probable cause).

[207] *See, e.g.*, Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 895 (11th Cir. 2013) ("Like the plaintiffs in *Farrar*, Gray achieved very limited success in this case; she asked for a large amount of money and received a nominal award. True, she did not seek $17 million. But the difference remains substantial between the $25,000 that she sought and the nominal award she received.") Other cases, mostly brought under Title VII, in which courts base fees on a comparison of the amount of money sought and the amount awarded, are discussed in Rosenthal, *supra* note 24, at 82–83. Professor Rosenthal concludes that "the less money the plaintiff requests, the more likely he is to recover attorney's fees if he is awarded only nominal damages." *Id.* at 82.

[208] Farrar v. Hobby, 506 U.S. 103, 114 (1992).

[209] *Id.*

at school without probable cause, even if they were also disappointed by the jury's nominal damage award.

With the exception of *Farrar*, the subjective inquiry is misguided for several reasons. First, it is inherently and nearly always unreliable because few courts can ever obtain trustworthy information on the plaintiff's subjective attitudes. Second, the effort to counter that difficulty by comparing the amount sought with the amount awarded disregards the possibility that plaintiffs are motivated by both money and victory on the merits or that motivations change over time. The merits may count for far more in the plaintiff's mind, even if he seeks a big award. Third, plaintiffs will typically rely on their lawyers for advice on conducting the litigation. As a result, the comparative approach creates a conflict of interest for the plaintiff's lawyer, as the client's interest might be better served by asking for more while the lawyer could ensure "success" (and, hence, a fee award) by asking for less. Fourth, the comparative approach is also at odds with the deterrence and vindication goals of both constitutional tort law and the fee statute. To the extent asking for less would systematically produce lower awards, both of these goals will be compromised. It seems perverse to encourage plaintiffs to litigate in a way that undermines the ultimate goals of the civil rights and attorney's fees statutes. For all of these reasons, it is better to forego basing attorney's fee awards on judicial inquiry into the plaintiff's subjective motivations and attitudes.

b. Do Low Awards Further Vindication and Deterrence?

Whether the plaintiff should get a fee in a nominal damages case depends on whether he has achieved *enough* success at furthering the vindication and deterrence goals of § 1983, given the distinctive features of constitutional tort litigation, including the immunity, "official policy," and (especially) damages calculation hurdles plaintiffs face. There are arguments on both sides of the issue of whether low awards sufficiently advance the deterrence and vindication goals. Because there is no unanswerable argument one way or the other on either goal, value judgments are unavoidable. In our view, the balance of competing considerations favors attorney's fees on both grounds.

i. Deterrence

The traditional deterrence rationale for constitutional tort law is that imposing liability for damages on municipalities and officials who violate constitutional rights will discourage them from committing future violations.[210] This rationale is challenged

[210] *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 161 (1992) ("The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); City of Riverside

by several scholars who offer a variety of reasons why damage awards in civil rights cases will not effectively deter future constitutional violations.[211] One complicating factor is the widespread practice of indemnification. One study reported that individual enforcement officials in thirty-seven small and mid-sized jurisdictions never contributed to a settlement or judgment in a civil rights suit brought against them.[212] Factors other than the size of a damage award, however, might contribute to deterrence. For example, another study reported that defendants in civil rights cases avoid making Rule 68 offers of judgment because of the adverse impact that a judgment would have on their personal lives and career.[213]

There are reasons to believe that awards of nominal damages can advance the goal of deterrence. First, as alluded to above, factors other than monetary liability may influence behavior. An officer adjudged to have inflicted excessive force may no longer be eligible for selection to a SWAT team, even if only nominal damages were awarded.[214] Second, the fact that a given constitutional violation produced only nominal damages in one case does not mean that substantial damages will be precluded in the next case. For example, although the nine-year-old plaintiff in *Gray* did not suffer an injury of monetary value,[215] the next child placed in handcuffs

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v. Rivera, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future[,] . . . particularly . . . in the area of individual police misconduct . . . ."); Owen v. City of Independence, 445 U.S. 622, 651–52 (1980) ("Moreover, § 1983 was intended . . . to serve as a deterrent against future constitutional deprivations . . . . The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."). Also, note that the potential of over-deterrence is the rationale used to justify the various immunity doctrines. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[211] For a summary of this argument and citations to authorities, see Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision-making*, 57 UCLA L. REV. 1023, 1025 (2010).

[212] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). Professor Schwartz also reports that litigation and budgeting practices of state and local governments tend to lessen the financial impact of settlements and judgments on law enforcement agencies. Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635673.

[213] Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 350 (2007) ("[W]e were told by several civil rights defense lawyers that a police officer who has a judgment entered against him individually would have more difficulty securing a mortgage and face difficulties in career advancement, such as becoming a member of a SWAT team.").

[214] *Id.*

[215] Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 899 (11th Cir. 2013).

without probable cause may suffer significant compensable emotional distress.[216] Thus, governmental employers who indemnify individual officials who violate the constitutional rights of others will have an economic incentive to avoid future violations.

Third, and perhaps most important, any model of deterrence assumes that the party whose behavior is sought to be influenced has reasonably accurate information regarding the risk of violations. Encouraging litigation that uncovers constitutional violations even though producing only nominal damages is necessary to provide a more accurate assessment of the risk of future violations.[217] Nominal damages cases can provide useful information to governments and supervisory officials. Litigation that results in nominal damages may help identify officers who are especially prone to commit constitutional violations or situations that are likely to give rise to them. Prospective plaintiffs in later litigation may also benefit from that information.

Fourth, the rule on attorney's fees will have consequences for whether constitutional tort claims with uncertain damages will be litigated at all.[218] The intangible nature of constitutional rights and the *Carey/Stachura* damages rules make it impossible to predict how a jury will assess damages in any given constitutional tort case. The problem is not unique to constitutional torts. Awards for nonpecuniary loss vary significantly from case to case in ordinary tort law as well.[219] Similarly, it is often impossible to predict whether and how much a jury will award in punitive

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[216] If the second victim is especially sensitive, the emotional distress of being handcuffed in front of fellow students might be severe. *Cf.* Complaint for Damages and Declaratory and Injunctive Relief and Jury Demand, S.R. v. Kenton Cty. Sheriff's Office, 2015 WL 9462973 (E.D. Kyl, Dec. 28, 2015) (No. 2:15-cv-143), 2015 WL 4606272. This suit involved the handcuffing of an eight-year-old boy and a nine-year-old girl in a Kentucky school. The boy was alleged to have suffered from post-traumatic stress disorder (PTSD) and attention deficit hyperactive disorder (ADHD). The girl was also alleged to have ADHD. *See* Sheryl Gay Stolberg, *A.C.L.U. Sues Over Handcuffing of Boy, 8, and Girl, 9, in Kentucky School*, N.Y. TIMES (Aug. 3, 2015), http://www.nytimes.com/2015/08/04/us/aclu-sues-over-handcuffing-of-boy-8-and-girl-9-in-kentucky-school.html. The common law "thin skull" or "egg shell skull" doctrine applies to constitutional torts. The constitutional tort defendant, like his common law counterpart, "takes his victim as he finds him" and is "fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim." Figueroa-Torres v. Toledo-Davila, 232 F.3d 270, 275–76 (1st Cir. 2000) (collecting cases).

[217] The importance of civil rights lawsuits in informing policymakers of risk is more fully developed in Schwartz, *supra* note 211, at 1028–29.

[218] *See* Julie Davies, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 237 (1997) (surveying thirty-five practitioners and finding that "[s]everal attorneys commented that they must make difficult strategic decisions about what claims to pursue given the combination of juror reluctance to award high damages for constitutional violations and the possibility that judges will use *Farrar* to justify a denial of fees").

[219] *See* Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 91 (2006).

damages, yet large punitive awards can have a significant deterrent impact. Unless plaintiffs who win on the merits can be assured of obtaining an attorney's fee, lawyers may be hesitant to take these cases at all, and the deterrent impact of the litigation that does result in a large award would be lost.

ii. Vindication

The issue here is whether constitutional rights are sufficiently vindicated by nominal damages to justify an adequate attorney's fee. One argument against a fee begins with the familiar principle of common law torts that the aim of damages is to make the plaintiff whole. Obliging the defendant to make up for the wrong corrects the injustice done by the tortfeasor and vindicates the plaintiff's rights against the wrongdoer. Suppose the constitutional tort plaintiff claims a large loss and receives a small or nominal award. There appears to be a gap between the amount needed to vindicate rights by making the plaintiff whole and the amount awarded. If the constitutional right is not fully vindicated, the vindication goal is not fully realized and the rationale for awarding a fee is weakened. Stated in this way, the anti-fee argument gets nowhere because it ignores a corollary of the common law rule: if the plaintiff wins on the merits but can prove only small or no damages, then he is necessarily made whole by a small or nominal award, and the vindication aim is met.

A better way to frame the objection to attorney's fees for vindication in nominal damages cases is that the force of the vindication goal nonetheless depends on the amount of the damages, since the damages are a measure of the value of the rights vindicated. Lack of compensatory damages shows that the rights are not sufficiently valuable to justify a fee. In common law tort litigation, the plaintiff cannot win a negligence case on the merits without establishing some damages; damages are an element of the cause of action.[220] Moreover, claims that do not involve large damages are rejected by many lawyers because they present no opportunity to obtain a large contingent fee.[221] The anti-vindication argument seems to apply this reasoning to the § 1983 context. Just as small claims for ordinary torts are not litigated on account of their slight value, the same should be true for constitutional torts. The Attorney's Fees Awards Act should not be applied in a way that encourages lawyers to bring them.

A premise of this argument is that the damages measure the value of the right. In the constitutional tort context, that premise is invalid.[222] The point of *Stachura* is

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[220] *See* RESTATEMENT (THIRD) OF TORTS § 6 (AM. LAW INST. 2005).

[221] This is so even in ordinary tort litigation. For a recent illustration, see Barry Meier & Hillary Stout, *Victims of G.M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES (Dec. 29, 2014), http://www.nytimes.com/2014/12/30/business/victims-of-gm-deadly-defect-fall-through-legal-cracks.html (quoting a letter from a plaintiffs' law firm to a Wisconsin family seeking legal representation against General Motors for a child's death possibly caused by a faulty airbag declining the case "[b]ecause of the $350,000 maximum recovery for loss of society in Wisconsin and the extreme expense of litigating the case against General Motors").

[222] Whether the premise is valid in the other contexts to which the Attorney's Fees Awards

that the plaintiff is not entitled to an instruction authorizing the jury to award damages for the value of the constitutional right the defendant violated.[223] Thus, an argument that the lack of an award is proof of the lack of value of the right seems unsound. In addition, the analogy to the common law ignores an important category of common law torts. Even in the common law, there are some torts for which nominal damages are available precisely because the litigation is a valuable means of enforcing rights against a variety of intrusions by wrongdoers, whether or not any harm results. In particular, there are "dignitary" torts, such as battery, assault, invasion of privacy, false imprisonment, and defamation, in which liability is imposed in order to vindicate the plaintiff's rights. Unlike negligence law, damages are not required in order to establish that liability, and nominal damages can be awarded even if no compensatory damages are proved.[224] At the end of its opinion in *Carey*, the Court recognized that constitutional torts fit into this category.[225] Even if the plaintiff cannot prove compensatory damages, Piphus would "be entitled to recover nominal damages not to exceed one dollar . . . ."[226]

The common law's premise in recognizing dignitary torts and awarding nominal damages for them is that the aims of tort include not only compensation for wrongful loss but also vindication of rights *independent* of loss.[227] Even if nominal or small damages do not make the plaintiff whole, they can provide the redress needed to adequately vindicate the right.[228] The goals of constitutional tort law likewise

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Act applies is a separate question and is not our concern here. *See supra* note 24 and accompanying text.

[223] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986).

[224] *See, e.g.*, MCCORMICK, *supra* note 204, § 22 (1935) (noting that for wrongs which are trespasses—such as assault and battery—the rule remains that proof of the defendant's wrongdoing enables the plaintiff to recover nominal damages though no loss or damages beyond the invasion of right shown); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 967 (1989) ("[F]or certain types of dignitary torts, the law serves the purpose of vindicating the injured party." (alteration in original)).

[225] Carey v. Piphus, 435 U.S. 247, 266 (1978).

[226] *Id.* at 267.

[227] *See, e.g.*, Ault v. Lohr, 538 So. 2d 454, 455 (Fla. 1989) (awarding nominal damages in an inmate's claim for assault and battery and noting that "[n]ominal damages are awarded to *vindicate* an invasion of one's legal rights where, although no physical or financial injury has been inflicted, the underlying cause of action has been proved to the satisfaction of a jury" (emphasis added)); Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1, 30 (1989) (noting that plaintiffs can recover nominal damages for dignitary torts as a means of "assuaging their dignity even if they have suffered no physical or emotional injury at all").

[228] *See, e.g.*, Bierman v. Weier, 828 N.W.2d 436, 467 (Iowa 2013) (Wiggins, J., concurring) ("[T]he only way a defamed person can definitely *vindicate* his or her reputation is to bring an action against the defamer. . . . [A nominal] award of one dollar *vindicates* the defamed person's reputation, a remedy far superior to any dollar amount a jury might award."(emphasis added)); *see generally* John C.P. Goldberg, *Two Conceptions of Tort*

include not only compensation (and deterrence) but also vindication. Like the rights protected by dignitary torts, constitutional rights "cannot be valued solely in monetary terms."[229] Winning on the merits and obtaining nominal damages is sufficient to achieve the vindication goal and to justify an attorney's fee under the statute.

c. Harmonizing Constitutional Remedies for Past and Future Violations

The Attorney's Fees Awards Act of 1976 does not distinguish between awards for prospective and retrospective relief. Yet prevailing plaintiffs in prospective relief cases fare well under the Supreme Court's attorney's fee doctrine, even when the real-world impact of the relief they obtain is minimal. Before late 2012, the issue of whether victorious plaintiffs could obtain attorney's fees in such cases was uncertain, and that lack of clarity may have provided some support for the "low award, low fee" principle in damages cases. But the Supreme Court undercut that support in *Lefemine v. Wideman*.[230] In that case, an abortion protestor challenged his treatment by the police and sought nominal damages and an injunction.[231] The injunction was granted, but the district court denied attorney's fees and the Fourth Circuit affirmed on the ground that the injunction did not alter the relative positions of the parties because it merely "ordered Defendants to comply with the law," and "[n]o other damages were awarded."[232] In a unanimous per curiam ruling, the Supreme Court vacated the judgment.[233] By removing the threat of future arrest, the injunction "worked the requisite material alteration in the parties' relationship."[234] Even a preliminary injunction, which does not definitively resolve the case on the merits,

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Damages: Fair v. Full Compensation, 55 DEPAUL L. REV. 435, 437 (2006) (arguing that "tort as a law for the redress of wrongs . . . supports a conception of tort damages as *fair compensation*," which need not make the plaintiff whole).

[229] *See* City of Riverside v. Rivera, 477 U.S. 561, 574 (1986) (plurality opinion); *see also* Robinson v. City of Harvey, 489 F.3d 864, 872 (7th Cir. 2007) (stating that the goal of vindication of constitutional rights is distinct from assessing the monetary damages from their violation). This point holds whether the award is small or nominal. On the distinct vindicatory role of nominal damages, see Guzman v. City of Chicago, 689 F.3d 740, 748 (7th Cir. 2012) ("nominal damages . . . are an appropriate means of vindicating rights whose deprivation has not caused actual, provable injury"); Schneider v. County of San Diego, 285 F.3d 784, 795 (9th Cir. 2002) ("Compensatory damages and nominal damages serve distinct purposes. Nominal damages are a purely 'symbolic vindication of [a] constitutional right,' and are awarded regardless of whether 'the constitutional violation causes any actual damage.' Compensatory damages, by contrast, serve to return the plaintiff to the position he or she would have occupied had the harm not occurred." (alteration in original) (citations omitted)).

[230] 133 S. Ct. 9 (2012).

[231] *Id.* at 10.

[232] *Id.* at 11 (first alteration in original).

[233] *Id.* at 12.

[234] *Id.* at 11. *See also* Sanchez v. City of Austin, 774 F.3d 873 (5th Cir. 2014) (holding that a district court abused its discretion in denying attorney's fees to plaintiffs who secured injunctive relief against the city's enforcement of criminal trespass laws against political protestors).

can be sufficient,[235] unless the preliminary relief is "undone by the final decision in the same case."[236] This doctrine can be traced back to the case law on which § 1988 was modeled. In *Newman v. Piggie Park Enterprises, Inc.*,[237] the Court approved an award of attorney's fees to a plaintiff who secured injunctive relief against a defendant who had violated Title II of the 1964 Civil Rights Act, even though the statute did not authorize an award of damages.[238] The framers of § 1988 cited *Newman* as the guiding authority for awarding attorney's fees under § 1988.[239]

It is fair to criticize *Gray*, decided in August 2013, for not having taken account of *Lefemine*, decided in November 2012. That said, there was, in fact, some pre-*Lefemine* lower court authority for the proposition that insufficiently significant injunctive relief would not merit a fee. In *People Helpers Foundation v. City of Richmond*,[240] for example, the court denied fees to a non-profit corporation that had obtained an injunction prohibiting the city from harassing it, reasoning that the relief was *de minimis* since it only required the city to obey the law.[241] But *Lefemine* repudiates that line of cases. It undermines the "low award, low fee" rulings by rejecting, in the context of prospective relief, the notion that courts should evaluate the importance of a given plaintiff's victory in deciding whether to award a fee.[242] That notion can survive in the retrospective relief context only if there are good grounds for distinguishing between backward-looking and forward-looking remedies.

The principle underlying the attorney's fee doctrine in prospective relief cases is that the plaintiff achieves success, and is entitled to a fee, when he vindicates his rights. Besides failing to implement the vindication and deterrence goals of constitutional tort law, the attorney's fee rule adopted in *Gray*, *Aponte*, *McAfee*, and *Richardson* draws an arbitrary distinction between the attorney's fee doctrine on prospective and retrospective relief. There are differences between the two remedies, but those differences relate to the various contexts in which constitutional violations take place and have no bearing on whether a fee should be awarded to a prevailing plaintiff. Some constitutional violations—the ones that give rise to suits for damages—occur more or less unexpectedly, or ad hoc, in the course of random encounters with the police that result in Fourth Amendment violations,[243] or by officials' decisions that violate their subordinates' First Amendment rights,[244] or prison guards' deliberate

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[235] *See, e.g.*, Higher Taste, Inc. v. City of Tacoma, 717 F.3d 712, 716 (9th Cir. 2013); Common Cause/Ga. v. Billups, 554 F.3d 1340, 1355–56 (11th Cir. 2009); People Against Police Violence v. City of Pittsburgh, 520 F.3d 226, 228–29 (3d Cir. 2008).

[236] Sole v. Wyner, 551 U.S. 74, 83 (2007).

[237] 390 U.S. 400 (1968).

[238] *Id.* at 400.

[239] *See* S. REP. NO. 94-1011, at 2–3 (1976).

[240] 12 F.3d 1321 (4th Cir. 1993).

[241] *Id.* at 1328–29.

[242] *See* LeFemine v. Wideman, 133 S. Ct. 9, 11 (2012).

[243] *See, e.g.*, Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001).

[244] *See, e.g.*, Lane v. Franks, 134 S. Ct. 2369 (2014).

indifference in response to specific threats to the health and safety of inmates in violation of the Eighth Amendment.[245] Other violations are more predictable because they are either ongoing or threatened in the future, such as prison conditions that fall short of Eighth Amendment requirements,[246] or ordinances that unduly restrict speech by regulating signs on the basis of their content,[247] or systematic police practices that present an ongoing threat of violations,[248] such as a policy of stopping drivers of a given ethnicity.[249] Plaintiffs charging the latter category of violations can seek prospective relief in the form of an injunction that will order officials to stop the challenged practice or else be held in contempt and fined or jailed. Alternatively, they may seek a declaratory judgment, which will generally have the same effect without the immediate threat of contempt.[250] In the former category, plaintiffs are barred from prospective relief because they cannot show an ongoing threat that their rights will be violated.[251] The only available remedy may be a suit for damages for the past violation. The two remedies are not mutually exclusive. They are mutually re-enforcing. Both aim at vindication and deterrence. When the violation is ongoing, the plaintiff may seek both prospective and retrospective relief.

There are differences between prospective and retrospective litigation, but the differences relate to the obstacles plaintiffs face on their way to victory on the merits and have no bearing on the level of success a prevailing plaintiff must achieve in order to obtain a fee. Thus, the plaintiff cannot get an attorney's fee unless he obtains a judicial ruling in his favor and not a mere change in defendant's behavior.[252] Another problem for plaintiffs seeking prospective relief is establishing their standing to sue. In order to do so, they must show that the defendant's violation has caused "injury in fact" to themselves and that the injury will be redressed by the available relief.[253] But the *Carey/Stachura* test does not apply. There is no need to show either economic harm or compensatory damages.[254] The injury in fact requirement is met

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[245] *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994).

[246] *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910 (2011).

[247] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

[248] *See, e.g.*, Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486 (9th Cir. 1996).

[249] *See, e.g.*, Melendres v. Arpaio, 695 F.3d 990 (9th Cir. 2012).

[250] *See* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1094 (2014).

[251] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). Plaintiffs who can establish neither a past violation nor a threat of future violation, but simply object to a law they believe to be unconstitutional, do not satisfy the requirements for either type of relief. *See, e.g.*, CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612 (3d Cir. 2013).

[252] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 619 (2001).

[253] *See* Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013); Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–67 (1992).

[254] The distinction between the two contexts was the core of the court's reasoning in Acevedo-Luis v. Pagan, 478 F.3d 35, 38–39 (1st Cir. 2007). The plaintiff established a free speech violation but was awarded no damages. *Id.* at 37. On the damages issue, he sought

by showing, for example, that the defendant's actions would diminish their enjoyment of the environment,[255] or violate their statutory right to privacy,[256] or block their access to information,[257] or threaten their future exercise of free speech rights.[258] When plaintiffs sue for both prospective and retrospective remedies, standing to sue must be met separately for each type of relief.[259] Being placed in a chokehold by a police officer on one occasion may entitle the plaintiff to damages, but it does not warrant prospective relief.[260] By contrast, a history of being stopped by the police fifteen times in the past will suffice to show a continuing threat.[261]

Once this threshold is met and the plaintiff obtains a judgment, or even preliminary relief in some cases, he has made his case for a fee. In setting standards for fee awards to plaintiffs who have obtained prospective relief, the Supreme Court has never required the plaintiff to meet the *Carey/Stachura* test or a variant of it adapted to the prospective relief context. That is, plaintiffs routinely obtain fees without showing either past or present compensatory damages.[262] Nor is it necessary to demonstrate a threat of future compensatory damages.[263] Nor does it matter that compensatory damages may be barred by official immunity.[264] The key issue is whether the resolution changed the legal relationship between the parties in the plaintiff's favor.[265] Now consider the nominal damages context. Under *Gray*, *Aponte*, *McAfee*,

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an instruction "that any violation of his First Amendment rights constituted irreparable injury." *Id.* at 38. Plaintiff cited the well-established principle in the context of prospective relief that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* (alteration in original). The district court had rejected this reasoning, noting "that while the language accurately described one of the requirements for a *preliminary injunction* in a First Amendment case, it would not be helpful to a jury in determining the *compensatory damages* for a First Amendment violation." *Id.* (citation omitted). The appellate court affirmed denial of the instruction, citing *Carey*, *Stachura*, and *Farrar*. *Id.* It also noted that the plaintiff had not sought nominal damages. *Id.* at 39.

[255] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 169 (2000).

[256] *See* Doe v. Chao, 540 U.S. 614, 624–25 (2004).

[257] *See* FEC v. Akins, 524 U.S. 11, 20–25 (1998).

[258] *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2340–41 (2014).

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

[260] *See id.* at 110.

[261] *See* Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983).

[262] *See, e.g.*, Sanchez v. City of Austin, 774 F.3d 873 (5th Cir. 2014) (finding an abuse of discretion to deny plaintiffs attorney's fees because they did not secure an award of damages when they did secure injunctive relief).

[263] *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 185–88 (2000).

[264] *See* Pulliam v. Allen, 466 U.S. 522, 527 (1984) (relying on the legislative history of § 1988).

[265] *See* Lefemine v. Wideman, 133 S. Ct. 9, 11 (2012). The type of case in which plaintiffs fail this test is illustrated by *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam). Two prisoners alleged violations of their Eighth Amendment rights and succeeded on the merits but were released before they could benefit from any relief. *Id.* The Court held that they could not obtain a fee.

and *Richardson*, plaintiffs who sue for past wrongs must meet a more demanding test. It is not enough that they vindicate their rights; they must obtain significant compensatory damages as well.[266]

The distinction between the standards for awarding fees in cases where the plaintiff seeks injunctive relief and cases in which he seeks damages is arbitrary and unjustified. The only difference between the two contexts is the timing of the constitutional violation. The damage claim concerns a violation that has already occurred and the injunction case involves a threatened future violation. This difference is irrelevant to the goal of § 1988—to encourage lawyers to take cases aimed at deterring constitutional violations and vindicating constitutional rights.

d. Implementing the Attorney's Fees Awards Act of 1976

Vindicating rights and remedying violations are worthy objectives, but they would not carry much weight by themselves if the fee statute was designed to further a different set of policies. However valuable those ends may be, it is up to Congress to decide whether, why, and to what extent we should carve out exceptions to the "American Rule" on attorney's fees. In fact, realizing the vindicatory, deterrent, and remedial goals of constitutional torts were among Congress's core aims in enacting § 1988.[267] As a matter of interpreting § 1988 so as to achieve congressional intent, the narrow reading of *Farrar*, in which its "no fee award for nominal damages" rule is limited to cases with similar facts, is preferable to the broad anti-fee rule adopted in *Gray*, *Aponte*, *McAfee*, and *Richardson*.

Congress recognized that there is a public interest in the vindication of individual constitutional rights. The public, and not just the individual litigant, benefits when constitutional violations are brought to light. As stated by the Court in *City of Riverside v. Rivera*:

> [A] civil rights action for damages [does not] constitute[ ] [merely] a private tort suit benefiting only the individual plaintiffs whose rights were violated. . . . [A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.
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> . . . .

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[266] *See, e.g.*, Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 893 (11th Cir. 2013).

[267] In this Section, our approach to interpreting § 1988 "proceed[s] on the assumption that judges must act as Congress's faithful agent," which is "the standard account of the role of the judge in the federal system." JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 201 (2010). The central question, and the one on which we focus, is whether Congress meant to include nominal damages cases among those for which attorney's fees may be awarded. In interpreting some statutes, other issues arise because of conflicts between the text and the purpose or because the passage of time has altered the context in which the statute will be applied. But § 1988, a broadly worded and comparatively recent statute, does not present such issues.

> Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, *Congress* did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief.[268]

Private litigation is a necessary mechanism for achieving the public benefits of vindicating constitutional rights. To be sure, there are additional ways by which constitutional rights can be enforced. Criminal prosecution of those who violate the constitutional rights of others is one such mechanism. So, too, is the assertion of constitutional rights as a defense to criminal prosecution. But these are not enough. The Senate Report accompanying the fee statute noted:

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
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> . . . .
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> There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts.[269]

Congress also expressly recognized that the services of an attorney were essential for private enforcement of civil rights, and a fee award was essential to secure those services. The House Report on the fee statute noted:

> The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short on resources, could not afford to do so. . . . [T]he Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.[270]

The Senate Report is even more explicit on this point:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental

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[268] 477 U.S. 561, 574–75 (1986) (emphasis added).
[269] S. REP. NO. 94-1011, at 2, 6 (1976).
[270] H.R. REP. NO. 94-1558, at 3 (1976).

> laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.[271]

The legislative history leaves no doubt that Congress recognized that there are public benefits from private enforcement of civil rights laws, that private enforcement requires legal representation, that money damages are often low, and that an award of fees to prevailing plaintiffs is a necessary ingredient to any strategy of private enforcement.[272] The goals of § 1988 include vindication of constitutional rights and deterring constitutional violations by encouraging § 1983 litigation that serves those aims.[273] Since a rule against fees in low damages cases would reduce the efficacy of our system of constitutional remedies, the legislative history counsels against a general limit on fees in low damages cases. *Gray*, *Aponte*, *McAfee*, and *Richardson* seem to rest on the premise that vindication and deterrence should be furthered only in cases in which plaintiffs can prove substantial damages under the *Carey/Stachura* doctrine.[274] Neither the legislative history nor the Court's doctrine on prospective relief support that premise.

It does not follow that every plaintiff who prevails on a technical issue is entitled to a fee. As Justice O'Connor pointed out in her concurring opinion in *Farrar*, the overall purpose of § 1988 was to restore the pre-*Alyeska* "equitable practice of awarding attorney's fees to the prevailing party in certain civil rights cases . . . ."[275] Thus, the statute provides that the judge "may" award a "reasonable" fee.[276] A whole range of equitable considerations bear on judicial resolution of fee issues. For example, indiscriminate fee awards would generate unjustified costs by encouraging low value litigation and "withdrawing limited judicial resources from other claims."[277] In a case like *Farrar*, where the injury for which the plaintiff sought redress was not caused by a violation of his constitutional rights, it may be appropriate to deny fees on equitable grounds.[278] In *Gray*, *Aponte*, *McAfee*, and *Richardson*, the objection to a fee award was merely that the damages were nominal, or low, or less than the

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[271] S. REP. NO. 94-1011, at 2.

[272] It is also worth noting that empirical studies of "loser pays" rules suggest that the fee awards generally fall short of actual legal expenses. *See* Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Attorneys' Fees in a Loser-Pays System*, 162 U. PA. L. REV. 1619, 1656 (2014).

[273] *See, e.g.*, S. REP. NO. 94-1011.

[274] *See supra* notes 176–86 and accompanying text.

[275] Farrar v. Hobby, 506 U.S. 103, 118 (1992) (O'Connor, J., concurring).

[276] 42 U.S.C. § 1988 (2012).

[277] Flenniken, *supra* note 154, at 488; *see also* Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317, 338–39 (2005) (discussing the costs generated by fee shifting).

[278] Recall, however, that the dissenters in *Farrar* correctly pointed out that the "issue [of what fee is reasonable] was neither presented in the petition for certiorari nor briefed by petitioners." 506 U.S. at 123 (White, J., dissenting). The dissent was joined by Justices Blackmun, Stevens, and Souter.

plaintiff sought.[279] The force of the equitable case for attorney's fees turns on how "success" is measured. That case is strong only if success depends on the amount awarded or on judicial assessment of the plaintiff's motivations. We have argued to the contrary that the "low award, low fee" rule is in tension with the Supreme Court's *Lefemine* doctrine on prospective relief, that the statutory purpose is better served by asking whether the litigation furthers the vindication and deterrence goals of § 1983, and that low awards often further both of those goals.[280]

Two general features of federal court constitutional litigation bolster our thesis. One relates to the showing a plaintiff has to make in order to obtain "prevailing party" status in the first place. Given the official immunity doctrine, no plaintiff ever meets the "prevailing party" threshold in litigation against an individual government official without showing, not only that the official violated a constitutional right, but also that the constitutional rule was "clearly established" at the time he acted.[281] In addition, many (but not all) plaintiffs suing local governments must show either that high-ranking officials were in one way or another "deliberately indifferent" to their constitutional rights.[282] Because of these requirements, many successful plaintiffs in suits for damages are especially well-placed to demand vindication, as they have shown not just that their rights were violated, but that some degree of fault was involved in the violations. For the same reason, they can credibly claim that deterrence is especially needed. Even if the amount of damages in a given case is small, officers who violate clearly established rights and high ranking officials who pay little attention to violations by their subordinates should have incentives to stop. On both deterrence and vindication grounds, the equitable case for a fee is stronger on account of these distinctive demands plaintiffs must meet in order to prevail in a § 1983 suit for damages.

The other general feature is one that applies to all litigation in the federal courts. Under Rule 68,[283] the defendant can always take steps to put a stop to future attorney's fees by "serv[ing] on an opposing party an offer to allow judgment on specified terms, with the costs then accrued."[284] If the plaintiff declines, and "the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."[285] The "costs" referred to in Rule 68 include attorney's fees under § 1988. In *Marek v. Chesny*,[286] the Court

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[279] *See* Richardson v. City of Chicago, 740 F.3d 1099, 1103 (7th Cir. 2014); McAfee v. Boczar, 738 F.3d 81, 92–93 (4th Cir. 2013); Aponte v. City of Chicago, 728 F.3d 724, 731 (7th Cir. 2013); Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 894 (11th Cir. 2013).

[280] *See supra* notes 230–39 and accompanying text.

[281] *See supra* note 24 and accompanying text.

[282] *See supra* notes 51–53 and accompanying text.

[283] FED. R. CIV. P. 68.

[284] FED. R. CIV. P. 68(a).

[285] FED. R. CIV. P. 68(d).

[286] 473 U.S. 1 (1985).

held that a civil rights plaintiff who rejected the defendant's Rule 68 offer and recovered less than the offer at trial was not entitled to recover post-offer attorney's fees.[287] Given the official immunity doctrine for officials and the "deliberate indifference" hurdles plaintiffs face in many suits against governments, it seems likely that officials and governments will often know early on that they risk an ultimate loss. For example, the right of the nine-year-old not to be handcuffed at school without probable cause was clearly established.[288] Of course, everyone is entitled to fight litigation to the end. But suppose a fair assessment of the ultimate outcome can be made early on. In that event, a substantial amount of the costs of litigation are attributable not to the plaintiff's decision to pursue the case for the sake of bare vindication and a nominal award. They are, instead, the defendant's responsibility.

Here again the equitable considerations bearing on fee awards have a role to play. In light of the Rule 68 option, it seems fair, in a proper case, to assign the costs of continued litigation to strategic or tactical litigation decisions made by the defendant or his lawyer and to put the defendant to the choice of whether to risk paying for the plaintiff's attorney's fees. For example, the litigation in *Gray* went on for several years and included three trips to the Eleventh Circuit, even though the defendant violated a clearly established Fourth Amendment right.[289] No doubt the extended litigation generated significant attorney's fees on the plaintiff's side, but those fees had to be incurred in order to vindicate constitutional rights and help deter future violations. They in no way suggest that the litigation was futile or wasteful, and they are fairly attributable to the obdurate refusal of the defense to acknowledge the wrong.

III. SUGGESTED PRINCIPLES FOR EVALUATING APPLICATIONS FOR AN AWARD OF ATTORNEY'S FEES IN NOMINAL OR LOW DAMAGE AWARD CASES

Starting with *Hensley*'s focus on success as the key factor in determining a reasonable fee, we have argued that "success" is a more complex test than some of the language in *Farrar* would suggest.[290] The focus of judicial attention should be on whether the litigation furthered the vindication and deterrence goals of § 1983 litigation. If so, the plaintiff should get a fee under § 1988 because that statute is aimed at encouraging worthwhile § 1983 suits for both damages and prospective relief. The litigation in *Farrar* may have "accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way."[291] It does not follow from *Farrar* that all or nearly all nominal recoveries accomplish little. As we have shown,

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[287] *Id.* at 11. For an overview of the practices and attitudes of civil rights lawyers in connection with Rule 68, see generally Lewis & Eaton, *supra* note 213.

[288] Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 895 (11th Cir. 2013).

[289] *Id.* at 890–92.

[290] *See supra* notes 170–77 and accompanying text.

[291] Farrar v. Hobby, 506 U.S. 103, 114 (1992) (alteration in original).

nominal damages can both vindicate rights and deter violations in cases in which the plaintiff's only shortcoming, if there is one, is the failure to meet the demanding *Carey/Stachura* test for compensatory damages. Yet *Gray*, *Aponte*, *McAfee*, and *Richardson* treat *Farrar* as having established a general principle that fees should be denied in nominal damages cases and reduced in other cases where the award is small.[292] We have argued that these courts are mistaken in their interpretation of the Civil Rights Attorney's Fees Awards Act of 1976. In this section of the Article, we suggest four guidelines for determining fees in low damages cases.

A. A Presumption in Favor of the Lodestar

Hensley directs that the lodestar figure should be reduced for lack of success,[293] and *Farrar* holds that lack of success includes the case in which the plaintiff wins on the constitutional merits but fails to show a sufficient causal connection between the constitutional violation and the injury for which the plaintiff seeks redress.[294] Cases in which juries conclude, as the *Farrar* jury did, that the plaintiff had failed to show that the violation was the proximate cause of the damages fall into this category. If we are right, and *Farrar* is read narrowly, the case does not also require subtracting from the lodestar when the plaintiff shows a direct link between the constitutional violation and the injury asserted but receives a low or nominal award only because he cannot prove significant compensatory damages on account of the limits on damages imposed in *Carey* and *Stachura*. Perhaps the best way to distinguish the two classes of cases is to routinely ask the jury to answer a special interrogatory like the one in *Farrar*,[295] with the proviso that there is a difference between "injury" and "amount of damages." Or perhaps this question is better left to the judge. In either event, the judge or jury should bear in mind that prospective relief is routinely granted to plaintiffs who cannot show monetary injury. We believe plaintiffs would fare well in many cases like *Gray* under this approach.

This approach would apply the Court's "lodestar" principle across the whole range of § 1983 cases.[296] In *Perdue v. Kenny A.*, the Supreme Court ruled that the "lodestar method yields a fee that is presumptively sufficient to achieve [§ 1988's] objective" of enforcing the civil rights statutes, without enhancements for success except in rare cases.[297] Conversely, the lodestar should also govern cases like *Gray*

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[292] *See supra* notes 154–57 and accompanying text.

[293] Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

[294] *Farrar*, 506 U.S. at 115.

[295] *Id.* at 106–07.

[296] Some commentators find fault with the lodestar method and recommend that it be replaced or modified. *See, e.g.*, Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 951–54 (1992) (marshalling arguments against the lodestar). We do not take sides on that issue but take the Court's rule as a given for present purposes.

[297] 559 U.S. 542, 552 (2010).

in which the plaintiff succeeds in vindicating his constitutional rights but cannot prove substantial compensatory damages. The plaintiff in such a case has succeeded in vindicating his rights and has done so against heavy odds. He has not only established a violation of his rights but, in litigation against officials, has also overcome official immunity. The plaintiff who successfully sues a local government has proven that some "official policy or custom" was the moving force behind the constitutional violation.[298] Of course, the *Hensley* rules would also apply.[299] Thus, the plaintiff should not get a fee for hours spent by the lawyer trying, but failing, to prove claims unrelated to the one upon which he prevailed.

B. Getting Less Than One Asks For

Hensley requires that the fee be adjusted to reflect limited success.[300] Thus, a plaintiff who makes three unrelated claims and succeeds on one may receive less in a fee award than a similarly situated plaintiff who prevailed on all three. Cases like *Gray* reason that the plaintiff who obtains less than he asks for necessarily achieves limited success.[301] In our view, it should not matter whether the plaintiff asked for more than he received, made no specific request, or got what he asked for. Yet courts find this significant. In *Farrar* the plaintiff asked for $17 million and received $1 in nominal damages.[302] The majority opinion notes this disparity, and Justice O'Connor, in her concurring opinion, emphasizes that Farrar "asked for a bundle and got a pittance."[303] She goes on to note that, under pre–§ 1988 attorney's fee principles, "a substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical."[304] The implication seems to be that the plaintiff is more likely to be deemed completely successful if he asks for less and gets most of it than if he asks for more and gets less of it. And for some courts the gap matters even where the ratio is far less than seventeen million-to-one. In *Gray* the court applies the principle to a case in which, according to the opinion, the plaintiff asked for $25,000 and got $1.[305]

There is, however, a difference between "limited success" and "not getting what one asked for." *Hensley* holds that an attorney who spends hours on unrelated futile claims should not receive a § 1988 award to the extent those hours can be separated from hours spent on successful ones.[306] By the same token, hours spent trying, but

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298 *See supra* notes 40–41 and accompanying text.

299 Hensley v. Eckerhart, 461 U.S. 424, 440 (1983).

300 *Id.*

301 Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 895 (11th Cir. 2013).

302 Farrar v. Hobby, 506 U.S. 103, 107 (1992).

303 *Id.* at 120 (O'Connor, J., concurring).

304 *Id.* at 121.

305 *Gray*, 720 F.3d at 895.

306 Hensley v. Eckerhart, 461 U.S. 424, 434–35 (1983).

failing, to prove that a particular harm was caused by the defendant's violation, as the plaintiff's attorney did in *Farrar*, should not be compensated under § 1988. The same is true of hours spent trying to prove a given element of damages, as where the plaintiff claims emotional distress or physical injury but the proof is insufficient to convince a jury. But it does not follow from *Hensley*, or any of these variations on the *Hensley* principle, that the gap, *by itself*, should count against the fee, as a factor for reducing the lodestar.[307] Suppose the case is like *Gray*: the plaintiff asserts just one claim and wins on the merits, causation is settled, and the attorney does *not* devote hours to a futile effort to prove emotional distress or some other consequential harm. In such a case, the mere fact that the complaint included a prayer for an award of damages, or that the attorney suggested a specific figure in closing argument, should not count against the fee.

We have addressed this issue above in a slightly different context—whether courts can or should make judgments about the plaintiff's subjective experience of success and the pitfalls of comparing the amount of damages sought and the amount awarded as a proxy for success.[308] The shortcomings of measuring success by comparing damages sought and damages awarded lead us to conclude that this measure should not be a factor in assessing a fee award. One problem, noted earlier, is that it may create a conflict of interest.[309] If modest success is rewarded with a big fee when little is sought by way of damages, and if similar success is punished by a small fee when big compensatory damages are sought, the plaintiff's lawyer's interests are better served by taking the former route while his client may be better served by the latter, as one cannot expect a big damages award without asking for it.[310]

Second, the problem is exacerbated by the difficulty of predicting how a given jury will respond to a request for nonpecuniary damages, a difficulty that is well-documented in ordinary tort law and that may be even greater in a politically charged area like constitutional torts. Quite apart from any ethical problem faced by the plaintiff's lawyer, giving significance to the gap between damages sought and damages awarded puts the plaintiff and his lawyer in an untenable position. In order to obtain a high fee, they must make a reasonably accurate forecast of how a jury will calculate nonpecuniary damages, and perhaps punitive damages, even though there are wide disparities among juries in arriving at these figures. The result is a kind of lottery in which obtaining high fees is a matter of chance.

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[307] Some opinions do not clearly distinguish between the two fact patterns, as we think they should. *See, e.g.*, Lytle v. Carl, 382 F.3d 978, 989 (9th Cir. 2004) (affirming a district judge's reduction of attorney's fees but leaving it unclear whether the reduction was justified by failure to prevail on all of the claims or by the limited jury award on the claim as to which plaintiff prevailed).

[308] *See supra* notes 202–09 and accompanying text.

[309] *See supra* notes 209–10 and accompanying text.

[310] *See supra* notes 209–10 and accompanying text.

Third, one rationale for allowing the plaintiff to obtain attorney's fees in "low damage, evident injury" cases is that he has vindicated his rights. Justice O'Connor seemed to agree that vindication takes place in low award cases, for she described § 1988 as "a tool that ensures the vindication of important rights, even when large sums of money are not at stake . . . ."[311] The validity and force of this congressionally sanctioned rationale does not depend on whether the plaintiff asked for more than he received.

Fourth, along with vindication, one of the aims of constitutional tort law is to deter constitutional violations.[312] The theory is that officers and governments would prefer to spend money in other ways than paying it in damages, and being forced to pay damages when they violate rights will induce them to forego violations they would otherwise commit. Giving weight to the difference between damages sought and damages awarded seems likely to lead to lower requests for damages, as asking for more can be risky.[313] But asking for less will lead juries to systematically award less, and the result over a range of cases and over time will be less deterrence.

C. Punitive Damages

In *Richardson v. City of Chicago*, the plaintiff received nominal damages of $1 and $3,000 in punitive damages.[314] The punitive award carried great significance for the Seventh Circuit panel. It asserted that "[i]f the jury had stopped with the $1 in nominal damages, then under *Farrar* an award of attorneys' fees would be un-warranted [sic]."[315] It went on to approve a substantial attorney's fee, though less than plaintiff had requested. Under the approach we have suggested, *Richardson*'s proviso would be repudiated. Since a substantial fee can be justified for nominal damages standing alone, the availability of a substantial fee should not depend on whether punitive damages were awarded.

While punitive damages are not *necessary* to support a fee for nominal damages, it does not follow that punitive damages are irrelevant. The plaintiff in such a case has not only succeeded in showing that the defendant's actions are unconstitutional and that his actions violated clearly established constitutional law, avoiding official immunity, but has achieved even greater success by showing that the defendant's actions are sufficiently reprehensible to support punitive damages. Strictly speaking, the punitive award does not vindicate the plaintiff's rights, as no one is entitled to

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[311] Farrar v. Hobby, 506 U.S. 103, 122 (1992).

[312] *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986); Smith v. Wade, 461 U.S. 30 (1983); Owen v. City of Independence, 445 U.S. 622, 650 (1980).

[313] *See* Rosenthal, *supra* note 24, at 82 ("[T]he bottom line is clear—the less money the plaintiff requests, the more likely he is to recover attorney's fees if he is awarded only nominal damages.").

[314] 740 F.3d 1099, 1101 (7th Cir. 2014).

[315] *Id.*

punitive damages. But the award may provide extra deterrence, and, in any event, it serves the important goal of expressing strong disapproval of the officer's conduct and will likely enhance respect for the constitutional values at stake.

D. The Significance of the Legal Issue and Public Purpose

In *Carey v. Piphus*, the Court's first § 1983 damages case, the Court said that awards of nominal damages could vindicate constitutional rights even when plaintiffs could not prove compensatory damages.[316] According to Justice O'Connor's *Farrar* concurrence, *Carey* "makes clear that an award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved."[317] She then went on to identify two additional factors bearing on whether a fee should be awarded in a nominal damages case.

One was "the significance of the legal issue on which the plaintiff claims to have prevailed."[318] In *Farrar,* this factor seems to have had no independent significance, even for Justice O'Connor. She simply notes that Farrar succeeded on just one issue against one of several defendants and showed no compensatory damages.[319] It was a "hollow victory," since "game, set, and match all went to the defendants."[320] This is not surprising since the precise nature of the constitutional right at issue and how it was violated are not specifically discussed in the opinion. It is hard to deem "significant" that which is not identified.

In *Gray*, the Eleventh Circuit panel devoted more attention to this factor. It ruled in favor of Gray on the Fourth Amendment issue, holding that the Fourth Amendment forbids "handcuffing . . . a compliant nine-year-old girl for the sole purpose of punishing her."[321] The court reasoned that this was not a significant issue.[322] In order to understand why, it is important to keep in mind that the courts had rebuffed the defendant's effort to avoid liability on official immunity grounds.[323] Judge Bowen, writing for the panel, reasoned that "since every objectively reasonable officer would have known that Bostic's conduct violated the Constitution, then the significance of the case as a precedential example is greatly diminished."[324]

It is easy enough to find fault with Judge Bowen's reasoning. This reasoning creates an inescapable catch-22 under which fee awards would never be made to civil rights plaintiffs who recover only nominal damages. If the clearly established

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316 435 U.S. 247, 266–67 (1978).

317 Farrar v. Hobby, 506 U.S. 103, 121 (1992).

318 *Id.*

319 *Id.*

320 *Id.*

321 Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887, 896 (11th Cir. 2013).

322 *Id.* at 897.

323 *Id.* at 896.

324 *Id.*

nature of the right makes the victory insignificant for purposes of supporting a fee award, then the prevailing plaintiff cannot recover a fee. If the constitutional right was not clearly established, then the defendant would be entitled to qualified immunity, the plaintiff would not be a prevailing party, and no fee could be awarded. This is the ultimate "heads I win, tails you lose" scenario for individual defendants.[325] Such a result would make it increasingly difficult for civil rights plaintiffs with meritorious claims but problematic damages to secure legal representation—a result flatly inconsistent with Congressional intent.

Justice O'Connor's second factor is whether the litigation "accomplished some public goal other than occupying the time and energy of counsel, court, and client."[326] In *Farrar*, the trial and its outcome produced no definitive holding on any issue. The verdict, which even the plaintiff's counsel characterized as "regrettably obtuse,"[327] makes it impossible to know just what the jury found to be unconstitutional. Thus, the plaintiff's victory "carrie[d] no discernible meaning."[328] That criticism could not be leveled at *Gray*. The litigation, quite unambiguously, found that Bostic had violated Gray's Fourth Amendment rights.[329] Judge Bowen nonetheless found that no public purpose had been achieved, because "an examination of Gray's relief sought and obtained makes clear that the primary purpose of her lawsuit was the recovery of private damages."[330] As with "significance," this objection could be leveled at almost all suits for damages for constitutional violations. Such suits necessarily focus on what happened to an individual in a narrowly defined encounter with some official. Given Justice O'Connor's focus on the facts of *Farrar*, it is hard to know what type of case she may have had in mind, but, as a general proposition, the category of suits that accomplish some public purpose will consist mainly of litigation seeking prospective relief that obliges officials to change their conduct toward a large number of people.

Our point is not at all to deny that there are constitutional tort cases in which "significance" and "public purpose" could justify higher fees than nominal or low damages would ordinarily justify. When these factors are present, the case for "success" is stronger and the case for a big fee is correspondingly stronger.[331] Our

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[325] There is a kernel of truth in Judge Bowen's reasoning. In suits against local governments, the defense of qualified immunity does not apply. Owen v. City of Independence, 445 U.S. 622, 638 (1980). Thus, it is theoretically possible for a plaintiff to recover from cities for violations of constitutional rights that were not clearly established at the time of the incident, but the demands of proving an official policy or custom renders this possibility quite remote.

[326] Farrar v. Hobby, 506 U.S. 103, 121–22 (1992) (O'Connor, J., concurring).

[327] *Id.* at 122.

[328] *Id.*

[329] *Gray*, 720 F.3d at 896.

[330] *Id.* at 899.

[331] *See, e.g.*, Lowry v. Watson Chapel Sch. Dist., 540 F.3d 752, 765 (8th Cir. 2008) (besides nominal damages, plaintiffs who successfully challenged disciplinary action taken against them for wearing black armbands as a form of speech "obtained an injunction that benefitted

objection to both of these factors is that Justice O'Connor, and lower courts following her lead, treat them as grounds for an exception to a general rule against any award of attorney's fees. We have argued that fees in "low award" cases are fully justified by focusing on the plaintiff's success at achieving vindication. That success is established by obtaining nominal damages in cases, such as *Gray*, which fit the "low damage, evident constitutional injury" fact pattern. That should be sufficient to justify a fee based, more or less, on the lodestar. As the legislative history demonstrates, Congress determined that the vindication of constitutional rights through private litigation is both significant and serves a public purpose.

CONCLUSION

Some courts of appeals have read *Farrar* to deny attorney's fee awards to prevailing plaintiffs who recover only nominal or small compensatory damages. This reading of *Farrar* is wrong. The goals of vindicating constitutional rights and deterring constitutional violations—goals underlying § 1988—support the award of fees to prevailing plaintiffs who prove that government officials violated their clearly established constitutional rights. This principle applies with equal force to plaintiffs who prove that a local government has violated their constitutional rights by way of an official policy or custom. Awarding fees in these cases recognizes that in litigation, as in life, "success" is not measured solely in terms of money. When a plaintiff brings a constitutional wrongdoer to account, that plaintiff has successfully vindicated the values that § 1983 promotes, and that success supports the recovery of attorney's fees under § 1988.

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all of the students in the school district, and the free speech right vindicated was not readily reducible to a sum of money") It may well be that, even absent the injunction, the precedent established by their victory would similarly serve a public purpose.