

WHO WANTS NOMINAL DAMAGES ANYWAY? THE IMPACT OF AN AUTOMATIC ENTITLEMENT TO NOMINAL DAMAGES UNDER § 1983

I. INTRODUCTION

Consider the following hypothetical situation. An individual becomes the victim of a constitutional violation at the hands of a government official acting under color of a state statute. The individual wisely seeks an attorney. The attorney, recognizing a possible deprivation of the client's constitutional rights, eagerly accepts the case. As an attorney *au courant* in federal rights, the attorney determines that a successful claim under these circumstances is likely under 42 U.S.C. § 1983 ("§ 1983").¹

The individual and the attorney envision the possibility of remedying the constitutional violation and securing a substantial monetary recovery. They immediately file under § 1983 against the government official² seeking compensatory damages, punitive damages, and attorney's fees.³ Following a lengthy trial, the jury finds that the

¹ 42 U.S.C. § 1983 (1999). This Act reads as follows:

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

Id. The Supreme Court in *Carey v. Phipps*, 435 U.S. 247 (1978), held that the basic purpose of a damage award under § 1983 is to compensate persons for injuries caused by the deprivation of constitutional rights. *See id.* at 255-56.

² In *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), the Supreme Court identified the rule for suing a public official under § 1983: the plaintiff must allege that 1) some person has deprived the plaintiff of a federal right, and 2) that person acted under color of state law.

³ Congress authored a companion provision to § 1983 that provides for an award of attorney's fees to plaintiffs who are "prevailing parties." This companion statute is found in 42 U.S.C. § 1988 (1999) ("§ 1988") and reads as follows:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . . [or] title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

government official violated the plaintiff's constitutional rights. The jury, however, renders a verdict for no recovery. The jury refuses to award compensatory or punitive damages because insufficient proof existed to justify monetary damages. Because the plaintiff failed to request nominal damages or include nominal damages in the jury instruction, the jury did not consider this award. The attorney promptly asserts a post-trial motion for nominal damages, with the prospect that prevailing party status⁴ will provide at least the possibility of recovering reasonable attorney's fees.⁵ The attorney also argues that the court must award nominal damages automatically in this situation because the jury found that the defendant violated the plaintiff's constitutional rights.⁶ However, because the plaintiff in this hypothetical failed to plead for nominal damages or include nominal damages in the jury instruction, the judge concurs with the jury's finding and dismisses the case.

Although the jury found that the defendant violated the plaintiff's constitutional rights, the outcome of this litigation resulted in dismissal. The plaintiff received no punitive damages, no compensatory damages, no nominal damages, and no attorney's fees. This scenario reflects precisely what has occurred in some courts.⁷

Thus, plaintiffs suing under § 1983 may also request the cost of reasonable attorney's fees under § 1988, although such an award is discretionary.

⁴ See 42 U.S.C. § 1988 (a plaintiff attempting to recover attorney's fees under § 1988 must be a "prevailing party"); see also, e.g., *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (holding that when a plaintiff receives nominal damages, the plaintiff is a "prevailing party" for purposes of attorney's fees); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (stating that a plaintiff must cross the "statutory threshold" of attaining prevailing party status before plaintiff may be considered for attorney's fees).

⁵ See 42 U.S.C. § 1988 ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."). Although a plaintiff who wins only nominal damages may receive reduced attorney's fees or no fees at all, the award of nominal damages qualifies the plaintiff for attorney's fees under § 1988. See *Hobby*, 506 U.S. at 112-14. However, the Court in *Hobby* held that a "reasonable" award of attorney's fees for a plaintiff who receives only nominal damages is "usually no fee at all." *Id.* at 115.

⁶ See *Carey*, 435 U.S. at 266 n.24 (noting that several "lower federal courts have approved the award of nominal damages under § 1983 where deprivations of constitutional rights are not shown to have caused actual injury").

⁷ This scenario demonstrates the approach taken particularly in Eighth Circuit courts. See, e.g., *Westcott v. Crinklaw*, 133 F.3d 658 (8th Cir. 1998) (holding that an award for nominal damages for a constitutional violation is not available unless specifically requested by the plaintiff); see also *Robinson v. City of St. Charles*, 972 F.2d 974 (8th Cir. 1992); *Warren v. Fanning*, 950 F.2d 1370 (8th Cir. 1991); *Sims v. Mulcahy*, 902 F.2d 524 (7th Cir. 1990). However, many district courts across the nation reach this conclusion, but the circuit court remands the case for an entry of nominal damages. See, e.g., *Robinson v. Cattaraugus County*, 147 F.3d 153, 162-63 (2d Cir. 1998) (remanding for an entry in the amount of nominal damages for a constitutional violation because if the jury finds a constitutional violation but no injury, "the plaintiff is entitled to nominal damages as a matter of law"). Consequently, the cases of many plaintiffs in district court cases will result

Since the Supreme Court's landmark decision in *Monroe v. Pape*,⁸ substantial litigation has resulted in the field of § 1983.⁹ Indeed, the annotations for this single section of the United States Code Annotated fill over 1,100 pages and contain more than 5,000 notes.¹⁰ Despite the substantial litigation, endless annotations, and scores of scholarly articles examining § 1983, the role of nominal damages in a plaintiff's cause of action often receives little regard, especially considering the potential of a large monetary recovery available to a plaintiff.¹¹

The text of § 1983 provides no guidance on the rules for determining damages. However, nominal damages function as an overlooked but important remedy in actions brought under § 1983. While courts acknowledge the role of nominal damages as vindicating a fundamental constitutional right,¹² the guarantee of an "automatic"¹³ award of nominal damages under these circumstances does not necessarily provide

in dismissal unless they either specifically request nominal damages or are in a circuit where the circuit court remands for an award of nominal damages.

⁸ 365 U.S. 167 (1961). *Monroe* is significant because, for the first time, the Supreme Court permitted an action to be brought under § 1983 for unconstitutional conduct that violated state law. *See id.*

⁹ *See* 42 U.S.C.A. § 1983 (West 1999); *see also* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (noting that litigation for § 1983 "pours into the federal courts tens of thousands of suits each year").

¹⁰ *See* 42 U.S.C.A. § 1983. This particular Act, including annotations, comprises one volume of the U.S.C.A., not including supplements.

¹¹ Large recoveries are usually the result of a jury's decision to award punitive damages. In *Smith v. Wade*, 461 U.S. 30, 56 (1983), the Supreme Court held that an official may be liable for punitive damages "under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Some commentators argue that punitive damage awards are exorbitant. *See generally* Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179 (1998) (concluding that trial judges should determine the level of punitive damages as a method of limiting excessive punitive damage awards by juries). Other commentators commend the value of large recoveries for victims of constitutional violations. *See* Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841 (1996) (arguing that punitive damage awards are essential for constitutional torts).

¹² *See* Farrar v. Cain, 756 F.2d 1148, 1152 (5th Cir. 1985) (concluding that an infringement of a "constitutional right[requires] at a minimum . . . nominal damages") (quoting *Webster v. City of Houston*, 689 F.2d 1220, 1230 (5th Cir. 1982)).

¹³ The nominal damage award is automatic because it is available without proof of actual injury as long as the jury finds a constitutional violation. *See* *Carey*, 435 U.S. at 266 (holding that a constitutional violation involving denial of procedural due process should be "actionable for nominal damages without proof of actual injury"); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (holding that a constitutional deprivation under § 1983 requires an award of nominal damages when jury finds such a violation, but plaintiff suffers no actual damages).

recovery of nominal damages for every plaintiff whose constitutional rights have been violated.¹⁴

This comment examines the interpretations of an “automatic” award of nominal damages in actions brought pursuant to § 1983 and identifies the inconsistent results that occur from the various approaches. The automatic award of nominal damages reveals that “the law recognizes the importance to organized society that [constitutional] rights be scrupulously observed,”¹⁵ even if insufficient proof exists for compensatory or punitive damages. Congress intended to provide vindication for fundamental constitutional rights by enacting § 1983. Beginning with *Carey v. Piphus*,¹⁶ the Supreme Court held that a constitutional deprivation of procedural due process entitles a plaintiff to nominal damages even with insufficient proof as to actual damages.¹⁷ Later courts construed *Carey* to provide protection for procedural rights as well as substantive constitutional rights.¹⁸

This comment first provides a brief historical background of § 1983 and its roots in the civil rights legislation of 1871. It also discusses the historical context of § 1983 and its expanded role after *Monroe* as a vehicle for plaintiffs to vindicate constitutional rights. It then examines *Carey* and subsequent cases relying on *Carey* that diverge on the interpretation of an automatic nominal damage award in actions brought pursuant to § 1983. Finally, it identifies the impact and effect of different courts’ approaches to the award of nominal damages.

An award of nominal damages confers prevailing party status upon the plaintiff, provides the plaintiff an opportunity to recover reasonable attorney’s fees, and may save a case from mootness. A refusal to award nominal damages automatically often results in a dismissal. While nominal damages as an automatic award provide vindication, a failure to make the award automatic in every situation decreases the importance of that vindication for the plaintiff whose rights are violated.

¹⁴ See *supra* note 7 and accompanying text.

¹⁵ *Carey*, 435 U.S. at 266.

¹⁶ 435 U.S. 247 (1978).

¹⁷ See *id.* at 266-67.

¹⁸ See, e.g., *Draper v. Coombs*, 792 F.2d 915, 921-22 (9th Cir. 1986) (stating “[f]or purposes of [*Carey*] it does not matter whether the underlying claim involves a deprivation of a procedural or substantive constitutionally-based right”); see also *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (awarding nominal damages for violation of Sixth Amendment rights); *Kincaid v. Rusk*, 670 F.2d 737, 746 (7th Cir. 1982) (awarding nominal damages for violation of First Amendment rights).

II. BACKGROUND OF § 1983

Congress enacted § 1983 to provide a civil cause of action for the deprivation of federal constitutional rights.¹⁹ This Act permits “any citizen of the United States or other person within the jurisdiction thereof”²⁰ to bring a claim under the United States Constitution.²¹ Litigants seeking recovery for violations of federal constitutional rights generally cannot sue under the Constitution but must assert their claims via § 1983.²²

Section 1983 does not provide a source of substantive rights but provides instead a method of vindicating federal rights granted elsewhere, such as the “Constitution and laws.”²³ The Supreme Court explained the assertion of constitutional claims this way: “one cannot go into court and claim a ‘violation of § 1983’— for § 1983 by itself does not protect anyone against anything.”²⁴

The Court detailed the legislative history of § 1983 in several cases.²⁵ The Court also identified the purposes of § 1983, stating that its purposes were several-fold— to override certain kinds of state laws, to provide a remedy where state law was inadequate, “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice,” and to provide a remedy in federal courts supplementary to any remedy any State might have.²⁶

Section 1983 derived from the Civil Rights Act of 1871.²⁷ The provision originally resulted from fear of violence initiated by members

¹⁹ See 42 U.S.C. § 1983 (1999).

²⁰ *Id.*

²¹ By enacting § 1983, “Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective.” *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (citations omitted).

²² See *id.* at 19.

²³ 42 U.S.C. § 1983; see also *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (noting that § 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes”).

²⁴ *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

²⁵ See, e.g., *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *Wilson v. Garcia*, 471 U.S. 261 (1985); *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981); *Allen v. McCurry*, 449 U.S. 90 (1980); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978); *Mitchum v. Foster*, 407 U.S. 225 (1972); *Monroe v. Pape*, 365 U.S. 167 (1961).

²⁶ *McNeese v. Board of Educ. for Community Unit Sch. Dist. 187*, 373 U.S. 668, 671-72 (1963) (citing *Monroe*, 363 U.S. at 180-83).

²⁷ See ch. XXII, 17 Stat. 13 (1871). This Act was known as the Ku Klux Klan Act of 1871. President Grant initiated the legislation by a letter he sent to Congress, reading in pertinent part:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the

of the Ku Klux Klan.²⁸ Congress passed this provision to provide a federal remedy for deprivations of rights because government officials were unwilling or unable to enforce state law.²⁹ As a means of providing a civil action for individuals whose rights were violated by government officials acting under a state law, the Forty-second Congress passed the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983.³⁰

Litigation under § 1983 expanded considerably³¹ following the landmark Supreme Court decision in *Monroe v. Pape*.³² Before *Monroe*, plaintiffs could only bring a cause of action for constitutional violations committed under color of law. In *Monroe*, the Court created a broad remedy for violations of rights by any person acting under pretense of

revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty and property, and the enforcement of law in all parts of the United States.

CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871); see also *Monroe*, 365 U.S. at 171-90 (discussing the history of the Ku Klux Klan Act of 1871).

²⁸ See *supra* note 27 and accompanying text.

²⁹ See 1A MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §1.3, at 9 (3d ed. 1997); see also *Monroe*, 365 U.S. at 175-76.

³⁰ See Civil Rights Act, ch. XXII, 17 Stat. 13 (1871). The Civil Rights Act of 1871 provided the following:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause 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 of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Id. Congress enacted the Civil Rights Act of 1871 to enforce the provisions of the Fourteenth Amendment. See *Monroe*, 365 U.S. at 171.

³¹ See RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1121-22 (4th ed. 1996); Daniel J. McDonald, *A Primer on 42 U.S.C. § 1983*, UTAH B.J., May 1999, at 29 ("Since *Monroe*, there has been a literal explosion of § 1983 litigation, ranging from suits brought by prisoners to land use cases brought by wealthy corporate developers.").

³² 365 U.S. 167 (1961).

state authority, even “in stark violation of state civil or criminal law.”³³ The scope of actions brought under § 1983 expanded again following the Supreme Court’s holding in *Monell v. Department of Social Services*³⁴ such that local governments could now be liable under § 1983.

To state a cause of action under § 1983, a plaintiff must allege two elements: 1) the conduct complained of must have been committed by a person acting under color of law; and 2) the conduct must have deprived the plaintiff of federal rights.³⁵ Further, to establish a violation of constitutional rights under § 1983, the plaintiff must prove that the defendant’s unconstitutional action was the “cause in fact” of the plaintiff’s injury.³⁶ Plaintiffs are able to hold certain state actors liable for violating constitutional rights of a “citizen of the United States or other person within the jurisdiction thereof.”³⁷ Courts also hold a municipality liable for damages under § 1983 when “action pursuant to official municipal policy of some nature caused a constitutional tort.”³⁸

While the scope of claims brought under § 1983 expanded to include deprivations of non-constitutional federal law,³⁹ the role of nominal damages to vindicate constitutional deprivations has not changed. Nominal damages vindicate constitutional violations when awarded automatically under § 1983. Further, § 1983 remains a crucial vehicle for plaintiffs to protect certain fundamental constitutional rights.⁴⁰ Whether courts adopt the recent expanded approach to § 1983 actions or the limited approach proposed by Justice Scalia in *Crawford-El v. Britton*,⁴¹ nominal damages exist as a crucial tool to vindicate constitutional violations. In addition, under the holding of *Carey*, nominal damages are

³³ *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting).

³⁴ 436 U.S. 658 (1978). Before *Monell*, cities and counties were not considered “persons” subject to liability under § 1983. *Id.* *Monell* overruled this part of *Monroe* and held that cities and counties are considered “persons” under § 1983 subject to compensatory damages. *Id.*

³⁵ See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

³⁶ *Carey v. Phipps*, 435 U.S. 247, 263 (1978).

³⁷ 42 U.S.C. § 1983 (1999).

³⁸ *Monell*, 436 U.S. at 691 (providing for municipal liability under § 1983 for injuries caused by the municipality’s own unconstitutional or illegal policies).

³⁹ See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). *Thiboutot* served as another expansion of § 1983 by the courts. By holding that plaintiffs may sue under § 1983 to vindicate federal statutory rights, the Court created the potential for a wide array of remedial theories brought under § 1983. See *id.* This comment argues that nominal damages should be automatically available for constitutional violations under § 1983 without considering whether nominal damages should be automatically available for cases brought under other non-constitutional federal statutes.

⁴⁰ See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 616-18 (1979).

⁴¹ 523 U.S. 574, 611-12 (Scalia, J., dissenting).

available automatically to a plaintiff who suffers from a constitutional deprivation.⁴²

III. NOMINAL DAMAGES IN § 1983 ACTIONS: *CAREY* AND BEYOND

An award of nominal damages under § 1983 is appropriate when the plaintiff fails to establish the factual basis for an award of compensatory damages but successfully establishes a constitutional violation.⁴³ An automatic entitlement to nominal damages for constitutional violations is important because compensatory damages are not available for the deprivation of a constitutional right alone.⁴⁴ Compensatory damages under § 1983 serve only to compensate the plaintiff, not to vindicate the constitutional right. The role of vindicating constitutional violations is served by an award of nominal damages.

A. *Carey v. Piphus* and the Entitlement to Nominal Damages for Violations of Procedural Due Process

While damages traditionally have been available as “the ordinary remedy for an invasion of personal interests in liberty,”⁴⁵ courts before *Monroe v. Pape*⁴⁶ refused to grant damages for § 1983 claims alleging that a state actor violated the law.⁴⁷ In 1978, the Supreme Court in *Carey v. Piphus*⁴⁸ recognized that an automatic entitlement to nominal damages in a § 1983 action provided vindication for the deprivation of a constitutional right.⁴⁹

1. The Circumstances of *Carey*

The Supreme Court in *Carey* held that a denial of procedural due process should be actionable for nominal damages without proof of actual injury.⁵⁰ *Carey* resulted from consolidated actions brought by students

⁴² See *Carey*, 435 U.S. at 266.

⁴³ See *id.* at 266-67.

⁴⁴ See *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (“[N]ominal damages, and not damages based on some undefinable ‘value’ of infringed rights, are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury.”).

⁴⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

⁴⁶ 365 U.S. 167 (1961).

⁴⁷ See *Zarcone v. Perry*, 572 F.2d 52, 54 (2d Cir. 1978) (noting that damages under § 1983 are of “relatively recent origin”).

⁴⁸ 435 U.S. 247 (1978).

⁴⁹ See *id.* at 266-67.

⁵⁰ See *id.*

suspended from school.⁵¹ The plaintiffs brought a § 1983 action against the school claiming a violation of their constitutional right to due process.⁵² The district court held that both students had been suspended without procedural due process but declined to award damages.⁵³ According to the district court, there was “no evidence in the record to quantify their damages, and the record [was] completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries.”⁵⁴ Although the district court stated that the students were entitled to have the records deleted from their files, the court simply dismissed the complaints.⁵⁵

On appeal, the court of appeals reversed and remanded.⁵⁶ The court of appeals held that even if the district court found on remand that the suspensions were justified, the students would be entitled to recover substantial “non-punitive” damages simply because they had been denied procedural due process.⁵⁷ The Supreme Court “granted certiorari to consider whether, in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial ‘nonpunitive’ damages.”⁵⁸

The Supreme Court in *Carey* analyzed the purpose and function of damages, comparing § 1983 damages to common law tort damages.⁵⁹ Holding that damage awards under § 1983 should be governed by the principle of compensation, the Court concluded that “[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.”⁶⁰ The Court then discussed the importance of making nominal damages available automatically to individuals whose constitutional rights are violated.⁶¹

⁵¹ See *id.* at 251.

⁵² See *id.* at 248.

⁵³ See *id.* at 251.

⁵⁴ *Id.* at 251-52 (quoting Appendix to Petition for Certiorari at A14).

⁵⁵ See *id.* at 252.

⁵⁶ See *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976).

⁵⁷ *Id.* at 31.

⁵⁸ *Carey*, 435 U.S. at 253.

⁵⁹ See *id.*; see also *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (stating that § 1983 intended to create a “species of tort liability” for persons who are deprived of rights, privileges, or immunities secured to them by the Constitution).

⁶⁰ *Carey*, 435 U.S. at 258.

⁶¹ See *id.* at 266. The Court viewed nominal damages as a crucial function in constitutional protections, yet it limited recovery of compensatory and punitive damages to those that were specifically proven:

By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized

2. The Automatic Award of Nominal Damages

The Court in *Carey* concluded that it would rectify the constitutional deprivation by making the claim for nominal damages actionable without proof of actual injury.⁶² The Court premised its holding in *Carey* on the importance of procedural due process in an organized society and on the principle that a right to procedural due process is "absolute."⁶³ Because the right to procedural due process is absolute, the denial of due process should be actionable for nominal damages without proof of actual injury.⁶⁴

Following *Carey*, several commentators argued that the Court's common law model of damages was inappropriate for constitutional violations.⁶⁵ One common argument is that the courts should adopt presumed damages for constitutional violations.⁶⁶ However, the Court "has resisted the notion that constitutional rights have intrinsic value to the plaintiff, independent of harms, like emotional distress, wrongful suspension from school, lost salary or medical expenses, which are all subject to proof."⁶⁷

While *Carey* stood for the premise that a violation of procedural due process requires an automatic entitlement to nominal damages, most courts have eliminated the distinction between the deprivation of procedural rights and substantive constitutionally-based rights.⁶⁸ As a

society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Id. As a result, nominal damages serve the purpose of vindicating constitutional deprivations.

⁶² See *id.* at 266-67.

⁶³ *Id.* at 266.

⁶⁴ See *id.*

⁶⁵ See generally Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 159 (1998) (stating that constitutional rights are no less valuable for being more difficult to calculate and suggesting that courts "should devise rules that reflect the distinctive features of damage suits aimed at vindicating constitutional rights"); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 687 (1987) (concluding that the median constitutional tort recovery was only \$11,000).

⁶⁶ See Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE L. REV. 67, 80 (1992) ("[I]f the plaintiff is allowed to recover presumed general damages, then the plaintiff will receive compensatory damages in an amount that 'may roughly approximate the harm that the plaintiff suffered.'").

⁶⁷ Wells, *supra* note 65, at 217-18.

⁶⁸ See, e.g., *Mount Health City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (permitting plaintiff to bring a claim under § 1983 based on the First Amendment); *Draper v. Coombs*, 792 F.2d 915 (9th Cir. 1986) (granting nominal damages for extradition

result, plaintiffs commonly assert § 1983 claims under diverse constitutional theories.

Several courts following *Carey* held that nominal damages must be awarded automatically upon a finding of a constitutional violation regardless of whether the plaintiff proves actual damages.⁶⁹ Some courts have attempted to expand *Carey* by holding that nominal damages are mandatory in causes of action not based on constitutional rights.⁷⁰ However, the Eleventh Circuit in *Walker v. Anderson Electrical Connectors*⁷¹ identified the unique and significant nature of constitutional violations compared with other statutory violations. *Walker* involved a Title VII claim in which the plaintiff made a post-trial motion for nominal damages, relying on *Carey*.⁷² The court in *Walker* concluded that “the reasoning in *Carey* applies only to violations of constitutional magnitude.”⁷³ Consequently, the court refused to imply an automatic entitlement to nominal damages when no constitutional violation existed.⁷⁴

Nominal damages as an automatic award should be available to plaintiffs suffering from constitutional violations. A defendant who violates a plaintiff’s constitutional rights should be liable for at least nominal damages under § 1983. The consideration of an “automatic” award should only apply to those violations that are fundamental constitutional rights. While an automatic entitlement to nominal damages provides vindication, non-constitutional violations do not require an analogous automatic award provision. Modern courts have expanded the scope of § 1983 claims to place “federal rights” in the same category as “constitutional rights.”⁷⁵ However, the automatic award in

statute violations); *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985) (allowing an award of nominal damages for violation of “civil rights”); *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984) (granting nominal damages for violation of Sixth Amendment Rights); *Kincaid v. Rusk*, 670 F.2d 737, 746 (7th Cir. 1982) (granting nominal damages for violation of First Amendment rights); *Reyes v. Edmunds*, 472 F. Supp. 1218, 1230 (D. Minn. 1979) (stating that the “general reasoning in *Carey* applies to most § 1983 cases, including Fourth Amendment cases”).

⁶⁹ See, e.g., *Coughlin*, 748 F.2d at 789 (remanding a case to the district court so that it may enter an award for nominal damages because litigant was able to prove a violation of a substantive constitutional right despite lack of proof of injuries).

⁷⁰ See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (expanding § 1983 to remedy violations under Social Security Act); *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated*, 499 U.S. 914 (1991).

⁷¹ 944 F.2d 841 (11th Cir. 1991).

⁷² See *id.* at 845.

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ *Monell v. Department of Social Servs.*, 436 U.S. 658, 669 (1978).

Carey applied specifically in the context of a due process violation.⁷⁶ Similarly, the automatic award of nominal damages should be limited to those situations where the victim is deprived of a constitutional right. An expansion of this rule fails to meet the policy behind *Carey*.

3. The Impact of *Carey*

The Court's declaration in *Carey* that individuals are "entitled" to an award of nominal damages presents several important procedural questions. First, since a nominal damage award is available, must a plaintiff include a request for nominal damages in the pleading? Second, if a plaintiff fails to include a request for nominal damages, can the plaintiff submit a request following the judgment to include nominal damages? Finally, if nominal damages are available as a matter of law for constitutional violations, must courts always provide the award regardless of whether the plaintiff requests them?

When a plaintiff is determining what damages to plead, considering nominal damages may be the last thing that comes to mind. With the possibility of a large recovery as the primary motivation of most plaintiffs, a typical award request includes a prayer for compensatory damages, punitive damages, and attorney's fees. Plaintiffs often exclude nominal damages in their pleading, either intentionally or unintentionally. Consequently, courts must consider the availability of nominal damages to those plaintiffs failing to plead for nominal damages.

Carey's common interpretation permits an automatic award of nominal damages under § 1983 upon a finding of a constitutional violation. This simply means that if a deprivation of constitutional rights exists, the plaintiff is entitled to nominal damages, regardless of either the plaintiff's procedural stance or the specific request for damages. However, not all courts proceed in this manner, and the different approaches produce significantly contrasted effects upon the plaintiff.

B. Beyond Carey: Interpretations of Automatic Entitlement

There are three common interpretations of *Carey*. Some courts have determined that although nominal damages are available absent proof of actual injury, a plaintiff must first request nominal damages.⁷⁷ Other courts permit the plaintiff to request nominal damages following the jury verdict even if the jury fails to award nominal damages.⁷⁸ Finally, some courts have intimated that an award of nominal damages may occur

⁷⁶ See *Carey*, 435 U.S. at 266-67.

⁷⁷ See *supra* note 7 and accompanying text.

⁷⁸ See *Campos-Orrego v. Rivera*, 175 F.3d 89 (1st Cir. 1999).

even without a specific request.⁷⁹ The result and impact of the contrasting views may have significant consequences on the case, including whether a plaintiff is declared a prevailing party, whether a plaintiff may receive attorney's fees, and whether a case becomes moot. While most courts treat nominal damages as an automatic entitlement regardless of whether the plaintiff requests them, some courts, particularly in the Eighth Circuit, require plaintiffs to specifically request nominal damages on risk of losing them.⁸⁰

1. The "Responsible Plaintiff" Approach and the Requirement of a Proper Jury Instruction

Courts following the most restrictive approach to the award of nominal damages under § 1983 require plaintiffs to include a request for nominal damages in the proposed jury instructions. Many of these cases require plaintiffs to either request nominal damages or risk losing the opportunity. Under this approach, a court does not provide the remedy of nominal damages when a plaintiff fails to request such an instruction.⁸¹ Courts require the plaintiff to act responsibly, and courts classify this responsible plaintiff approach as the "invited error" doctrine.⁸²

This approach is the most restrictive because it withholds an award of nominal damages from the plaintiff who fails to include such a request in the jury instruction. While courts differ as to the grant of nominal damages to an irresponsible plaintiff, the responsible plaintiff approach may be appropriate under some circumstances.⁸³

⁷⁹ See, e.g., *Floyd v. Laws*, 929 F.2d 1390 (9th Cir. 1990) (holding that nominal damages must be awarded regardless of the jury instruction).

⁸⁰ See *infra* note 109 and accompanying text.

⁸¹ See *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 283 (3rd Cir. 1995) (finding in an action not brought under § 1983, a jury verdict of \$3 million was unwarranted since there were no compensatory damages, and the court refused to imply an award of nominal damages); see also *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995) (noting that nominal damages for 42 U.S.C. § 1981a(a)(1) claims are not recoverable unless specifically requested either as a jury instruction or on additur); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 844-45 (11th Cir. 1991) (holding that a plaintiff was not entitled to a presumption of nominal damages when she failed to specifically request them); *Sims v. Mulcahy*, 902 F.2d 524, 535 (7th Cir. 1990) (same). *But see infra* Part III.B.3. (explaining that the jury's finding of a constitutional violation requires a mandatory award of nominal damages).

⁸² The "responsible plaintiff" approach is a phrase suggested by the author of this comment to describe the "invited error doctrine." See *United States v. Benny*, 786 F.2d 1410, 1417 (9th Cir. 1986) (where the criminal defendant proposes an erroneous jury instruction, review of the instruction is barred by doctrine of invited error); *DeLand v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336-37 (9th Cir. 1985) (doctrine of invited error applicable in context of civil jury trial).

⁸³ When an irresponsible plaintiff is unable to coherently assert the legal theory on which the claim is brought, a court may properly deny an automatic award of nominal

A court's refusal to automatically award nominal damages often results from an incorrect jury instruction offered by the plaintiff. In *Ganey v. Edwards*,⁸⁴ the Fourth Circuit upheld a jury verdict refusing nominal damages despite a finding that the defendant violated the plaintiff's constitutional rights. The court instructed the jury that it "may" award nominal damages upon a finding that the plaintiff was deprived of a constitutional right, but the jury was not required to do so.⁸⁵ In refusing to make an award of nominal damages "automatic," the court concluded that its decision did not misinterpret *Carey*:

Our ruling in no way challenges this *Carey* holding, which enables a § 1983 claim to be actionable for nominal damages without any showing of actual injury. We conclude that once the issue is presented to the jury, it *may* decide to award a zero sum or some other small amount as nominal damages.⁸⁶

In *Sims v. Mulcahy*,⁸⁷ the plaintiff brought an action under § 1983 for violations of the Fourth and Fourteenth Amendments.⁸⁸ The plaintiff neglected to request a jury instruction that required an award of nominal damages.⁸⁹ Although the jury found that the defendant violated the Fourth Amendment, it returned a verdict awarding zero damages.⁹⁰ The plaintiff offered the jury instruction regarding damages, but the

damages, unsure as to whether the plaintiff is suing under § 1983. See *Kelly v. Municipal Courts*, 97 F.3d 902 (7th Cir. 1996) (refusing to award nominal damages when the plaintiff failed to mention § 1983 as the cause of action and specifically requested reinstatement as the only form of relief sought). Since the purpose of an automatic award of nominal damages is to vindicate constitutional violations, a court should not imply a constitutional theory when the plaintiff fails to submit one.

⁸⁴ 759 F.2d 337 (4th Cir. 1985). In *Ganey*, jail officials refused access to the prison's law library in violation of the prisoner's right to petition the courts. See *id.* at 338.

⁸⁵ See *id.* at 339. The relevant part of the jury instruction reads:

If you find that plaintiff was deprived of his constitutional right of access to the courts, but do not find that he suffered any actual damages, then you *may* award him some sum as damages, such as five cents or \$1.00 or some other insignificant sum. While such an award of nominal damages may not be significant, it may be greater than \$1.00.

Id. at 339 n.2 (emphasis added).

⁸⁶ *Id.* at 339 (emphasis added).

⁸⁷ 902 F.2d 524 (7th Cir. 1990).

⁸⁸ See *id.* at 526.

⁸⁹ See *id.* at 534. The relevant part of the jury instruction stated: "[e]ven if you find plaintiff is entitled to no compensatory damages, however, you may still award plaintiff nominal damages of up to \$1 for the violation of her constitutional right by any individual defendant." *Id.*

⁹⁰ See *id.* at 535-36 (refusing an appeal for nominal damages because of the "necessity for a party to raise any objections it might have to jury instructions prior to the time the jury begins its deliberations").

court refused to declare an award of nominal damages mandatory after the plaintiff himself offered the permissive damage award instruction.⁹¹

Similarly, in *Warren v. Fanning*,⁹² the plaintiff brought an action under § 1983 alleging an Eighth Amendment violation.⁹³ In *Warren*, the Eighth Circuit refused to award nominal damages because the plaintiff failed to specifically request them.⁹⁴ The court justified its refusal based on the plaintiff's failure to offer the correct jury instruction:

Although, as explained earlier in this opinion, Warren would have obtained nominal damages under a proper instruction, the erroneous instruction given to the jury is the very instruction proffered by Warren, and when the trial judge read this instruction to the jury, no objection was voiced. Warren and his counsel thus have no one to blame but themselves for the jury's decision not to award nominal damages⁹⁶

The *Warren* court apparently interpreted *Carey* to stand for the proposition that plaintiffs are entitled to nominal damages, but only upon a specific request. While this allows something less than an "automatic" award of nominal damages, the approach taken in these cases reflects a "responsible plaintiff" approach to § 1983 litigation. Judge Heaney concurred in *Warren's* holding, but he wrote separately to "underscore the importance of properly instructing the jury on the necessity of awarding nominal damages to redress violations of constitutional rights."⁹⁸

Following *Warren*, the Southern District Court of Florida held in *Watchtorn v. Town of Davie*⁹⁷ that a plaintiff and her attorney "have no one to blame but themselves" for an improper jury instruction.⁹⁸ The court in *Watchtorn* quoted substantial sections from *Warren* and held that "the instant case mirrors *Warren*."⁹⁹ In *Watchtorn*, the plaintiff did not receive nominal damages because she proffered a jury instruction that failed to include nominal damages.¹⁰⁰ The court noted, however, that the plaintiff may have intentionally left out a nominal damage

⁹¹ See *id.* at 536.

⁹² 950 F.2d 1370 (8th Cir. 1991).

⁹³ See *id.* at 1372 (where plaintiff alleged "that his constitutional right to be free from cruel and unusual punishment was violated").

⁹⁴ See *id.* at 1375.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1375-76 (Heaney, J., concurring). Judge Heaney decided to "reluctantly concur" in affirming the district court. *Id.* at 1376.

⁹⁷ 795 F. Supp. 1112 (S.D. Fla. 1992). The plaintiff in *Watchtorn* brought a post-trial motion for nominal damages in order to be considered for attorney's fees. See *id.* at 1113.

⁹⁸ *Id.* at 1115.

⁹⁹ *Id.*

¹⁰⁰ See *id.*

instruction for fear of losing other remedies.¹⁰¹ The court concluded that although the plaintiff's due process rights were intentionally violated by the defendant, the lack of a damage award and failure to plead nominal damages resulted in only a "Pyrrhic [sic] victory"¹⁰² and refused attorney's fees.¹⁰³

The Eighth Circuit in *Robinson v. City of St. Charles*¹⁰⁴ again refused to award a request of nominal damages in a § 1983 claim brought for a Fourth Amendment violation.¹⁰⁵ The jury in *Robinson* found the officer liable but awarded zero damages.¹⁰⁶ The Eighth Circuit refused to award nominal damages since the plaintiff did not specifically request them:

However, [Plaintiff] neither requested an instruction on nominal damages nor objected to the damage instructions given. The instructions gave the jury the discretion not to award nominal damages. The jury did not award [Plaintiff] nominal damages, and he made no post-verdict motion challenging the failure to award nominal damages. Therefore, [Plaintiff] was not a prevailing party under *Warren v. Fanning* and his motion for an attorney's fee was properly denied.¹⁰⁷

The *Robinson* court's refusal to award automatic nominal damages resulted in a denial of prevailing party status for the purposes of attorney's fees. The plaintiff failed to receive nominal damages merely because the plaintiff failed to assert a proper jury instruction. The result affected not only the opportunity to win attorney's fees, but the symbolic vindication of constitutional rights that nominal damages afford.¹⁰⁸

In 1998, the Eighth Circuit reaffirmed its restrictive approach to automatic awards of nominal damages in *Westcott v. Crinklaw*.¹⁰⁹ While

¹⁰¹ See *id.* at 1115 n.7. The court implied that the plaintiff intentionally disregarded a nominal damage instruction in order to increase the chance of a larger recovery from compensatory and punitive damages: "Query whether Watchtorn intentionally avoided highlighting the nominal damage alternative for fear of jeopardizing her substantial compensatory and punitive damage claims by offering the jury a 'Solomonic solution.'" *Id.* Despite this assertion, the court offered no proof that the plaintiff intentionally disregarded the nominal damage request. See *id.*

¹⁰² *Id.* at 1117. "A pyrrhic victory is a victory that is offset by staggering losses." Dillenbeck v. Hayes, 830 F. Supp. 673, 675 n.1 (N.D.N.Y. 1993).

¹⁰³ See *Watchtorn*, 795 F. Supp. at 1117.

¹⁰⁴ 972 F.2d 974 (8th Cir. 1992).

¹⁰⁵ See *id.* at 976.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 977 (Wellford, J., concurring). Judge Wellford's concurring opinion noted the improper outcome of the situation when a jury finds defendant liable for violating constitutional rights, but the jury refuses to award nominal damages: "[w]hile the results here seem somewhat unsatisfactory, I concur in the opinion since we must affirm under the precedent cited, particularly *Warren*." *Id.* at 978.

¹⁰⁹ 133 F.3d 658 (8th Cir. 1998).

the procedural path in *Westcott*¹¹⁰ is much different than the other cases, the court explicitly affirmed the notion that a jury may find liability but award zero damages.¹¹¹ *Westcott* interpreted *Carey* as permitting the jury to award nominal damages but not mandating such an award. Referring to its understanding of *Carey*, the court in *Westcott* stated that “we reasoned that the jury could have awarded nominal damages.”¹¹² By using the word “could,” the court upheld a permissive, non-mandatory approach to nominal damages upon a finding of constitutional violation.

The restrictive approach requires plaintiffs to be responsible both during and after trial. Courts adopting this method of § 1983 nominal damage awards require plaintiffs to include such a plea in the jury instruction. As Judge Heaney’s concurring opinion in *Warren* stated, juries must be properly instructed regarding nominal damages.¹¹³ The consequence of an improper instruction under the restrictive approach is usually a dismissal or denial of reasonable attorney’s fees based on the doctrine of invited error.

Clearly, the difference between a successful or unsuccessful plaintiff under this approach is the wording of the jury instruction. Courts under the responsible plaintiff approach often permit a jury instruction that states something like, “If you find for the plaintiff, but find that the loss has no monetary value, you may return a verdict for the plaintiff for nominal damages in the amount of One Dollar (\$1.00).”¹¹⁴ In order to succeed under this approach, a plaintiff must specifically request a jury instruction that includes nominal damages. Not only must nominal damages be included, but the plaintiff also must request an instruction based on *Carey* that the jury must, as opposed to may, return a verdict for nominal damages upon a finding of a constitutional violation. Only by utilizing this specific instruction will a responsible plaintiff receive nominal damages for constitutional violations under § 1983.

2. The Intermediate Approach

The second approach to awarding nominal damages for constitutional violations is a less restrictive approach than the “responsible plaintiff” approach, yet it still requires a plaintiff to include

¹¹⁰ Unlike the cases in which a plaintiff attempts to receive nominal damages at the last minute as a vindication of constitutional rights, *Westcott* involved a plaintiff who complained that the nominal damage instruction was erroneous because proof of actual injury existed. *See id.* at 662.

¹¹¹ *See id.* at 663.

¹¹² *Id.* (citing *Carey*, 435 U.S. at 263).

¹¹³ *See supra* text accompanying note 95.

¹¹⁴ This instruction is typical of a jury instruction by courts that follow *Warren*. *See Sims v. Mulcahy*, 902 F.2d 524, 534 (7th Cir. 1990).

a request for nominal damages sooner or later during the process. Under this approach, the court permits the plaintiff to make a pre-trial or post-verdict request for nominal damages. The court allows nominal damages as long as the plaintiff requests them, either before or after the jury verdict.

The First Circuit Court of Appeals recently determined that in light of *Carey*, a plaintiff may be entitled to nominal damages but must make a timely request for nominal damages, either before or after the trial.¹¹⁵ In *Campos-Orrego v. Rivera*,¹¹⁶ the plaintiff claimed that she was terminated for attempting to counsel a client regarding a sexual harassment claim.¹¹⁷ The plaintiff alleged that the termination violated local laws that safeguard individuals against retaliation for affording assistance to persons who seek to make sexual harassment claims, and that the firing abridged her right to procedural due process.¹¹⁸

Since the plaintiff brought the complaint pursuant to § 1983, the district court retained original jurisdiction and supplemental jurisdiction over the local claims.¹¹⁹ At trial, the jury returned a verdict awarding \$80,000 in compensatory damages for the local violation and \$10,000 in punitive damages on the due process claim.¹²⁰ The plaintiff then moved that \$1 be deducted from the punitive damage award and reallocated as nominal damages on the due process claim.¹²¹ The court held that although the plaintiff did not charge the jury on nominal damages, the plaintiff made a "sufficiently prompt post-verdict request."¹²² As a result, the court allowed the award of nominal damages. The court noted the importance of an award of nominal damages because such an award "bridges any gap attributable to the absence of a compensatory damage award" for the federal claim.¹²³

Despite the court's holding in *Campos-Orrego*, the court made specific mention that nominal damages may not be automatically entitled even when there has been a deprivation of constitutional rights:

¹¹⁵ See *Campos-Orrego v. Rivera*, 175 F.3d 89, 98 (1st Cir. 1999). The plaintiff in *Campos-Orrego* brought the § 1983 action based on a deprivation of procedural due process. See *id.* at 92.

¹¹⁶ 175 F.3d 89 (1st Cir. 1999).

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 92-93.

¹¹⁹ See *id.* at 92 n.1.

¹²⁰ See *id.* at 93.

¹²¹ See *id.* The court explained the trial court's actions: "[i]n respect to the due process claim, the court recast the \$1 from the punitive damage award as nominal damages, thus keeping the aggregate amount intact but reducing punitives to \$9,999." *Id.*

¹²² *Id.* at 98.

¹²³ *Id.* at 99.

[W]e hold that when a jury in a case brought pursuant to 42 U.S.C. § 1983 finds a violation of the plaintiff's procedural due process rights, but fails to award compensatory damages, nominal damages are available to the plaintiff.

Let us be perfectly clear. We do not suggest that this entitlement is automatic, but, rather, it is incumbent upon the plaintiff to make a timely request for nominal damages.¹²⁴

The *Campos-Orrego* holding is crucial because it prohibits a plaintiff whose constitutional rights have been violated to receive nominal damages unless the plaintiff makes a request for nominal damages either ex post or ex ante.¹²⁵ The *Campos-Orrego* court based its reasoning on its prior holding in *Kerr-Selgas v. American Airlines, Inc.*¹²⁶ *Kerr-Selgas* did not involve a claim brought under § 1983, but a sexual discrimination claim.¹²⁷ The *Kerr-Selgas* court refused to grant punitive damages absent compensatory or nominal damages.¹²⁸ The court also refused to imply a plea of nominal damages in actions brought under 42 U.S.C. § 1981a(a)(1). As the court stated:

We return briefly to the matter at hand. Although nominal damages are recoverable in intentional discrimination cases under 42 U.S.C. § 1981a(a)(1), we do not think that a liability verdict compels such an award absent a timely request. Kerr neither requested a jury instruction on nominal damages, nor asked the district court . . . We therefore conclude—given the circumstances of this case—that the punitive damages award must be vacated absent either a compensatory damages award, or a timely request for nominal damages, on the federal claims.¹²⁹

In both *Campos-Orrego* and *Kerr-Selgas*, the First Circuit failed to distinguish between actions brought under § 1983 for constitutional violations and actions brought under other federal theories. While the *Kerr-Selgas* court was correct that nominal damages must be requested specifically in non-constitutional actions, this rule was applied

¹²⁴ *Id.* at 98.

¹²⁵ *See id.* at 99. The court summarized this intermediate approach:

Accordingly, we hold that a timely request for nominal damages can be made either ex ante (to the jury) or ex post (to the judge). Thus, a plaintiff may request the judge to instruct the jury on nominal damages, or in the absence of such an instruction, may ask the trial court for damages on the occasion of, or immediately after, the return of the verdict.

Id.

¹²⁶ 69 F.3d 1205 (1st Cir. 1995). The court in *Campos-Orrego* explained its reliance on *Kerr-Selgas*: “[i]n dictum, *Kerr-Selgas* adumbrates a more expansive approach . . . and we think that the interests of justice warrant such expansiveness.” *Campos-Orrego*, 175 F.3d at 99.

¹²⁷ *See Kerr-Selgas*, 69 F.3d at 1206-07.

¹²⁸ *See id.* at 1214.

¹²⁹ *Id.* at 1215.

incorrectly to the constitutional issues raised in *Campos-Orrego*. The difference involved the nature of the federal action, and consequently, the automatic entitlement to an award of nominal damages under *Carey*.

The Supreme Court's language in *Arizonans for Official English v. Arizona*¹³⁰ could indicate a rejection of this approach:

It should have been clear to the Court of Appeals that a claim for nominal damages, extracted late in the day from [Plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection. . . . On such inspection, the Ninth Circuit might have perceived that [Plaintiff's] plea for nominal damages could not genuinely revive the case.¹³¹

However, *Arizonans for Official English* was a case about immunity under § 1983, not about whether nominal damages were available after a jury trial.¹³²

The view that a plaintiff must make a request for nominal damages either in the jury instruction or after the verdict is less stringent than that followed by the "responsible plaintiff" approach, but the plaintiff under this approach must still request nominal damages at some time during the process. Only by requesting nominal damages at some point during the litigation can a plaintiff under this approach receive a vindication for constitutional rights violations.

3. The Permissive Approach: Nominal Damages as an Automatic Award upon Finding of a Constitutional Violation

The most permissive and most common approach to an "automatic" award of nominal damages occurs when courts permit a plaintiff to recover nominal damages regardless of whether the plaintiff specifically pleads for them. While courts following the responsible plaintiff approach enforce the doctrine of invited error, the permissive approach relaxes the invited error doctrine in order to grant nominal damages to plaintiffs automatically.

The Fifth Circuit in *Farrar v. Cain*¹³³ held that nominal damages must be awarded when "an infringement of a fundamental right was

¹³⁰ 520 U.S. 43 (1997).

¹³¹ *Id.* at 70.

¹³² *See id.* at 67-68. The Supreme Court refused to award nominal damages because § 1983 actions do not lie against a State. *See id.* at 45 (citing *Will v. Michigan Dept. of State Police*, 491 U.S. 55, 71 (1989)). Because of state immunity, no monetary damages were available to the plaintiff, regardless of when during the suit the plaintiff makes the request. *See id.* However, the Court did not criticize the Ninth Circuit's decision to find an implied fee of nominal damages. *See id.* The Ninth Circuit held that a plea for nominal damages may be read into a complaint that includes compensatory damages, punitive damages, and "all other relief" without specifically requesting nominal damages. *See Yniguez v. State*, 975 F.2d 646 (9th Cir. 1992).

¹³³ 756 F.2d 1148 (5th Cir. 1985).

shown.¹³⁴ In *Cain*, the trial court entered judgment for the plaintiffs based on a jury verdict that found at least one defendant liable but awarded no damages.¹³⁵ The plaintiffs succeeded only on the grounds that a nominal damages plea can be inferred for a violation of a fundamental right despite plaintiff's failure to present a proper jury instruction.¹³⁶

In *Beyah v. Coughlin*,¹³⁷ the plaintiffs did not plead for nominal damages yet the court held that such an award would be automatic if defendants violated the plaintiffs' constitutional rights. The Second Circuit determined that if the plaintiffs could prove a deprivation of a constitutionally protected right, the plaintiffs would be entitled to recover at least nominal damages.¹³⁸ The court remanded the case for examination of whether such an award was appropriate.¹³⁹

Recall that in the "responsible plaintiff" approach,¹⁴⁰ courts will not grant nominal damages if a plaintiff offers the incorrect jury instruction.¹⁴¹ The Ninth Circuit in *Floyd v. Laws*¹⁴² expressly rejected the doctrine of invited error regarding nominal damages. In *Floyd*, the plaintiff proposed the following jury instruction: "you may return an award of nominal damages to the plaintiffs."¹⁴³ The court held that the

¹³⁴ *Id.* at 1152. The court in *Cain* stated that the jury "should have awarded" nominal damages since the jury found that the defendant violated the plaintiff's civil rights, and "it was error for the trial court not to do so when the Farrars so moved in their motion for a new trial." *Id.*

¹³⁵ *See id.* at 1149.

¹³⁶ *See id.* at 1151. As the court stated:

We have awarded nominal damages, not to exceed one dollar, when an infringement of a fundamental right was shown and we have also held that, once a jury has found a violation of a plaintiff's civil rights, it "could not ignore that finding in calculating damages." Because the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages

Id.

¹³⁷ 789 F.2d 986 (2d Cir. 1986).

¹³⁸ *See id.* at 989.

¹³⁹ *See id.* at 990.

¹⁴⁰ *See supra* Part III.B.1.

¹⁴¹ Courts justified this approach based on the doctrine of "invited error." *See supra* note 82 and accompanying text.

¹⁴² 929 F.2d 1390 (9th Cir. 1991) (holding that "the question of invited error is irrelevant").

¹⁴³ *Id.* at 1401 n.8. The complete jury instruction provided:

If you determine from the evidence that the plaintiffs have established that a legal right of theirs has been violated by the defendants, but that they have sustained no actual damage, or that they have not established actual damage, you may return an award of nominal damages to the plaintiffs.

The award of a nominal sum on account of actual damages would not preclude your awarding punitive damages in such amount as you deem

trial court's instruction on nominal damages amounted to "an incorrect statement of the law and amounted to invited error."¹⁴⁴ The court summarized the correct approach to nominal damages when a deprivation of constitutional rights exists: "[e]ven if jury awards zero actual damages, judgment and \$1.00 nominal damage award are mandatory if plaintiff proves violation of her constitutional right."¹⁴⁵

The *Floyd* court determined that *Carey* stood for the proposition that nominal damages are always awarded when the defendant deprives the plaintiff of a constitutional right:

We hold that neither the judge nor the jury has any discretion in this matter, assuming that the jury has reasonably rendered its verdict for the plaintiff. *If the jury finds a constitutional violation, an award of nominal damages is mandatory, not permissive.* That a jury might choose to award zero actual damages is irrelevant to the legal question of whether, on the basis of the jury's verdict, the plaintiff was entitled to judgment and nominal damages. Because Floyd secured a favorable jury verdict on her section 1983 claim against the City of Sherwood, she was legally entitled to judgment with a mandatory nominal damages award of \$1.00 as a symbolic vindication of her constitutional right.¹⁴⁶

Like the Ninth Circuit, the Second Circuit adopted the permissive approach to awarding nominal damages regardless of whether the plaintiff requests them.¹⁴⁷ In *Gibeau v. Nellis*,¹⁴⁸ the Second Circuit reversed a district court's refusal to award an automatic entitlement to nominal damages. The jury in *Gibeau* found that an officer used

appropriate, if you find that the award of punitive damages is justified under these instructions.

Id.

¹⁴⁴ *Id.* at 1401. The court, in a footnote, offered the legally correct jury instruction: "[i]f the jury finds that the defendant violated plaintiff Floyd's constitutional right, it must at least award the plaintiff \$1.00 in nominal damages." *Id.* at 1401 n.9. The court rejected the importance of a jury instruction under these circumstances: "[w]e are concerned not with the accuracy of the jury instruction on nominal damages, but rather with the trial court's erroneous decision to enter judgment for both defendants." *Id.* at 1401.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1402-03 (emphasis added). The *Floyd* court reversed the lower court's judgment, entered judgment for the plaintiff for nominal damages and assessed reasonable attorney's fees. *See id.* at 1403.

¹⁴⁷ *See, e.g., LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2d Cir. 1995) (holding that a jury instruction that the jury "may" award nominal damages was error because jury found a violation of plaintiffs Federal Housing Act and First Amendment rights); *Cabrera v. Jakobovitz*, 24 F.3d 372 (2d Cir. 1994) (upholding a district court's award of nominal damages notwithstanding jury's refusal to award nominal damages in a Federal Housing Act action); *see also McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332, 335-36 (2d Cir. 1981) (requiring an automatic award of nominal damages for a violation of a First Amendment claim).

¹⁴⁸ 18 F.3d 107 (2d Cir. 1994).

excessive force in violation of the Eighth Amendment but declined to award any damages.¹⁴⁹ The verdict instruction did not mention nominal damages, and the jury never addressed the size of the damage award.¹⁵⁰ The plaintiff moved for a judgment notwithstanding the verdict, but the judge denied the motion.¹⁵¹

Although the Second Circuit agreed that no compensatory damages were available, the court remanded the case for an award of nominal damages.¹⁵² The court held that a nominal damage award is mandatory upon the finding of a constitutional violation.¹⁵³ Further, the court found irrelevant the plaintiff's failure to mention nominal damages in the proposed jury instruction.¹⁵⁴ The court noted that *Carey* "does not compel an award of nominal damages where plaintiffs had proved actual injury and recovered damages," but the award of nominal damages here was automatic and "compelled by law upon proof of a substantive constitutional violation, because Gibeau did not prove any actual injury."¹⁵⁵

Similarly, the Second Circuit in *Robinson v. Cattaraugus County*¹⁵⁶ was not faced with the issue of nominal damages, yet it declared the lower court's instructions regarding nominal damages erroneous.¹⁵⁷ The court declared that both the original and supplemental jury instructions contained error by stating that "an award of nominal damages, even in

¹⁴⁹ See *id.* at 108.

¹⁵⁰ See *id.* at 109.

¹⁵¹ See *id.*

¹⁵² See *id.* at 111.

¹⁵³ See *id.* at 110-11.

¹⁵⁴ See *id.* The court explained that the plaintiff failed to correctly instruct the jury but held that the vindication of the constitutional right is mandatory regardless of the propriety of the jury instruction:

In addition, although the district court instructed the jury that it may award nominal damages in the event it found a constitutional violation but no injury, it did not instruct the jury that it was required to do so. Because Gibeau did not object to either the verdict sheet or the instructions, he may challenge their propriety only if they were the product of plain error.

Because an award of nominal damages is not discretionary where a substantive constitutional right has been violated, the district court should have instructed the jury that it must award nominal damages if it were to find that Gibeau's Eighth Amendment rights were violated, and it should have provided a corresponding verdict form.

Id. The approach taken by the court in *Gibeau* apparently eliminates the "irresponsible plaintiff" approach altogether. As long as the plaintiff can identify a constitutional violation regardless of injury, the court must award nominal damages.

¹⁵⁵ *Id.* at 111.

¹⁵⁶ 147 F.3d 153 (2d Cir. 1998). The plaintiffs in *Robinson* brought a § 1983 action under the Fourth Amendment. See *id.* at 156.

¹⁵⁷ See *id.* at 161.

the amount of one dollar, may be made."¹⁵⁸ The court specifically held that a jury retains no discretion on whether to award nominal damages upon a finding of a constitutional violation.¹⁵⁹ The court therefore found it irrelevant that the plaintiff approved an incorrect jury instruction. This approach is in stark contrast to the "responsible plaintiff" approach.¹⁶⁰

More recently, the Second Circuit reaffirmed its expansive approach in *Amato v. City of Saratoga Springs*.¹⁶¹ In *Amato*, the district court found that defendant exerted excessive force during an arrest procedure but refused to award compensatory damages.¹⁶² The district court then dismissed from the bench the plaintiff's claims against the city and the police department because of the "futility of proceeding with only nominal damages . . . at stake."¹⁶³ The Second Circuit Court remanded for consideration of whether the plaintiff's § 1983 claim should proceed for an award of nominal damages, although no other damages would be awarded.¹⁶⁴

Under the permissive approach, a court ignores the propriety of the jury instruction and the requests made by the plaintiff. Instead, a court following the permissive approach simply inquires as to whether a constitutional violation occurred. If the defendant violated the plaintiff's constitutional rights, but the plaintiff is unable to prove actual injury, an award of nominal damages is automatic. The permissive approach rejects the invited error doctrine in order to vindicate constitutional violations.

The three approaches to awarding nominal damages all agree that nominal damages are available. However, the award of nominal damages hinges on the propriety of a jury instruction. A jury instruction for a court under the "responsible plaintiff" approach must include nominal damages as a mandatory award or risk forfeiting the award. In

¹⁵⁸ *Id.* at 162. The court found the nominal damage instruction erroneous even without the plaintiff raising an objection:

There is one part of the supplemental instruction, however, that was erroneous though not mentioned in plaintiffs' objection If a jury finds that a constitutional violation has been proven but that the plaintiff has not shown injury sufficient to warrant an award of compensatory damages, the plaintiff is entitled to an award of at least nominal damages as a matter of law The jury should be so instructed, and we have held that it is plain error to instruct the jury merely that, having found a violation, it "may" award nominal damages.

Id.

¹⁵⁹ *See id.*

¹⁶⁰ *See supra* Part III.B.1.

¹⁶¹ 170 F.3d 311 (2d Cir. 1999).

¹⁶² *See id.* at 314.

¹⁶³ *Id.* at 316-17.

¹⁶⁴ *See id.* at 321.

the intermediate approach, a jury instruction may fail to request nominal damages, but as long as the plaintiff makes a request for nominal damages either before or after trial, the court will award them. In the permissive approach, a plaintiff may leave out nominal damages altogether in the jury request, yet the court will imply nominal damages and require an award of nominal damages upon finding a constitutional deprivation.

IV. THE IMPACT OF THE DIFFERENT APPROACHES

Once a jury concludes that the defendant violated the plaintiff's constitutional rights, whether the plaintiff receives nominal damages depends upon a proper jury instruction and the particular approach taken by the court, as seen above. A decision by the court to either deny or require nominal damages may have a significant effect on the outcome of the plaintiff's claim.

A. Nominal Damages Provide Prevailing Party Status

One of the most important roles of a nominal damage award is that the court will declare the plaintiff a "prevailing party."¹⁶⁵ This consideration is necessary for two reasons. First, as a prevailing party, the plaintiff receives vindication for a violation of constitutional rights. Second, prevailing party status allows the plaintiff to cross the "statutory threshold"¹⁶⁶ before receiving consideration for attorney's fees. The Supreme Court recently determined in *Farrar v. Hobby*¹⁶⁷ that a plaintiff who receives only nominal damages is considered a prevailing party.¹⁶⁸

In *Hobby*, the Supreme Court granted certiorari on the issue of whether a plaintiff who receives nominal damages under § 1983 is a "prevailing party" eligible to receive attorney's fees.¹⁶⁹ The plaintiffs originally brought the case in the Southern District of Texas.¹⁷⁰ The jury in the original action found that the defendants violated plaintiff's constitutional rights but awarded zero damages, and the court dismissed

¹⁶⁵ See *Farrar v. Hobby*, 506 U.S. 103 (1992) (a plaintiff who received only nominal damages is considered a prevailing party); see also *Hewitt v. Helms*, 482 U.S. 755 (1987) (plaintiff is prevailing party when he receives nominal damages).

¹⁶⁶ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

¹⁶⁷ 506 U.S. 103 (1992).

¹⁶⁸ See *id.* at 112.

¹⁶⁹ *Id.* at 105.

¹⁷⁰ See *id.* at 106.

the action.¹⁷¹ The Fifth Circuit, implementing the permissive approach discussed above, remanded the case for an entry of nominal damages.¹⁷²

Once the plaintiffs received nominal damages, they sought attorney's fees under 42 U.S.C. § 1988 ("§ 1988").¹⁷³ The district court entered a judgment awarding \$280,000 in fees, \$27,932 in expenses, and \$9,730 in prejudgment interest.¹⁷⁴ The Fifth Circuit reversed the fee award and held that the plaintiffs were not prevailing parties.¹⁷⁵

The Supreme Court reversed and held that nominal damages confer prevailing party status because "[w]hen a court awards nominal damages, it neither enters judgment for defendant on the merits nor declares the defendant's legal immunity to suit."¹⁷⁶ The Court declared that nominal damages for a constitutional violation "modif[y] the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he would otherwise not pay."¹⁷⁷

In a Second Circuit decision prior to *Hobby*, the court in *Ruggiero v. Krzeminski*¹⁷⁸ identified that the plaintiff's failure to establish actual injury did not detract from the significance of the constitutional violation. A constitutional violation must be vindicated by nominal damages. The *Ruggiero* court held that the jury's finding of a constitutional violation and subsequent award of nominal damages alters the legal relationship between parties so as to confer prevailing party status.¹⁷⁹

¹⁷¹ See *id.*

¹⁷² See *id.* at 107 (citing to the Court of Appeals decision in *Farrar v. Cain*, 756 F.2d 1148 (5th Cir. 1985)); *supra* note 134 and accompanying text.

¹⁷³ See *id.* at 107.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* (citing to the Court of Appeals decision in *Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991)). The Court analyzed previous Court decisions in *Hewitt v. Helms*, 482 U.S. 755 (1987), *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam), and *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), and determined that plaintiffs did not "change the legal relationship" and therefore were not prevailing parties. See *Estate of Farrar*, 941 F.2d at 1315.

¹⁷⁶ *Hobby*, 506 U.S. at 112.

¹⁷⁷ *Id.* at 113. The Court also dismissed the argument that nominal damages are too trivial to confer prevailing party status, noting that "prevailing party inquiry does not turn on the magnitude of the relief obtained." *Id.* at 113-14.

¹⁷⁸ 928 F.2d 558 (2d Cir. 1991).

¹⁷⁹ See *id.* at 564. The court in *Ruggiero* provided reasoning similar to the Supreme Court's holding in *Hobby*:

The jury's determination that appellant's fourth and fourteenth amendment rights were violated by the search conducted by the Officers assuredly is significant. Simply because the jury found that the Ruggieros did not establish their claims in all respects does nothing to lessen the significance, or importance, of the Ruggieros' success. Although no compensatory damages were awarded, the jury's determination "changes the legal relationship"

The Court's holding in *Hobby* created interesting implications. Based on the approach taken by a particular court, an award of nominal damages produces a direct effect on whether a plaintiff wins or loses. For instance, courts under the "responsible plaintiff" approach do not award nominal damages when a plaintiff fails to request specifically for them. The absence of nominal damages eliminates prevailing party status for the plaintiff whose constitutional rights have been violated. On the other hand, courts that always award nominal damages upon a finding of a constitutional violation will always confer prevailing party status to the plaintiff.

B. Nominal Damages May Justify Attorney's Fees

As seen above, once a plaintiff wins nominal damages for a constitutional deprivation, the plaintiff is considered a prevailing party under *Hobby*. One of the significant effects of a successful claim under § 1983 is that a prevailing party may recover attorney's fees.¹⁸⁰ However, the Court in *Hensley v. Eckerhart*¹⁸¹ stated that a finding that a plaintiff is a "prevailing party" simply brings the plaintiff "across the statutory threshold."¹⁸² Once the statutory threshold is crossed, a court must then consider the reasonableness of a fee award.¹⁸³

While the Supreme Court provided an automatic entitlement to nominal damages in *Carey* for violations of § 1983, the Supreme Court has not upheld a corresponding right to an automatic award of attorney's fees.¹⁸⁴ In *Hobby*, the Court held that "a plaintiff who wins nominal damages is a prevailing party under § 1988."¹⁸⁵ However, the same Court

between the Ruggieros and the Officers in that a violation of rights had been found.

Id.

¹⁸⁰ The American rule, established in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), held that attorney's fees are not recoverable as an element of damages. The Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness*, 421 U.S. 240 (1975), ruled that fee-shifting must be authorized by Congress. As a result, Congress responded by passing the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, which became Title 42 U.S.C. § 1988. See *supra* note 3 and accompanying text. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

¹⁸¹ 461 U.S. 424 (1983).

¹⁸² *Id.* at 433.

¹⁸³ The Court in *Hobby* held that, in many cases, an award of only nominal damages justifies a reasonable attorney fee of zero. The Supreme Court held that, since the plaintiff sought \$17 million in compensatory damages and recovered only \$1 in nominal damages, the appropriate fee was no fee at all. See 506 U.S. at 115; see also *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (introducing a twelve-factor test to determine the reasonableness of an attorney's fee award).

¹⁸⁴ *Hobby*, 506 U.S. at 114.

¹⁸⁵ *Id.*

also held that while a “nominal damages award . . . does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988.”¹⁸⁶ The Supreme Court concluded:

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 [F]ee awards under § 1988 were never intended to ‘produce windfalls to attorneys,’ [because] attorney’s fees [should consider] the relationship between the extent of success and the amount of the fee award.¹⁸⁷

While the Court in *Hobby* refused to award attorney’s fees in that instance, several courts have expanded *Hobby* to hold that reasonable attorney’s fees are available upon a finding of nominal damages for violation of constitutional rights in § 1983 litigation. In granting attorney’s fees, courts often utilize Justice O’Connor’s three-part test.¹⁸⁸ Justice O’Connor’s concurring opinion in *Hobby* suggested a three-part test to determine whether the prevailing party “achieved enough success to be entitled to an award of attorney’s fees.”¹⁸⁹ The test examines 1) the difference between the judgment recovered and the judgment sought; 2) the significance of the legal issue on which the plaintiff prevailed; and 3) the public purpose served by the litigation.¹⁹⁰

The First Circuit in *Schneider v. Colegio de Abogados de Puerto Rico*¹⁹¹ recently determined that attorney’s fees equaling nearly \$250,000 were proper although plaintiffs received only one dollar each in nominal damages.¹⁹² This holding is significant because the court allowed a very permissive approach to an award of attorney’s fees. In *Schneider*, the court carefully examined whether a prevailing party plaintiff who receives only nominal damages should receive attorney’s fees.¹⁹³ Finding that the award of nominal damages provided a vindication of constitutional rights, the court held the vindication to be sufficient to merit an award of attorney’s fees of \$230,975.92.¹⁹⁴

¹⁸⁶ *Id.* The Court went on to state that “in some circumstances, even a plaintiff who formally ‘prevails’ under § 1988 should receive no attorney’s fees at all.” *Id.* at 115.

¹⁸⁷ *Id.* at 115-16 (citations omitted).

¹⁸⁸ *See id.* at 116-22 (O’Connor, J., concurring).

¹⁸⁹ *Id.* at 121-22 (O’Connor, J., concurring). Several courts follow O’Connor’s test in determining attorney’s fees. *See, e.g.,* Brandau v. Kansas, 168 F.3d 1179 (10th Cir. 1999) (applying O’Connor’s test in allowing \$41,598.13 in attorney’s fees); Briggs v. Marshall, 93 F.3d 355, 360-61 (7th Cir. 1996) (applying the three-part test in denying attorney’s fees to prevailing party).

¹⁹⁰ *See Hobby*, 506 U.S. at 122 (O’Connor, J., concurring).

¹⁹¹ 187 F.3d 30 (1st Cir. 1999) (per curiam).

¹⁹² *See id.* at 32.

¹⁹³ *See id.* at 41-44.

¹⁹⁴ *See id.* at 42. The court determined that plaintiffs were prevailing parties and qualified for attorney’s fees, although the fees were reduced from \$244,848.12 to

In *Floyd v. Laws*,¹⁹⁶ the automatic entitlement to nominal damages transformed a verdict for the defendants to a verdict for the plaintiff in the amount of nominal damages and reasonable attorney's fees.¹⁹⁶ Recall in *Floyd*, the court held that a nominal damage award is "mandatory" upon the jury's finding of a constitutional violation.¹⁹⁷ This mandatory award allowed the plaintiff the "calculation of reasonable attorney's fees in accordance with the procedures set forth in *Hensley v. Eckerhart*."¹⁹⁸

In *Brandau v. Kansas*,¹⁹⁹ the Tenth Circuit limited *Hobby* to situations where the plaintiff wins only a technical victory that serves no important public purpose. Applying Justice O'Connor's three-part test from *Hobby*, the court in *Brandau* allowed attorney's fees.²⁰⁰ In *Brandau*, the court granted attorney's fees of more than \$41,000 to a plaintiff who recovered only one dollar in nominal damages.²⁰¹ The court reasoned that since the victory put the plaintiff's employer on notice that it should reform its policies, thereby vindicating the rights of all state employees, this victory served an important public purpose.²⁰²

Following the "responsible plaintiff" approach, in *Warren v. Fanning*,²⁰³ the court refused to grant an award of nominal damages because the plaintiff failed to specifically request them in the jury instruction.²⁰⁴ The concurring opinion²⁰⁵ in *Warren* identified the impact on a plaintiff when the court fails to grant an automatic entitlement to nominal damages:

\$230,975.92. *Id.* at 33. In a concurring opinion, Judge Lipez noted that the plaintiffs were never interested in monetary damages but were interested in injunctive relief. *Id.* at 42. This relief, along with the nominal damages, permitted plaintiffs to be considered as prevailing parties and receive attorney's fees. *Id.* at 42-43.

¹⁹⁶ 929 F.2d 1390 (9th Cir. 1991).

¹⁹⁶ See *id.* at 1400-03; *supra* note 142 and accompanying text.

¹⁹⁷ *Id.* at 1401.

¹⁹⁸ *Id.* at 1403. *Floyd* was decided before *Hobby* and did not have the benefit of Justice O'Connor's three-part test.

¹⁹⁹ 168 F.3d 1179 (10th Cir. 1999).

²⁰⁰ See *id.* at 1181-83.

²⁰¹ See *id.* at 1183.

²⁰² See *id.*

²⁰³ 950 F.2d 1370 (8th Cir. 1991).

²⁰⁴ See *supra* note 94 and accompanying text.

²⁰⁵ See *Warren*, 950 F.2d at 1375-76 (Heaney, J., concurring). Judge Heaney noted that the jury should have been instructed to award Warren nominal damages if it was unable to place a monetary value on the harm Warren suffered. See *id.* at 1376. However, Judge Heaney refused to disagree with the result and found that Warren's inability to properly instruct the jury caused an ineligibility for nominal damages and, therefore, possible attorney's fees. See *id.* While noting the importance of nominal damages, Judge Heaney failed to award them: "I reluctantly concur in affirming the district court's refusal to amend the judgment and to award attorney's fees." *Id.*

Had a properly instructed jury awarded nominal damages against Dr. Taca, Warren certainly would have crossed the statutory threshold of eligibility for attorney's fees and costs under 42 U.S.C. § 1988 Prevailing party status for purposes of section 1988 requires only that the plaintiff succeed on any significant issue in litigation which achieves some of the benefit sought in bringing the action.²⁰⁶

The Eighth Circuit's refusal to grant an automatic award of nominal damages upon a finding of constitutional deprivation is especially curious in light of its holding in *Butler v. Dowd*.²⁰⁷ The court in *Butler* upheld a jury's award of nominal damages and found this award sufficient to justify attorney's fees of \$94,680.²⁰⁸ However, precedent in that circuit indicates that if the jury would have refused nominal damages, the court would not imply nominal damages, and the plaintiff in *Butler* would not have recovered anything.²⁰⁹

The Supreme Court in *Hobby* probably envisioned only certain rare circumstances when attorney's fees are appropriate upon a nominal damage award.²¹⁰ The Court expressed concern that allowing nominal damages to constitute prevailing party status provides unreasonable "windfalls to attorneys."²¹¹ Such a windfall of nearly a quarter of a million dollars occurred in *Campos-Orrego v. Rivera*.²¹² While nominal damages serve to vindicate constitutional rights, attorney's fees do not. The benefit of an award of attorney's fees is the message to a plaintiff that constitutional rights should be protected and plaintiffs should be encouraged to redress constitutional wrongs.²¹³ However, attorney's fees do not serve as the means to vindicate fundamental rights; they only serve as an incentive to bring constitutional actions.

As a vehicle that vindicates constitutional violations, nominal damages provide the vindication automatically when a court adopts the permissive approach. Once nominal damages are awarded, reasonable attorney's fees are available but should not be correspondingly

²⁰⁶ *Id.*

²⁰⁷ 979 F.2d 661 (8th Cir. 1992).

²⁰⁸ *See id.* at 676.

²⁰⁹ *See supra* Part III.B.1.

²¹⁰ *See supra* note 186 and accompanying text. The Court held that when a plaintiff "recovers only nominal damages . . . the only reasonable fee is usually no fee at all." *Hobby*, 506 U.S. at 115.

²¹¹ *See id.*

²¹² 175 F.3d 89 (1st Cir. 1999); *see Schneider v. Colegio de Abogados de Puerto Rico*, 187 F.3d 30, 42 (1st Cir. 1990) (per curiam); *supra* text accompanying note 191.

²¹³ *See* 42 U.S.C. § 1988; *see also* S. REP. NO. 94-1011, at 2 (1976). Congress enacted § 1988 to encourage plaintiffs who suffer civil rights violations to seek relief. *See id.* Congress noted that "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." *Id.*

automatic. The varied results regarding attorney's fees again illustrate the importance of a one dollar nominal damage award. For one court, the nominal damage award made the difference between zero recovery and a quarter of a million dollars.²¹⁴

C. Nominal Damages May Rescue a Case from Dismissal and Mootness

As one commentator stated, "Although the issue is not free from doubt, the better view appears to be that a properly pleaded claim for nominal damages will defeat a claim of mootness."²¹⁵ As demonstrated, if a court follows the approach that nominal damages must be awarded to a plaintiff who suffers a constitutional violation, the case will usually defeat a claim of mootness, regardless of whether the claim was properly pleaded.

In *Yniguez v. Arizona*,²¹⁶ a predecessor of *Arizonans for Official English v. Arizona*,²¹⁷ the Ninth Circuit held that when a jury finds that a plaintiff's constitutional rights were violated and awards nominal damages, the claim does not become moot. The court held that a plaintiff's "pursuit of nominal damages provides a sufficiently concrete interest in the outcome of the litigation to confer standing to pursue declaratory relief and thereby prevents mootness."²¹⁸

A mandatory nominal damage award provided the difference between a dismissal and a remand in *Amato v. City of Saratoga Springs*.²¹⁹ The defendants in *Amato* argued that a suit against the city and Police Department should not go forward where the plaintiff stood to obtain only nominal damages.²²⁰ However, the court held that this is "contrary to the rationale behind permitting suits based on the deprivation of constitutional rights to proceed despite a lack of proof as to actual injury."²²¹ The city and police department argued that the

²¹⁴ See *Schneider*, 187 F.3d at 42; *supra* text accompanying note 191.

²¹⁵ 1C SCHWARTZ & KIRKLIN, *supra* note 29, § 15.3, at 185.

²¹⁶ 975 F.2d 646 (9th Cir 1992), *overruled on other grounds by Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); see *supra* text accompanying note 130.

²¹⁷ 520 U.S. 43 (1997). Recall that in *Arizonans for Official English*, the Supreme Court dismissed the case against the plaintiff because a § 1983 action does not lie against a state, not because the existence of only nominal damages deems the case moot. See *id.*; *supra* text accompanying note 130. In fact, the Court did not overrule this holding at all, although a few subsequent courts have interpreted *Arizonans for Official English* to stand for the proposition that nominal damages do not save a case from mootness. See *Thomas v. Massachusetts Dept. of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) (declaring that plaintiff's claim was "too little, too late").

²¹⁸ *Yniguez*, 975 F.2d at 647.

²¹⁹ 170 F.3d 311 (2d Cir. 1999).

²²⁰ See *id.* at 316-17.

²²¹ *Id.* at 317. The Court further went on to describe the significance of a nominal damage award:

plaintiff may be improperly motivated by a desire for an attorney's fee award.²²² The court found this argument unavailing and noted that a nominal damage award can be grounds for a reduced or zero attorney's fee award, but "the impact of an award of nominal damages on Amato's right to legal fees is a matter for the district court in the first instance."²²³

By holding that a plaintiff should not lose his right to proceed against a defendant because only nominal damages are at stake, the court in *Amato* expressly rejected²²⁴ the Ninth Circuit's approach in *George v. City of Long Beach*.²²⁵ The court in *Amato* clearly points out that a trial may continue even if only nominal damages are available to a plaintiff.²²⁶

In *Committee for the First Amendment v. Campbell*,²²⁷ the Tenth Circuit did not dismiss the claim for nominal damages as moot even when the claim for injunctive relief was dismissed.²²⁸ The court adopted the permissive approach to nominal damages and held that this sole basis of relief conferred standing:

[W]e must reverse the summary judgment insofar as the Plaintiff's complaint for nominal damages. We reverse due to legal error. . . . Therefore, the district court erred in dismissing the nominal damages claim If proven, a violation of First Amendment rights concerning freedom of expression entitles a plaintiff to at least nominal damages.²²⁹

As the Supreme Court has stated, "[b]y making the deprivation of such ['absolute'] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." Thus, while the monetary value of a nominal damage must, by definition, be negligible, its value can be of great significance to the litigant and to society.

Id. (citations omitted) (alterations in original).

²²² See *id.* at 317 n.5.

²²³ *Id.*

²²⁴ See *id.* at 319-20. The court stated:

[W]e agree in part and disagree in part with the decision of the Ninth Circuit in *George v. City of Long Beach* Precisely because nominal damages afford a litigant vindication of the deprivation of his constitutional rights, the decision to dismiss a plaintiff's claim against a municipality because only nominal damages are at stake is error.

Id.

²²⁵ 973 F.2d 706 (9th Cir. 1992) (finding that the district court's dismissal of a § 1983 *Monell* claim was harmless error). The court in *George* seems to endorse an automatic entitlement approach to nominal damages by vacating the district court's judgment regarding nominal damages and entering a judgment of \$1 for the plaintiff. However, the court then dismissed the *Monell* claim since only nominal damages were at stake.

²²⁶ 170 F.3d 311, 319-20 (2d Cir. 1999).

²²⁷ 962 F.2d 1517 (10th Cir. 1992).

²²⁸ See *id.*

²²⁹ *Id.* at 1526-27.

The court remanded the case for further consideration based on the claim for nominal damages.²³⁰

Nominal damages serve a valuable role by keeping a case from being declared moot. Courts recognize that the existence of only nominal damages for constitutional deprivations represents something greater than just monetary relief. As we have seen, the award of nominal damages serves to vindicate fundamental constitutional rights. This vindication in the form of nominal damages should not create mootness solely because the award was not sought in the jury instruction. As the court in *Amato* stated, the value of a nominal damage award is not negligible, though the amount may be.²³¹

V. CONCLUSION

Litigation under § 1983 allows a plaintiff to bring a cause of action to vindicate fundamental constitutional rights. Damages for § 1983 violations include nominal, compensatory, and punitive damages; damages awards for § 1983 are governed by the common-law model of compensation. Nominal damages are often regarded as a trivial award, yet they serve a vital function in § 1983 litigation by vindicating constitutional violations. While courts disagree as to the manner and effect of nominal damages, the holding of *Carey v. Piphus* allows an award of nominal damages automatically upon finding of a constitutional violation. Nominal damages should not be awarded automatically for violations of federal rights but only for violations of fundamental constitutional rights. In order to preserve fundamental constitutional rights, this award should be provided to each plaintiff who suffers from constitutional violations, regardless of whether the plaintiff specifically requests such an award. By providing nominal damages automatically upon finding of a constitutional violation, a plaintiff receives prevailing party status and becomes eligible for attorney's fees. This opportunity is lost when a court refuses to imply a nominal damage award for constitutional violations.

Mark T. Morrell

²³⁰ *See id.*

²³¹ *See Amato*, 170 F.3d at 319-20.