2022

Nominal Damages as Vindication

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Abstract. A recent Supreme Court decision inspired a resurgence of interest in an old mystery: How can nominal damages vindicate a plaintiff for past harm? The Court relied on the longstanding common law practice of entitling a plaintiff to sue for violation of her rights, even without demonstrating harm in fact, and to recover nominal damages. Courts have long asserted that awarding nominal damages in such suits vindicates the plaintiff. But they have not explained just how awarding $1 provides vindication, and serious observers scoff at the idea that it does. This Article offers a theory of vindication through nominal damages litigation. It argues that permitting suits for nominal damages enables courts to function as producers of presumptively reliable reputation-relevant information. Plaintiffs pursue, and courts have long allowed, lawsuits for nominal damages when these suits might provide information that effectively remedies or deters harm.

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* Associate Professor, Notre Dame Law School. For helpful comments, I am grateful to Sam Bray, Christian Burset, Maureen Carroll, Andrew Gold, John Goldberg, John Golden, Joshua Kleinfeld, Paul Miller, Jim Pfander, Daniel Markovits, Mark Ramseyer, Veronica Root-Martinez, Jennifer Nadler, Henry Smith, Michael L. Wells, and workshop participants at the Harvard Private Law Workshop, the North American Workshop on Private Law Theory, the AALS Annual Meeting Remedies Section Panel, the Junior Business Law Scholars Workshop, Notre Dame Law School, and the Midwestern Law and Economics Association Annual Meeting. Thanks to Zachary Beculheimer, William Eisenhauer, Holly Lanchantin, Marquan Robertson, Shamalla Semoy, Maria Murphy, and Sravya Nallaganchu for excellent research assistance. Any errors are mine.

Introduction

Oliver Wendell Holmes famously conceived of the law as a prediction of when courts will coerce a party to pay compensation or suffer a penalty for certain behavior.[1] Law for the Holmesian bad man is that body of rules the violation of which will result in his being forced to forfeit money or sent to jail.[2] Or as the leading American remedies casebook observes, "Clients are more interested in the bottom line than in the principle of the thing."[3]

Yet the law permits plaintiffs to start or continue a suit even if they will receive nothing more from the court by succeeding than a verdict in their favor and a nominal sum. Pop star Taylor Swift did just that recently, countersuing a radio personality who groped her for assault and battery and requesting just one dollar in damages, which the court awarded her.[4] Swift explained that she did not sue for substantial damages because her purpose was to hold the defendant accountable and to strengthen the social norm against sexual assault.[5] Taylor Swift's lawsuit is a specific instance of a larger phenomenon. While Swift chose not to pursue substantial damages, in other cases a plaintiff is unable to recover damages because she cannot establish that an alleged legal violation caused her harm or cannot prove the quantum of damages with reasonable certainty. Common law courts usually do not grant substantial damages absent evidence of harm causing an ascertainable loss.[6]

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[1] Oliver Wendall Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

[2] *Id.* at 459. Austin and Bentham articulated similar views of the law. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 13–14 (Isaiah Berlin et al. eds., 1954); JEREMY BENTHAM, *Of Laws in General*, *in* 2 THE COLLECTED WORKS OF JEREMY BENTHAM 1, 1–2 (H.L.A. Hart ed., 1970).

[3] DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 2 (5th ed. 2019).

[4] *See Taylor Swift Sexual Assault Case: Why Is It Significant?*, BBC (Aug. 15, 2017), https://perma.cc/T2EE-YTTF. Swift's initial counterclaim complaint sought compensatory and actual damages in an amount to be determined at trial, but she later amended her request for relief to include only $1 in damages. *See* Defendants' Answer, Affirmative Defenses, and Counterclaim at 14, Mueller v. Swift, No. 15-cv-01974, (D. Colo. Oct. 28, 2015); Keith Coffman & Jann Tracey, *Colorado DJ's Suit Against Taylor Swift Dismissed in Groping Trial*, REUTERS (Aug. 11, 2017, 6:06 AM), https://perma.cc/W72U-UFDJ.

[5] Daniel Kreps, *Taylor Swift Talks 'Symbolic' Lawsuit, Groping Trial, Sexual Assault*, ROLLINGSTONE (Dec. 6, 2017), https://perma.cc/RN26-9XND ("I think that this moment is important for awareness, for how parents are talking to their children, and how victims are processing their trauma .... The brave women and men who have come forward this year have all moved the needle in terms of letting people know that this abuse of power shouldn't be tolerated.").

[6] *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (overturning verdict because jury instructions that allowed recovery for the "abstract value of a constitutional right"

But even when a plaintiff cannot establish harm or quantify her loss, the common law often entitles her to maintain an action for violation of her legal right. The centuries-old black-letter law is encapsulated by Blackstone's statement, "where there is a legal right there is also a legal remedy, by suit or action of law, whenever that right is invaded."[7] When a case sits between the divergent standards for maintaining a cause of action and receiving monetary compensation, courts typically award nominal damages.[8] Early American courts adopted this doctrine from the courts of England, and though it has since been somewhat circumscribed,[9] actions can still be pursued—and are pursued—that entitle the victorious plaintiff only to nominal damages.[10]

This Article argues that some plaintiffs pursue suits for nominal damages to employ courts as producers of presumptively reliable information that is used in reputation-based private governance. That information might include credible factual findings, assessments of behavior relative to legal rules, articulation of legal rules, or some combination of those information types. Plaintiffs sometimes pursue lawsuits in which they expect to receive only nominal damages because

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violated the principle that damages should compensate "for provable injury" and not be based "on the jury's subjective perception of the importance of constitutional rights as an abstract matter").

[7] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23.

[8] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978). During part of the eighteenth century, plaintiffs could in principle recover substantial damages without proving the fact or amount of loss sustained. Nevertheless, courts regularly and therefore reasonably predictably awarded plaintiffs only nominal damages in such cases, and over time the law developed to permit only nominal damages in such cases absent special circumstances entitling a plaintiff to punitive damages. *See* Hall v. Ross (1813) 3 Eng. Rep. 672 (HL) 674 (appeal taken from Scot.) ("[I]f in England a majority of the Judges had been of the opinion that some damages were due, their Lordships would never have heard of the decision being against the person who had made out his claim to damages. Too much might be given him, or too little; but he could never, under such circumstances, be dismissed out of Court, with the additional loss of having to pay expenses of the suit. . . . [W]here there was no ground or criterion to estimate the damage, they were in the habit of giving nominal damages; but they never dismissed the claim altogether, when it appeared that there was some damage."); *see also* John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair Versus Full Compensation*, 55 DEPAUL L. REV. 435, 435–37 (2006); 1 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 164–190 nn.2–115 (9th ed. 1920) (collecting hundreds of cases, going back to nineteenth century demonstrating English courts awarding nominal damages); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 283 n.38 (2008) (citing seventeenth- and eighteenth-century English cases in which plaintiffs recovered nominal damages for establishing violations of their private rights but failing to offer adequate evidence of compensable harm).

[9] Hessick, *supra* note 8, at 283–86.

[10] *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (holding that federal courts can have jurisdiction over a claim in which the only relief requested is nominal damages); *see also infra* Part II (discussing cases involving alleged breach of contract, tort, and fiduciary duty for nominal damages).

the credible-information-producing function of courts is effective at deterring wrongful behavior or remedying its harmful effects.[11] In addition to shining new light on nominal damages, this insight has implications for the concept of vindication in the law, the expressive value of the law, the perceived legitimacy of courts, federal standing doctrine, and remedies.

To be sure, plaintiffs sometimes proceed through litigation with the hope of receiving substantial damages or an equitable remedy only to find that hope dashed. However, other times it is apparent well before a verdict that no more than nominal damages are likely to be awarded. For example, courts sometimes rule on summary judgment or dismissal motions that a plaintiff cannot show compensable harm under the applicable standards but is nonetheless entitled to proceed with the suit for nominal damages.[12] Alternatively, some plaintiffs pursue lawsuits in which they seek no compensatory damages.[13] And sometimes plaintiffs request only nominal damages because there is no alleged loss for which they can recover.[14]

The longstanding rule allowing suits for nominal damages has been disputed in recent federal constitutional tort cases, giving rise to a circuit split that culminated in the 2021 Supreme Court case *Uzuegbunam v. Preczewski*.[15] The legal doctrine permitting nominal damages suits developed predominantly in the context of private law matters such as contractual and private law tort claims. Following this history, the Court's decision in the case rests heavily on common law tradition and precedent in what are predominantly private law suits.[16] Drawing from that long practice, the Court held that a claim for nominal damages is sufficient to

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[11] Courts have been found to function as information intermediaries in some contexts. That is, the pure information-producing power of courts, as distinguished from their coercive enforcement power, can effectively influence behavior. For example, in the foreign-issued sovereign debt market, when a sovereign borrower defaults, creditors sue even though they have little hope of recovering damages through the courts. They sue to produce information about the debtor state's government that induces third parties to sanction or refuse to deal with the state or the government. The ability to produce such information strengthens the litigating creditors' bargaining position in settlement negotiations. Courts thus serve as information intermediaries that strengthen reputational enforcement in the international sovereign debt market. Sadie Blanchard, *Courts as Information Intermediaries: A Case Study of Sovereign Debt Disputes*, 2018 BYU L. REV. 497, 503.

[12] *See infra* note 32 and accompanying text.

[13] *See infra* notes 72, 99 and accompanying text.

[14] *See, e.g.*, Yukos Capital S.A.R.L. v. Feldman, 977 F.3d 216 (2d Cir. 2020) (affirming jury verdict for plaintiffs in action for breach of fiduciary duty and rejecting defendant's challenge to denial of summary judgment motion filed at close evidence on grounds that plaintiffs sought only nominal damages because defendant had returned all money before trial, relating to one count, and plaintiffs had received compensation by settlement with an alleged coconspirator, relating to another count; plaintiffs were permitted to proceed to verdict for nominal damages).

[15] 141 S. Ct. 792, 796 (2021).

[16] *Id.* at 797–98.

prevent a lawsuit from becoming moot in federal court.[17] The legal challenge to permitting nominal damages suits to continue—once other claims for relief were moot—relied on the arguments that nominal damages cannot provide an effective remedy and that nominal damages suits violate the separation of powers and undermine judicial administrability.[18] The Supreme Court correctly held that courts have long recognized deciding nominal damages suits as a legitimate judicial function within the bounds of federal standing and mootness doctrines.[19] But the Court's analysis of the history of nominal damages suits is formalistic and somewhat cursory. Similarly, other courts, and even legal scholars, have failed to appreciate the full range of functions that nominal damages suits historically have served and can continue to serve.[20] This Article uncovers the overlooked reputational governance function of nominal damages litigation.

Part I explains the legal doctrines that make nominal damages suits possible and presents the three existing explanations of nominal damages: that they serve as a peg for costs, a vehicle for declaratory judgments, or a means of vindication.

Part II illustrates the inadequacy of existing explanations of nominal damages by discussing cases that those theories fail to explain.

First, the peg-for-costs account fails to explain the nominal damages suits in which attorney's fees are not available to the prevailing plaintiff.[21] That category includes most causes of action by default under the American rule that litigants bear their own attorney's fees unless a cost-shifting statute or contract provides otherwise.[22] The peg-for-costs explanation also assumes that the decision to award nominal damages arises only at the end of a suit when it turns out that the plaintiff failed to establish substantial damages. This explanation therefore ignores the role of nominal damages in preventing suits from being dismissed at a preliminary stage of litigation or concluded on summary judgment. The rule allowing plaintiffs to proceed with certain claims even if they only request nominal damages has prevented courts from dismissing cases when courts concluded that no other relief is available based on the pleadings or after discovery.[23]

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17 *Id.* at 802.

18 *Id.* at 807 (Roberts, C.J., dissenting).

19 *Id.* at 801–02.

20 *See infra* Section I.B; *infra* Part II.

21 *See infra* Section II.B.

22 *See infra* Section II.B.

23 *See, e.g.*, Clearview Concrete Prods. Corp. v. S. Charles Gherardi, Inc., 453 N.Y.S.2d 750, 756 (App. Div. 1982); W.J.A. v. D.A., 43 A.3d 1148, 1159–60 (N.J. 2012).

The second explanation—that nominal damages serve as a vehicle for a declaratory judgment—accurately describes a subset of nominal damages suits. The classic example is an action for trespass to property that serves to establish a property boundary or to protect the plaintiff's property right from future legal claims by the defendant grounded in the defendant's pattern of uncontested possession or use.[24] But there is a second category of nominal damages suits that does not fit this description. These category-two suits challenge completed past behavior that does not threaten legal rights subject to remedies in a future legal action.[25] The category-two nominal damages suit does not derive its force in governing behavior from the threat of future legal remedies. Rather, it drives behavior because of actual or potential reputational repercussions from judicial fact-finding and legal determinations.[26]

Third, nominal damages suits are often said to vindicate legal rights, but the concept of vindication is underarticulated by courts and legal scholars.[27] Courts invoke the maxim that the law should "not authorize the least violation of" a legal right, but they fail to elaborate just how awarding nominal damages achieves the end of vindicating a legal right.[28] Indeed, serious observers contend that awarding nominal damages trivializes rather than vindicates a right and, in some circumstances, awarding substantial damages is thought necessary to achieve vindication.[29] Whether and how nominal damages can vindicate, then, remains to be fully understood.

Part III introduces the informational theory of vindication through nominal damages, the core contribution of this Article. It argues that the common law has developed to allow plaintiffs to bring informational nominal damages suits because these suits serve core purposes of the common law pertaining to social ordering. This Part explains the role of the three key sets of players in informational nominal damages suits and the factors that determine the effectiveness of courts as reputation adjudicators. First is the plaintiff as initiator, seeking reputational reckoning, reputational rehabilitation, or rule reinforcement. The plaintiff's motivation is of course intertwined with the expected effect of its actions on the defendant. Second is the court as producer of reputation-relevant information in the form of factual revelations and legal determinations. To perform this function, the court must be trusted

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24 *See infra* Section II.C.

25 *See infra* Section II.C.

26 *See infra* Section II.C.

27 *See infra* Section II.D.

28 *See* Scott v. City of Toledo, 36 F. 385, 394 (C.C.N.D. Ohio 1888); Webb v. Portland Mfg., 29 F. Cas. 506, 507 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322).

29 *See infra* note 106 and accompanying text.

as reliable. Three core characteristics of judicial process—participation, formal adjudicative procedure, and publicity—allow courts to engage in costly signaling to increase public confidence in their reliability. The third set of actors is the audience. For reputational adjudication to be effective, there must be an audience that can access the information produced by the lawsuit and that has the will and power to impose or withdraw sanctions in the direction desired by the plaintiff. Confidence in factual and legal determinations will vary with the audience. For instance, a commercial audience to a commercial dispute between sophisticated parties might have to believe that the adjudicator understands the relevant commercial realities before accepting judicial conclusions as inputs into reputational governance.

Part IV considers remaining puzzles in nominal damages and offers preliminary analyses of how the information theory of nominal damages applies to those puzzles. It first looks at the internal perspective and asks whether courts are self-consciously performing the reputational governance function elaborated here. Next, it considers whether constitutional torts are a special case that courts should treat differently from the predominantly private law actions that were the context in which the law of nominal damages developed. Part IV also discusses whether features of today's social, media, and litigation environment might raise concerns about reputational lawsuits that justify modifying the law of nominal damages. It examines to what extent the law should subsidize reputational nominal damages suits and considers possible implications of the reputational account for damages more broadly.

Part V concludes by considering the implications of reputational nominal damages suits for the relationship between legal institutions and private ordering.

I. What Are Nominal Damages For?

Existing explanations of nominal damages point to their role in shifting the costs of litigation, serving as a vehicle for a declaratory judgment, and vindicating a plaintiff's legal rights.

The common law has long entitled a plaintiff to maintain an action for violation of a legal right even without demonstrating harm in fact. The centuries-old black-letter law is encapsulated by Blackstone's statement, "every right when with-held must have a remedy, and every injury it's [sic] proper redress."[30] Common law courts, however, usually would not grant substantial damages absent evidence of factual injury causing an

[30] 3 BLACKSTONE, *supra* note 7, at *109.

ascertainable compensable loss.[31] Courts typically award nominal damages when a case sits between the divergent standards for maintaining a cause of action and receiving monetary compensation.[32] The general rule in English law was that "every infringement of a right involves a claim to nominal damages, though all actual damage is disproved."[33] American courts adopted this view, as explained in an opinion by Justice Story in 1838:

> I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages.... Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.[34]

Though the availability of actions for nominal damages is now considered less universal than Justice Story's statement suggests,[35] plaintiffs can, and do, still maintain actions that entitle them only to nominal damages.[36] The existing explanations for allowing suits for nominal damages fall into three categories: nominal damages serve as a peg for costs, they permit courts to declare rights, and they vindicate the plaintiff. The remainder of this Part sets out those theories of nominal damages, and the next Part explains why they are incomplete.

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[31] *See* Carey v. Piphus, 435 U.S. 247, 254–58 (1978).

[32] *See* DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 226 (3d. ed. 2018); *see also supra* note 8.

[33] JOHN D. MAYNE, A TREATISE ON THE LAW OF DAMAGES 6–7 (Philadelphia, T. & J.W. Johnson & Co. 1856).

[34] Webb v. Portland Mfg. Co., 29 F. Cas. 506, 507–08 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322) (citation omitted).

[35] Standing doctrine in U.S. federal court developed to impose barriers, at least before the Supreme Court's decision in *Uzuegbunam*, to suits that would have historically been actionable for nominal damages. *See* Hessick, *supra* note 8, at 290 (noting that the Supreme Court "continues to require proof of injury in fact and demonstration of cognizability."). In addition, some actions, such as those for negligent torts, now require a showing of harm. *See* Restatement (Second) of Torts § 907 cmt. a (Am. L. Inst. 1979).

[36] *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 796 (2021); *see also infra* Part III (discussing cases involving alleged breach of contract, tort, and fiduciary duty for nominal damages).

A. *A Peg for Costs*

Nominal damages are often viewed as "a mere peg to hang costs on."[37] A leading remedies treatise describes the award of nominal damages as a "rescue operation" that courts undertake to protect the plaintiff who has established a cause of action, but failed to prove damages, from having to bear the costs of the suit.[38] There is some truth in this explanation, but it is incomplete and, for some of the cases it describes, only an intermediate explanation.[39]

Today, most attention paid by courts and scholars to the question of nominal damages and costs focuses on suits against government defendants alleging violations of constitutional or other civil rights.[40] Fee-shifting statutes apply to those causes of action and therefore make the availability of costs relevant to which party prevails.[41] A plaintiff who receives nominal damages is a prevailing party and therefore eligible to recover statutory attorney's fees, although "ordinarily" he will not under current Supreme Court precedent.[42] There are other reasons that the question of nominal damages is especially salient in those cases. Civil rights plaintiffs sometimes seek an injunction or declaratory relief against a government action that is either ongoing or threatens the plaintiff with

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[37] SEDGEWICK, *supra* note 8, at 53; *see, e.g.*, Cummings v. Connell, 402 F.3d 936, 943 (9th Cir. 2005) ("Nominal damages . . . clarify the identity of the prevailing party for the purposes of awarding attorney's fees and costs in appropriate cases."). Particularly when a statute provides for the award of court costs to the prevailing party, a court may award nominal damages to avoid ordering the plaintiff to pay court costs and ensure the cost burden is on the defendant. *See also* Moore v. Liszewski, 838 F.3d 877, 879 (7th Cir. 2016) (citing 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION 295-96 (2d ed. 1993)). A third explanation applies to cases in which punitive damages might be available. Some jurisdictions permit nominal damages to satisfy the actual damages requirement for punitive damages to be awarded. *See Moore*, 838 F.3d at 879.

[38] DOBBS & ROBERTS, *supra* note 32, at 226.

[39] *See infra* Sections II.A, II.B.

[40] *See, e.g.*, Webb v. Portland Mfg. Co., 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322) (discussing the right to seek nominal damages for violation of the right to vote).

[41] *See, e.g.*, 42 U.S.C. § 1988(b) (providing that courts may award the prevailing party "a reasonable attorney's fee").

[42] Farrar v. Hobby, 506 U.S. 103, 115 (1992) ("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."). For a discussion on the state of federal law on fee shifting and nominal damages, see Maureen Carroll, Fee Shifting, Nominal Damages, and the Public Interest (unpublished manuscript) (on file with author) (showing that some federal courts decide whether to award fees to plaintiffs who win nominal damages based on the public interest value of the lawsuit and arguing that they should instead adopt a more "objective evaluation of the extent to which plaintiffs prevailed on their claims.").

repetition in the future.[43] After the plaintiff files suit, and sometimes after a court has "strongly intimated" that the policy or action is unlawful, the government defendant changes the challenged policy or stops engaging in the challenged conduct.[44] This change in behavior renders the requested prospective relief moot and leaves a request for nominal damages as the only requested relief for the past harm.[45] If the court dismissed the suit as moot, the plaintiff would bear the costs of the lawsuit. Congress and state legislatures have provided for victorious plaintiffs in such suits to recover costs.[46] It would be perverse for the law to enable government actors to throw the costs of suits that cause the cessation of rights violations onto plaintiffs in this way. It would undermine the legislative purpose in providing for cost recovery if a government defendant could unilaterally elect to render a lawsuit moot and wriggle out of paying costs by changing its policy. There is, therefore, truth in the peg-for-costs explanation of nominal damages. However, as explained below, it fails to account for some of the functions that nominal damages serve in the law.[47]

B. *A Declaration of Rights*

Some suits for nominal damages serve a purpose similar to that of a declaratory judgment.[48] Declaratory judgments are a form of prospective, "preventive adjudication" that resolves uncertainty about legal rights and duties rather than serving to redress past harm.[49] They offer a notification of the likely result in court if a party later sues for damages or equitable

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[43] *See, e.g.*, Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (seeking relief from college's speech policy).

[44] *See* Comm. for the First Amend. v. Campbell, 962 F.2d 1517, 1519 (10th Cir. 1992) (considering whether university's change to speech policy and reversal of decision preventing speech, both made after a preliminary injunction hearing in which the district court "strongly intimated" that the court would rule against the university, rendered requests for nominal damages moot).

[45] *See, e.g.*, *Uzuegbunam*, 141 S. Ct. at 797 (considering whether change to challenged speech policy after First Amendment suit filed rendered request for nominal damages moot); Naturist Soc'y, Inc. v. Fillyaw, 958 F.2d 1515, 1519 (11th Cir. 1992) (considering whether amendments to speech regulations made after final district court decision renders appeal moot); *Campbell*, 962 F.2d at 1524 (considering whether change to speech policy rendered request for nominal damages moot). As explained further below, the declaratory judgment is not available in such cases once the challenged conduct is stopped and not expected to recur because the declaratory judgment is available only to prevent future harm and not to remedy past harm. *See infra* Section II.B.

[46] *See, e.g.*, 42 U.S.C. § 1988(b) (providing that courts may award the prevailing party "a reasonable attorney's fee").

[47] *See infra* Sections III.A-B.

[48] *See* DOBBS & ROBERTS, *supra* note 32 at 226.

[49] Samuel L. Bray, *Preventive Adjudication*, 77 U. CHI. L. REV. 1275, 1276 (2010).

relief.[50] Declaratory judgments and nominal damages suits that function analogously might sit squarely within Holmes's view of the law because they govern behavior by allowing the courts to let the Holmesian bad man know in advance whether he should expect to be sanctioned if he pursues a course of action.[51] Such actions are accounted for by theories of private ordering in the shadow of the law, where the force of potential future legal remedies on behavior is presumably doing the work of encouraging compliance once legal rights are clarified.[52] The classic example is an action for trespass to property. The trespass action has been used to establish a boundary or to declare that a defendant's entry onto the property is unlawful, which in turn protects the plaintiff's property right from future claims of entitlement to use the property, such as through adverse possession or prescriptive easement.[53] Plaintiffs have used lawsuits in a similar manner to establish ownership of intellectual property rights.[54] Applying a related legal technique, before the abolition of slavery in the United States, Black persons sometimes won nominal damages in suits sounding in causes of action such as assumpsit and assault and battery through which they sought to establish their right to freedom under laws prohibiting slavery in a state or territory.[55] U.S. state and territorial courts sometimes awarded prevailing plaintiffs only nominal damages in these suits on the basis that the suits were brought "for the purpose of trying" the plaintiffs' "right to . . . freedom."[56] The limits of the explanation of

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[50] The federal and many state declaratory judgment statutes are based on the Uniform Declaratory Judgments Act. *See* LAYCOCK & HASEN, *supra* note 3, at 593. On the prospective purpose of declaratory judgments, see section 12 of the Uniform Declaratory Judgment Act, 12A U.L.A 740, 752 (2008) (explaining the purpose of declaratory judgments as being "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations").

[51] *See* Holmes, *supra* note 1, at 459.

[52] However, the information theory presented here, which highlights the power of information to activate social forces, implies that even preventive adjudication might sometimes, contra Holmes, operate not because of the coercive remedial power of the law but because of its information-producing power.

[53] *See, e.g.*, Paul v. Slason, 22 Vt. 231, 238 (1850); Webb v. Portland Mfg. Co., 29 F. Cas. 506, 507 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322).

[54] *See* 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.04[1][a][i] (2022) (discussing equity courts' deference to law courts' factual adjudication of validity of patent rights); Samuel Bryan, *Reply to Wilson's Speech: "Centinel" II*, FREEMAN'S JOURNAL (Philadelphia), Oct. 24, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 77, 82 (Bernard Bailyn ed., 1993) (discussing equity courts' dependence on law courts to establish matters of fact).

[55] *See, e.g.*, Jarrot v. Jarrot, 7 Ill. 1, 12 (1845) (holding that the plaintiff was free and awarding damages in action for assumpsit).

[56] In at least some cases where plaintiffs had established damages, compensatory damages were awarded. *See id.* at 8 (holding that plaintiff was free and awarding him the $5 for value of services

nominal damages suits as vehicles for declaratory judgment are discussed in the next Part.[57]

C. *Vindication of the Plaintiff's Right*

Nominal damages are sometimes said to vindicate the plaintiff or its legal rights. But the concept of vindication is underarticulated in judicial opinions and legal scholarship. The word "vindication" appears not infrequently in judicial opinions but is rarely elaborated upon. The Supreme Court's statement on the relationship between nominal damages and vindication is illustrative:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; 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.[58]

When courts explain the availability of nominal damages by reference to vindication, they often invoke some variant of the maxim that when a right is absolute, the law should not authorize any violations of it.[59] The federal courts have stated that nominal damages are a form of "recognition of a violation of rights," a way of "vigorously defend[ing]" rights, or "symbolic vindication."[60] Historically, when English and U.S.

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rendered that he had proven at trial, together with costs, in an action for assumpsit); *id.* at 12, 16, 30, 31 (separate opinion arguing that in other such cases plaintiff had been awarded nominal damages, and that is the appropriate remedy since the purpose of the suit is to establish the right). The available records do not show whether other Black plaintiffs sought compensatory or only nominal damages.

[57] *See infra* Section III.C.

[58] Carey v. Piphus, 435 U.S. 247, 266 (1978). The Court reiterated this principle in *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

[59] *See, e.g.*, Bernhardt v. County of Los Angeles, 279 F.3d 862, 872 (9th Cir. 2002) ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." (quoting City of Riverside v. Rivera, 477 U.S. 561, 574 (1986))); 1 BLACKSTONE, *supra* note 7, at *139.

[60] Amato v. City of Saratoga Springs, 170 F.3d 311, 319 (2d Cir. 1999); *see also* Calhoun v. DeTella, 319 F.3d 936, 941 (7th Cir. 2003); Redding v. Fairman, 717 F.2d 1105, 1119 (7th Cir. 1983); *Bernhardt*, 279 F.3d at 871 (holding that plaintiff's case remained live even though it did not satisfy the mootness exception of "capable of repetition yet evading review"); Yniguez v. Arizonans for Official English, 42 F.3d 1217, 1243 (9th Cir. 1995) (en banc) (holding that nominal damages were an appropriate remedy because "[t]he right of free speech ... must be vigorously defended" and "the protection of First Amendment rights is central to guaranteeing society's capacity for democratic self-government"), *rev'd on other grounds sub nom.* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997). *See generally* DOBBS & ROBERTS, *supra* note 32. Several courts have invoked "symbolic vindication." *E.g.*, Hassan v.

courts recognized a right to bring an action without a showing of harm, they also cited vindication as if it were self-evident how prevailing and receiving nominal damages would achieve this end.[61] They often relied on the following passage from the eighteenth-century case *Ashby v. White*[62]:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal . . . surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. . . . [I]n an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there.[63]

Despite repeated judicial invocations of vindication, it is far from obvious that a judgment for nominal damages vindicates a plaintiff. To the contrary, awards of nominal damages have sometimes been characterized as insignificant "technical victor[ies]"[64] or even expressions of judicial contempt for frivolous claims.[65] The notion that a nominal damages judgment vindicates is examined below.[66]

II. The Incompleteness of Existing Explanations

The justifications for nominal damages discussed above do not account for all the functions nominal damages serve in the law. Section A explains that the law of nominal damages serves the previously overlooked function of keeping alive lawsuits that would otherwise be terminated at

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City of New York, 804 F.3d 277, 294 (3d Cir. 2015); Floyd v. Laws, 929 F.2d 1390, 1403 (9th Cir. 1991); *Amato*, 170 F.3d at 317. The Supreme Court in *Uzuegbunam* rejected the characterization of nominal damages as symbolic but with little explanation, asserting that rather than being "symbolic," nominal damages are "concrete" because they require the defendant to hand over money, albeit a trivial sum. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 799 (2021).

61 *See, e.g.*, Parker v. Griswold, 17 Conn. 288, 304–06 (1845) (citing a string of cases also relying on this principle articulated in *Ashby v. White* (1703) 92 Eng. Rep. 126; 2 Ld. Raym. 954); Webb v. Portland Mfg. Co., 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322).

62 Ashby v. White (1703) 92 Eng. Rep. 126, 136–37; 2 Ld. Raym. 938, 953–55.

63 *Id.* at 136–37 (showing that Chief Justice Holt's view of the case prevailed on appeal in the House of Lords). U.S. cases relying on this statement from *Ashby* include, for example, *Uzuegbunam*, 141 S. Ct. at 799, *Carey*, 435 U.S. at 265, *Comm. To Elect Dan Forest v. Emps. Pol. Action Comm.*, 853 S.E.2d 698, 732 (N.C. 2021), *Parker*, 17 Conn. at 304–06, and *Webb*, 29 F. Cas. At 508.

64 *See* Farrar v. Hobby, 506 U.S. 103, 113 (1992).

65 *See infra* notes 67–68 and accompanying text.

66 *See infra* Section III.B.

a preliminary stage. Section B shows that in many cases in which courts are asked to rule on nominal damages, the core matter at stake is more substantive than the costs of the suit. Section C observes that plaintiffs sometimes seek only nominal damages, even when a declaration of rights by the court does not have a practical legal effect. Finally, Section D argues that the notion that a plaintiff might be vindicated through a suit for nominal damages rings true but is undertheorized.

A. *Nominal Damages Can Keep a Suit Alive*

The peg-for-costs explanation views a court's decision to allow nominal damages as one that is presented only at the tail end of a lawsuit after a plaintiff has proven a violation of her legal right but has failed to prove damages to the applicable standard. This explanation ignores the fact that permitting suits for nominal damages prevents suits from being dismissed or summarily adjudged before fact-finding or full adjudication. When damages are an element of a cause of action, as in actions for negligence, a court might dismiss or summarily adjudicate a suit before evidence is produced, factual findings are made, or the merits of the claim are determined. Claims are dismissed or summarily adjudicated on the pleadings, after discovery, or otherwise before extensive public hearing or adjudication on the merits because the loss alleged or supported by evidence could not satisfy the legal standards for showing harm or establishing damages.[67]

For example, in actions that plaintiffs may not maintain for nominal damages, courts dismiss suits on the pleadings when plaintiffs fail to allege pecuniary loss, when the damages claimed are too speculative or remote, or when the damages claimed are not of the kind allowed for the cause of action.[68] Courts dismiss other suits after discovery on the basis that while the plaintiff raised material issues of fact regarding the conduct elements of the claim, it has "failed to produce competent evidence sufficient to create a genuine issue of material fact as to injury."[69] In still

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[67] Electron Trading, LLC v. Morgan Stanley, 69 N.Y.S.3d 633, 633 (App. Div. 2018).

[68] *See, e.g., id.* at 582 (affirming dismissal of fraud claim based on pleadings because they failed to allege pecuniary loss caused by the alleged deception and because damages claimed were "inherently speculative," consisting in "loss of alternative contractual bargain"); Route 217, LLC v. Greer, 119 A.D.3d 1018, 1019–20 (N.Y. App. Div. 2014) (affirming summary judgment for defendants based on the pleadings in fraud suit, holding that damages are an element of the cause of action for fraud and plaintiff sought only lost profits, which were not allowable damages for fraud).

[69] *E.g.*, Trumpet Vine Invs., N.V. v. Union Cap. Partners I, Inc., 92 F.3d 1110, 1117–19 (11th Cir. 1996) (affirming summary judgment against fraud counterclaimant because nominal damages were unavailable for fraud and, although counterclaimant raised material issues of fact related to

other suits, courts issue or direct verdicts for defendants after the presentation of some evidence on the basis that the plaintiff failed to show that it suffered any damage.[70] Such early termination of suits allows defendants to prevent courts from revealing or deciding facts or legal issues regarding the merits of the dispute that have reputational consequences.[71] In contrast, the availability of nominal damages for some causes of action prevents lawsuits from being similarly terminated before a full presentation of evidence and adjudication of disputed legal and factual issues.[72]

The rule that nominal damages preclude dismissal interacts with the harmless error doctrine to create judicial flexibility. This flexibility allows courts to take into account considerations of conserving judicial resources and preventing frivolous suits by dismissing nominal damages suits deemed insignificant. Courts have held that while a plaintiff should have been entitled to proceed for nominal damages, the error was harmless

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intentional deception, it "failed to produce competent evidence sufficient to create a genuine issue of material fact as to injury").

[70] *E.g.*, Moore v. Beakley, 215 S.W. 957, 958 (Tex. Comm'n App. 1919) (overturning directed verdict in defendant's favor granted on basis, inter alia, that plaintiff failed to show during presentation of evidence that it suffered any damage, holding that plaintiffs were entitled to at least nominal damages if they could prove that defendant made fraudulent statements that induced reliance).

[71] *Compare, e.g.*, Winegeart v. Cone, No. 07-14-00427-CV, 2015 WL 3463109, at *1, 4 (Tex. Ct. App. Jun. 1, 2014) (affirming summary judgment after discovery in favor of defendant on medical malpractice claim on the grounds that there was no evidence of harm caused by any possible negligence that might have occurred) *with, e.g.*, Magu Realty Co. v. Spartan Concrete Corp., 658 N.Y.S.2d 45, 45 (App. Div. 1997) (permitting plaintiffs to proceed with claim for breach of contract after some evidence was introduced even though they "failed to demonstrate that they incurred any actual damages resulting from the alleged breach"; plaintiffs "may still be entitled to nominal damages to vindicate their rights arising from the alleged breach" if they succeed on other "triable material issues of fact").

[72] *See, e.g.*, W.J.A. v. D.A., 43 A.3d 1148, 1151–52, 1155 (N.J. 2012) (reversing, on basis that damages need not be alleged to maintain suit, summary judgment granted to defendant before presentation of case to jury when plaintiff's attorney averred that he would present "no testimony as to actual damages made . . . because there is none as to economic loss"); Clearview Concrete Products Corp. v. S. Charles Gherardi, Inc., 453 N.Y.S.2d 750, 755–56 (App. Div. 1982) ("[Plaintiff] proffered no evidence to establish the actual value of the property . . . or what the property would have been worth if unaffected by the [fraudulently induced clause]. . . . Notwithstanding its failure to establish damages, [plaintiff] is entitled to nominal damages to vindicate its rights deriving from the fraud and breach of warranty practiced upon it."); Treadwell v. Tillis, 18 So. 886, 887 (Ala. 1896) (overturning demurrer in breach of contract action granted below on grounds that claimed damages were too remote and speculative, reasoning that because a plaintiff is entitled to recover nominal damages for breach of contract, dismissing the suit on that basis was improper); Seidman v. Bandes, 74 N.Y.S.2d 883, 887 (App. Div. 1947) (holding that a fraud plaintiff "is entitled to at least nominal damages," and rejecting motion to dismiss based on insufficiency of pleading on damages).

because no substantial right or question of reputation was at stake.[73] Appreciating the different manifestations of the reputational function of nominal damages suits suggests that when considering whether such a suit should be permitted to proceed and when applying the harmless error doctrine, courts should consider the reputation interests at stake broadly. These interests include not only reputational rehabilitation of the plaintiff but also the possibility of revealing valuable information about the defendant's wrongful behavior that might allow the plaintiff to obtain redress through a negotiated settlement or that might deter wrongful behavior.[74]

Even when courts decide to award nominal damages after a full trial rather than at a preliminary stage of litigation, the legal doctrine that a plaintiff can maintain a suit for nominal damages potentially transforms the court's task and the information produced by its decision. If plaintiffs were required to establish damages to prevail, a court could dispense with a case simply on the basis that the plaintiff did not establish damages; it could forego factual and legal analysis of the merits of the claim. For causes of action that a plaintiff may maintain for nominal damages, a court may bifurcate the trial between liability in the first proceeding and injury in the second.[75] In contrast, when nominal damages are not available, the decision-making may proceed in the opposite order.

B. *Sometimes Costs Are Not the Core Interest at Stake*

The "peg for costs" explanation is also incomplete for two reasons. First, it does not explain the historic availability of nominal damages in the United States for most lawsuits. Second, it does not explain the purpose of plaintiffs who pursue claims even when they know they will receive insignificant compensation.

Under the American Rule on costs, which governs lawsuits in the United States unless a statute or contract provides for fee shifting, each party bears its own costs.[76] Plaintiffs in colonial and early U.S. courts bore most of their own legal fees, and by the mid-nineteenth century, the

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[73] *See, e.g.*, Reid v. Johnson, 31 N.E. 1107, 1108 (Ind. 1892); Hesse v. Imperial Elec. Light, Heat, & Power Co., 129 S.W. 49, 50 (Mo. Ct. App. 1910).

[74] *See infra* Section III.A.

[75] *See* Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 890–91 (7th Cir. 1995) (explaining that for breach of contract, a trial may be bifurcated in this way, whereas a trial for tort liability may not be so bifurcated when injury is an element of the cause of action).

[76] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

"American Rule" was formalized.[77] When plaintiffs bear most of their own litigation expenses, it is all the more striking when they pursue litigation knowing that their prospect of recovering substantial damages is limited by applicable burdens of proof and other constraints on the availability of damages.

Costs are not the matter under consideration in the cases discussed in the previous Section regarding whether a suit should be allowed to proceed at a preliminary stage.[78] Additionally, even under cost-shifting statutes, a plaintiff who recovers only nominal damages is sometimes unable to recover attorney's fees. A plaintiff who wins nominal damages under a federal fee-shifting statute, for instance, will "ordinarily" not recover attorney's fees under current Supreme Court precedent.[79] Most states permit awarding attorney's fees to the prevailing party under a relevant fee-shifting statute or contract when that party received only nominal damages,[80] but the outcome sometimes varies depending on the applicable statute or contract.[81]

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[77] *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (rejecting an attorney fee award of $1600, reasoning that "[t]he general practice of the United States is in opposition to" allowing such charges); 7 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 750 (Maeva Marcus et al. eds., 2003) ("the cost of retaining counsel could not be included as part of a damage award"). Colonial and then state statutes provided for attorney fee shifting in very small amounts ("a few dollars"), but because the fees of American lawyers were effectively unregulated, prevailing American litigants bore most of their own attorney fees. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 14-15 (1984). The law on the matter was not perfectly clear through the middle of the nineteenth century; courts sometimes permitted juries to consider attorney's fees when deciding on damages. *Id.* at 15.

[78] *See supra* Section II.A.

[79] Farrar v. Hobby, 506 U.S. 103, 114 (1992). The Supreme Court in *Hobby* stated that, for a plaintiff who recovers only nominal damages "because of his failure to prove an essential element of his claim for monetary relief, the only reasonable [attorney fee] is usually no fee at all." *Id.* at 104. The Court stated that attorney's fee awards are not appropriate where a plaintiff wins only "the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated." *Id.* at 114 (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987)). In a concurrence, Justice O'Connor sets out a three-factor standard inviting courts to look at the difference between the damages sought and those recovered, the significance of the legal issue on which the plaintiff prevailed, and whether the case accomplished an important public goal. *See id.* at 116, 20 (O'Connor, J., concurring).

[80] King v. Brock, 646 S.E.2d 206, 207 (Ga. 2007) (stating that a majority of jurisdictions provide for attorney's fee recovery under applicable statutes for a party who prevails and receives nominal damages); *see also, e.g.*, Evans v. Werle, 31 S.W.3d 489, 493 (Mo. Ct. App. 2000) (holding that a plaintiff that recovered only nominal damages was entitled to attorney's fees under a contract awarding them to prevailing party); Quik Park W. LLC v. Bridgewater Operating Corp., 189 A.D.3d 488, 489 (N.Y. App. Div. 2020) (affirming award of attorney's fees for breach of contract claim in which plaintiff recovered nominal damages).

[81] Texas is an outlier in not permitting nominal damages to serve as a basis for awarding attorney's fees under state fee-shifting statutes. *See* Versata Software, Inc. v. Internet Brands, Inc., 902

Finally, even in cases covered by fee-shifting statutes or contract terms, the entitlement to attorney's fees does not explain the decision of the plaintiff to pursue a low- or nominal-value lawsuit. Permitting plaintiffs to prevail and collect litigation costs even without a showing of loss reflects the reality that, even apart from their role in awarding compensation for the effects of legal wrongs, courts perform a legitimate judicial function when they publicly ascertain facts and categorize behavior as wrongful in the context of a legal dispute. The availability of attorney's fees permits plaintiffs with low-monetary-value suits to procure legal representation to pursue those suits, including on a contingency-fee basis.[82] That the lawyer can expect compensation if the suit succeeds does not explain the plaintiff's objective in pursuing the suit.[83] To the extent, then, that nominal damages serve as a peg for costs, they do so because nominal damages awards are recognized as serving a legitimate judicial purpose. This feature of the law suggests that private law adjudication is at least as concerned with adjudicating legal wrongs as it is with remediating harms.[84]

F. Supp. 2d 841, 867 (E.D. Tex. 2012). The language of some fee-shifting statutes requires recovery of compensatory damages to support an attorney's fee award. *See* Belle Terre Ranch, Inc. v. Wilson, 232 Cal. App. 4th 1468, 1475–77 (2015) (stating that California law ordinarily permits a party receiving only nominal damages to recover attorney's fees under relevant fee-shifting statutes, but the fee-shifting statute relating to property disputes requires a party to recover actual damages to be awarded attorney's fees).

[82] *See* City of Riverside v. Rivera, 477 U.S. 561, 575–76 (1986).

[83] A lawyer who regularly represents individual (non-institutional) clients who pursue low-monetary-value or nominal damages lawsuits explained that his clients pursue the suits to draw attention to rights violations as a way to advocate for reform of existing laws and government practices. One client, for instance, sued a prison for behaviors such as unjustifiably destroying his books and wrongfully denying him access to newspapers. The plaintiff continued his suits, which initially requested injunctive relief, even after he was released from prison, and it was apparent that he would receive very little compensation if he prevailed. The plaintiff prevailed for nominal damages in one suit and then settled that suit for attorney fees. Complaint at 1, 5, Koger v. Dart, No. 13CV07150 (N.D. Ill. Oct. 4, 2013); Verdict and Settlement Summary at 2, Koger v. Dart, No. 13CV07150, 2015 WL 13668334 (N.D. Ill. Oct. 7, 2015); Interview with Mark Weinberg, attorney in the foregoing case, (July 27, 2022). The *ABA Model Rules of Professional Conduct* Rule 5.4 forbids lawyers to share legal fees with nonlawyers. All jurisdictions have adopted this rule; only the District of Columbia has relaxed it to allow sharing with legal professionals or other law firm employees. *See* Katherine L. Harrison, Comment, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879, 883 (2000).

[84] Notably, a claim for nominal damages usually cannot sustain an action for negligence. This might suggest that the purpose of negligence law is to spread losses; it might stem from concerns about excessive, frivolous, or harassing litigation that were more salient during the period of development of negligence law. Further research would be needed to assess the significance of the unavailability of nominal damages for negligence. *See generally* G. Edward White, *The Intellectual*

C. *A Declaration of Rights Sometimes Has No Practical Legal Effect*

This Article uncovers and focuses on nominal damages actions not accounted for by the declaratory judgment or costs theories. It explains suits that differ from nominal-damages-as-declaratory-judgments suits in two ways. First, these nominal damages suits ask courts to adjudicate the lawfulness of behavior that has already happened, is unlikely to recur, and does not—if left unchallenged—threaten the plaintiff's legal rights, such as property rights under doctrines like adverse possession.[85] Second, unlike in declaratory judgment suits, the incentive to comply with the law in these non-declaratory nominal damages suits does not come from the threat of future legal sanctions. Instead, it comes from private ordering in response to the revelation of facts and legal determinations by the court.[86]

Prior to the Supreme Court's decision in *Uzuegbunam*, some federal courts distinguished nominal damages suits that have no practical legal effect from those that do, with only that latter cases satisfying standing requirements.[87] In a concurrence to an opinion permitting a suit for only nominal damages to survive a mootness challenge, Judge Michael McConnell elaborated the view that nominal damages claims ought to be actionable only when they have a practical legal effect. Judge McConnell argued that the Tenth Circuit's precedent permitting suits for only nominal damages to proceed should be overruled.[88] He reasoned that a claim for nominal damages alone is beyond federal court jurisdiction because "[f]ederal courts exist to resolve live controversies, to remedy wrongs, and to provide prospective relief."[89] Since the defendant's conduct at issue in the case had stopped and was not expected to recur, and because the plaintiffs alleged no compensatory harm, Judge McConnell

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Origins of Torts in America, 86 YALE L.J. 671 (1977) (describing the late development of tort law in the nineteenth century as a product of industrialization and new thinking about legal categories).

[85] *See, e.g.*, Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1257–58 (10th Cir. 2004) ("It may seem odd that a complaint for nominal damages could satisfy Article III's case or controversy requirements, when a functionally identical claim for declaratory relief will not. But this Court has squarely so held . . . finding that . . . 'the district court erred in dismissing the nominal damages claim which relates to *past* (not future) conduct.'" (quoting Comm. for the First Amend. v. Campbell, 962 F.2d 1517, 1526 (10th Cir.1992))); *Taylor Swift Sexual Assault Case: Why Is It Significant?*, *supra* note 4 (arguing that, contrary to the court's statement in *Utah Animal Rights Coal.*, 371 F.3d at 1257–58, nominal damages claims for past harm are not functionally identical to declaratory judgment actions).

[86] *See* Blanchard, *supra* note 11.

[87] *See* Morrison v. Bd. of Ed., 521 F.3d 602, 610 (6th Cir. 2008) ("No readily apparent theory emerges as to how nominal damages might redress past chill."); *Utah Animal Rights Coal.*, 371 F.3d at 1257, 1263, 1265–71.

[88] *Utah Animal Rights Coal.*, 371 F.3d at 1270–71 (McConnell, J., concurring).

[89] *Id.* at 1262.

reasoned that the court could do nothing to make the plaintiffs whole for the alleged constitutional violation.[90] Chief Justice Roberts's dissent in *Uzuegbunam* makes the same argument, contending that "an award of nominal damages does not change [a plaintiff's] status or condition at all."[91]

Judge McConnell's concurrence tries to distinguish the case before the court from common law cases in which nominal damages suits are permitted to proceed. The latter, he argues, are limited to situations in which the judgment for nominal damages will have a practical prospective effect on the disputing parties.[92] To illustrate the kind of case in which an adjudication of the lawfulness of past conduct not expected to recur constitutes a practical effect, Judge McConnell discusses the most prominent examples of nominal damages suits at common law: libel and trespass.[93] Nominal damages are legally important, he reasons, only when they affect rights that matter prospectively between the parties, such as when used to "obtain a legal determination of a disputed boundary" through an action for trespass or to prove a libelous statement false.[94]

But this reasoning contradicts Supreme Court precedent at the time, now reaffirmed and expanded in *Uzuegbunam*, that a plaintiff whose constitutional rights have been violated, but who cannot show compensable harm, can still receive redress through adjudication in the form of nominal damages.[95] A second problem is that the argument ignores the other causes of action that plaintiffs have long been able to pursue for nominal damages, such as breach of contract.[96] The Supreme Court explicitly rejected the distinction in *Uzuegbunam*, holding that nominal damages alone can today, as they could traditionally, provide retrospective and not only prospective relief.[97] This category of nominal

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90 *Id.*

91 Uzuegbunam v. Preczewski, 141 S. Ct. 792, 804 (2021) (Roberts, J., dissenting).

92 *Utah Animal Rights Coal.*, 371 F.3d at 1264 (McConnell, J., concurring).

93 *Id.*

94 *Id.*

95 *See Uzuegbunam*, 141 S. Ct. at 802; Carey v. Piphus, 435 U.S. 247, 266–67 (1978).

96 *See* Kronos, Inc. v. AVX Corp., 612 N.E.2d 289, 293 (N.Y. 1993) ("There is no anomaly in the fact that nominal damages are recognized in plaintiff's breach of contract claim . . . but disallowed in this tort action, in which the same contractual breach is an element. Fundamentally different functions are served by an action in tort on the one hand, and an action in contract on the other, and an understanding of that functional difference is critical to understanding why nominal damages are appropriate in one and not in the other. Contract liability is 'imposed by the law for the protection of a single, limited interest, that of having the promises of others performed. . . . The law of torts . . . is concerned with the allocation of losses arising out of human activities.' . . . In other words, a party's rights in contract . . . exist[s] independent of any breach. Nominal damages allow vindication of those rights. In tort, however, there is no enforceable right until there is a loss." (citations omitted)).

97 *Uzuegbunam*, 141 S. Ct. at 801–02.

damages suits involving no practical legal effect, however, remains undertheorized.

D. *How Nominal Damages Vindicate Is Undertheorized*

The judicial opinions discussing vindication as a function of a judgment for nominal damages rarely elaborate the concept of vindication or explain how an award of nominal damages achieves the end of vindication. It is easy to understand how such a judgment can provide vindication in the case of defamation[98] by establishing that statements made about the plaintiff are false.[99] But when a dispute involves a matter other than clearing the plaintiff's good name, it is more mysterious how the entitlement to seek an award of nominal damages vindicates the plaintiff or the right.

Indeed, both scholarly and judicial observers have interpreted awards of nominal damages as trivializing rather than vindicating. Judge Richard Posner has described the suggestion that nominal damages vindicate the plaintiff as risible: "If the plaintiff goes around bragging that he won his suit, and is asked what exactly he won, and replies '$1 dollar,' he'll be laughed at."[100] The Ninth Circuit has called nominal damages "trifling and purely symbolic."[101] While the Supreme Court held in *Uzuegbunam* that nominal damages can provide the redress for past harm required to establish standing, its reasoning does little to erase the impression that the redress supposedly provided is form without substance. The Court relied on the long line of common law precedent assuming that nominal damages provide redress[102] and on the judgment's effect of ordering the defendant to do something—hand over a single dollar—vis-à-vis the plaintiff "'to effectuate a partial remedy.'"[103] Even when the Court held in

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98 RESTATEMENT (SECOND) TORTS § 623 Special Note on Remedies for Defamation Other Than Damages (AM. L. INST. 1976).

99 *See* RESTATEMENT (SECOND) TORTS § 620 cmt. a (AM. L. INST. 1976) (describing vindication of reputation as a purpose of defamation law); W.J.A. v. D.A., 43 A.3d 1148, 1159 (N.J. 2012) (attributing the doctrine permitting defamation claims to proceed absent a showing of actual injury to the vindicatory purpose of defamation law: "A trial, even one with only nominal damages awarded, will establish that a defendant's allegations against a plaintiff were false.").

100 Moore v. Liszewski, 838 F.3d 877, 879 (7th Cir. 2016).

101 Bayer v. Neiman Marcus Grp., Inc., 861 F.3d 853, 872 (9th Cir. 2017).

102 *Uzuegbunam*, 141 S. Ct. at 801–802 ("Because nominal damages were available at common law in analogous circumstances, we conclude that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right.").

103 *Id.* at 801 (quoting Church of Scientology of Cal. v. United States, 506 U.S. 9, 13 (1992)).

Farrar v. Hobby[104] that a plaintiff who wins nominal damages in a civil rights suit is a "prevailing party" under a federal fee shifting statute, the Court concluded that "the only reasonable attorney fee" in many such cases "is usually no fee at all."[105] This reasoning implies that such a victory might typically be merely "technical," which is difficult not to read as "trivial."

Neither have legal scholars explained how nominal damages might vindicate outside the context of defamation. The English legal philosopher John Gardner described contemptuous damages as a "conspicuously trifling sum" awarded to express contempt for the plaintiff for pursuing a petty lawsuit.[106] Professor Robert Post, in an article on defamation law and reputation, explained that he would "use the term 'vindication' to refer to the process by which honor is restored. Vindication should be understood as the mirror image of the 'denunciation of wrong doing' which occurs in the criminal law."[107]

But courts use the term more variously. They sometimes use it in the denunciatory sense that Post excludes from his definition.[108] Most often, they use it to refer to the recognition of the importance or even inviolability of rights, treating it as self-evident that litigation can achieve such recognition apart from an exercise of the judicial power to order a right violator to pay damages or change its behavior.[109] The skepticism

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104 506 U.S. 103, 105 (1992).

105 *Id.* at 115.

106 JOHN GARDNER, TORTS AND OTHER WRONGS 17 (2019); John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. L. REV. 43, 57 (2011).

107 Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 703–704 (1986) (internal citations omitted). A Westlaw search of the Journals and Law Reviews database for "vindication" yields only Post's definition of the term.

108 *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 572 (1986) (quoting and upholding the district court's conclusion that "[c]ounsel for plaintiffs . . . served the public interest by vindicating important constitutional rights. Defendants had engaged in lawless, unconstitutional conduct, and the litigation of plaintiffs' case was necessary to remedy defendants' misconduct. Indeed, the Court was shocked at some of the acts of the police officers in this case and was convinced from the testimony that these acts were motivated by a general hostility to the Chicano community in the area where the incident occurred. The amount of time expended by plaintiffs' counsel in conducting this litigation was clearly reasonable and necessary to serve the public interest as well as the interests of plaintiffs in the vindication of their constitutional rights."). While *City of Riverside* did not involve a nominal damages award, it considered the reasonableness of an attorney's fee award that was around eight times the size of the compensatory damages awarded for a civil rights violation. In analyzing the question, the court considered the vindicatory effect of the litigation beyond the award of monetary compensation. *Id.*

109 *See, e.g.*, Carey v. Piphus 435 U.S. 247, 266 (1978) ("Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized

about nominal damages outlined above demonstrates that this presumption is mistaken. Professor Nathan B. Oman might capture something of this broader sense of vindication by conceiving of private law adjudication as offering vindication by providing a means by which a plaintiff can act against a wrongdoer to reestablish her entitlement to respect and equal standing.[110] But Oman's honor-centered theory of vindication by private law adjudication presumes the availability of damages to the wronged plaintiff.[111] More generally, vindication is a recognized purpose of tort law, but accomplishing it is usually thought to require more than nominal damages. According to the Restatement (Second) of Torts,

> [F]or certain types of dignitary torts, the law serves the purpose of vindicating the injured party. Thus, in suits for defamation, invasion of privacy or interference with civil rights, the major purpose of the suit may be to obtain a public declaration that the plaintiff is right and was improperly treated. This is more than a simple determination of legal rights for which nominal damages may be sufficient, and will normally require compensatory or punitive damages.[112]

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society that those rights be scrupulously observed."); Memphis Cmty. Sch. Dist. V. Stachura, 477 U.S. 299, 307–10 (1986); *City of Riverside*, 477 U.S. at 574–75 ("Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. . . . [D]amages awards do not reflect fully the public benefit advanced by civil rights litigation . . . ."); Kronos, Inc. v. AVX Corp., 612 N.E.2d 289, 293 (N.Y. 1993) ("Contract liability is imposed by the law for the protection of a single, limited interest, that of having the promises of others performed . . . . Nominal damages allow vindication of those rights.") (internal quotations and citations omitted); Magu Realty Co. v. Spartan Concrete Corp, 658 N.Y.S.2d 45, 46 (App. Div. 1997) (permitting plaintiffs to proceed with claim for breach of contract despite the unavailability of substantial damages because "they may still be entitled to nominal damages to vindicate their rights arising from the alleged breach" if they succeed on other "triable material issues of fact . . . .").

110 Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 34 (2011).

111 *See, e.g., id.* at 42 (describing one of the critiques of civil recourse theory to which he is responding as characterizing seeking compensatory damages as a form of morally blameworthy exacting of retribution); *id.* at 48 (recounting nineteenth-century English case awarding exemplary damages for a trespass that caused no pecuniary loss on the grounds that permitting juries to "punish insult by exemplary damages" "goes to prevent the practice of duelling" to vindicate honor) (citation omitted). While Oman's honor-centric defense of civil recourse theory seems to presume the availability of damages, it is less clear that it needs to do so. The theory rests on how private law adjudication empowers the wronged plaintiff to demand responsive action by the wrongdoer. This power to invite the other party to respond is what reestablishes the equality between the two parties. *Id.* at 58–59. However, Posner's depiction of the plaintiff who recovers nominal damages as a laughingstock, and the observed practice of awarding low damages to express contempt for a plaintiff who brings a petty lawsuit, call into question whether the equality of the wronged plaintiff can be reestablished by an action for nominal damages. *See supra* notes 41–42 and accompanying text.

112 RESTATEMENT (SECOND) TORTS § 901 cmt. c (AM. L. INST. 1979); *see also* DOBBS & ROBERTS, *supra* note 32, at 641–42.

Whether and how awarding nominal damages can provide vindication, then, remains to be understood. Understanding nominal damages suits from an information-producing perspective illuminates unappreciated aspects of vindication and how litigation, including for nominal damages, might achieve it.

III. Adding a Credible-Information Theory of Vindication

The central claim of this Article is that the law allows suits for nominal damages to vindicate rights and that the vindication provided for completed past harms is essentially the public provision—through an adjudicative process—of credible factual information or legal determinations that can be used in reputation-based private ordering. Nominal damages suits empower the judiciary to provide reliable information about the plaintiff's or the defendant's behavior to assess that behavior against legal norms. The availability of a forum in which to produce that information might deter violations of legal rights or aid the plaintiff in receiving redress through a negotiated settlement. The work of deterrence and redress is done by the interaction of the information produced with social forces rather than by the threat of future legal remedies.

The common knowledge of the possibility—and therefore the threat—of the plaintiff bringing an action is critical to the power of informational nominal damages lawsuits. The threat of information being revealed by a suit might improve the likelihood of the plaintiff reaching an acceptable resolution of a dispute through negotiations.[113] Relatedly, that same threat will deter some violations of legal rights.[114] Alternatively, a plaintiff can use such a suit to clear her own name when another person's behavior has threatened her reputation. In addition to reasons of strictly rational self-interest, plaintiffs might sometimes pursue such suits to contribute to the collective good of producing information about bad actors.[115] Such altruistic suits might be aided by the emotional satisfaction obtained from imposing reputational costs on a norm violator or from providing information to the community about a violator. The

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[113] This occurs in sovereign debt litigation. *See* Blanchard, *supra* note 11, at 497.

[114] By pursuing such a suit, a plaintiff can establish a valuable reputation as someone who vigorously defends her legal rights, which might advantage her in future dealings with others.

[115] Eliana Dockterman, *'I Was Angry.' Taylor Swift on What Powered Her Sexual Assault Testimony,* TIME (Dec. 6, 2017, 6:10 AM), https://perma.cc/AVC4-SFNL (quoting Taylor Swift: "I figured that if he would be brazen enough to assault me under these risky circumstances and high stakes, imagine what he might do to a vulnerable, young artist if given the chance. It was important to report the incident to his radio station because I felt like they needed to know.").

reputational capital earned by revealing valued information to others might also incentivize these suits.[116]

Informational nominal damages suits operate by the actions of plaintiffs as initiators, courts as adjudicators, and the parties and the public (or a part of it) as a responsive audience. Core features of courts position them to fulfill the function of adjudicating norm adherence effectively by lending judicial conclusions presumptive reliability. Those features are participation, publicity, and process.

A. *The Plaintiff's Purposes*

Nominal damages suits have long been a feature of private law, including in tort, contract, and property.[117] A plaintiff might seek one of the following types of vindication in a suit for nominal damages: reputational rehabilitation, reputational reckoning, or norm reinforcement and publication.

1. Reputational Rehabilitation

A well-understood purpose of defamation suits is to permit a plaintiff to protect or rehabilitate his reputation against falsehoods. This vindication of the plaintiff's reputation is achieved not by the awarding of damages but by either a judicial finding of fact that the defendant made false statements about the plaintiff or by the defendant's admission—procured by the threat or initiation of the suit—that the statements were false.[118]

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[116] Experiments in economic sociology find evidence for this kind of behavior, and theorists have argued that both intrinsic motivation and reputational capital explain it. *See, e.g.*, Kevin A. McCabe & Vernon L. Smith, *Strategic Analysis in Games: What Information Do Players Use?*, *in* TRUST AND RECIPROCITY: INTERDISCIPLINARY LESSONS FROM EXPERIMENTS 275, 275, 277, 291 (Elinor Ostrom & James Walker eds., 2003).

[117] Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801–02 (2021).

[118] An example from recent legal events illustrates how a defamation suit might force an admission by the defamer. Dominion Voting Systems sued attorney Sidney Powell for defamation based on her campaign to persuade the public that the Presidential election was stolen from Donald Trump through widespread election fraud, including through the rigging of Dominion's voting machines. Powell filed a motion to dismiss in which she argued that "no reasonable person would conclude that [her] statements were truly statements of fact." Mem. of Law in Supp. of Defs.' Mot. to Dismiss at 27–28, U.S. Dominion, Inc. v. Powell, 554 F. Supp. 3d (D.D.C. 2021) (No. 21-cv-00040). This leap back from the claims she had been advancing for months after the election illustrates the truth-producing power of the litigation. Her declaration that her claims were obviously not factual was of course widely reported in the media. The Dominion suit requests substantial damages, and it is impossible to know the degree to which the prospect of having the falsehood of her statements—and her knowledge of or recklessness about their falsehood—publicly determined and exposed by means

A historical example illustrates how a suit for nominal damages can vindicate a person's reputation.[119] In 1913, former President Theodore Roosevelt sued the publisher of a small Michigan newspaper for libel for publishing the statement that Roosevelt got "drunk and that not infrequently."[120] This allegation had apparently been made before, and Roosevelt brought the suit to prove it false.[121] The publisher initially defended himself by arguing that the statement was true.[122] After Roosevelt presented at trial "many distinguished men," who gave "unqualified testimony" that Roosevelt was abstemious, the publisher retracted the statement in court, saying, "I am forced to the conclusion that I was mistaken."[123] Roosevelt then withdrew his request for damages and asked the court to award only nominal damages, making the following statement in court:

> In view of the statement of the defendant, I ask the court to instruct the jury that I desire only nominal damages. I did not go into this suit for money. I did not come into it for any vindictive purpose.
>
> As this court has said, I made my reputation an issue, because I wished once and for all during my lifetime thoroughly and comprehensively to deal with these slanders.
>
> Never again will it be possible for any man in good faith to repeat them. I have accomplished my purpose and I am content.[124]

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of discovery and other judicial factfinding powers has caused her to walk back her claims. Section III.B.1 below discusses the limits of the ability of nominal damages suits to deter or to incentivize negotiated settlement, two of which might be relevant to the Powell case. One of those limits is the level of public awareness of and trust in the courts. Another is the possibility that committing a legal wrong might enhance the defendant's reputation because of animosity against the plaintiff by the public or a subset of the public.

[119] Though not addressing nominal damages lawsuits, Professor Kishanti Parella describes the relationship between the courts and the media as an important aspect of the ability of courts to help rehabilitate reputation. Media serves the important role of spreading information and controlling what public discourse focuses on through "agenda setting," and courts in turn help media confirm and contextualize information while providing media with new information and sources they could only access through litigation. This relationship between courts and media, and media and information, helps to explain courts' effectiveness as rehabilitators and judges of reputations. Kishanthi Parella, *Public Relations Litigation*, 72 VAND. L. REV. 1285, 1319–21 (2019).

[120] *T.R. Gets Verdict: Six Cents Given the Colonel in Michigan Libel Action*, THE KENNA RECORD, June 6, 1913, at 2, https://perma.cc/RTU6-88CX.

[121] *Six Cents Left Uncollected by Colonel: Roosevelt, Vindicated, Departs Without Collecting His Judgment*, EL PASO HERALD, June 12, 1913, at 1, https://perma.cc/LN2E-RZTN.

[122] *Id.*

[123] *Id.*

[124] *T.R. Gets Verdict*, *supra* note 120, at 2. The verdict was reported in newspapers nationwide. *E.g.*, *Defamer of Colonel Retracts on Stand Admitting Mistake*, THE ARIZONA REPUBLICAN, June 1, 1913, at 1, https://perma.cc/WRK4-P5SM; *Six Cents Left Uncollected by Colonel*, *supra* note 121, at 1; *Vindicated*,

Other legal actions function analogously to defamation suits. For instance, plaintiffs have recovered nominal damages against banks that wrongfully refused payment on checks.[125] These verdicts have served to rehabilitate the plaintiff's reputation with prospective counterparties after a bank falsely indicated to the plaintiff's trading partners that the plaintiff's checks were bad.[126] Similarly, in an action for wrongful foreclosure on a deed of trust, the intervening plaintiff alleged that he suffered "loss and embarrassment" because the bank foreclosed on a commercial property that he had pledged to the bank as security, but which he had redeemed with substitute collateral before selling to another party.[127] After the sale, the bank wrongfully foreclosed on the property and evicted the purchaser, threatening to damage the seller's reputation by suggesting that he had fraudulently sold an encumbered property.[128] In a similar manner, other legal actions—such as those for false arrest and malicious prosecution—can vindicate a plaintiff's reputation by revealing and making a matter of public record that another party's conduct rather than his was wrongful, making a suit for only nominal damages valuable to him. For example, a verdict for a plaintiff awarding nominal damages in an action for malicious prosecution can help to clear the residue of suspicion left on the plaintiff's credit history by an action for collection of a debt recklessly brought even though the plaintiff already paid the debt.[129] Even though the credit report showed that the court dismissed the debt collection suit, that record leaves the besmirching impression that the debtor paid the debt only after being sued.[130]

THE LABOR WORLD, June 7, 1913, at 2, https://perma.cc/8372-HK5D; *Roosevelt Wins, Editor Retracts*, N.Y. TIMES, June 1, 1913, at 9–10, https://perma.cc/D5GU-E389.

125 See *infra* note 126.

126 Marzetti v. Williams, (1830) 109 Eng. Rep. 842, 846–47; 1 Barn. & Adol. 415, 427–28. *See also* Ernest W. Huffcut, *Liability of a Bank to the Maker of a Check for the Wrongful Dishonor Thereof*, 2 COLUM. L. REV. 193, 194–95 (1902) (collecting many cases arising under the same circumstances and describing the reputational threat to the account holder).

127 *See* Bowen v. Fidelity Bank, 183 S.E. 266, 266–67 (N.C. 1936).

128 *Id.* The state supreme court overturned the trial court's set-aside of the $1 jury verdict in favor of the intervening plaintiff. The court reasoned that the award of nominal damages achieved the plaintiff's purpose because the gravamen of the complaint was the embarrassment of the third-party plaintiff, and the court had adjudicated the bank to be in the wrong, ordered it to compensate the wrongfully evicted purchaser, and therefore "mollified" the seller's embarrassment.

129 *See* Robinson v. Goudchaux's, 307 So. 2d 287, 290–91 (La. 1975).

130 *Id.*

2. Reputational Reckoning

In *Bond v. Hilton*,[131] ship owners sued a co-owner of the ship, who was to serve as its master on a long voyage, for breaching the parties' contract by delaying the voyage and abandoning the ship to another captain.[132] The court held that the plaintiffs were entitled to maintain their action for breach of contract and recover nominal damages.[133] It reasoned that

> it is no answer, except as to the *quantum* of damages, that the plaintiffs had sustained no actual injury by the substitution of Moss as Captain. The defendant had violated his duty and broken his contract: the plaintiffs had a right to bring their action on the *contract*, or in *tort*, and to allege the *gravamen* to consist in a breach of duty.[134]

Why should the ship owners not be indifferent between two verdicts: (1) the defendant breached the contract but caused no loss; therefore, nominal damages; and (2) no loss, therefore verdict for the defendant? The direct pecuniary result of the two outcomes are equal. The conventional assumption, discussed above,[135] is that the ship owners would prefer the first outcome only because it might entitle them to recover their litigation costs. On this view, the decision to pursue the lawsuit is like making a speculative investment. The ship owners sue in an effort to show that they suffered loss and to recover damages. They might win or lose, but permitting recovery of litigation costs for establishing a legal violation but no harm lowers the expected cost of trying.

This depiction obscures core features of common law adjudication and ignores important drivers of behavior. It does not explain the location of the line between who may and who may not collect costs. Why should a plaintiff who has failed to show the defendant caused him any loss shift the cost of his lawsuit to that defendant? Why is it the violation of a legal right that determines where to draw that line?[136]

The ship owners likely knew that they had little chance of recovering substantial damages given the evidence available to them, the applicable standards of proof, and the legal limits on recovering damages, including the doctrines of remoteness and foreseeability. Therefore, to fully understand the function of common law adjudication requires serious consideration of the other ends the plaintiffs might have sought by pursuing this suit. The verdict that the defendant breached the contract and neglected his duty—and, importantly, the common knowledge that

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131 Bond v. Hilton, 44 N.C. (2 Jones) 149 (1855).

132 *Id.* at 152.

133 *Id.*

134 *Id.*

135 *See supra* Section II.B.

136 *See supra* Section II.B.

the law provided for such an outcome—might be valuable to the plaintiffs for several reasons. The prospect of being publicly outed for neglect of duty increases the expected cost of breach and therefore makes petty or risky shirking less likely to occur in the first place. The threat of being publicly exposed in this way could also improve the plaintiffs' position in negotiating with the defendant to make amends for the breach.

The eighteenth-century English case *Leach v. Money*[137] illustrates vividly how a plaintiff might achieve reputational reckoning—together perhaps with reputational rehabilitation (discussed above) and rule reinforcement (discussed further below)—through a trial and verdict entirely apart from any recovery of damages. Leach was a printer who was wrongfully arrested for seditious libel as part of a larger operation by the Crown against members of the press.[138] The state relied on a general warrant—a warrant that failed to specify the persons against whom it authorized search, seizure, and detention.[139] Officials erroneously arrested Leach in an egregious manner, as they also did to other printers and publishers.[140] They broke into his house, "pulled [him] from his bed, seized papers and took him and his servants to be held under guard. They detained him for four days."[141] The legality of general warrants was disputed, but the court proceedings allowed Leach to clearly establish his own innocence and to expose the state's egregious conduct.[142] Leach's attorneys opted to bring the case for false imprisonment and trespass in the Court of Common Pleas rather than the King's Bench to maximize publicity.[143] They also strategically put facts in issue to ensure a jury trial, witness testimony, and fact finding to use the court as a platform on which to display how the Crown's use of general warrants invaded subjects' privacy and threatened their liberty.[144] Leach's suit was one of a series of lawsuits brought through coordination by members of the press who had been targeted; the legal proceedings attracted extraordinarily large

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137 (1765) 97 Eng. Rep. 1075; 3 Burr. 1741.

138 Tom Hickman, *Revisiting* Entick v. Carrington*: Seditious Libel and State Security Laws in Eighteenth-Century England*, *in* ENTICK V CARRINGTON: 250 YEARS OF THE RULE OF LAW 43, 46, 66–67 (Adam Tomkins & Paul Scott, eds. 2015). Leach and other "ordinary" printers were recruited by Wilkes—a man of high standing who was also targeted in the anti-sedition operation—to bring suits against the Crown. *Id.* at 59–60.

139 *Leach*, 97 Eng. Rep. at 1088.

140 *Id.* at 1081, 1085.

141 Hickman, *supra* note 138, at 62.

142 *Id.* at 62–67.

143 *Id.*

144 *Id.* at 65 (discussing the Wilkes case, in which the author explains that the same strategy was employed in the cases of the others Wilkes enlisted to sue the Crown).

crowds.[145] Having set up the litigation for maximum visibility and public exposure of the Crown's conduct—which was embarrassing but not clearly illegal[146]—Leach prevailed on his claims and, dramatically, in open court, offered to accept nominal damages.[147] As reported, his lawyers stated, "[t]hat as they had the happiness of feeling vindicated, asserted, and maintained, all the great and constitutional points of liberty, which had been so solemnly debated and determined, they were willing to accept nominal damages."[148] This declaration earned praise from the court and applause from the audience, further boosting the plaintiff's public standing even beyond the elevation occasioned by the favorable verdict.[149]

A less dramatic case in the United States was reported in a 1907 Sunday edition of the *New York Times*: "Woman Sued for Principle: Asked and Got Nominal Damages from Men Who Cut Her Trees."[150] The plaintiff sued a government agency for cutting back her trees to clear a parade route and sought only six cents in nominal damages, stating that she sued "for a matter of principle and to establish her rights."[151] One view of this case is that it is an example of using nominal damages to establish a boundary, as in trespass suits. The plaintiff had an ongoing relationship with the government entity that infringed her right. The agency posed no immediate threat of cutting her trees again, but government officials might possibly seek to do so in the future. With the court's pronouncement of her right, she could perhaps more readily get or threaten to get an injunction in the event of a future threat. But another explanation of the suit's purposes and effects is that the plaintiff sued to inflict a reputational penalty on the government actors for cutting her trees unlawfully. The *New York Times* published the names and official titles of the men who cut her trees.[152] Indeed, even if the prospective effect of winning a suit against the government motivated her, it is as plausible that the reputational consequences for the government of knowingly violating her rights would protect her entitlement as well as any potential coercive legal remedies a court might impose in the future.

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145 *Id.* at 62–63.

146 *Id.* at 70.

147 Hickman, *supra* note 138, at 67.

148 3 THE BEAUTIES OF ALL THE MAGAZINES SELECTED, FOR THE YEAR 1764, at 34 (1764).

149 *Id.* at 35.

150 *Woman Sued for Principle: Asked and Got Nominal Damages from Men Who Cut Her Trees*, N.Y. TIMES, Dec. 15, 1907, at 5.

151 *Id.*

152 *See id.*

3. Rule Reinforcement

Given the costliness of suing, it has likely been historically rare for a plaintiff to pursue a nominal damages suit solely to reinforce or develop norms. It is likely less rare in the age of well-funded impact litigation organizations, discussed further in Part IV below. A repeat player, either with a particular defendant or in a kind of interaction, might pursue norm reinforcement and development for her benefit in future dealings, together with the additional deterrence benefit gained from signaling that she will vigorously pursue violators. In addition to reasons of strictly rational self-interest, plaintiffs might sometimes pursue such suits to contribute to the collective good of producing information about bad actors.[153] Such altruistic suits might be aided by the emotional satisfaction of imposing reputational costs on a norm violator or of providing information to the community about a violator, as well as by possible reputational capital earned by having revealed that valued information to others.[154]

However, a plaintiff might be more likely to seek norm reinforcement, clarification, or development together with fact production. As the Taylor Swift case illustrates, rule reinforcement can be an effect, even an intended effect, of a case in which adjudication of disputed facts is central, even when the norm at issue is itself widely accepted. The norm against unwanted sexual contact was sufficiently widely accepted in 2013, when the defendant violated it, that he was immediately fired and ostracized for the battery.[155] And yet, while the behavior at issue, which the defendant denied, uncontroversially constituted the tort of battery, there remained, for some, refusal to accept the seriousness of "minor" groping.[156] The knowledge that groping is transgressive, that it is the kind of transgressive act that often goes uncontested, and that it can be plausibly denied as accidental or minimized as a joke, are part of the act's allure. Swift's suit, filed before the beginning of the Me Too movement but tried during its height, conveyed the message that even "minor" acts of unwanted sexual contact are not funny but disgraceful and unlawful. Even though few people have the power and resources that enabled Swift to pursue the suit and to attract the level of attention that it received, the suit also

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153 *See* Dockterman, *supra* note 115.

154 *See* McCabe & Smith, *supra* note 116, at 276.

155 Mekita Rivas, *Taylor Swift's Sexual Assault Case: The DJ, the Groping, & the $1 Lawsuit*, REFINERY 29 (Jan. 31, 2020, 12:51 PM), https://perma.cc/H984-Q9GT.

156 *See* Joanna L. Grossman, *Groping Is a Crime*, VOX (Jan. 2, 2018, 10:00 AM), https://perma.cc/2CLR-ZFYJ.

contributed to an emerging norm of contesting unwanted sexual contact rather than tolerating it.[157]

The case of *Bond v. Hilton*, introduced above, illustrates how a plaintiff might seek to reinforce social norms through litigation in the context of commercial transactions. By successfully pursuing the suit against the shirking business partner, the plaintiffs enlisted the court in public affirmation of the legal and social norm that requires the diligent performance of duties. At the same time, they signaled to third parties that they would vigorously pursue violators.[158]

In *Leach v. Money*, introduced above, we see again how a suit that seeks reputational rehabilitation and reputational reckoning can also achieve norm reinforcement and extension. The innocent printer's suit against the Crown attracted—indeed, cultivated—public attention to a longstanding law enforcement practice, the use of general warrants, that had long been considered lawful but that violated the public's sense of respect for privacy and individual rights. The courts did not determine general warrants to be unlawful, but the Crown no longer used them because of the negative attention they attracted and consequent condemnation by the courts.[159]

B. *The Court's Role: Courts as Producers of Reputation-Relevant Information*

Courts produce three types of reputation-relevant information. For this information to be effective for private ordering, the relevant audience has to consider it reliable. Essential features of judicial system—participation, publicity, and process—allow courts to engage in costly signaling about their reliability as reputational information producers.

1. Types of Reputation-Relevant Information Produced Through Litigation

Courts can contribute to reputational governance both by producing credible factual information and by assessing behavior against legal norms.

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[157] Taylor Swift was especially well placed to contribute to norm reinforcement because she has the money, power, and prestige to have pursued the lawsuit, to have disclaimed any but nominal damages, and to have avoided suspicion that she was lying to force a settlement or for other reasons.

[158] *See generally* David M. Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253 (1982) (presenting a game theoretic model capturing the effect on other's behavior of establishing a reputation for retaliation).

[159] Hickman, *supra* note 138, at 68, 70–71.

Uncovering and processing facts constitutes most of adjudication.[160] As Blackstone remarked, "experience will abundantly show, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of."[161] Raw facts revealed through pleading, discovery, and witness testimony are valuable inputs into reputational governance. This category includes documents, admissions by parties, and witness statements. The perceived reliability of these raw facts will vary. However, the authority of the court increases the reliability of raw facts submitted in judicial process as compared to the same facts provided in other fora or media. When the relevant audience perceives the courts as fair and trustworthy, it views them as filtering for truthfulness, even at the stage of the submission of factual allegations.[162] Courts filter for truthfulness by taking testimony under oath, by having the capability to assess the truthfulness of statements through the litigation process, and by their power to penalize litigants and lawyers for submitting false evidence.

An example of this dynamic was the yawning chasm between the claims of election fraud made by President Donald Trump and his surrogates in public in the months immediately after the 2020 presidential election and the allegations they made in court, where they expected to have to prove them. Of course, the existence of this gap failed to convince many Trump supporters that the election fraud claims were false, for several reasons: public ignorance about what was happening in the litigation, a decline in the quality of the media environment and trust in the media, and mistrust of courts and elite institutions more generally.[163] Nonetheless, the gap between the claims made outside of court and those made in court was widely reported, including by center-right media outlets whose audiences were likely more inclined than the median American to be receptive to the election fraud allegations.[164] The difference between the allegations made in the legal complaints and those

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160 *See* John H. Langbein, *Bifurcation and the Bench*, *in* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW AND CIVIL LAW 67, 67 (Paul Brand & Joshua Getzler eds., 2012).

161 3 BLACKSTONE, *supra* note 7, at *330.

162 *See* Tom R. Tyler & Justin Sevier, *How do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting through Just Procedures*, 77 ALB. L. REV. 1095, 1108 (2013).

163 *See, e.g.*, Uri Friedman, *Why Trump Is Thriving in an Age of Distrust*, ATLANTIC, (Jan. 20, 2017), https://perma.cc/XB5E-5BKZ.

164 *See, e.g.*, Dan McLaughlin, *This Is Not a Coup—Just a Very Cynical Fraud*, NAT'L REV. ONLINE, (Jan. 4, 2021, 5:43 PM), https://perma.cc/F7ZU-8YZ2; Andrew C. McCarthy, *A Stunning Passage from the Latest Court Rejection of Team Trump*, NAT'L REV., (Dec. 13, 2020, 5:28 PM), https://perma.cc/CM97-ANAW.

made outside of legal fora convinced some people that the claim that the election was stolen was false.[165]

Compared to raw factual inputs, factual conclusions reached through judicial process are more important when the facts in question are not readily ascertainable from raw evidentiary inputs but require sifting and synthesis. As noted above, the prospect of such fact finding by a competent and trusted adjudicative body will sometimes force explicit admissions or imply facts through omission in pleadings. Further backward induction implies that the prospect of fact-finding will also deter some wrongful conduct and press some wrongdoers to offer compensation voluntarily to avoid litigation.

The effect of legal conclusions in reputational governance is more nuanced. Blackstone's observation that most lawsuits arise from disputed facts rather than disputed law is relevant here.[166] To the extent that legal obligations are sufficiently unclear that they require a judicial determination of what the law says, the party adjudged to have committed a legal wrong might suffer little reputational harm. If the conduct at issue appears to consist of bad-faith attempts to get as near as possible to violating another's rights without crossing a legal line, then it would seem that the factual revelations about the wrongdoer's conduct would do more work than the determination that the wrongdoer miscalculated and did indeed cross the line into unlawful behavior.

However, legal determinations matter for reputational governance because they address the problems of uncertainty about the content of norms and plausible deniability. The ex ante effect of the availability of adjudication is important to adjudication's performance of these functions. That each party knows that the other has access to an authority empowered to publicly draw lines between conforming and breaching behavior incentivizes the parties to be attentive to the location of those lines. Reputationally conscious actors will have reason to be careful about their own behavior that might plausibly be found to violate the law or to be vigilant about resisting behavior by others that appears to opportunistically push boundaries. They might be more likely to explain their own conduct, or challenge others' behavior that they believe to be plausibly law-violating. The availability of a forum for adjudication therefore creates incentives to engage in negotiations when behavior might plausibly violate rights.

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165 *See, e.g.*, JOHN DANFORTH, BENJAMIN GINSBERG, THOMAS B. GRIFFITH, DAVID HOPE, MICHAEL LUTTIG, MICHAEL W. MCCONNEL, THEODORE B. OLSON & GORDON H. SMITH, LOST, NOT STOLEN: THE CONSERVATIVE CASE THAT TRUMP LOST AND BIDEN WON THE 2020 ELECTION (2022), https://perma.cc/NK2G-K3CC; Byron Tau & Sara Randazzo, *Trump Cries Voter Fraud. In Court, His Lawyers Don't.*, WALL ST. J. (Nov. 13, 2020, 3:21 PM), https://perma.cc/65VP-ZNPR.

166 3 BLACKSTONE, *supra* note 7, at *330.

Moreover, some good-faith disagreements about the content of legal norms or how they apply to a particular case might most effectively be resolved through adjudication. Nominal damages adjudication that functions solely to clarify legal norms in this way fits with the theory of nominal damages suits as declaratory, described above.[167] This type of suit is analogous to an action for trespass that serves to clarify the location of a property line. However, appreciating the role of adjudication in reputational governance reveals that, once the line is clarified, it is not necessarily the threat of future legal sanctions that does all of the work of producing compliance. Rather, reputation might also be a significant driver of adherence to legal norms.

In addition to or instead of determining that a party has violated the law, courts might condemn behavior revealed in litigation or exhort a party to conduct itself differently in the future.[168] Analogously, Professor Edward B. Rock has shown how the Delaware Court of Chancery contributes to reputational and internal normative control of elite corporate managers and lawyers. These professionals are insulated from the effects of damages awards by liability insurance and wide discretion granted by the applicable doctrines of fiduciary law, such as the business judgment rule.[169] The court employs narrative, interweaving detailed factual accounts of their behavior with normative assessments of that behavior and exhortation in something like a sermon, giving content to the vague standard of "good faith."[170]

2. Determinants of Judicial Credibility as Information Producers

The facts produced and conclusions reached through litigation must be trusted as reliable for reputational litigation to be effective. The most basic requirements for confidence in courts are perceived judicial independence, impartiality, and competence.[171] The trust and confidence that courts must sustain to be presumptively reliable adjudicators depends to some extent on factors that vary depending on the relevant audience and the kind of dispute. For example, in a commercial dispute between sophisticated parties, it might be necessary for the court to be, and to be

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167 *See supra* Section I.B.2.

168 See *infra* note 176 and accompanying text.

169 *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1015–16 (1997).

170 *See id.*

171 *See* LOGAN CORNETT & NATALIE ANNE KNOWLTON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PUBLIC PERSPECTIVES ON TRUST AND CONFIDENCE IN THE COURTS 4–5 (2020), https://perma.cc/8XEY-4XYV.

perceived as being, knowledgeable or educable about the relevant commercial realities. In disputes with political implications, perceptions of politically biased decision-making undermine trust in judicial conclusions.[172] Three characteristics of judicial process—participation, formal adjudicative procedures, and publicity—allow courts to engage in costly signaling about their independence, impartiality, and competence. These characteristics therefore improve confidence in the information produced by courts.

Adjudicative procedures are the rules for participating in adjudication. In civil adjudication, this process begins with the right of petition, which makes the court a responsive forum in which persons may hold to account others whom they believe have violated their rights.[173] The right of petition contributes to trust in courts because holding agenda-setting power protects against judicial dependence and partiality.[174] In addition to the right of petition, the rights of participation and the procedures governing participation offer further protections against partiality, dependence, and incompetence.[175] Those include the rights to present one's case and defend one's case, and the right of each party to present evidence and arguments—with formal procedures governing the exercise of these rights. These protections are buttressed by the publicity of proceedings and by involving other members of the public in decision-making as jury members.[176] Publicity works in concert with participation

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172 *See id.* at 6.

173 FED. R. CIV. P. 8(a).

174 *See* Mark Moller, *Separation of Powers and the Class Action*, 95 NEB. L. REV. 366, 396 (2016).

175 *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 585 (2011).

176 Though litigation process was less formal in early common law litigation when the right to proceed for nominal damages was developed, litigation even then involved significant publicity and community participation that, channeled through formal investigative and judicial procedures, enhanced the credibility of the court as fact adjudicator. Jurors served as representatives of the village and relied on its social interdependence and communal structure for information. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 224 (2d ed. 2009). Much of the information gathered by juries came from communal gossip and members of the community approaching the jury directly out of court to share their side of the case. Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 123 (2003). These juries occasionally heard from witnesses, individuals in the community including neighbors who had some interest in the process, as well as public officials such as the sheriff who may not have been involved directly. *Id.* at 139. Jurors were selected by the sheriff from within either the community or neighboring communities' in the same geographic region. *Id.* at 129. The trial was held locally. LANGBEIN ET AL., *supra*, at 122–23. While there was less formality in evidence gathering and presentation, there were formal processes available for determining the validity of evidence jurors brought to trial. Jurors had to present evidence and base their judgement, often under oath, to what was frequently an open court. Klerman, *supra*, at 127. Sworn testimony and public access to trials and testimony allowed courts to signal the trustworthiness of their decision and process.

and formal procedure to contribute to adjudicative legitimacy by making judicial partiality, dependence, and incompetence easier to detect.

C. *Audiences*

The availability of a suit for nominal damages allows a person whose legal right has been violated to notify a relevant audience, even where the violation, by chance or calculation, does not result in harm compensable by law. The value to a plaintiff of these suits will vary according to whether there is an audience that has the capacity and will to respond to information produced through litigation in a way that achieves the desired reputational consequences. It is not necessary that the parties be famous or that the issue be one of great public importance; the audience need not be large for a plaintiff to benefit from a reputational suit. The remedy sought might be nothing more than a judgment that a plaintiff can bring to the attention of particular persons with whom she deals or will deal in the future.[177]

A significant determinant of whether such an audience will exist is judicial credibility, either generally or within the particular social fields of the parties' concern, as discussed in the preceding Section. Another factor that might impact credibility is the relationship between the legal norms at stake and the social norms of the relevant audience. Incongruence between legal and social norms will undermine a court's effectiveness as a contributor to reputational governance most directly when the legal wrong at issue is not considered a moral wrong by the relevant audience. If legal norms do not track moral ones, then a person announced as a legal norm violator might not suffer or expect to suffer social sanctions for violating the law. In that case, judicially enforced remedies are necessary to deter or make whole. The reputation penalty that accompanies a successful suit for violation of a legal norm that is also a social norm is analogous to either a fine on the norm-violating behavior—if the plaintiff does not enjoy a reputational boost from prevailing in the suit—or additional damages, if the plaintiff receives reputational benefit. Conversely, when the legal norm conflicts with a social norm, the plaintiff

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Judges could challenge the information presented by the jury and inquire into how it received its information, while defendants could seek to have jurors removed for just cause during trial. *Id.* 134. *See also* TOM JOHNSON, LAW IN COMMON: LEGAL CULTURES IN LATE-MEDIEVAL ENGLAND 185–93 (2020) (describing how courts produced locally credible knowledge by inviting informational inputs from community members, assessing information for credibility through formal procedures, and acting in accordance with a "legal culture of publicity" that strove to produce knowledge the legitimacy of which was manifest to any reasonable observer).

177 *See, e.g.*, Marzetti v. Williams, (1830) 109 Eng. Rep. 842, 843; 1 Barn. & Adol. 415, 425; Huffcut, *supra* note 126, at 194–95 (1902); Robinson v. Goudchaux's, 307 So. 2d 287, 290–91 (La. 1975).

might suffer a reputational penalty from bringing the suit, and the defendant might enjoy a reputational boost. To enforce the legal norm in this situation requires additional damages to offset these reputational effects for both parties. Informational nominal damages, for instance, would not effectively enforce anti-discrimination laws in a society that rewards invidious discrimination. Laws intended to change social norms are more likely to require damages for effective enforcement—damages large enough to offset the perverse reputational effects that might result from publicizing the discriminatory conduct.

Must the law have any particular relationship to conventional norms for a court to provide valuable information by ascertaining facts? As long as the divergence of governing legal norms from social norms does not render the court entirely untrustworthy in the eyes of the relevant audience, the court can still be an effective fact adjudicator for reputational governance. For example, as long as a court is trusted as a disinterested, neutral adjudicator, a court can restore a defamed person's reputation by its finding of fact that statements made about her were false. For courts to serve this function, the relevant audience must trust the courts as fact-finding bodies even if not as upholders of the audience's norms. However, the relationship between the legal norms upheld by the court and the norms of the relevant audience is not entirely irrelevant to trust in courts as fact finders. If the relevant audience perceives the court as committed to norms that are antagonistic to those of the relevant audience, then the court's presumptive trustworthiness as a factual adjudicator might be jeopardized.[178]

One might also wonder why a court would not merely chastise the defendant for its wrongful behavior instead of deciding in favor of a plaintiff who has been legally wronged and awarding nominal damages. When the relevant audience for reputational information was primarily geographically local and litigation was a community spectacle, which would have been true of many lawsuits historically, exhortation from the bench might have been effective even without entering judgment against a defendant.[179] Recall the role that permitting plaintiffs to prevail and receive nominal damages plays at earlier stages of litigation in enabling

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[178] This is sometimes seen, for instance, in surveys finding that perceptions of political bias in the judiciary reduce trust in courts. *See, e.g.*, CORNETT & KNOWLTON, *supra* note 171, at 6. Courts in medieval England made central community participation in producing knowledge of applicable norms as a way of establishing judicial and legal legitimacy. *See* JOHNSON, *supra* note 176, at 206–07.

[179] *See* Klerman, *supra* note 176, at 123 (describing the role of juries in particular, and local courts generally, in informing community members about their neighbors, including by convening jurors, witnesses, disputing parties, and officials to sift and assess the truth of gossip); RICHARD CUST, CHARLES I AND THE ARISTOCRACY, 1625-1642, at 153 (2013) (describing the reputational function of the High Court of Chivalry).

plaintiffs to get to fact revelation and adjudication.[180] If not for the rule that a plaintiff is entitled to receive nominal damages if she succeeds on the merits of her claim, some suits would never get far enough to establish that wrongful behavior occurred. Further, the normative content and the communicative clarity of a judgment for a plaintiff might in some social environments make it a more effective input into reputational governance than a judgment for a defendant on the basis that the plaintiff did not establish harm. The message received, particularly by non-lawyers, from a judgment for a plaintiff together with nominal damages is that the defendant committed a legal wrong against the plaintiff. Judgment for a defendant on the basis that the plaintiff did not establish harm will sometimes convey—both to the parties and to the audience—that either no wrong occurred or, if one did occur, it was trivial. In communicating the outcome, the different judgments mean the difference to the plaintiff between: (1) saying a court found in her favor and against the defendant; or (2) explaining that, although she lost her lawsuit, it was only on a technicality or that the court admonished the defendant. A defendant could diminish the perceived wrongfulness of her conduct by pointing out that she won the lawsuit.

Communicative clarity might be more important when the audience for the reputational information devotes less time and attention to judicial pronouncements, when judicial decisions are not reported in detail or reliably, or when such reports are not readily accessible to the relevant audience. For instance, historically, when legal reporters took notes by hand on opinions read from the bench, there was a high risk that the reporter would miss or intentionally omit exhortations because they focused on recording the legal conclusions.[181] Therefore, the court's judgment—the pronouncement that a plaintiff prevailed in the suit even if only for nominal damages—might have been necessary for reliably conveying that a defendant committed a legal wrong. Other factors that affect the importance of communicative clarity and the means of achieving it in a judgment include the quality of media reporting and the heterogeneity of norms among the relevant audience.[182] As noted above,

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180 *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021).

181 Throughout much of the history of the common law legal system, opinions were given orally at the end of a case or trial, and the reporter decided which cases to report and how to represent the judge's opinion. The creator of the Burrow Reports, one of the earliest and most influential of legal reports, said that he would "watch for the sense rather than the words." *See* LANGBEIN ET AL., *supra* note 176, at 822-826.

182 Sometimes, for instance, the same factual revelations about conduct might improve reputation with some audiences and damage it with others. One can imagine differing assessments by regulators, competitors, potential transactional partners, and customers. This dynamic is at work in sovereign debt disputes. Sometimes the majority of the domestic population views favorably a

courts might have sometimes used nominal damages to express judicial contempt for a plaintiff deemed to have pursued a frivolous suit.[183] However, in other reasoned decisions, courts do not ascribe pettiness to a plaintiff who is entitled to nominal damages; rather, they treat the plaintiff as pursuing a valid entitlement.[184]

IV. Puzzles and Implications

A. *Are Courts Self-Consciously Performing This Function?*

The account given above might be seen as largely functionalist because it focuses on the plaintiff's and defendant's purposes and incentives that depend on social factors that are to some extent external to the law. Those who take seriously the internal point of view of the law might wonder whether judges, in addition to some plaintiffs and defendants, have historically understood themselves to be engaging in reputational governance. Is the reputational governance function of nominal damages litigation a purpose of the legal rule permitting such suits or only a fruitful side effect? This Section offers preliminary remarks on this question.

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government's decision to repudiate foreign debt obligations, while foreign investors view it unfavorably. Specialized distressed sovereign debt investors that pursue aggressive campaigns to recover repudiated debt use litigation to uncover information about corruption by debt repudiating governments that is reputationally harmful with the domestic population. Such litigation thereby activates reputational sanctions even among audiences that do not share their critical assessment of the core behavior that is the subject of the dispute, the debt repudiation. *See* Blanchard, *supra* note 11, at 551.

183 *See* Moore v. Liszewski, 838 F.3d 877, 879 (7th Cir. 2016) ("A jury verdict awarding nominal damages . . . functionally it is no damages award at all. If the plaintiff goes around bragging that he won his suit, and is asked what exactly he won, and replies '$1 dollar,' he'll be laughed at."); GARDNER, *supra* note 106, at 17.

184 *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 266 (1978) (holding that nominal damages are appropriate because of the "importance to organized society that . . . rights be scrupulously observed" while also "remain[ing] true to the principle that substantial damages should be awarded only to compensate actual injury" or for other valid purposes in limited cases); Bankers Health & Life Ins. Co. v. G.W. Fryhofer, 150 S.E.2d 365, 369 (Ga. App. Ct. 1966) (holding that attorney could maintain a cause of action for intentional interference with contract against client's insurer for inducing attorney's client (the insured) to discharge attorney but was entitled only to nominal damages because evidence of actual loss was speculative). Notably, the appellate court, in overturning the award of substantial damages against the insurance company because the damages were speculative, made a point of stating in the last line of the opinion that it was not condoning the defendant's behavior: "Nothing said in this opinion is to be construed as an approval of the conduct of the agents of the insurance company or of the derogatory remarks made by them concerning the plaintiff." *Id.* at 371 (footnote omitted).

In defamation law, it is uncontroversial that courts are knowingly engaged in reputational governance.[185] Beyond defamation law, judicial opinions seldom elaborate on how nominal damages achieve vindication. As discussed above, some decisions refer to nominal damages as technical in a manner that implies that they are trivial.[186] In contrast, other decisions treat nominal damages as the plaintiff's legitimate entitlement without suggesting that they are trivial or expressing any contempt for the plaintiff who seeks them. This appears to be the more common posture toward nominal damages. Among those cases, some explicitly connect the availability of nominal damages to the plaintiff's interest in reputational rehabilitation.[187] However, the modal approach appears to be simply to assert, without elaborating, that nominal damages vindicate.[188]

Nevertheless, by invoking vindication, courts intimate that they are engaging in a practice that entails, and that is at a minimum difficult to disentangle from, reputational governance. That is because vindication means to show to be blameless, right, reasonable, or justified, which implies an audience for the showing.[189]

Constitutional tort cases more explicitly connect the vindication provided by nominal damages to reputational governance, specifically the two purposes of reputational reckoning for wrongs and rule reinforcement. When judges suggest that vindication is about "making the deprivation of . . . rights actionable" to "recognize[] the importance to organized society that those rights be scrupulously observed,"[190] they are invoking the judicial practice of authoritatively reinforcing the law by publicly adjudicating violations. When they refer to "alert[ing] the municipality and its citizenry"[191] to violations of legal rights, they acknowledge the judicial function of community notification. These statements implicitly recognize the power of declaring wrongs even apart from awarding compensation. When courts declare behavior wrongful

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185 *See Uzuegbunam*, 141 S. Ct. at 801–02; *see also* RESTATEMENT (SECOND) TORTS § 623 Special Note on Remedies for Defamation Other Than Damages (AM. L. INST. 1976).

186 *See supra* notes 99, 103–104 and accompanying text.

187 *See supra* notes 127–129 and accompanying text. Other malicious prosecution cases also explicitly link the availability of nominal damages to the plaintiff's reputation interest. *See, e.g.*, Ryland v. Law Firm of Taylor, Porter, Brooks, and Phillips, 496 So. 2d 536 (La. App. Ct. 1986).

188 *See supra* notes 71, 107–108 and accompanying text. *See also, e.g.*, Freund v. Washington Square Press, Inc., 314 N.E.2d 419, 421–22 (1976); McVea v. George, 130 N.Y.S.3d 63 (App. Div. 1925); Gluck v. Hotchner, 176 N.Y.S. 756 (App. Term 1919); Northrop v. Hill, 57 N.Y. 351 (1874).

189 *See Vindicate*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Vindicate*, OXFORD ENGLISH DICTIONARY ONLINE (Dec. 2021), https://perma.cc/UF4D-XYXK.

190 Carey v. Piphus, 435 U.S. 247, 266 (1978). *See also* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986) (discussing nominal damages as a means of vindicating rights).

191 Amato v. City of Saratoga Springs, 170 F.3d 311, 318 (2d Cir. 1999).

and issue judgment even absent the establishment of compensable harm, that action communicates that the rules and the court's application of them have normative force that transcends the imposition of coercive remedies. In declaring the wrong and declining to impose a sanction or remedy, the court makes a claim about its legitimate authority to assess behavior relative to legal norms.

Judicial opinions granting nominal damages sometimes do so explicitly to spare the plaintiff who proved a violation of rights but failed to establish compensable harm from paying court costs.[192] This observed practice does not contradict the account given here. These discussions occur primarily in cases in which there is a statutory provision for the plaintiff to recover attorney's fees.[193] It bears explaining why judges believe that the plaintiff who failed to establish compensable harm ought not be held responsible for the costs of litigation. That judges conceive of it as self-evident that such a plaintiff ought not bear the costs of the suit implies that there is value in the suit itself apart from the availability of standard compensatory or injunctive remedies.

B. *Constitutional Torts Today: A Special Case?*

What does the theory of nominal damages presented here imply for the Supreme Court's recent decision in *Uzuegbunam v. Preczewski* and constitutional tort suits more generally? The Court correctly recognized that suits for nominal damages have long been held permissible under the common law. However, recognizing that the effects of nominal damages suits for reputational vindication vary depending on the social and litigation environment might make some observers sympathetic to the concern expressed by Chief Justice Roberts in his dissent about nominal damages suits being used in a way that unduly expands the power of the federal courts.[194]

The prevalence of nominal damages suits in constitutional tort cases in recent U.S. history has historical analogs. A significant branch of the nominal damages cases consists of suits against government officials for violations of private rights that result in harms that cannot be proven to

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192 *See* MAYNE, *supra* note 33 and accompanying text.

193 *See supra* Section I.B.1.

194 Uzuegbunam v. Preczewski, 141 S. Ct. 792, 807 (2021) (Roberts, C.J., dissenting). Chief Justice Roberts has proposed a procedural device that would permit defendants in nominal damages suits to end the suit by forced settlement by simply depositing the requested nominal sum in a bank account for the plaintiff. It is unclear whether such a forced settlement is legally permissible. For an analysis of the question and argument against the Roberts Strategem, see Michael L. Wells, Uzuegbunam v. Preczewski, *Nominal Damages, and the Roberts Stratagem* (unpublished manuscript), https://perma.cc/GTE2-XWRJ.

the applicable standards or are hard to measure monetarily.[195] In other cases against government actors, the plaintiffs demand only nominal damages because the reputational consequences of prevailing accomplish their goals.[196]

It is not surprising that a long-running body of nominal damages cases involves suits against government officials. Reputational lawsuits have special force in the public sphere. To a greater extent than in other social fields, the force of legal rules against government officials relies on reputational enforcement in the form of elections and funding decisions by other branches of government.[197] As professors Jack Goldsmith, Daryl Levinson, Oona Hathaway, and Scott Shapiro have argued, domestic public law is largely unenforceable by conventional coercive means because there is "no sovereign above the sovereign."[198] Hathaway and Shapiro persuasively theorize domestic public law as being law that—like medieval Icelandic law, classic canon law, and international law—is enforced through a reputation-based mechanism they call "outcasting."[199] Judicial recourse—including through suits for nominal damages for the deprivations of private rights that cause harm that is difficult to value in monetary terms—makes it possible for a person subjected to a violation of her rights by a government actor to establish and publicize the violation and to possibly attract the attention of voters, activists, or other government entities with authority or influence over the violator's power.

As discussed above, the effectiveness of nominal damages suits in providing vindication depends on the actual or expected reactions of the public, or a subset of it, to the information produced by the courts. These suits can be ineffective if (1) the relevant audience is not paying attention to what the courts are doing; (2) the relevant audience does not trust the

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195 *See, e.g.*, Ashby v. White (1703) 92 Eng. Rep. 126, 136–37; 2 Ld. Raym. 938, 953–55 (wrongful deprivation of the right to vote); McAneany v. Jewett, 92 Mass. 151, 152 (1865) (wrongful killing of citizen's dog by constable); Webb v. Portland Mfg. Co., 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322) (discussing the English law permitting plaintiffs to prevail for nominal damages for matters such as an official's wrongful refusal to allow a person to cast a vote and a mayor's wrongful refusal of an electoral candidate's demand for a poll).

196 *See supra* notes 98–106 and accompanying text.

197 *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1832 n.137 (2009).

198 *See id.* at 1840 (2009) (arguing that domestic public law is legally unenforceable because there is "no sovereign above the sovereign," and thus public law is "internally self-enforcing through some combination of rationally self-interested and normative, internalized, or role-based motivations."); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 280–81 (2011) (countering Goldsmith and Levinson by arguing that public law is enforced reputationally, that is by denying violators the benefits of cooperation, including in the public sphere through impeachment, elections, job termination, and defunding).

199 Hathaway & Shapiro, *supra* note 198, at 346–47.

courts' factual or legal conclusions; (3) the relevant audience does not care about wrongs committed against certain persons; or (4) norms are so heterogeneous as to undermine the effects of any social repercussions that might result among relevant subgroups.

Conversely, it might be possible to use nominal damages suits in a way that is so out of proportion to their historical role that they aggrandize judicial power relative to the authority of other government actors, and in the context of our federal system, perhaps especially state and local government actors.[200] There were historically natural limits to a plaintiff's ability to bring nominal damages suits, such as the costliness of litigating and of transmitting information about litigation. Those constraints have been loosened by the existence of deep pocketed impact litigation organizations and the effectiveness of social media at disseminating information to activate public reactions.[201] It was suggested above that nominal damages suits for norm reinforcement and publication have historically been rare because they would not ordinarily provoke the kind of organic public reaction that normally gives nominal damages suits their force. It might be that the existence of well-funded impact litigation firms has fundamentally changed this dynamic and made a substantial proportion of nominal damages suits, at least those against public officials, largely about inflicting litigation costs on government actors.[202] One possible response that courts might employ, drawing from the harmless error doctrine, is to formulate a set of factors for deciding when nominal damages ought to be available for past harms and when dismissals of such suits should be affirmed.[203]

C. *Reputation Effects and Remedies*

1. Should Reputational Nominal Damages Suits Be Subsidized?

If the information provided by nominal damages suits is valuable for social ordering, should the law incentivize the filing of more suits by awarding prevailing plaintiffs substantial damages even if they do not show harm? If plaintiffs could win sizeable damages without showing

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200 Maura B. Grealish, *A Dollar for Your Thoughts: Determining Whether Nominal Damages Prevent an Otherwise Moot Case from Being an Advisory Opinion*, 87 FORDHAM L. REV. 733, 756 (2018).

201 *See id.* at 739 (discussing how Taylor Swift was praised for standing up for women with her suit despite winning only $1); *see also id.* at 741 (discussing cases in which plaintiffs seek social change, "[t]hese are ideological plaintiffs that bring claims to enforce 'legal principles that touch others as directly as themselves . . . valued for moral or political reasons independent of economic interests'" (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978))).

202 *See supra* Section III.A.3.

203 *See supra* Section II.A.

compensable harm, it would incentivize the pursuit of more lawsuits with low informational value and would likely increase the incidence of frivolous or abusive lawsuits. To be sure, permitting nominal damages suits makes more frivolous lawsuits possible.[204] However, balanced against creating an opportunity for frivolous suits is the value of permitting persons to bring claims to vindicate their legal rights and legally protected interests and the associated community interests described above. Allowing such suits to proceed while capping recovery to nominal damages filters in plaintiffs that place a high value on the information produced through litigation and cases in which the information produced has high social value. These two aspects of the value of information produced are correlated.

To see the tendency of nominal damages suits to filter in suits that produce information with high social value, consider that when the plaintiff's payoff from litigation comes predominantly or exclusively from the information revealed by the suit, the likelihood that a plaintiff will pursue the suit increases with the social value of the information revealed.[205] This is not a mere tautology: the plaintiff will value the information more when it is more important to third parties. In other words, the magnitude of the informational value of the suit for the plaintiff is a function of its value to third parties. Other than the occasional crank, it would not much benefit a plaintiff to have a court ascertain a fact or make a legal judgment the response to which is a shrug.

Permitting suits to proceed for nominal damages for alleged violations of legal rights therefore reflects a judgment that the courts exist to give citizens the opportunity to assert their legal rights, to hold violators to account, to prompt the state to reinforce selected legal norms, and to alert the community to violations of legal and social norms. The absence of public subsidy for informational suits in the form of supracompensatory damages or more liberal standards of proof of loss is consistent with a judgment that the informational value of suits should be determined organically by individual demand for information and current community norms.

That is not to say that this somewhat crude filter will not also permit suits producing information with low social value to proceed. The filters of the common law are not susceptible of perfect refinement. The choice

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[204] Nineteenth-century American courts discussed the concern that permitting nominal damages suits to proceed engendered "useless or vindictive litigation." Paul v. Slason, 22 Vt. 231, 238–39 (1850). Chief Justice Roberts expresses a similar concern in his dissent in *Uzuegbunam v. Preczewski*, arguing that plaintiffs will turn to the judiciary as "the least expensive source of legal advice." 141 S. Ct. 792, 807 (2021) (Roberts, J., dissenting).

[205] "Social value" here is being used in the economic sense of the total value to individuals rather than in any objective evaluative sense.

is between overinclusiveness and underinclusiveness. Permitting suits to proceed for nominal damages is consistent with an institutional judgment that, given the core purposes of common law courts, it is preferable to permit suits that might produce information that is valuable to the individual seeking vindication, to the state, and to the community or society even given the increased risk of abusive or frivolous litigation.

2. Nominal Damages as an Anchor for Punitive Damages

Some courts permit a plaintiff to receive punitive damages when the only other damages awarded are nominal if a defendant behaved egregiously.[206] They sometimes allow punitive damages even where the facts leave little question that no harm in fact occurred.[207] Awarding punitive damages in such cases is consistent with the informational theory of nominal damages presented here. Punitive damages are appropriate when a defendant's actions suggest invulnerability to the reputational effects of an adverse judgment for nominal damages.[208] Punitives are for the shameless. Judicial decisions awarding punitives on the basis of nominal damages suggest that a defendant's open defiance of social norms requires an award of punitive damages to reinforce those norms.[209]

In the famous case *Jacque v. Steenberg Homes*,[210] the Wisconsin Supreme Court awarded punitive damages for a one-shot trespass when the defendant hauled a trailer over private property after being repeatedly admonished by the property owner not to do so.[211] The trespass caused no harm to the property.[212] The court explained its decision to follow the minority view by permitting an award of nominal plus punitive damages to stand by reasoning from a nineteenth-century English case:[213]

> In *Merest*, a landowner was shooting birds in his field when he was approached by the local magistrate who wanted to hunt with him. Although the landowner refused, the magistrate proceeded to hunt. When the landowner continued to object, the magistrate

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206 *See* RESTATEMENT (SECOND) OF TORTS § 908, Reporter's Note cmt. c (AM. L. INST. 1979) (listing cases holding that punitive damages may be added to nominal damages and cases holding that punitive damages may only be layered onto compensatory damages).

207 *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 156–57, 159, 161 (Wis. 1997).

208 *See, e.g., id.;* Merest v. Harvey, (1814) 128 Eng. Rep. 761, 761; 2 Taunt. 442, 443.

209 Ellis v. La Vecchia, 567 F. Supp. 2d 601, 611 (S.D.N.Y. 2008) (holding punitive damages available with nominal damages where a "tort, . . . is committed for an outrageous purpose, but no significant harm resulted" (quoting Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2622 (2008))).

210 563 N.W.2d 154 (Wis. 1997).

211 *See id.* at 156–57, 166.

212 *See id.* at 159.

213 *See id.*; *Merest*, 128 Eng. Rep. at 761; 2 Taunt. at 443.

> threatened to have him jailed and dared him to file suit. Although little actual harm had been caused, the English court upheld damages of 500 pounds, explaining "in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?"[214]

The *Jacque* court goes on to assess the social interest in "punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner."[215] Those interests include "preserving the integrity of the legal system" to give citizens faith in its ability to protect their rights to prevent them from engaging in violent self-help.[216] The court also invokes the commonplace desire to see wrongdoers punished even when the wrongs do not inflict costly harm, as well as the state's interest in deterring the tortfeasor from intentionally violating the legal rights of others in the future.[217] The trespasser's behavior in *Jacque* is like the magistrate's behavior in *Merest* in that it similarly expresses open defiance of the legal and social norms at issue when confronted with those norms by a community member before engaging in the wrongful conduct.[218]

Perhaps the Wisconsin Supreme Court in 1997 recognized a decline in the force of community-enforced reputational sanctions. The lesson of *Jacque* is that reputation-based community enforcement has a limited domain.[219] Its effectiveness is attenuated by shamelessness, concentrated power, and community inattention or indifference. Reputational enforcement often fails to protect *persona non grata* within a group and, as the long history of invidious discrimination demonstrates, incentivizes harms against oppressed minorities.[220] It will tend to be less effective as norms among relevant audience members become more heterogeneous. The next Section examines some implications of the limits of reputation-based enforcement for damages more generally.

3. Implications for Damages

Looking beyond nominal damages, the analysis above suggests that judges and policymakers should sometimes consider the reputation effects of adjudication when selecting remedies. The law provides for remedies disproportionate to the wrong—such as punitive or other

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214 *Jacque*, 563 N.W.2d at 159.

215 *Id.* at 160.

216 *Id.*

217 *See id.* at 161.

218 *See Merest*, 128 Eng. Rep. at 761; 2 Taunt. at 443.

219 *See Jacque*, 563 N.W.2d at 156, 161; Hathaway & Shapiro, *supra* note 198, at 280–81.

220 *See* Ellis v. La Vecchia, 567 F. Supp. 2d 601, 629–31 (S.D.N.Y. 2008).

supracompensatory damages—when the probability of detecting the wrongful conduct is low.[221] Disproportionate damages offset the reduction in deterrence that results from the wrongdoer's discounting of damages by the likelihood of being caught. Similarly, disproportionate damages can also counteract reductions in deterrence caused by reputational effects. Reputation effects might undermine deterrence when they impose social costs on the plaintiff for pursuing a claim or create benefits for the defendant for having engaged in the conduct at issue in the litigation. Such effects might occur, for instance, in litigation to enforce antidiscrimination laws in a society that overtly favors oppression of members of particular groups.[222]

There are related implications for optimal remedies more generally. In many suits in which the alleged loss consists of lost profits, plaintiffs know that it will be difficult to establish the loss to the applicable standard of reasonable certainty.[223] And even after a plaintiff adjusts their expected compensation based on the reasonable certainty standard, they must further discount this expectation to account for the contingencies and uncompensated expenses inherent in pursuing litigation. For example, it is black-letter law that the default remedy for breach of contract is expectation damages—the amount of money necessary to put the nonbreaching party in the position she would have been in had the other party performed the contract as promised.[224] An important line of criticism of expectation damages is that they might systematically undercompensate, leading to inefficiently high levels of breach of contract.[225] But inefficient breach of contract might be less common, at least over some range of transactions, than is suggested by conventional economic theories that consider only direct pecuniary incentives.[226]

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221 *See* Mathias v. Accor Econ. Lodging, 347 F.3d 672, 676 (7th Cir. 2003); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 936–38 (1998).

222 *See infra* Section III.E (discussing the limited effectiveness of reputational adjudication at changing norms).

223 *See* Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 136 (1992).

224 RESTATEMENT (SECOND) OF CONTS. § 344 cmt. a (1981) ("Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach. The interest protected in this way is called the 'expectation interest.'"); U.C.C. § 1-305(a) (2011) (stating that the purpose of contract remedies is to put the nonbreaching party "in as good a position as if the other party had fully performed").

225 *See* Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885, 1886, 1888–89 (2000); Daniel A. Farber, *Reassessing the Economic Efficiency of Compensatory Damages for Breach of Contract*, 66 VA. L. REV. 1443, 1444–45 (1980).

226 Farber, *supra* note 225, at 1444–46.

Undercompensation sometimes results from the legal limits on recovering damages, including that they be proven to a reasonable certainty and that they be foreseeable.[227] Additionally, a breached-against party might not be willing to reveal information necessary to prove its expectation damages, which will often include lost profit.[228] Proving lost profit often requires revealing sensitive information about the business that might damage the plaintiff's bargaining position in future negotiations or weaken its competitive advantage in the market.[229] Recognizing that a plaintiff may pursue nominal damages in a breach of contract suit introduces the possibility of a plaintiff declining to provide evidence of damages or of some aspects of its losses and pursuing a suit exclusively or substantially for its reputational reckoning value. When the reputational value is sufficiently large to deter the breach, the availability of litigation expands the scope and effectiveness of reputational governance and therefore reduces the incidence of breach. Of course, a great many breaches of contract will not involve behavior that other potential counter-parties will view as wrongful, limiting the range of possible breaches that could be deterred by the prospect of reputational nominal damages litigation.

Conclusion

The judicial information-providing function is powerful. Even apart from courts' coercive enforcement power—even in a situation in which that power is effectively nonexistent—they have the power to uncover information and to label it as wrongful, which prove to be effective drivers of behavior under certain conditions. Separating the information-uncovering and behavior-labeling functions of courts from the enforcement (that is, asset- and body-seizing) functions illuminates how adjudication by courts contributes to social ordering, how it interacts with private ordering, and, consequently, its nature.

Adjudication by courts expands the range over which social forces can sanction behavior that a relevant audience deems norm violating. That is because courts can feed presumptively reliable information that would not otherwise be available into the relevant social fields. If calculative self-interest is an important driver of compliance with social norms, then this function of courts is important because it increases the likelihood that the norm violator will be caught by thwarting his efforts to hide his misdeeds

227 *Id.*

228 *See* Ben-Shahar & Bernstein, *supra* note 225, at 1886–88.

229 *See id.* at 1888.

or to maintain plausible deniability under complexity that tends to obscure cause and effect relationships.

Over a more limited range of social environments—those in which an audience accepts judicial norm-setting authority in addition to viewing courts as reliable factual adjudicators—nominal damages suits can reinforce norms by bringing the authority of the courts to bear in publicly restating and reminding the audience of those norms. In these cases, adjudication might govern behavior through several mechanisms. It might affect the relevant audience's assessment of whether behavior is wrongful, thereby activating social sanctions against those adjudicated to have committed wrongs. Apart from its effect on social sanctions, adjudication—and the prospect of adjudication—in such cases might affect the behavior of those persons who abide by norms because of moral commitments or because of extra- or quasi-rational mental states such as emotions.[230]

Recognizing that courts can govern behavior in these ways complicates the Holmesian characterization of the law and the Posnerian characterization of adjudication as resting essentially on the power to sanction or to coerce compensation.[231] Even viewing the law's governing power through a rational-choice lens, an accurate understanding of the incentives facing decision-makers requires taking into account how the law and courts affect the social repercussions of actions. Legal scholars have conventionally viewed reputation-based governance as an alternative to courts and legal ordering—as an "opting out" of the legal system.[232] Recently, leading scholars have encouraged looking beyond the conventional paradigm of "small, geographically concentrated, close-knit groups" understood to rely heavily on reputation-based governance and "explore the wide variety" of institutional structures that support private ordering.[233] The common law's provision for reputational nominal damages suits is one such institutional structure. Its presence highlights

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230 *See, e.g.*, McCabe & Smith, *supra* note 116, at 298.

231 *See supra* note 2 and accompanying text.

232 Bernstein, *supra* note 223, at 116; *see* Ted Sichelman, *Top 25 Most Cited Law Articles Published in the Last 25 Years* (Sept. 10, 2015), perma.cc/4TBV-U76W (listing Bernstein's article as the most-cited article in contract law of the last quarter-century).

233 *See* Lisa Bernstein, *Contract Governance in Small World Networks: The Case of the Maghribi Traders*, 113 NW. UNIV. L. REV. 1009, 1014–15 (2019) ("[T]he legal literature on private ordering should move beyond its focus on small, geographically concentrated, close-knit groups . . . and begin to explore the wide variety of network structures . . . that can be used to support exchange."); Lisa Bernstein, Alan Morrison & J. Mark Ramseyer, *Private Orderings*, 7 J. LEGAL ANALYSIS 247, 250 (2015) ("[T]he social forces and institutions that make private ordering effective can and do operate in contexts that are not characterized by the conditions that the legal literature commonly associates with their success such as small, geographically concentrated, socially or ethnically homogenous groups.").

that modes of private ordering often presumptively characterized as "extralegal" are not necessarily entirely so. In addition to revealing the private-ordering power of state ordering by adjudication, the account given here highlights—in opposition to Hobbesian, sanction-centered conceptions of law—how the effectiveness of legal ordering depends on social factors, particularly audience perceptions of judicial reliability as factual and normative adjudicators.