ARTICLES

Remedies and Respect: Rethinking the Role of Federal Judicial Relief

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Plaintiffs bringing civil lawsuits often express sentiments like "I just wanted the defendants to admit they were wrong" and "we're worth something and can't be treated this way." These statements suggest that civil litigation is not only a vehicle for material redress. It can also be a quest for more intangible forms of relief—respect, dignity, or vindication. But are these the kinds of interests that courts imposing remedies may legitimately satisfy? In analyzing divergent responses to this question, this Article illuminates the bounds of courts' remedial authority.

According to an influential line of reasoning in federal courts, which the Article identifies and calls the "circumscribed" approach, the central remedial task is to change the material circumstances of the parties to a lawsuit. On this view, federal courts are not meant to provide "moral" or "psychic" satisfaction. The Article reveals the impact of the circumscribed approach in a variety of doctrinal areas, including class action mootness, nationwide injunctions, and attorney's fees. The effect of this approach, the Article argues, is to define appropriate judicial relief in ways that shortchange litigants for whom a true remedy requires courts to take due account of their dignity.

The Article then articulates and justifies an alternative approach: a remedy that takes effect by expressing respect for the party whose rights were violated is a constitutionally legitimate, normatively desirable, and practically feasible exercise of federal judicial authority. This alternative view has several implications. For example, it provides a basis for courts to impose "symbolic" remedies like nominal damages; to treat an admission of liability from the defendant as a prerequisite of full relief for the plaintiff; and to issue nationwide injunctions in order to address stigma directed at a group to which the plaintiff belongs. In addition to highlighting these practical consequences, the Article draws out theoretical

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ramifications for the nature of a judicial remedy. The result is a distinctive and fuller view of federal courts' remedial authority.

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INTRODUCTION

"[W]e're real people here and we're not worth dirt," declared a plaintiff bringing suit against an insurance company.[1] "People should have dignity in their lives," one medical malpractice plaintiff explained, while another expressed an interest in having the defendant "admit[] he made an awful mistake."[2] Sentiments like these suggest that civil litigation is not exclusively a vehicle for securing material benefit. It can also be a way to pursue an interest in something more intangible: dignity, respect, or vindication. But is this the kind of interest that courts imposing judicial remedies may legitimately satisfy?

Dignity and respect are powerful social forces—resonating, for example, in movements challenging racial injustice,[3] unequal treatment of women,[4] and stigmatization of same-sex relationships.[5] Yet dignity is often criticized as malleable, difficult to measure, or too contested to apply fairly.[6] It may be questioned, then, whether courts should be engaged in promoting dignity or in repairing dignitary harm.

This Article focuses on the interaction between courts and dignity with respect to a particular issue: what counts as a proper federal judicial remedy? As a doctrinal matter, this question arises when federal courts are tasked with deciding whether parties have received "complete relief" or litigation satisfaction. To take a few examples, courts can declare suits moot if the plaintiffs have received complete relief.[7] Under many civil rights statutes, plaintiffs may receive attorney's

1. Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 93 (2011).

2. Tamara Relis, *"It's Not About the Money!" : A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 730, 737 (2007).

3. *See, e.g.*, Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 671 (2005) ("The struggle for racial justice in America, then, is perhaps best understood as a struggle to secure dignity in the face of sustained efforts to degrade and dishonor persons on the basis of color.").

4. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1298 (1991) ("Like other inequalities, but in its own way, the subordination of women is socially institutionalized, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in community, speech, and power.").

5. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("[D]enial to same-sex couples of the right to marry . . . . [S]erves to disrespect and subordinate [gays and lesbians].").

6. *See, e.g.*, Ruth Macklin, *Dignity Is a Useless Concept: It Means No More than Respect for Persons or Their Autonomy*, 327 BRIT. MED. J. 1419, 1419 (2003); Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity,'* ATLANTIC (Apr. 29, 2015), https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796.

7. *See, e.g.*, County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

fees only upon "prevailing";[8] the question, then, is what it means to win. In controversies about nationwide or universal injunctions, a notable argument against these injunctions is that they extend more broadly than needed to provide complete relief to the parties before the court.[9]

In these instances and others,[10] courts deciding whether relief is complete must determine which types of relief parties may properly pursue. Courts' decisions on this matter are practically significant; issues such as mootness, attorney's fees, and the scope of injunctive relief affect litigants' ability to vindicate their rights from a systemic perspective.[11] Further, courts' analyses of the appropriate shape of judicial relief reflect fundamental views about the role of judicial institutions, and for federal courts, the remedies permitted by Article III of the Constitution.

This Article highlights sharply divergent visions of the remedial functions that federal courts can and should fulfill. One is a powerful current of judicial thinking that the Article identifies and names the "circumscribed approach." On this approach, changes in parties' material circumstances are the standard remedial goal. Federal courts ought not aim to provide, in the Supreme Court's terms, "psychic satisfaction."[12] The circumscribed approach has prominent adherents, as evidenced by Chief Justice Roberts' statement in a class action case that a plaintiff was not seeking a proper Article III remedy when he was offered monetary relief but still wanted the court to hold a company liable.[13] The circumscribed approach reflects serious concerns about the role of courts, especially federal courts, in a representative democracy.[14] Yet the result of this approach, this Article argues, is to measure "complete relief" in ways that shortchange litigants for whom true relief would entail addressing their dignity.

As its core thesis, the Article introduces and justifies a different vision of a federal judicial remedy, which it calls the "expressive approach." Beyond changing parties' material circumstances, another important role for federal judicial

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8. *See, e.g.*, 42 U.S.C. § 1988(b) (2018).

9. *See* Memorandum from the Attorney Gen. to Heads of Civil Litigating Components and U.S. Attorneys 1–3 (Sept. 13, 2018) [hereinafter DOJ Memo] (citations omitted) (available at https://www.justice.gov/opa/press-release/file/1093881/download [https://perma.cc/J3MF-NEP3]); *see also* DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit."). For analysis of nationwide injunctions, see, for example, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); and *infra* notes 176–78.

10. *See infra* Section I.B.2 (nominal damages); *infra* Section III.C (appellate standing).

11. On the practical influence of the scope of available remedies, see, for example, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 130–91 (2017); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1191 (2012); and Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 233–34 (2003).

12. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998); *see also* Hewitt v. Helms, 482 U.S. 755, 761–62 (1987) (describing relief as "moral satisfaction").

13. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 677–78 (2016) (Roberts, C.J., dissenting). For more detail on *Campbell-Ewald*, see *infra* Section I.B.1.

14. *See infra* Section I.A.

remedies is to express respect for parties that have suffered dignitary harm. Dignitary harm, as here understood, results from being treated as though one matters less than one actually does, being excluded from a social group to which one rightfully belongs, or being subject to undue exposure.[15] To express respect, by contrast, is to act or speak in ways that send the message that people possess significance, are full members of a social group, and are entitled to avoid such exposure.[16]

How, then, can a judicial remedy express respect for dignity? To offer a couple of initial examples, a nominal damages award may deliver just a dollar to the plaintiff but signal that the plaintiff is entitled to respect.[17] A more substantial monetary award may also be expressive; for instance, a punitive damages award in a sexual harassment case can convey that the plaintiff is entitled to be treated more respectfully than the defendant treated the plaintiff.[18] In either case, the remedy sends the message that the plaintiff possesses a certain status and ought not to have been treated otherwise.

The expressive approach has practical implications. For example, defendants cannot moot lawsuits by arguing that only "symbolic" relief, like a defendant's acknowledgement of wrongdoing, is at stake. The expressive approach thus has ramifications for questions regarding class action mootness that the Supreme Court has left unresolved.[19] In the realm of attorney's fees, parties should be able to "prevail" for the purpose of recovering fees when a court makes factual findings vindicating their dignity, even if judgment is not ultimately entered in their favor. In the context of nationwide injunctions, courts may issue these injunctions in order to address stigma directed at a group to which the parties belong. Beyond these specific implications of the expressive account, the broader project of rethinking the goals of federal judicial remedies (which the Article supports) has consequences for lawsuits ranging from civil rights actions to class actions to suits challenging executive action.[20]

The expressive approach raises thorny conceptual issues and questions of implementation that this Article explores in detail. "Dignity" is a notoriously slippery idea, and the notion that a remedy should promote dignity is challenging to pin down.[21] In one sense, any judicial remedy could be said to further dignity, as it reflects recognition of the plaintiff's legal rights. This Article conceptualizes dignity, however, not simply as the status attaching to those with legal rights, but as a quality of real-world experiences free from the sting of humiliation and stigma. On this account, not every court judgment—or statement by a court

15. *See infra* Section II.A.
16. *See infra* Section II.A.
17. *See infra* Section I.B.2.
18. *See infra* notes 366–68 and accompanying text.
19. *See infra* Section I.B.1.
20. *See supra* note 11.
21. On the complexity of the concept of dignity, see, for example, AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 3–4 (Daniel Kayros trans., 2015).

recognizing that a plaintiff is right about the law—represents recognition of the plaintiff's dignity to the same degree. Rather, a remedy that expresses respect for dignity acknowledges the plaintiff's significance, full membership in a social group, and entitlement to avoid undue exposure when the defendant has acted in ways that call these features into question.

Accordingly, this Article presents criteria to guide determinations about when a legal violation distinctively implicates dignity, and when a remedy expressing respect for dignity is particularly warranted.[22] These criteria include the content of the legal violation (for instance, defamation is more likely to implicate dignitary concerns than breach of a commercial contract) and the intentionality of the violation (with an intentional or reckless act more likely to impose dignitary harm). More generally, the expressive account does not mandate unlimited judicial promotion of dignity. Courts and legislatures may decide that complete relief is unwarranted in certain circumstances, as when a remedy expressing respect would greatly strain judicial resources. But such decisions should be understood to flow from the costs and benefits of granting a particular remedy, not from the essential nature of federal judicial authority.

In presenting and justifying a distinctive vision of federal courts' remedial role, and in exploring in depth the relationship between dignity and court-ordered remedies, this Article breaks new ground. Legal scholars have conducted some examination of dignity and respect, focusing largely on conceptual analysis and the role of these ideas in constitutional and antidiscrimination law.[23] Much less attention has been devoted to the impact of dignitary considerations on judicial remedies.[24] To some extent, this may reflect the historical tendency to neglect the

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22. *See infra* Part III; *infra* Section II.C.

23. For discussion of dignity, see, for example, JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (Meir Dan-Cohen ed., 2012); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1929–38 (2003); and Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1735–63 (2008). For discussion of respect, see, for example, Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977); Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1617–23 (2020); and Deborah Hellman, *Equal Protection in the Key of Respect*, 123 YALE L.J. 3036, 3058–59 (2014).

24. Some literature on certain remedies, such as punitive damages and nominal damages, has referenced their role in sending a message, including (in some work) one of respect. *See, e.g.*, Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 433–36 (2008); Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 858–63, 875–76 (2016); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1432–40 (1993); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1633–34 (2011); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1007–20 (2007). In addition, Scott Hershovitz has provided an expressive view of tort remedies, *see* Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1 (2017), Andrew S. Gold has offered a (partially critical) look at remedies' expressive role, *see* Andrew S. Gold, *Expressive Remedies in Private Law*, *in* REMEDIES AND PROPERTY 109–15 (François Lichère & Russell L. Weaver eds., 2013) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360219 [https://perma.cc/R8BC-F9J6]), Margaret Jane Radin has described compensation in tort as "a form of redress" that "affirm[s]

field of remedies.[25] Yet remedies are increasingly recognized as more than a mere afterthought to courts' determination of liability; they determine "what the court can do *for* you if you win, and what the court can do *to* you if you lose."[26] This Article's contribution, then, is to conduct an in-depth exploration of the *intersection* of remedies and dignitary concerns.

In addition, this Article makes more specific contributions. First, it uncovers an influential vision of the federal judicial role at work in an array of doctrines. Second, it explains how federal courts could and should take dignity into account when providing relief.[27] Third, it highlights the collective dimension of expressive remedies and the limits of a purely individualistic approach. To elaborate, a legal violation may inflict dignitary harm on a plaintiff by virtue of the message it sends about a group to which the plaintiff belongs. As a result, complete relief for the plaintiff may require a remedy that benefits non-party members of the group—a point that affects, for instance, the appropriate scope of injunctive relief.[28]

The Article is structured as follows. Part I illustrates clashing visions of complete relief in settings including mootness, nominal damages, attorney's fees, and nationwide injunctions. In these settings, an influential approach—which the Article calls the "circumscribed view"—treats changes in plaintiffs' material circumstances as the remedial norm. Though the Article ultimately rejects the circumscribed view, it identifies weighty concerns animating this approach. These include the worries that intangible factors are difficult to define, challenging to

public respect for the existence of rights," Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 57 (1993), Matthew Shapiro has described expressive effects of civil litigation, *see* Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 558–77 (2020), and Emily Sherwin has described "compensatory remedies" as a way to "provide satisfaction to the victims of legal wrongs," Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1389 (2003). While building on these valuable contributions, this Article both offers a full-throated defense of the role of remedies in expressing respect and takes a broader approach than much existing literature. It extends beyond particular remedies, tort theory, and the theory of compensatory remedies to highlight themes appearing in several doctrinal areas in which courts are asked to decide what counts as complete relief. Further, the Article examines the role of court-ordered remedies, as distinct from judicial procedures, in expressing respect. For contributions on the dignitary impact of procedure and of broad participation in the remedial process, see *infra* notes 312–16 and accompanying text.

25. *See, e.g.*, F. Andrew Hessick, *The Challenge of Remedies*, 57 ST. LOUIS U. L.J. 739, 739 (2013).

26. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 165 (2008); *see also* Doug Rendleman, *Remedies: A Guide for the Perplexed*, 57 ST. LOUIS U. L.J. 567, 574 (2013) (describing remedies as "what a winning plaintiff gets"). This Article draws on points from the literature about the relationship between rights and remedies. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 (1991) ("The law of remedies, like all law, is largely conventional, and what counts as a full or adequate remedy is scarcely less so." (footnote omitted)).

27. My previous work has explored the function of dignity in administrative agencies' cost–benefit analyses, *see* Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost–Benefit Analysis*, 123 YALE L. J. 1732 (2014) [hereinafter Bayefsky, *Cost–Benefit Analysis*], as well as whether "intangible" harm counts as injury-in-fact for purposes of Article III standing analysis, *see* Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018) [hereinafter Bayefsky, *Tangibility*]; Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555 (2016) [hereinafter Bayefsky, *Psychological Harm*]. This Article addresses themes related to dignity and respect in the distinctive context of judicial relief and court-ordered remedies.

28. *See infra* notes 223–31, 406–07 and accompanying text.

substantiate, and ideologically controversial. Many of these concerns stem from judicial reluctance to usurp the perceived role of more representative institutions.

Part II proposes and supports an alternative, "expressive" view of a proper federal judicial remedy. According to this view, the expression of respect for parties' dignity is a legitimate form of federal judicial relief. This Part begins by discussing the definition of dignity. It then argues that remedies sending a message of respect for dignity are compatible with the judicial function. Such remedies have long-standing roots in legal practice, including liability for "dignitary torts" such as defamation and battery. In addition, empirical studies demonstrate that an interest in seeking respect plays a role in civil litigation.[29] After providing reasons to view judicial action expressing respect as an appropriate remedy, Part II offers benchmarks to gauge which settings particularly call for a remedy that sends a message of respect. In this way, it addresses the question of where to draw the line in urging imposition of expressive remedies.

Part III applies the expressive view of federal judicial remedies to a range of concrete doctrinal issues, including mootness, attorney's fees, and nationwide injunctions. The Article thereby demonstrates that the expressive account is a workable approach to defining complete relief, contrary to concerns often taken to support the circumscribed view. Overall, then, the Article argues that judicial actions that provide relief by expressing respect for dignity—regardless of whether these actions produce any more "concrete" benefit—are constitutionally legitimate, normatively desirable, and practically feasible exercises of federal judicial power.

I. MARKING THE BOUNDS OF COMPLETE RELIEF

This Part illustrates contestation over the nature of a proper federal judicial remedy arising from doctrines that require courts to determine what constitutes complete relief or litigation satisfaction. In particular, the Part identifies and analyzes an influential line of judicial reasoning, which it calls the circumscribed approach. Under this approach, the central remedial task of federal courts is to change parties' material circumstances, and plaintiffs should not come to court seeking "moral" or "psychic" satisfaction. The Part begins (Section I.A) by providing an overview of the complete relief principle and the underpinnings of the circumscribed approach. It then shows how disputation over the nature of a legitimate federal judicial remedy plays out in several procedural and remedial doctrines: mootness (Section I.B), attorney's fees (Section I.C), and nationwide injunctions (Section I.D).

A. COMPLETE RELIEF AND THE CIRCUMSCRIBED APPROACH: AN OVERVIEW

At first glance, the notion that judicial remedies should provide complete relief may appear to be a simple outgrowth of a basic remedial aim: to preserve or restore the plaintiff's "rightful position," namely "the position plaintiff would

29. *See infra* Section II.B.2.

have been in but for the wrong"[30] or the plaintiff's position in advance of an anticipated wrong.[31] Yet courts deciding when a plaintiff has received complete relief make contestable normative choices about which consequences of a legal violation need to be remedied.[32] To take an example (from Richard Fallon and Daniel Meltzer), "consequential damages are typically available in tort but not contract cases," even though "[t]o say that the more limited contract remedy makes the plaintiff whole will often be demonstrably untrue."[33] In the setting of injunctive relief, the Supreme Court has stated that "the scope of the remedy is determined by the nature and extent of the constitutional violation."[34] But the question here, too, is "what counts as . . . a legally relevant effect" of the violation.[35]

Marking the boundaries of complete relief, in other words, is not an exercise in clear-cut delineation, but a disputable and often fraught choice about which kinds of harm courts ought to address. This Section identifies and synthesizes a cluster of views that embody a "circumscribed" approach to the role of federal judicial remedies. The term "circumscribed" is meant to convey that this approach emanates from concern about too unbounded a role for federal courts.

The circumscribed approach appeared in Supreme Court opinions in the 1980s and 1990s urging skepticism about the extent to which "psychic" or "moral" satisfaction is a legitimate form of federal judicial relief. For example, in the 1998 case *Steel Co. v. Citizens for a Better Environment*, the Court rejected an environmental group's standing under Article III to sue a manufacturer for failing to file timely reports on pollution.[36] According to constitutional standing doctrine, federal courts have Article III jurisdiction only if the plaintiff has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[37]

In *Steel Co.*, the Supreme Court denied that the redressability prong was satisfied.[38] Because the monetary penalties the plaintiff sought would be payable to the U.S. Treasury rather than to the plaintiff, the Court reasoned, the plaintiff was not seeking a constitutionally valid remedy.[39] In particular, the "psychic satisfaction" resulting from the view that "a wrongdoer gets his just deserts" was "not an acceptable Article III remedy."[40] Further, the plaintiff's request for a declaratory

30. DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 14 (5th ed. 2019).

31. David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 628 (1988).

32. *See* Sherwin, *supra* note 24, at 1388–89.

33. Fallon, Jr. & Meltzer, *supra* note 26, at 1779–80.

34. Milliken v. Bradley, 418 U.S. 717, 744 (1974) (citation omitted).

35. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 592 (1983).

36. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 105 (1998).

37. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (citations omitted).

38. *See* 523 U.S. at 105.

39. *Id.* at 106–07.

40. *Id.* at 107.

judgment could not sustain the suit;[41] because all agreed that the manufacturer had failed to file timely reports, a declaratory judgment stating as much "is not only worthless to [the plaintiff], it is seemingly worthless to all the world."[42]

Emphasis on material benefit, and wariness about "psychic satisfaction," have cropped up in several doctrinal areas, as demonstrated below. Some of this emphasis appears in majority opinions in the Supreme Court and the federal courts of appeals. Other instances of the circumscribed view emerge from separate writings (including dissents) by Supreme Court Justices and other judges. Though these separate writings are not the law, they cannot be overlooked, especially given the changing composition of the Court and continuing debate over many of the legal issues discussed in this Part.

The circumscribed approach is not monolithic, and it is rooted in multiple concerns. A basic tenet of the approach is that courts should not order relief that intrudes too deeply into social ordering by more representative institutions.[43] As a consequence, the contours of a dispute should be bounded and ascertainable, and the harm that litigants seek to remedy should be measurable. Further, the harm should be broadly understood as a genuine and significant type of damage warranting the exercise of judicial power. Relatedly, courts should not be used by ideologically motivated litigants as vehicles for social change better carried out by legislatures.[44] Thus, cognizable injuries and remedies should be defined in a way that limits the circle of potential plaintiffs to those personally and meaningfully affected by the alleged legal violation.[45]

The circumscribed view is, in part, an understanding of the proper role of court-ordered remedies writ large. But it is also, to some extent, a vision of *federal* judicial relief, including the scope of remedial authority under Article III of the Constitution. This Article focuses on federal judicial remedies. To the extent the analysis here speaks to the role of courts in general in addition to the function

41. *Id.* at 106.

42. *Id.*

43. One way to understand this perspective is through the lens of "legal process" theory and its concern with: "What kinds of social tasks can properly be assigned to courts and other adjudicative agencies?" and "What tacit assumptions underlie the conviction that certain problems are inherently unsuited for adjudicative disposition and should be left to the legislature?" Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354 (1978). In the constitutional law context, Daryl Levinson has noted the "haunt[ing]" influence of "[w]orries about the legitimacy of less-democratically-accountable judges trumping the political preferences of more-democratically-accountable legislators (and executive officials)." Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 932 (1999). The circumscribed approach is particularly rooted in Justice Scalia's views of limitations on the role of federal courts. For discussion of these views, see, for example, John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997)) and Kermit Roosevelt, *Justice Scalia's Constitution—and Ours*, 8 J. LAW & SOC. CHANGE 27 (2005).

44. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 755–56 (1984).

45. For further discussion of limits on the circle of potential plaintiffs, see Bayefsky, *Tangibility*, *supra* note 27, at 2359–63.

of federal courts in particular,[46] it could affect judicial remedies outside federal courts. But the issue of how state courts delineate judicial relief is left for future consideration.[47]

B. "COMPLETE RELIEF" AND MOOTNESS DOCTRINE

When must a lawsuit be put to bed? This question, which courts face in grappling with mootness doctrine, raises the fundamental issue of how to define a judicial remedy. A moot case, the Supreme Court has stated, is "'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts."[48] A suit is moot "when the issues presented are no longer 'live,'"[49] that is, when it is "impossible for a court to grant any effectual relief . . . to the prevailing party."[50] One reason a court cannot grant effectual relief is that the plaintiff has already received "the relief [it] sought."[51] In deciding whether this condition is satisfied, courts must determine which types of relief parties may properly pursue.

For instance, if a plaintiff files suit seeking a specified amount of monetary damages and the defendant hands over to the plaintiff the full monetary amount, the defendant might argue that the suit is moot because the plaintiff has received complete relief.[52] If the plaintiff argues that she is also entitled to an admission of liability (and, perhaps, had inserted such a demand into the complaint), then a court adjudicating a motion to dismiss the case as moot will need to decide whether an admission of liability from the defendant can be a prerequisite for complete relief.

Though the nature of complete relief plays a role in many mootness cases, the rest of this Section focuses on two more specific settings. The first is class-action mootness, in which defendants' offers to provide "complete relief" have particularly high stakes. The second is the mootness of cases seeking nominal damages,

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46. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836 (2001) (differentiating between "Article III courts" and "the institutional possibilities of courts more generally").

47. For discussion of state-based enforcement of rights where federal courts have constricted remedies, see generally Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018) and Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223 (2018).

48. United States v. Sanchez–Gomez, 138 S. Ct. 1532, 1537 (2018) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013)). Despite the Court's formulation of mootness as a constitutional doctrine, mootness has aspects more reminiscent of a prudential rule, such as an exception for conduct "capable of repetition, yet evading review." *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 677–78 (2006) (quoting Roe v. Wade, 410 U.S. 113, 125 (1973)); Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 574 (2009).

49. Chafin v. Chafin, 568 U.S. 165, 172 (2013) (quoting *Already*, 568 U.S. at 91).

50. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 627–28 n.5 (2018) (quoting *Chafin*, 568 U.S. at 172).

51. *In re* Burrell, 415 F.3d 994, 998 (9th Cir. 2005); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3553.2.1, Westlaw (database updated April 2021).

52. *See, e.g.*, Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 70 (2013).

a topic that raises basic quandaries about the nature of a proper federal judicial remedy.

1. Class Action Mootness and Federal Judicial Remedies

Courts have paid particular attention to mootness and defendants' monetary offers in the class action context. In this context, defendants have sought to moot class actions by "picking off" individual plaintiffs with payment of a small fraction of the sum for which the class action might ultimately settle.[53] This strategy may be most attractive to defendants in suits seeking statutory damages. Defendants may view these damages as mechanisms for plaintiffs' attorneys to take advantage of "technical" statutory violations to extract large settlements.[54] And statutory damages are often capped in a way that makes it possible to calculate the plaintiff's maximum monetary recovery. The procedural avenue frequently employed in these cases is Federal Rule of Civil Procedure 68, which outlines a means for defendants to offer relief to plaintiffs and then have judgment entered, closing the case.[55]

Here is a scenario the Supreme Court addressed in the 2016 case *Campbell–Ewald Co. v. Gomez*[56]: Before the named plaintiff moves for class certification,[57] the defendant offers that plaintiff a monetary sum representing the maximum the plaintiff could recover on the individual claim. The defendant also proposes an injunction that, while barring the defendant from committing future violations, states that the defendant is not "admitting any liability or admitting any allegations in the complaint."[58] The named plaintiff declines the offer. The defendant argues that because the plaintiff has been offered complete relief on the individual claim and a class has not been certified, the suit is moot. Should a court dismiss the case?

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53. *See* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 986–87 (2017). For a defense perspective on this approach, see *Rule 23 Study Agenda – FRCP 68 and Mootness*, CLASS ACTION COUNTERMEASURES (Feb. 4, 2015), https://www.classactioncountermeasures.com/2015/02/papers/motions-practice/rule-23-study-agenda-frcp-68-and-mootness/ [https://perma.cc/VD89-F27D]. For a discussion of why class action defendants may seek to prevent aggregation of claims even without a resolution of the action that has preclusive effect, see D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 493–501 (2016).

54. *See* Michael T. Morley, Spokeo*: The Quasi-Hohfeldian Plaintiff and the Nonfederal Federal Question*, 25 GEO. MASON L. REV. 583, 590 (2018).

55. *See* FED. R. CIV. P. 68. Under Rule 68, if the plaintiff declines an offer and ultimately obtains a judgment less favorable than the offer, the plaintiff must pay the costs (including attorney's fees) that he or she incurs after the offer is made. *See id.*; Marek v. Chesny, 473 U.S. 1, 9 (1985).

56. 136 S. Ct. 663 (2016).

57. Once a class has been certified, the Supreme Court has declined to find a class action moot simply because the named plaintiffs' claim expires. *See* Sosna v. Iowa, 419 U.S. 393, 399, 402–03 (1975). The Court has also held that an appeal of a district court's ruling denying class certification survives mootness of the named plaintiff's claim. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980).

58. Petition for a Writ of Certiorari at 60a, *Campbell–Ewald*, 136 S. Ct. 663 (No. 14–857); *see Campbell–Ewald*, 136 S. Ct. at 668.

In *Campbell–Ewald*, the Supreme Court ruled that such a class action was not moot because an *unaccepted* settlement offer has "no continuing efficacy."[59] Focusing on the legal effect of an offer absent acceptance, the Court did not address the nature of "complete relief." Lurking in the background of *Campbell–Ewald*, however, is a provocative issue about the meaning of "complete relief." Did the defendant's offer fully satisfy the plaintiff's individual claim, independent of the plaintiff's decision to accept or decline the offer? In particular, the plaintiff alleged that the defendant had violated the law,[60] but the defendant's proposed injunction disclaimed liability.[61]

Chief Justice Roberts in dissent confronted the "complete relief" question in a way that helps to illustrate a strand of the circumscribed approach. The Chief Justice noted that the defendant proposed to pay the plaintiff the maximum monetary award he could receive on his individual claim.[62] Yet, the Chief Justice stated: "[The plaintiff] wants more. He wants a federal court to say he is right."[63] For a court to act on that desire, according to the Chief Justice, would be incompatible with Article III. "[T]he constitutional limitation of federal-court jurisdiction to actual cases or controversies,"[64] the Chief Justice wrote, means that a federal court may not "decide[] the merits of such a case" once a party "ceases to have a concrete interest in the outcome of the litigation."[65] In his view, the plaintiff's request for an adjudication of liability after receiving a "complete offer of relief" amounted to a demand for a prohibited "advisory opinion[]."[66]

The Chief Justice's dissent illustrates certain aspects of the circumscribed approach. First, a financial stake counts as a "concrete interest." This may reflect the perception that financial harms are more straightforward for courts to ascertain and measure.[67] Second, a federal court would exceed the bounds of its constitutional role to "say [a plaintiff] is right" once the plaintiff "ceases to have a concrete interest."[68] This perspective, rooted in a view of the separation of powers,[69] is meant to keep the federal judiciary within constitutionally limited bounds.

As later discussed more fully, the expressive perspective on federal judicial remedies—according to which the expression of respect constitutes legitimate relief—provides a basis on which to question whether a monetary sum counts as a complete remedy. True, the interest in having a court say one "is right" is not

59. *Campbell-Ewald*, 136 S. Ct. at 670.

60. *Id.* at 667.

61. *Id.* at 668; *see* Pfander, *supra* note 24, at 1636–37 (arguing that for plaintiffs seeking nominal damages, "an offer of money alone, unaccompanied by a declared rights violation, should not trigger Rule 68's cost-shifting apparatus").

62. *Campbell–Ewald*, 136 S. Ct. at 677 (Roberts, C.J., dissenting).

63. *Id.*

64. *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)).

65. *Id.* at 679.

66. *Id.* at 680.

67. For a discussion questioning this view, see Bayefsky, *Tangibility*, *supra* note 27, at 2341–51.

68. *Campbell–Ewald*, 136 S. Ct. at 677, 679 (Roberts, C.J., dissenting).

69. *See id.* at 678.

necessarily a dignitary interest; a court's approval of a legal argument is not coextensive with recognition of dignity.[70] But when a party has suffered a dignitary violation, a judicial ruling affirming that a party was wronged could provide redress by expressing respect.[71] The circumscribed view would cast the quest for such a ruling as one that risks unraveling key limits on federal court jurisdiction.

Both Chief Justice Roberts' dissent and the majority opinion in *Campbell–Ewald* reflect views on important topics other than the ingredients of complete relief—notably whether the named plaintiff, prior to class certification, should be treated as an individual or part of a class.[72] But even if the composition of "complete relief" was not the issue most central to the disposition of *Campbell–Ewald*, the Chief Justice's response to the mootness question reveals a certain approach to the nature of legitimate federal judicial remedies. Moreover, the availability of class-wide relief may be connected to dignitary concerns. Individual dignity (as discussed below) could be linked to treatment of a group, such that relief for the individual is not complete without judicial action affecting similarly situated people.[73]

The definition of complete relief in *Campbell–Ewald* has practical implications. Chief Justice Roberts was in dissent in *Campbell–Ewald*. But his vision of "complete relief"—not directly challenged by the *Campbell–Ewald* majority, and recently bolstered in a concurrence by Justice Kavanaugh[74]—could come to the fore if the Court takes up an issue it left open in *Campbell–Ewald*: whether a class action would be moot "if a defendant deposit[ed] the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enter[ed] judgment for the plaintiff in that amount."[75] Is a court judgment against the defendant for a monetary amount equivalent to complete relief, even if the defendant continues to disclaim liability? Or does a full remedy require more?

Emphasis on economic gain as a paradigmatic federal judicial remedy is also found in other cases concerning class action mootness. In the 1980 case *Deposit Guaranty National Bank of Jackson v. Roper*, the Supreme Court permitted named plaintiffs to appeal the denial of class certification even after judgment was entered in the individual plaintiffs' favor.[76] The plaintiffs, the Court explained, "retain a continuing individual interest . . . in their desire to shift part of the costs of litigation to those who will share in its benefits if the class is

70. Thanks to Todd Rakoff for raising this point.

71. *See infra* Section II.C.

72. Indeed, the plaintiff in *Campbell–Ewald* argued that individualized relief did not fully satisfy his claim in light of his quest to proceed as a class representative. *See* Brief for the Respondent at 32–35, *Campbell–Ewald*, 136 S. Ct. 663 (No. 14–857).

73. *See infra* Section II.C.4.

74. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (Kavanaugh, J., concurring); *see also infra* note 440.

75. *Campbell–Ewald*, 136 S. Ct. at 672. Since *Campbell–Ewald*, some courts of appeals have declined to hold that defendants' attempts to deposit sums in accounts payable to named plaintiffs moot class actions. *See, e.g.*, Geismann v. Zocdoc, Inc., 909 F.3d 534, 537 (2d Cir. 2018); Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541, 542 (7th Cir. 2017).

76. 445 U.S. 326, 340 (1980).

certified and ultimately prevails."[77] In the 2013 case *Genesis Healthcare Corp. v. Symczyk*, the Court distinguished *Deposit Guaranty* on the basis that the named plaintiff in a collective action suit "failed to assert any continuing economic interest in shifting attorney's fees and costs to others."[78] The Court has therefore treated the possibility of individualized monetary benefit as an important factor in preventing the mootness of a class or collective action claim.

There is still a doctrinal basis for a different view, as the Supreme Court has previously referenced noneconomic factors in its class action mootness jurisprudence. In the 1980 case *United States Parole Commission v. Geraghty*, the Court described a proposed class representative's "personal stake" in obtaining class certification in terms of "the private attorney general concept."[79] The Court recently characterized this type of reasoning as "dicta."[80] Yet it remains possible to articulate a broader view of Article III remedies than is reflected in current invocations of "complete relief." Part II contributes to the fulfillment of this task. For now, the aim is to highlight a circumscribed view about the kind of satisfaction federal courts can properly provide.

2. Nominal Damages and "Effectual Relief"

Nominal damages have been described as "damages in name only, usually $1 or six cents."[81] Courts may award these damages when the plaintiff wins on the merits but proves no "actual" harm. Examples of cases in which nominal damages are available include common-law intentional tort suits for trespass and defamation,[82] as well as constitutional tort suits against government officials for violating rights such as procedural due process and the Fourth Amendment.[83]

Nominal damages sometimes inspire bewilderment. "It's a considerable mystery," then-Judge Posner of the Seventh Circuit wrote, "why nominal damages . . . are ever awarded."[84] Moreover, this remedy raises basic questions about the nature of Article III jurisdiction and the function of federal courts.[85] If nominal damages are damages "in name only," do they remedy "real" harm?[86] If not, why does a plaintiff have constitutional standing to seek these damages, given that "injury in

77. *Id.* at 336.

78. 569 U.S. 66, 78 (2013).

79. 445 U.S. 388, 403–04 (1980) (citing *Deposit Guaranty*, 445 U.S. at 338). "The idea behind the 'private attorney general'" is that "Congress can vindicate important public policy goals by empowering private individuals to bring suit." Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186.

80. *Genesis Healthcare*, 569 U.S. at 78 (citing *Deposit Guaranty*, 445 U.S. at 339).

81. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 56 n.5, Westlaw (database updated June 2020).

82. *See* RESTATEMENT (FIRST) OF TORTS § 907 cmt. b (AM. LAW INST. 1939); 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.3(2), at 295–96 (2d ed. 1993).

83. For an argument that "constitutional tort claimants should be permitted to avoid the qualified immunity defense by pursuing claims for nominal damages alone," see Pfander, *supra* note 24, at 1601.

84. Moore v. Liszewski, 838 F.3d 877, 878 (7th Cir. 2016).

85. *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 216–17.

86. Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1267–68 (10th Cir. 2004) (McConnell, J., concurring).

fact" is a prerequisite for standing under Article III?[87] In proportion to the depth of the issues that nominal damages raise, this remedy has received comparatively little scholarly attention.[88]

The constitutional status of nominal damages has elicited scrutiny through a question that split the federal courts of appeals and that the Supreme Court recently addressed in *Uzuegbunam v. Preczewski*: whether a claim for nominal damages suffices to ward off mootness.[89] If a claim for nominal damages prevents mootness, then plaintiffs can seek redress for legal violations that have already occurred and are not expected to recur (so injunctive relief is unavailable) and that cannot readily be shown to have caused physical or economic harm. Further, a nominal damages claim can render civil rights plaintiffs "prevailing" for attorney's fees purposes.[90] Thus, to the extent that a suit seeking only nominal damages survives a mootness challenge, a nominal damages claim becomes a more solid basis for a fee award.

In the decades prior to the Supreme Court's *Uzuegbunam* decision, several federal courts of appeals held, albeit often without detailed reasoning, that "a claim for nominal damages avoids mootness."[91] For instance, the Tenth Circuit ruled that an animal rights group could maintain a First Amendment challenge to a city's procedure for issuing permits to protest at a long past event because the group continued to seek nominal damages.[92] In other quarters, however, a view of nominal damages reflecting the circumscribed approach to Article III remedies gained steam. In particular, some judges challenged the notion that "a claim for nominal damages precludes dismissal of the case on mootness grounds."[93]

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87. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016); *Utah Animal Rights Coal.*, 371 F.3d at 1263 (McConnell, J., concurring).

88. Work addressing nominal damages includes Eaton & Wells, *supra* note 24 and Pfander, *supra* note 24. For contributions that mention nominal damages as part of a broader analysis, see Baude, *supra* note 85; Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 970 (2019); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 283–89, 315–16 (2008); and see also *infra* note 89 for contributions on nominal damages and mootness.

89. 141 S. Ct. 792, 796 (2021); *see* Megan E. Cambre, Note, *A Single Symbolic Dollar: How Nominal Damages Can Keep Lawsuits Alive*, 52 GA. L. REV. 933, 942 (2018); Maura B. Grealish, Note, *A Dollar for Your Thoughts: Determining Whether Nominal Damages Prevent an Otherwise Moot Case from Being an Advisory Opinion*, 87 FORDHAM L. REV. 733, 745–57 (2018).

90. *See, e.g.*, Farrar v. Hobby, 506 U.S. 103, 112 (1992).

91. Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 748 (5th Cir. 2009); *see, e.g.*, Freedom from Religion Found., Inc. v. New Kensington Arnold Sch. Dist., 832 F.3d 469, 480 (3d Cir. 2016); Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 802 (8th Cir. 2006*); Utah Animal Rights Coal.*, 371 F.3d at 1257–58; Bernhardt v. County of Los Angeles, 279 F.3d 862, 872 (9th Cir. 2002); Van Wie v. Pataki, 267 F.3d 109, 115 n.4 (2d Cir. 2001).

92. *See Utah Animal Rights Coal.*, 371 F.3d at 1257–58.

93. *Id.* at 1262–63 (McConnell, J., concurring); *see* Flanigan's Enters., Inc. v. City of Sandy Springs, 868 F.3d 1248, 1265, 1271 (11th Cir. 2017) (holding a nominal damages claim did not save the case from mootness); *Freedom from Religion Found.*, 832 F.3d at 482 (Smith, J., concurring dubitante) (expressing doubt "that a claim for nominal damages alone suffices to create standing to seek backward-looking relief"); Morrison v. Bd. of Educ., 521 F.3d 602, 611 (6th Cir. 2008) (dismissing, for lack of Article III standing, a case in which the plaintiff sought only nominal damages).

An influential opinion in the latter line of judicial reasoning was then-Judge Michael McConnell's 2004 concurrence arguing that a case in which only a claim for nominal damages remained was "reminiscent of the coroner's verdict in *The Wizard of Oz*: It's not only merely moot, it's really most sincerely moot."[94] To be clear, opinions that casted doubt on the ability of nominal damages to ward off mootness did not take the position that "a lawsuit in which nominal damages are the only claim for relief is always or necessarily moot."[95] Rather, the claim was that nominal damages sustain a suit only when "a judgment in favor of a plaintiff . . . would have a practical effect on the parties' rights or obligations."[96]

The essential question, however, is what counts as a "practical effect." Responses in certain opinions reflected the circumscribed understanding of an Article III remedy. The Eleventh Circuit, for example, held that plaintiffs challenging a municipal ordinance on due process grounds could not sustain their suit once the ordinance was repealed.[97] The plaintiffs, the court stated, had "already won"; they had "received all the relief they requested," and there was "nothing of any practical effect left for [the court] to grant them."[98] Though the plaintiffs continued to seek nominal damages, that request amounted to a prayer for "judicial validation . . . of an outcome that ha[d] already been determined."[99] Judicial validation, the Eleventh Circuit continued, is not a "practical remedy"; rather, it is equivalent to "psychic satisfaction."[100] And providing such satisfaction to plaintiffs, in the court's view, is an improper role for federal courts.[101]

Arguments that nominal damages do not preclude mootness absent a "practical effect" drew on a parallel to declaratory judgment actions.[102] Under this line of reasoning, nominal damages serve a function similar to that of declaratory judgments; they declare that a plaintiff's rights have been violated.[103] And just as a request for a declaratory judgment does not create Article III jurisdiction absent an actual controversy,[104] a request for nominal damages should not do so either.[105] The rejoinder is that a key function of nominal damages has been to "remedy a *past* invasion of a right."[106] Thus, the rejoinder runs, nominal damages

94. *Utah Animal Rights Coal.*, 371 F.3d at 1262 (McConnell, J., concurring).
95. *Id.* at 1266.
96. *Flanigan's*, 868 F.3d at 1263.
97. *Id.* at 1264.
98. *Id.*
99. *Id.* at 1268.
100. *Id.* at 1264, 1268.
101. *Id.* at 1270.
102. *See* Baude, *supra* note 85, at 217 n.117 ("There are some who argue that nominal damages should not be available in circumstances where a declaratory judgment would not be.").
103. *See Flanigan's*, 868 F.3d at 1268–69.
104. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950).
105. *See Flanigan's*, 868 F.3d at 1268–69; Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1265 (10th Cir. 2004) (McConnell, J., concurring).
106. *Flanigan's*, 868 F.3d at 1274 (Wilson, J., dissenting) (emphasis added); *see also* 22 AM. JUR. 2D *Damages* § 10, Westlaw (database updated November 2020) (stating that some authorities award nominal damages to recognize the plaintiff's right).

serve a valid purpose even if they do not resolve an ongoing or future controversy.

In *Uzuegbunam v. Preczewski*, decided in March 2021, the Supreme Court held that an award of nominal damages can redress a past injury and thereby ward off a mootness challenge.[107] In *Uzuegbunam*, the plaintiff students alleged that their college had prevented them from distributing religious literature in violation of the First Amendment.[108] After the suit was filed, the college changed its policy, and one of the students graduated.[109] The Eleventh Circuit upheld a dismissal on mootness grounds,[110] but the Supreme Court reversed.[111] The Court's reasoning centered on the historical availability of nominal damages at common law as a form of redress for past harm.[112] A vigorous dissent from Chief Justice Roberts charged the Court with licensing advisory opinions and "bursting the bounds of Article III."[113] At the same time, the Chief Justice suggested, the Court's decision left open the possibility that defendants could moot nominal-damages suits by handing over a dollar[114]—a prospect that Justice Kavanaugh endorsed in a brief concurrence.[115]

The Supreme Court's resolution of *Uzuegbunam* suggests that the circumscribed view, manifested in Chief Justice Roberts's dissent, may at times yield to certain readings of the historical record. With its heavy reliance on common-law analogues, however, the majority did not provide much of a conceptual basis for rejection of the circumscribed view.[116] Moreover, the Court did not entirely eschew emphasis on monetary benefit in the definition of a legitimate remedy. The majority noted plaintiffs' historical interest in providing remedies for rights that "were not readily reducible to monetary valuation."[117] But the Court also stated that "[b]ecause nominal damages are in fact damages paid to the plaintiff, they 'affec[t] the behavior of the defendant towards the plaintiff'" and thus provide proper redress.[118] To bolster the latter point, the Court cited a case noting that "[i]f there is any chance of money changing hands, [the] suit remains live."[119]

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107. 141 S. Ct. 792, 796 (2021).

108. *Id.* at 796–97.

109. *Id.* at 797; *see* Uzuegbunam v. Preczewski, 781 Fed. App'x 824, 826 (11th Cir. 2019), *rev'd*, 141 S. Ct. 792.

110. *Uzuegbunam*, 781 Fed. App'x at 833.

111. *Uzuegbunam*, 141 S. Ct. at 797.

112. *Id.* at 797–801.

113. *Id.* at 803, 806 (Roberts, C.J., dissenting).

114. *Id.* at 804, 808.

115. *Id.* at 802 (Kavanaugh, J., concurring).

116. *Id.* at 801–02 (majority opinion) ("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.").

117. *Id.* at 800.

118. *Id.* at 801 (alteration in original) (quoting Hewitt v. Helms, 482 U.S. 755, 761 (1987)).

119. *Id.* (alteration in original) (quoting Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019)).

The expressive view of federal judicial remedies, as discussed below, provides a way to explain how nominal damages can have a real impact even without "money changing hands." Nominal damages can remedy violations of dignity such as those involved in trespass, defamation, or breach of constitutional rights. Part II expands on the expressive view, and Part III applies this view to nominal damages. The primary aim here is to highlight contestation over whether a remedy that provides "judicial validation" is a legitimate form of federal judicial relief.

C. PREVAILING PARTIES AND ATTORNEY'S FEES

What does it mean to win?[120] Courts confront this question when asked to decide whether a party has "prevailed" for the purpose of receiving an award of attorney's fees. Plaintiffs suing under several federal civil rights statutes, for instance, are statutorily authorized to recover "reasonable" attorney's fees if they are the "prevailing" parties.[121] "Fee-shifting in such a case," the Supreme Court has stated, "reimburses a plaintiff for what it cost him to vindicate civil rights" and "holds to account a violator of federal law."[122] Prevailing defendants may also be entitled to attorney's fees under certain conditions, as when a civil rights plaintiff's claim "was frivolous, unreasonable, or groundless."[123]

The issue of when parties have "prevailed" implicates the nature of a federal judicial remedy. For a party to "prevail," the party must secure relief that courts view as legitimate and constitutionally defensible. The challenge of defining such relief arose in a series of Supreme Court cases, beginning in the 1980s, addressing attorney's fees provisions in civil rights suits. These cases reflected the Court's approach to important subjects other than the nature of federal judicial relief, such as its treatment of prisoners' claims.[124] The current goal, however, is to draw attention to a certain view of federal judicial remedies that the Court deployed in its analysis.

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120. *Cf.* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 943–45 (2011) (noting the complexity involved in characterizing the effects of litigation wins and losses).

121. *E.g.*, 42 U.S.C. § 1988(b) (2018).

122. Fox v. Vice, 563 U.S. 826, 833 (2011) (internal quotation marks omitted) (citations omitted); *see also* Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 39 (2018) ("[P]rivate rights of action with fee shifting proved unexpectedly potent in cultivating a private enforcement infrastructure in the American bar."). For a discussion of the practical impact of certain doctrines involving "prevailing party" status, see, for example, Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1116–27 (2007).

123. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

124. *See* Hewitt v. Helms (*Helms II*), 459 U.S. 460, 467 (1983); Judith Resnik, Hirsa Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NW. U. L. REV. 45, 129–30 (2020). For further discussion of several factors involved in judges' determinations regarding attorney's fees, especially in aggregate litigation, see generally Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

To set the stage, the Court explained in 1983 that, to prevail, plaintiffs must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[125] The question, then, is what counts as a "benefit," and Supreme Court jurisprudence features responses to this question that reflect the circumscribed view.

For example, in *Helms v. Hewitt*, plaintiff Helms brought suit under 42 U.S.C. § 1983 against officials at the prison where he was incarcerated, seeking damages and injunctive and declaratory relief.[126] Helms argued that the procedures by which he was placed in "administrative segregation" violated his due process rights.[127] Though Helms was released on parole, his suit continued (it sought damages for past harm).[128] The district court ruled against him, but the Third Circuit reversed in part;[129] it held that Helms' due process rights had been violated because a prison hearing committee convicted him of misconduct based on uncorroborated hearsay testimony.[130] However, the Third Circuit remanded for consideration of official immunity, and Helms' hearsay claim was ultimately rejected on that ground.[131]

Had Helms prevailed in the sense relevant for attorney's fees? The Third Circuit said yes, reasoning that its previous holding that Helms' constitutional rights were violated was "an important vindication of the plaintiff's rights" and "a form of judicial relief which serves to affirm the plaintiff's assertion that the defendants' actions were unconstitutional and which will serve as a standard of conduct to guide prison officials in the future."[132]

The Supreme Court reversed, holding that Helms had not prevailed.[133] In an opinion by Justice Scalia, the Court (among other points) denied that the Third Circuit's characterization of Helms' "disciplinary proceeding [a]s unconstitutional" was a "vindication of . . . rights" that qualified as cognizable judicial relief.[134] The Supreme Court explained:

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. . . . As a consequence of the present lawsuit, [the plaintiff] obtained nothing from the defendants. The only "relief" he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated.[135]

125. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (citation omitted).
126. Helms v. Hewitt (*Helms I*), 655 F.2d 487, 489 (3d Cir. 1981), *rev'd*, 459 U.S. 460.
127. *Id.* at 492–93.
128. *Id.* at 489, 491.
129. *See* Hewitt v. Helms (*Helms IV*), 482 U.S. 755, 757–58 (1987).
130. *Helms I*, 655 F.2d at 503.
131. *See Helms IV*, 482 U.S. at 758; *Helms I*, 655 F.2d at 503.
132. Helms v. Hewitt (*Helms III*), 780 F.2d 367, 370 (3d Cir. 1986), *rev'd*, 482 U.S. 755.
133. *Helms IV*, 482 U.S. at 759–60.
134. *Id.* at 761.
135. *Id.* at 761–62.

Thus, the Court treated the effect of a judicial statement that Helms' constitutional rights were violated as "moral satisfaction" that did not count as genuine judicial relief.

The Court reiterated this conclusion a year later in *Rhodes v. Stewart*, in which two imprisoned people alleged that state officials violated their First Amendment rights by not allowing them to subscribe to a magazine.[136] A district court determined that the plaintiffs' constitutional rights had been infringed and ordered the prison to implement certain procedures.[137] By that time, however, one plaintiff had died and the other had been released.[138] The Supreme Court denied that the plaintiffs were prevailing parties.[139] Citing its decision in *Helms*, the Court stated that a declaration that a party's rights had been violated "will constitute relief, for purposes of [the civil rights fee shifting statute 42 U.S.C.] § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff."[140] In *Stewart*, "there was no such result. . . . A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order."[141]

The picture of prevailing on display in *Helms* and *Stewart* bears the hallmarks of the circumscribed understanding of federal judicial relief. The Court required an "effect" on the defendant's behavior that benefited the plaintiff,[142] but it interpreted "effect" to exclude "vindication."[143] Instead, the Court looked for such indicia as "a monetary settlement or a change in conduct that redresse[d] the plaintiff's grievances," as when a prisoner was personally subject to a different disciplinary procedure.[144]

The circumscribed approach in *Helms* and *Stewart* did not solely reflect a view of Article III. First, the proper interpretation of "prevailing" under 42 U.S.C. § 1988 is a statutory question. Second, the Court in *Helms* invoked the character of "all civil litigation," not just litigation in federal court.[145] As noted, the circumscribed approach does not apply exclusively to *federal* judicial authority.[146] At the same time, the Court's understanding of proper judicial relief in *Helms* and

136. Rhodes v. Stewart (*Stewart II*), 488 U.S. 1, 2 (1988) (per curiam).

137. Stewart v. Rhodes (*Stewart I*), 845 F.2d 327, No. 87–3542, 1988 WL 38966, at *2 (6th Cir. Apr. 27), *rev'd*, 488 U.S. 1 (1988).

138. *Id.* at *1. The district court's order did not mention these developments. *Stewart II*, 488 U.S. at 3. The Sixth Circuit held that the prisoners had prevailed even if the case had become moot, because the plaintiffs had received a "judgment directing the [officials] to comply with the constitutional requirements." *Stewart I*, 1988 WL 38966, at *2, *4.

139. *Stewart II*, 488 U.S. at 4.

140. *Id.* at 3–4; *see* Farrar v. Hobby, 506 U.S. 103, 112–13 (1992) (reiterating this rule).

141. *Stewart II*, 488 U.S. at 4.

142. *See id.* at 3–4; *Helms IV*, 482 U.S. 755, 761 (1987); *see also Farrar*, 506 U.S. at 113.

143. *Helms IV*, 482 U.S. at 761–62.

144. *Id.* at 760–61; *see Stewart II*, 488 U.S. at 4. The Court later held that a settlement procured without "judicial imprimatur" failed to render a party "prevailing." *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001) (emphasis omitted); *see also infra* notes 152–54 and accompanying text.

145. *Helms IV*, 482 U.S. at 761.

146. *See supra* Section I.A.

Stewart was inflected with Article III concerns. For instance, the Court insisted on "a proper judicial resolution of a 'case or controversy' rather than an advisory opinion."[147]

The Supreme Court, then, is reluctant to view "moral satisfaction" as litigation victory. But it has permitted a plaintiff who secures only nominal damages to "prevail."[148] "A judgment for damages in any amount," the Court explained in the 1992 case *Farrar v. Hobby*, "modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay."[149] Thus, a financial transaction, however small, is a genuine "effect."[150] Yet the magnitude of the financial transaction has consequences for the attorney's fees analysis. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief," the *Farrar* Court stated, "the only reasonable fee is usually no fee at all."[151]

Aversion to "moral satisfaction" as a cognizable "win" has persisted in attorney's fees jurisprudence. The Supreme Court has, since 2001, required "judicial imprimatur" (a judgment or court-ordered consent decree) for a party to prevail.[152] Thus, a plaintiff does not prevail when a suit "cataly[zes]" a voluntary change in the defendant's conduct.[153] But imprimatur alone does not suffice; a "judicial pronouncement" cannot render a party prevailing absent "judicial relief."[154] How, then, is "judicial relief" defined? According to the Court, there must be a "material alteration of the legal relationship of the parties."[155] As the Fifth Circuit put it, "the relief must modify the defendant's behavior in a way that directly benefits the plaintiff."[156] A cognizable benefit could include monetary relief[157] or an injunction (such as a court order permitting a protest).[158]

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147. *Helms IV*, 482 U.S. at 761; *see Stewart II*, 488 U.S. at 4.

148. *See* Farrar v. Hobby, 506 U.S. 103, 112–13 (1992).

149. *Id.* at 113.

150. The Court echoed that reasoning in its recent *Uzuegbunam* decision. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801 (2021) ("[N]ominal damages are in fact damages paid to the plaintiff.").

151. 506 U.S. at 115 (citation omitted). Justice O'Connor, in concurrence, observed that "[n]ominal relief does not necessarily a nominal victory make" and urged courts, in gauging the size of an attorney's fees award, to look to "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served." *Id.* at 121–22 (O'Connor, J., concurring). Some courts of appeals have followed Justice O'Connor's lead. *See, e.g.*, Millea v. Metro–North R.R. Co., 658 F.3d 154, 167 (2d Cir. 2011); Díaz–Rivera v. Rivera–Rodríguez, 377 F.3d 119, 125 (1st Cir. 2004).

152. *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605 (2001) (emphasis omitted).

153. *Id.* "Judicial imprimatur" need not involve public recognition of a legal wrong; it does not, for example, require a "judgment on the merits" or a "finding of wrongdoing." *Id.* at 622 (Ginsburg, J., dissenting).

154. *Id.* at 606 (majority opinion) (emphasis omitted) (quoting *Helms IV*, 482 U.S. 755, 760 (1987)).

155. *Id.* at 604 (quoting Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989)).

156. Davis v. Abbott, 781 F.3d 207, 214 (5th Cir. 2015) (quoting Petteway v. Henry, 738 F.3d 132, 137 (5th Cir. 2013)).

157. *See, e.g.*, Grissom v. Mills Corp., 549 F.3d 313, 319 (4th Cir. 2008).

158. *See, e.g.*, Lefemine v. Wideman, 568 U.S. 1, 4 (2012) (per curiam).

"Moral victories," however, do not count. In a 2014 Seventh Circuit case, for instance, a plaintiff challenging the conduct of an off-duty police officer lost his claims against the City of Chicago but secured a jury's special verdict finding that the officer "acted under color of state law because he had a City-issued weapon."[159] The Seventh Circuit rejected the view that the special verdict was "at least a moral victory vis-à-vis Chicago, which may lead it to take greater care in the future when selecting and supervising police officers."[160] "Costs (and fees)," the Seventh Circuit stated, "do not follow moral victories, however; they depend on concrete judgments that alter legal relations."[161]

The circumscribed view of Article III judicial relief also manifests itself in the Supreme Court's analysis of prevailing *defendants*. The Court held in 2016 that a defendant need not win on the merits in order to "prevail," provided that "the plaintiff's challenge is rebuffed" by a court.[162] A defendant "might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations."[163] But "[c]ommon sense" says that a defendant's objective is to prevent "a material alteration in the legal relationship between the parties" "to the extent it is in the plaintiff's favor."[164] Defendants, that is, do not require judicial vindication to prevail.

It may be argued that the analysis in attorney's fees cases is driven by considerations other than a court's approach to the nature of legitimate judicial relief—such as skepticism about civil rights or prisoners' litigation. The aim here, however, is to draw attention to the development of a certain understanding of federal judicial remedies. The Court's invocation of this understanding provides evidence of that phenomenon even if the Court's cases were importantly influenced by other factors. Overall, then, attorney's fees jurisprudence has treated the "vindication" that courts' rulings can produce as a dubious form of judicial relief.

D. NATIONWIDE INJUNCTIONS AND COMPLETE RELIEF

"Universal" or "nationwide" injunctions[165] have become a lightning rod for controversy over the proper role of federal courts. Courts have issued nationwide injunctions—as here understood, orders enjoining defendants from taking action

159. Richardson v. City of Chicago, 740 F.3d 1099, 1102 (7th Cir. 2014). The jury had issued the special verdict in connection with the plaintiff's claims against the police officer (as distinct from the City). *Id.* The "prevailing party" issue arose with respect to the allocation of court costs, which are generally awarded to the "prevailing" party under Federal Rule of Civil Procedure 54(d). *See id.*

160. *Id.*

161. *Id.* (citations omitted).

162. *See* CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642, 1651 (2016).

163. *Id.*

164. *Id.*

165. "Nationwide injunction" may be a misnomer, as these orders are best defined not by their geographic scope but by their application to nonparties. *See, e.g.*, Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 338 (2018). Nevertheless, this Article follows the frequent practice of using the term "nationwide injunction." For analysis of the term "nationwide injunction" and the problems arising from the absence of a clear definition, see generally Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* 91 U. COLO. L. REV. 847 (2020).

against nonparties[166]—to bar high-profile government programs ranging from President Obama's immigration policies[167] to President Trump's travel ban.[168] Justices Thomas and Gorsuch have called for the Supreme Court to address the issue directly.[169]

Among numerous critiques of nationwide injunctions[170] is that they contravene the precept, endorsed by the Supreme Court, that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."[171] Put differently, the Court has stated that a "remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[172] But nationwide injunctions, the critique runs, "afford[] relief far beyond" that inadequacy.[173] Justice Gorsuch put the point this way: "Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit."[174] Thus, "when a court goes further than" "order[ing] the government not to enforce a rule against the plaintiffs. . . . [I]t is hard to see how the court could still be acting in the judicial role of resolving cases and controversies."[175]

The issue, however, is what kind of relief is needed to rectify the plaintiffs' injuries. After all, even some skeptics about nationwide injunctions acknowledge that, in Michael Morley's words, "to grant complete relief to a plaintiff, a court sometimes must issue an order which winds up benefiting other people."[176] Justice Thomas has stated that American courts of equity traditionally provided

166. *See, e.g.*, Frost, *supra* note 9, at 1071; *see also* Bray, *supra* note 9, at 419 (using a similar definition for "national injunctions").

167. *See* Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

168. *See, e.g.*, Hawaii v. Trump, 265 F. Supp. 3d 1140, 1160 (D. Haw.), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018).

169. *See* DHS v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay); *Trump*, 138 S. Ct. at 2424–25 (Thomas, J., concurring).

170. For a summary of several critiques of nationwide injunctions, see *infra* notes 533–36 and accompanying text.

171. *See* DOJ Memo, *supra* note 9, at 3 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)).

172. Lewis v. Casey, 518 U.S. 343, 357 (1996) (citing Missouri v. Jenkins, 515 U.S. 70, 88, 89 (1995)); *see* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 42 (1984) ("Under [*City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)], article III limits judicial relief to the alleviation of injuries suffered by the party seeking an injunction.").

173. DOJ Memo, *supra* note 9, at 3; *see also* DHS v. New York, 140 S. Ct. at 600 (Gorsuch, J., joined by Thomas, J., concurring in the grant of stay).

174. DHS v. New York, 140 S. Ct. at 600 (Gorsuch, J., concurring in the grant of stay).

175. *Id.*

176. Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. L. & PUB. POL'Y 487, 525 (2016) [hereinafter Morley, *De Facto Class Actions*]. In Morley's view, such an order could be justified in "cases involving 'indivisible' rights," where granting relief to one plaintiff means "effectively granting relief to all other affected right holders." Michael T. Morley, *Nationwide Injunctions, Rule 23 (b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 646 n.184 (2017) [hereinafter Morley, *Nationwide Injunctions*].

relief that "advantaged nonparties," but only as an "incidental" "consequence of providing relief to the plaintiff."[177] The question of what constitutes adequate relief for plaintiffs therefore looms large. This question is also relevant in fleshing out the view, advanced by those more favorable toward nationwide injunctions, that these remedies are needed to provide complete relief to plaintiffs.[178]

The task of identifying complete relief highlights both the influence of the circumscribed account of Article III remedies and its limitations. Arguments over whether complete relief for plaintiffs requires benefits for nonparties frequently center on the allocation of material resources and the existence of logistical constraints. In 2018, for instance, the Ninth Circuit overturned a nationwide injunction against regulations exempting certain employers from a contraceptive mandate.[179] The court explained that "an injunction that applies only to the plaintiff states would provide complete relief to them. It would prevent the economic harm extensively detailed in the record."[180] Similarly, the Third Circuit, upholding a nationwide injunction against similar regulations—in a decision the Supreme Court later reversed at the merits stage[181]—cited expenses that the state plaintiffs would incur if the injunction were not extended to non-plaintiff states.[182] More generally, "[c]hallenges to policies that cross state lines—such as regulations concerning clean air and water, as well as some immigration policies," are treated as examples of claims that "require broad injunctions."[183]

The overall theme is that an injunction benefitting nonparties is warranted when, as The American Law Institute has put it, "relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants."[184] But the emphasis on material or "practical" effects should not be seen as the be-all and end-all of the "complete relief" question. A sole focus on these effects reflects the tendency to equate judicial relief with the physical or economic alteration of the plaintiff's circumstances.

177. Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

178. *See* Frost, *supra* note 9, at 1090–94; Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 60 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2132–35 (2017).

179. *See* California v. Azar, 911 F.3d 558, 585 (9th Cir. 2018).

180. *Id*. at 584.

181. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

182. Pennsylvania v. President U.S., 930 F.3d 543, 576 (3d Cir. 2019), *rev'd*, *Little Sisters of the Poor Saints Peter & Paul Home*, 140 S. Ct. 2367. The Third Circuit found standing for the state plaintiffs based on the increased expenditures that states would have to make if women turned to state-funded services for their contraceptive needs. *Id*. at 562. Thus, the turn to economic spillover effects in the nationwide injunction context may be an outgrowth of a more general emphasis on economic harm in the Article III standing context.

183. Frost, *supra* note 9, at 1091.

184. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION: INDIVISIBLE REMEDIES VERSUS DIVISIBLE REMEDIES § 2.04(b) (AM. LAW INST. 2010); *see* Morley, *Nationwide Injunctions*, *supra* note 176.

Another factor in calibrating "complete relief" for the parties before the court, or so this Article will argue, is the message a remedy sends.[185] One such message is that society respects the dignity of the plaintiff whose rights the defendant violated. And a remedy can express respect for a plaintiff by mandating lawful treatment of others who are similarly situated.[186] For instance, an injunction preventing the government from discriminating against a plaintiff based on race or religion may ring hollow as an expression of respect if the government is permitted to continue discriminating against nonparties of the same race or religion. Thus, a nationwide injunction could be needed in order to provide complete relief to the plaintiff independent of the "practical" feasibility of granting relief to the plaintiff without benefiting nonparties.

The task of determining when the expression of respect for a plaintiff requires a benefit for nonparties requires a nuanced response.[187] Notably, it cannot be assumed that every member of a group experiences harm in the same way. Yet impact on the dignity of nonparties should not be discounted in accounting for the potential effects of a legal violation. Below, the Article discusses circumstances in which dignitary harm to individuals requires relief directed at the effects of denigrating a group.[188]

Overall, this Part has drawn attention to disputes over the nature of complete relief and highlighted the development of a circumscribed view of federal judicial remedies. The next Part articulates a different approach toward the role of Article III judicial relief.

II. DIGNITY, RESPECT, AND FEDERAL JUDICIAL REMEDIES

This Part presents an argument about the relationship between court-ordered remedies and dignitary concerns—the expressive account. On this view, a legitimate and important remedial task for federal courts is to express respect for parties' dignity. Section II.A proposes working understandings of dignity and respectful treatment, and it explains why such treatment is normatively desirable and socially significant. Section II.B bolsters the case that these concepts should have a meaningful role in judicial determinations by highlighting the function they have served in legal settings and drawing on empirical research about litigants' dignitary concerns. Section II.C tackles the question of how dignity and respect work in the remedial context. Section II.D considers objections to the expressive account of federal judicial remedies, namely that this account contravenes historical practice and the prohibition on advisory opinions.

185. *See* Gewirtz, *supra* note 35, at 668 ("Words are deeds, and what courts 'do' may turn out differently depending on what they give as an explanation.").

186. *See infra* Section II.C.4.

187. *See infra* Section III.D.

188. *See infra* notes 528–29 and accompanying text.

A. DIGNITY AND RESPECT: DEFINITIONS AND SOCIAL SIGNIFICANCE

Dignity and respect can be understood in multiple ways.[189] That does not mean these concepts are meaningless. They have powerful resonance in individual lives and social movements,[190] and—as discussed below—have made their way into legal doctrine.[191] As with other contested concepts that influence legal determinations, such as equality, rights, and autonomy,[192] complexity provides little basis for sidelining dignity and respect.

The current aim is to provide a plausible understanding of dignity and respect that can shed light on legal issues related to "complete relief" in remedies. On a prominent philosophical account, "dignity" refers to the inherent worth attaching to each individual by virtue of a characteristic such as humanity, autonomy, or moral capacity.[193] This account of dignity is a possible understanding, but it is not the one employed here.[194] The inherent-worth account risks reducing dignity to a general normative principle about how people should be treated. The goal here, by contrast, is to capture the social experience of dignity and its absence.[195]

It is therefore instructive to consider occasions on which dignity is violated—experiences that call to mind words like "disrespect," "humiliation," "denigration," and "stigma."[196] Here are elements that frequently play a role in these experiences[197]:

- Being treated as though one does not adequately matter;[198]
- Being excluded from a relevant social group;[199] and
- Being exposed in compromising ways.[200]

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189. *See, e.g.*, BARAK, *supra* note 21, at 4–6; Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172–73 (2011).

190. *See supra* notes 3–5 and accompanying text.

191. *See infra* Section II.B.1.

192. *See* Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994) (autonomy); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 899 (1981) (equality); Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 503–06 (1989) (rights).

193. This view is frequently attributed to thinkers such as Immanuel Kant and John Rawls. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 42 (Mary Gregor trans. & ed., 1997); JOHN RAWLS, A THEORY OF JUSTICE 386 (rev. ed. 1999). For an interpretation highlighting complexities in standard understandings of Kant's views on dignity, see generally Rachel Bayefsky, *Dignity, Honour, and Human Rights: Kant's Perspective*, 41 POL. THEORY 809 (2013).

194. For an account of two conceptions of dignity, one as "an inalienable attribute of every human person," and the other rooted in societal status, see Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305, 1325–28 (2019).

195. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 282 (2004) (describing laws that help "creat[e] a 'facilitating environment' in which citizens can live lives free from shame and stigma").

196. *See* AVISHAI MARGALIT, THE DECENT SOCIETY 51–53 (Naomi Goldblum trans., 2d prtg. 1996).

197. These criteria draw on previous work. *See* Bayefsky, *Cost–Benefit Analysis*, *supra* note 27, at 1773–75.

198. *See* WALDRON, *supra* note 23, at 21 (mentioning dictionary definition of dignity invoking "gravity").

199. *See* MARGALIT, *supra* note 196, at 130–49; NUSSBAUM, *supra* note 195, at 231–32.

200. *See* NUSSBAUM, *supra* note 195, at 203–11; Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1832–33 (2010); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 534 (2006).

A working account of dignity, then, is the status of those accorded proper weight, treated as full members, and not subject to improper exposure. The term "status" is meant to convey that dignity implicates individuals' social positions;[201] dignity as understood here pertains to an individual's experience in a social world.[202]

A couple of explanatory points regarding this account of dignity are in order. First, the status involved in treating people with dignity may vary. Along lines that Michael Walzer has suggested, people inhabit different "spheres"—the market, a political unit, civil society, a religious community, an educational institution.[203] As members of a democratic society governed by a common set of legal institutions, individuals ought to possess the status of equals under the law. But they are also entitled to be treated in accordance with the status associated with participation in a particular social sphere (such as their role as teachers or physicians).

Second, dignity as understood here is subject to both internal and external limitations. To impose an internal limitation is to define dignity in such a way that dignitary claims rooted in an improper factor, such as inequality or animus, do not give rise to a normative obligation. To impose an external limitation is to argue that a dignitary claim that gives rise to a normative obligation can properly be outweighed by other factors.

To begin with internal limitations: Because the account of dignity offered here refers to *rightful* status, not every dignitary claim carries normative weight. For instance, members of favored groups have sometimes demanded greater respect due to their elevated position in a hierarchy.[204] Those demands for respect, however, are not claims to be treated in accordance with one's *rightful* status. It may then be asked how to determine which status is rightful. The current account of dignity does not provide an ultimate explanation for why certain social arrangements are justified while others are not. This does not mean dignity is normatively inert; references to dignity can form part of the explanation of why certain states of affairs, such as a society that fails to provide services accessible to people with disabilities, are normatively troubling. But a full justification for the status to which people are rightfully entitled requires additional philosophical resources, such as a defense of democracy or egalitarianism.

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201. *See* WALDRON, *supra* note 23, at 47–49.

202. *See infra* notes 223–31, 406–07 and accompanying text.

203. *See generally* MICHAEL WALZER, SPHERES OF JUSTICE (1983).

204. *See, e.g.*, Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1671–72 (1992) ("White supremacists 'brought low' by the actions of people such as Rosa Parks are, we believe, right to be lowered, because they claimed a position for themselves, relative to others, that we believe is too high; hence we do not take seriously the psychological pain they experience as a result of such actions."); Hellman, *supra* note 23, at 3041 ("[S]ometimes humiliation may be . . . supportive of the equality concerns vindicated in *Brown*.").

As to external limitations, even when a dignitary claim carries normative weight, this weight is not absolute.[205] For example, it may sometimes be normatively permissible to make financial transfers in a less dignity-enhancing manner (say, a more impersonal one) if doing so maximizes financial assistance. Even so, when the goal of treating others with dignity is justifiably overcome, there is a moral remainder marking the loss of a quality with social value.[206]

The next step is to explicate the concept of respect. On the account here, "respect" refers to an attitude[207] consisting of the recognition or acknowledgment of a person's dignity. Respect for dignity, drawing on Stephen Darwall's work, is a form of "recognition respect"; it involves acknowledging "some feature of its object in deliberating about what to do" and does not require esteem or admiration for the object of respect.[208] Accounts of respect differ in terms of the relevant "object."[209] The pertinent feature for this Article's purposes is a person's dignity—that is, the status of those accorded proper weight, treated as full members, and not subject to undue exposure. Respect as an attitude can (though need not be) manifested in respectful treatment, and disrespect in disrespectful treatment.[210]

A further step is to describe the "expressive" aspect of the current account. A plausible way to understand the connection between respect as an attitude and respectful conduct is to draw on expressive theories of behavior.[211] According to these theories, actions "express . . . attitudes"[212] and "have meanings."[213] "At the level of individual action, a shrug may express indifference; a whisper, reverence; a swagger, cockiness; a song, joy; a sneer, contempt."[214] At the societal level,

205. *See* Mashaw, *supra* note 192, at 922 ("Participation and revelation . . . . [C]annot be asserted as virtually absolute constitutional rights.").

206. *See* BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 61 (1981).

207. Eidelson, *supra* note 23, at 1617.

208. Darwall, *supra* note 23, at 38.

209. Eidelson, *supra* note 23, at 1617.

210. Thanks to Richard Fallon for discussion of this point.

211. The claim here is not that any plausible account of respect must be "expressive" in nature, but that expressive theories offer a useful lens through which to conceptualize the connection between possessing an attitude and manifesting it in action.

212. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000).

213. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996) (emphasis omitted); *see* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021–22 (1996). This Article applies expressive theories to issues in remedies; it does not defend expressivist theories at length. There is, however, vigorous debate about the meaning and plausibility of these theories. *See, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001).

214. Anderson & Pildes, *supra* note 212, at 1506; *see* DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 36 (2008) ("[C]onventions for disrespect [include] giving someone the finger, spitting on someone, looking over someone's shoulder when she is speaking to one, and so on."); Scott Hershovitz, *Tort as a Substitute for Revenge*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 86, 86–87 (John Oberdiek ed., 2014) (providing the example of spitting in someone's face).

"the burning of a cross," for instance, "is a symbol of hate."[215]

The reference to "attitudes" should not be taken to mean that action expresses attitudes only when the actor subjectively possesses certain beliefs.[216] Rather, an action can have a social meaning even if that is not the actor's private intention.[217] An action expresses respect for dignity by communicating that a person matters, is worthy of belonging to a social group, and should not be subject to undue exposure. An action expresses disrespect for dignity by communicating the opposite.

Action that expresses disrespect often causes dignitary harm—for example, by relegating the victim to a lower-than-deserved status or excluding the victim. Treatment that causes this harm is normatively troubling as an intuitive matter. Moreover, it is socially significant both because it undermines the goal of creating a more inclusive society and because it may give rise to societal disharmony.[218]

Actions can express respect and disrespect in multiple ways, including through material means, such as physical contact or the transfer of money. Paying men and women unequally for the same work expresses disrespect. In that example, the treatment inflicts dignitary harm in addition to material harm. In other cases, an action has the same material impact but a different dignitary effect. Handing a homeless person a five-dollar bill, for instance, diverges from throwing the bill into the gutter for the person to pick out.[219] In other words, an action's effects—and its normative valence—depend on its social meaning, not only its physical or economic consequences.

The dignitary consequences of respectful and disrespectful treatment matter independently of such treatment's psychological effects.[220] Expressions of contempt—for example, disparaging comments about disabled individuals—are normatively and socially concerning not only because of their psychological impact, but also because of their negative effect on "people's standing as full members of society."[221] These expressions would be troubling even if targets

215. Virginia v. Black, 538 U.S. 343, 357 (2003) (internal quotation marks omitted) (citation omitted); *see* Hellman, *supra* note 23, at 3058 ("Just as holding out one's hand and spitting can express respect or disrespect, so too some laws and policies can express respect and disrespect."); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1504–13 (2016) (discussing "crime and punishment as an *exchange of meanings*").

216. *See* Sunstein, *supra* note 213, at 2022.

217. *See* Anderson & Pildes, *supra* note 212, at 1512.

218. *See* Hershovitz, *supra* note 214, at 92–95 (discussing revenge as a response to disrespectful treatment).

219. As Nancy Fraser has written, "misrecognition" can be differentiated from "maldistribution" (or material disadvantage) even if the two experiences often occur in tandem. *See* Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, *in* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 7, 7–11 (Joel Golb, James Ingram & Christiane Wilke trans., 2003).

220. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 967 (1989) ("[D]ignitary harm does not depend on the psychological condition of an individual plaintiff, but rather on the forms of respect that a plaintiff is entitled to receive from others.").

221. Fraser, *supra* note 219, at 31.

were psychologically unaffected. Thus, in Nancy Fraser's words, the account here "avoids mortgaging normative claims to matters of psychological fact."[222]

Finally, respectful and disrespectful treatment have a collective dimension. In particular, negative treatment of individuals may express disrespect toward fellow members of a broader group. This may be especially likely to happen when a shared trait is socially salient or important in the lives of individuals.[223] Disrespectful treatment of some individuals may then denigrate the group in general.[224] Of course, group identity is complex;[225] some members may be impervious to group-based attacks or wish to dissociate themselves from the group.[226] But potential effects on others cannot be disregarded in gauging the impact of respectful or disrespectful treatment.[227]

Even when the shared characteristic is not generally a salient part of individual identity, disrespectful treatment can have spillover effects across individuals.[228] Injured consumers of a product the manufacturer knew was defective, for example, may share little other than their injury and sense of outrage.[229] But individuals may, as discussed below, bring suit to ensure that others do not suffer the same harm, and they may view preventing repetition of the same conduct as a way to assert their own dignity.[230] Thus, there are several circumstances in which individual dignity is linked to the treatment of others.[231]

B. DIGNITY AND RESPECT: LEGAL AND EMPIRICAL IMPACT

Respectful and disrespectful treatment, in addition to being normatively and socially significant, matter from a legal and empirical perspective. To support this point, this Section first highlights legal doctrines suggesting that concern for

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222. *Id.* at 32.

223. These conditions may obtain, for instance, in collectivities that Avishai Margalit and Joseph Raz call "encompassing groups," "members of which are aware of their membership and typically regard it as an important clue in understanding who they are." Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 446–48 (1990) (emphasis omitted). Examples include (some) racial groups, religious groups, and social classes. *Id.* at 447.

224. *See* MARGALIT, *supra* note 196, at 140–41. For a discussion of how community members vicariously experience "the marginalizing effect of police maltreatment that is targeted toward others," see Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2104–14 (2017).

225. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1623–24 (1997).

226. *See, e.g.*, KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 78–79 (8th prtg. 2007); Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 33–36 (2009).

227. Dignity as understood here, however, still attaches to the individual and not to the group in itself—contrary to certain views of dignity as an attribute of state sovereignty. *See* Resnik & Suk, *supra* note 23, at 1941–60; Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 36–50 (2003).

228. *See* Burch, *supra* note 226, at 24–25.

229. *See* Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 108 (2011).

230. *See infra* Section II.B.2.

231. *See* Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 1000 (1993) ("Recognition of the group's interests constitutes an important aspect of individual dignity.").

dignity and respect is embedded in several areas of American law. This is a descriptive claim, but it serves to support a normative claim: that dignitary considerations should not only be maintained, but also applied more frequently in the context of courts' determinations about "complete relief." The Section then identifies empirical evidence suggesting that the interest in securing respect furnishes a powerful reason for litigants to sue. The general point is that dignity and respect have roots in concrete doctrine and the experience of litigation; they are not simply normative ideals.

1. Dignity, Respect, and Legal Sources

Dignity and respectful treatment are not phenomena that the law ignores. Several areas of antidiscrimination law and equal protection jurisprudence support this point.[232] In *Brown v. Board of Education*, the Supreme Court looked to African-American schoolchildren's "feeling of inferiority as to their status in the community" in holding that segregation in public schools violated equal protection regardless of whether "tangible" factors were equalized.[233] The "feeling of inferiority" was a psychological effect, but it stemmed from the social meaning of segregation, which centrally involved disrespect: "[T]he policy of separating the races is usually interpreted as denoting the inferiority" of African-Americans.[234] The Court's statements on segregation's message of inferiority in *Brown* have frequently been interpreted to evince concern with stigmatic harm[235] and with the expression of a demeaning message.[236]

Other antidiscrimination settings implicating dignity and respect are same-sex relations and sex equality. The Supreme Court has deemed unconstitutional laws that "demean th[e] existence" of gays and lesbians[237] and cause "[d]ignitary wounds."[238] It has also noted that the Constitution "requires the Government to

232. *See, e.g.*, William D. Araiza, *No Cake for You: Discrimination, Dignity, and Refusals to Serve*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 115, 119–24 (2018) (describing concern with nonmaterial harms, including stigma, in the Supreme Court's equal protection jurisprudence).

233. 347 U.S. 483, 492–94 (1954).

234. *Id.* at 494 (citation omitted).

235. *See, e.g.*, Bd. of Educ. v. Dowell, 498 U.S. 237, 257–58 (1991) (Marshall, J., dissenting) (noting the Court's "pointed focus in *Brown I* upon the stigmatic injury caused by segregated schools"); *see also* Sheryll Cashin, *Civil Rights for the Twenty-First Century: Lessons from Justice Thurgood Marshall's Race-Transcending Jurisprudence*, 17 LEWIS & CLARK L. REV. 973, 976–77 (2013) (noting themes related to dignity in then-attorney Thurgood Marshall's advocacy in *Brown*); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3078–80 (2014) (discussing the "anti-humiliation principle" at work in *Brown*).

236. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439; Sunstein, *supra* note 213, at 2022. Angela Onwuachi-Willig has argued that the Supreme Court's analysis of the harms of discrimination in *Brown* left out segregation's instillation of "a feeling of superiority in white children." Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355 (2019).

237. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

238. Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015); *see* Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 141, 158 (2013); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 30 (2015). For a discussion of the

respect the equal dignity and stature of its male and female citizens."[239] Even if women seem to be advantaged by a gender differentiation in a material sense,[240] that does not obviate the constitutional relevance of "overbroad generalizations about the different talents, capacities, or preferences of males and females,"[241] including "the denigration of the efforts of women."[242] Dignity and respectful treatment also figure in statutory antidiscrimination law, in areas including sexual harassment[243] and age discrimination.[244]

In antidiscrimination contexts, courts often conceptualize dignity and disrespectful treatment in terms reminiscent of the "significance" and "social acceptance" ideas discussed above.[245] Disrespectful treatment fails to treat people with appropriate gravity; it conveys "ridicule" and "insult,"[246] and it casts certain individuals or relationships as "unworthy."[247] Disrespectful treatment additionally involves exclusion and social rejection; its objects are accorded "a separate status"[248] and "[e]xclud[ed]."[249]

Moreover, the Court's invocation of dignity and respect is not confined to a single Justice, area of law, or ideological perspective. Examples of these concepts' broad resonance include Justice Scalia's statement that the Fourth Amendment's "knock-and-announce rule" protects "privacy and dignity";[250] Chief Justice Earl Warren's indication that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man";[251] and Chief Justice Roberts' endorsement of the view that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[252] In fact, some opposition to the constitutional protection of same-sex

limits of *Obergefell*'s focus on the dignity of marriage with respect to efforts to advance the dignity of racial minorities, see R.A. Lenhardt, *Race, Dignity, and the Right to Marry*, 84 FORDHAM L. REV. 53, 54–64 (2015).

239. Sessions v. Morales–Santana, 137 S. Ct. 1678, 1698 (2017).

240. For example, a provision that places a greater financial burden on men than on women.

241. United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted).

242. Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

243. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); Reva B. Siegel, *A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 26–27 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

244. *See, e.g.*, Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("Congress' promulgation of the [Age Discrimination in Employment Act of 1967] was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

245. *See supra* Section II.A.

246. *Meritor Sav. Bank*, 477 U.S. at 65.

247. United States v. Windsor, 570 U.S. 744, 772 (2013).

248. *Id.* at 770.

249. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

250. Hudson v. Michigan, 547 U.S. 586, 594 (2006).

251. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); *e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002) (quoting *Trop*, 356 U.S. at 100).

252. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 746 (2007) (plurality opinion) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)). For additional examples of references to dignity in Supreme Court opinions, see the sources cited in Henry, *supra* note 189, at 173–74 nn.18–26;

marriage sounds in the language of stigma and disrespect. The *Obergefell v. Hodges* decision, Justice Alito stated in dissent, "will be used to vilify Americans who are unwilling to assent to the new orthodoxy"[253] and "facilitates the marginalization of the many Americans who have traditional ideas."[254]

Far from being extra-legal values, then, dignity and respectful treatment have constitutional significance. Though themes related to dignity in Supreme Court opinions have been criticized as vague or subjective,[255] this does not mean the concept has little to offer legal doctrine. The breadth of references to dignity can reasonably be understood to signal not incoherence, but the concept's wide resonance and persuasive power.[256] Further, increased use of dignity in judicial opinions could result in the buildup of a body of law with greater consistency.

Beyond constitutional law and antidiscrimination law, more support for the legal recognition of dignity and respect comes from the category of "dignitary torts." This category is commonly taken to encompass claims including battery, defamation, invasion of privacy, false imprisonment, and intentional infliction of emotional distress (IIED).[257] Dignitary torts are not identical in the ways in which, and the extent to which, they implicate status-based harm;[258] and they do not cause exclusively this type of harm. For instance, psychological effects loom large in IIED regardless of whether the legal violation sends a demeaning message.

Nonetheless, dignitary torts bolster the case that disrespectful treatment is not a phenomenon the law disregards. Defamation, for example, frequently involves both a loss of status and social exclusion.[259] Torts connected to privacy plausibly implicate dignity-related exposure.[260] In addition, the "common law development of a law of insult and indignity" has some kinship to legal violations, such as

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Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 16 & n.7 (2004); and Siegel, *supra* note 23, at 1736 & n.118.

253. *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

254. *Id.* at 2643; *see* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267 (2020) (Thomas, J., concurring) (referring to "the repeated denigration of those who continue to adhere to traditional moral standards").

255. For a summary of critiques of dignity as a legal concept, see Henry, *supra* note 189, at 174–75; and see, for example, *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting) ("There is, after all, no 'Companionship and Understanding' or 'Nobility and Dignity' Clause in the Constitution.").

256. *See* WALDRON, *supra* note 23, at 15–19.

257. *See, e.g.*, Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 322 (2019); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 711 (1986); Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 65 (2012).

258. For discussions of the challenge of imposing a unified structure on dignitary torts, see Abraham & White, *supra* note 257, at 353–61 and Gregory Keating, *What Ever Happened to Dignity?*, JOTWELL (Oct. 12, 2018), https://torts.jotwell.com/what-ever-happened-to-dignity [https://perma.cc/7RTE-CZLE] (reviewing Abraham & White, *supra*).

259. *See* Post, *supra* note 257, at 711–13.

260. *See* Citron, *supra* note 200. For further discussions of dignity and privacy, see, for example, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 19–20 (2012); Solove, *supra* note 200, at 486–87, 535–39; and James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1160–64 (2004).

racial discrimination, that are often recognized to have a respect-based component.[261]

Dignitary torts are generally state-law claims, and so it may be argued that they do not shed light on the question of whether federal courts—with their particular jurisdictional limits—should be adjudicating dignitary claims. Yet federal courts do address these state-law claims, as under diversity jurisdiction.[262] Moreover, the dignitary dimension of tort law arises in the domain of "constitutional torts" adjudicated in Article III courts, often against state officials for violations of federal law under 42 U.S.C. § 1983. Some of these constitutional torts, such as infringement of procedural due process or the Fourth Amendment, have a dignitary component; they manifest disrespect for a plaintiff's status or expose a plaintiff to unwarranted law enforcement scrutiny even without causing physical or economic harm.[263]

It may be contended that courts' recognition of dignity and respect as legally significant reflects a "dignity-plus" approach: dignity matters, but only in conjunction with material harm.[264] For example, battery often causes both physical and dignitary harm. At the outset, it is true that dignitary harm cannot be wholly disconnected from material *effects*. Given that human interaction generally occurs through a physical medium, a dignitary violation will be accompanied by some sort of physical phenomenon—even if only speech or words on a page.

Dignitary violations, however, are not necessarily accompanied by material *harm*. Examples include offensive-touching battery and false imprisonment. Indeed, conduct that has physical consequences may be legally actionable precisely because of the dignitary valence of these consequences. With offensive-touching battery, physical contact is "offensive," and hence illegal, when the contact is "offensive to a reasonable sense of personal dignity."[265] In fact, a dignitary violation may even be accompanied by a material benefit. A law can embody disrespectful stereotypes about women's roles, for instance, even if it grants women a financial advantage.[266] And even when dignitary harm is accompanied by material harm, the dignitary aspect of the legal violation can change the nature of the

261. *See* Curtis v. Loether, 415 U.S. 189, 196 n.10 (1974) (Marshall, J.) ("[I]t has been suggested that 'under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort.'" (quoting CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS 961 (2d ed. 1969))); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 939 (2010) ("It takes but a short step to move from the vindication of individuals' dignitary interests via battery, assault, and false imprisonment claims (among others) to the recognition as torts of workplace sexual harassment, civil rights violations, and human rights violations.").

262. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 449–50 (2011).

263. *See* Michael L. Wells, *Civil Recourse, Damages-As-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1023 (2012).

264. Thanks to Tara Grove for discussion of this point.

265. W. D. Rollison, *Torts: Assault; Battery*, 17 NOTRE DAME L. REV. 1, 3 & n.10 (1941) (citing nineteenth century cases); *see* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 114 (1784) (M'Kean, C.J.); Goldberg & Zipursky, *supra* note 261, at 938–39.

266. An example is a law that mandates paid parental leave only for women. Of course, one might argue that such a law has the overall or long-term effect of disadvantaging women economically.

offense; spitting in someone's face is an intentional tort, while spilling water on the person by accident is not.[267] Thus, the coexistence or interrelationship of dignitary and material effects is consistent with recognition of the legal salience of dignity.[268]

The discussion thus far—cataloguing the willingness of courts, including federal courts, to consider dignity-related claims—demonstrates that dignity is legally significant in several contexts. It also casts doubt on the view that there is an Article III jurisdictional obstacle to recognition of these claims (though judicial decisions that do not discuss constitutional standing are not precedential as to that issue[269]). Yet when it comes to direct pronouncements on dignitary harm and Article III standing, the Supreme Court has displayed some ambivalence.

Constitutional standing under current doctrine requires "de facto," or "actually exist[ing]," injury in fact.[270] The Supreme Court's most detailed consideration of dignitary harm as injury in fact occurred in the 1984 case *Allen v. Wright*.[271] There, the Court held that "abstract stigmatic injury" could not ground standing; in particular, members of a racial group who had not personally been subject to discrimination could not challenge racial discrimination elsewhere.[272] Yet, the Court stated, a "stigmatic injury . . . is judicially cognizable to the extent that [plaintiffs] are personally subject to discriminatory treatment."[273] This approach suggests that the Court has narrowed but not eliminated the prospect of dignitary harm as the basis for Article III standing.

At the same time, skepticism about the extent to which injuries related to dignitary harm could ground standing appears to have picked up steam. The Supreme Court has long held that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not a cognizable injury.[274] In a concurrence in the 2019 Supreme Court case *American Legion v. American Humanist Ass'n*, Justice Gorsuch (joined by Justice Thomas) argued that this principle should be extended to block suits by observers "offended" by religious

267. *See* Hershovitz, *supra* note 24, at 7–8.

268. Indeed, the terms in which harm is discussed may themselves have dignitary effects. In discussing "the prospect of corporate law liability in cases of sexual harassment," Daniel Hemel and Dorothy S. Lund note "potential dignitary harms that stem from characterizing a sexual attack on one person as an economic injury to another." Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1671 (2018). They argue, however, that the possibility of these discursive harms should not preclude corporate law approaches. *Id.* at 1673.

269. *See* Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996).

270. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (emphasis omitted).

271. 468 U.S. 737 (1984); *see* Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 458–62 (2007).

272. *Allen*, 468 U.S. at 755–56.

273. *Id.* at 757 n.22 (citation omitted).

274. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 485 (1982).

displays on public property.[275] Standing for such observers, Justice Gorsuch stated, was inconsistent with Article III's demand for "a real controversy with real impact on real persons."[276]

Opposition to "offended observer" standing in Establishment Clause cases does not *necessarily* entail reluctance to view dignitary harm as injury in fact. Offense could be understood as a psychological effect, and dignitary harm (as noted) should not be reduced to its psychological effects.[277] But if dignitary harm were assigned legal weight in Establishment Clause cases, a judge would need to consider the possibility that perceived government endorsements of religion send a message of exclusion to plaintiffs who do not adhere to the religion. Critiques of "psychological consequences" or "offense" as a basis for standing do not leave much room for such consideration.

More generally, the overall thrust of Supreme Court standing jurisprudence is to be more skeptical of "intangible" harm as a ground for standing than "tangible" economic harm; after all, in the economic context, even the loss of a few cents can count as Article III injury.[278] As explored in my other work, courts' approaches toward the cognizability of harm less "tangible" than physical or economic damage are not especially consistent or clear.[279] Indeed, even the Court's line between "tangible" and "intangible" harm is blurry.[280] The expressive account, in drawing attention to longstanding sources of concern with dignity and respect in legal claims adjudicated by federal courts, provides a firmer basis for the treatment of dignitary harm as cognizable injury.

The expressive account does not mandate judicial recognition of all dignitary harm as injury in fact. As discussed in my other work, courts could impose limitations grounded on concerns about the separation of powers and resource constraints.[281] For instance, they could use a modified version of the particularity inquiry to separate claims about dignitary harm that qualify as injury in fact from claims that do not.[282] Further, plaintiffs asserting constitutional standing must

275. 139 S. Ct. 2067, 2098 (2019) (Gorsuch, J., concurring in the judgment).

276. *Id.* at 2103.

277. *See supra* notes 220–22 and accompanying text.

278. *See, e.g.*, Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 983 (2017) (citation omitted); Bayefsky, *Tangibility*, *supra* note 27, at 2321; Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 265 U. PA. L. REV. ONLINE 47, 52 (2016); Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 450, 457 (2017). For an argument that "the theories of recovery commonly employed in more traditional tort contexts," such as bodily injury, are less "concrete and precise" than we have come to imagine, see Julie E. Cohen, *Information Privacy Litigation as Bellwether for Institutional Change*, 66 DEPAUL L. REV. 535, 540–41 (2017).

279. *See* Bayefsky, *Tangibility*, *supra* note 27, at 2330–33; Bayefsky, *Psychological Harm*, *supra* note 27, at 1570–92.

280. *See* Bayefsky, *Tangibility*, *supra* note 27, at 2330–37; Wu, *supra* note 278, at 440 n.6.

281. *See* Bayefsky, *Tangibility*, *supra* note 27, at 2353–69.

282. *See* Bayefsky, *Psychological Harm*, *supra* note 27, at 1602–14. On this account, courts would examine the extent to which the legal violation is especially likely to affect a particular plaintiff. *Id.* at 1610–11. Plaintiffs could be affected even if they are not in close physical proximity to the source of the legal violation—for instance, because they have a history of deep involvement with a cause that is central to the suit. *Id.*

show not only harm but also a "legally protected interest"[283]—and the decision whether to classify an interest as "legally protected" depends on legislators in addition to judges.

The expressive account is compatible with a longstanding (and plausible) critique of the injury in fact criterion—that ostensibly factual judgments about harm are really normative judgments about which kinds of harm the law will recognize.[284] To the extent courts are making normative judgments, this Section has provided reason for courts to recognize the normative value of respectful treatment. And to the extent the injury in fact criterion ought to be replaced with an inquiry into whether the plaintiff has a cause of action,[285] the expressive account supports the creation and continued viability of causes of action that facilitate redress for dignitary harm. Given the entrenchment of the injury in fact criterion in current jurisprudence, however, there is value in arguing that dignitary harm should qualify.

Overall, this Section has argued that dignity and respect ought not be classified as philosophical notions without legal heft; to the contrary, they play an important role in significant legal doctrines.[286] This argument bolsters the view that courts should not only continue to place legal weight on dignity—contrary to skepticism about the legal role of intangible harm—but should also apply dignity more broadly in the setting of federal judicial *remedies*.

2. Litigation and the Quest for Respect: The Empirical Angle

Why do people sue?[287] This Section first draws attention to empirical analyses that highlight the interest in seeking respect as a motivation for litigation. It then explains why the motivations of litigants should matter in assessing the nature of legitimate judicial relief.

One powerful driver of litigation, then, is the sense that the plaintiff[288] has been treated as though he or she is inconsequential. A study of medical malpractice claimants by Tamara Relis showcased this dynamic, with plaintiffs noting that they had sued "mostly because of the lack of concern";[289] because of the defendant's "arrogance" and "the respect and dignity of [the plaintiff's]

283. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

284. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 231–32 (1988); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1154–60 (1993); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186–92 (1992). Further, the Supreme Court's standing doctrine has long been critiqued as overly malleable and influenced by judges' political preferences. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1750–58 (1999).

285. *See, e.g.*, Fletcher, *supra* note 284, at 223.

286. *See supra* notes 250–54 and accompanying text.

287. For a discussion of plaintiffs' reasons for litigating, see, for example, Burch, *supra* note 229, at 103–04.

288. Like much of the empirical literature, this Section focuses on plaintiffs' perceptions of litigation—here, because the relief involved in "complete relief" accrues to the plaintiff. *See* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 364 n.258 (1996).

289. Relis, *supra* note 2, at 729.

father";[290] and because "[p]eople should have dignity in their lives."[291] In a study of lead plaintiffs in consumer class actions, Stephen Meili found that several plaintiffs were motivated by anger, which "typically resulted from a feeling that they (and other customers) were being disrespected."[292] Explained a plaintiff suing an insurance company: "[W]e're real people here and we're not worth dirt."[293] Relatedly, plaintiffs expressed the belief that they had been taken advantage of. An individual suing a debt collector said: "My main goal [was] to prove that you can't mistreat people and basically think that you can get away with it."[294]

Evidence indicating that plaintiffs are driven to sue by an interest in redressing perceived disrespectful treatment[295] also comes from studies of defamation suits,[296] sexual assault and harassment actions,[297] landlord–tenant disputes,[298] lawsuits arising from neighborhood conflicts,[299] and victim compensation proceedings following incidents of mass violence.[300] The Section below considers common features of legal settings in which a concern with disrespectful treatment comes to the fore.[301]

In several studies, part of the quest for respect involved an effort to secure acknowledgment of the harm by either the defendant or the court.[302] Plaintiffs in the medical malpractice study, for example, expressed an interest in having the defendants recognize the harm the plaintiffs had suffered and accept responsibility.[303] Other plaintiffs, including victims of sexual abuse, sought a public

290. *Id*. at 730.

291. *Id*. at 737.

292. Meili, *supra* note 1.

293. *Id*.

294. *Id*. at 91.

295. *See* Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 19–23 (2000) (collecting sources); *see also* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 305–06 (1999) (outlining plaintiffs' nonmonetary interests in litigation).

296. *See* Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985); Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CALIF. L. REV. 789, 790–92 (1986).

297. *See* Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67, 84–85 (1999); Nathalie Des Rosiers, Bruce Feldthusen & Oleana A. R. Hankivsky, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 450 (1998).

298. *See* Cross, *supra* note 295, at 21; Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 147 (1994).

299. *See* Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984).

300. *See* Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645, 661 (2008); Paul Heaton, Ivan Waggoner & Jamie Morikawa, *Victim Compensation Funds and Tort Litigation Following Incidents of Mass Violence*, 63 BUFF. L. REV. 1263, 1290 (2015).

301. *See infra* Section II.C.2.

302. *See* Burch, *supra* note 229, at 103–04.

303. *See* Burch, *supra* note 226, at 29; Relis, *supra* note 2, at 723.

declaration that a wrong had been committed.[304] In an experimental study involving a personal injury scenario, researchers found that apologies conveying the acceptance of responsibility facilitated settlement.[305]

Some plaintiffs contrasted their dignitary goals with the sole pursuit of monetary damages.[306] It may then be asked why plaintiffs who say "[i]t's not about the money"[307] seek monetary damages at all. In response, plaintiffs may have multiple motivations, among them both dignitary aims and economic interest.[308] Additionally, a damages award can be a vehicle for respectful treatment. Just as a salary is often interpreted to "represent . . . how much people are valued," the size of a damages award can speak to the "degree of acknowledgement or importance ascribed to the harm."[309]

The sense of having been treated disrespectfully, then, plays a role in fueling litigation. Of course, any given study is subject to methodological constraints. For instance, people asked to self-report may say they possess aims perceived to be more "noble" than monetary gain.[310] But to the extent that parties' expressions of sentiments connected with dignity and respect strike readers as recognizable, the case for taking dignitary considerations seriously as a driver of litigation gains added strength.

The literature on procedural justice also highlights litigants' interest in dignity and respect.[311] As scholars have documented, parties frequently have a strong interest in being treated with dignity with respect to legal processes they

304. *See* Bruce Feldthusen, Olena Hankivsky & Lorraine Greaves, *Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse*, 12 CANADIAN J. WOMEN & L. 66, 75–76 (2000); *see also* Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 36 ("That a verdict is rendered determining the merits of the dispute is also of importance to many litigants. One side is . . . vindicated and the other defeated.").

305. *See* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 506 (2003); *see also* Relis, *supra* note 2, at 725 ("[T]he third-most repeated plaintiff objective was to obtain apologies and retribution for insulting physician conduct."); Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1270–71 (2006) ("[S]cholars have noted that many civil claimants want apologies from defendants.").

306. *See* Relis, *supra* note 2, at 721; *see also* Cross, *supra* note 295 (discussing plaintiffs' nonmonetary goals).

307. *See* Relis, *supra* note 2, at 721.

308. *See* Cross, *supra* note 295, at 17; Jennifer K. Robbennolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1127–29 (2003).

309. Relis, *supra* note 2, at 730; *see also* Galanter & Luban, *supra* note 24, at 1436 ("[I]nflicting a monetary defeat [can be] an especially expressive form of punishment."); Radin, *supra* note 24, at 74 ("Weightiness is signified by using something of great importance in our society—money.").

310. *See* Resnik et al., *supra* note 288, at 369. Another possible methodological constraint is skew toward clients willing to participate in studies.

311. Though this Article focuses on litigation, another rich area of study is parties' experiences in alternative dispute resolution, such as mediation. For a discussion of the relationship between procedural justice and mediation, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 830–58 (2001). For a study finding that "significant nonmonetary terms" in settlement "were relatively uncommon" in a certain set of employment-related mediations, see Daniel Klerman & Lisa Klerman, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, 12 J. EMPIRICAL LEGAL STUD. 686, 705 (2015).

confront.[312] More broadly, in Tom Tyler's words, "a key determinant of citizen reactions to encounters with legal authorities is the respondents' assessment of the fairness of the procedures used in that contact,"[313] and procedural justice includes mechanisms that "support [citizens'] sense of self-respect."[314] These findings underscore litigants' interests in judicial processes that safeguard dignity, such as by enabling litigants to make their cases and furnishing reasons for decisions.[315] As will be argued in a subsequent Section, the interest in respectful treatment should not only spur dignity-enhancing procedures but should also affect the ultimate relief granted.[316] For now, the point is that empirical work documenting litigants' interest in dignity-enhancing judicial process is consistent with the idea that the quest for respect plays a meaningful role in civil litigation.

Plaintiffs' interest in dignitary relief has a collective dimension as well. Lead plaintiffs in the study of consumer class actions expressed an interest in "collective justice" goals—ensuring that the company would not engage in the same conduct with respect to others, or "achieving justice for a large number of people affected by the same harm."[317] Studies concerning litigation following episodes of mass violence similarly revealed plaintiffs' desires to prompt "responsive policy change—making sure that lessons were learned and heeded in the future."[318] Commentators on public interest litigation have long explored individual plaintiffs' efforts to draw public attention to an asserted legal violation and to spur a

312. *See, e.g.*, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 112–13 (2017); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 106 (1988); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 978 (1993); Mashaw, *supra* note 192, at 887–88; Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 532. For an argument that "[a]s a general theory of procedural justice, the dignity interpretation is a nonstarter," see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 262–64 (2004).

313. Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988).

314. *Id.* at 129; *see also* Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 401 (2000) ("[L]egitimacy is one of the keys to engendering greater compliance.").

315. *See, e.g.*, Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1174–75; Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 847–48 (1984). On the value of "reason giving" in decisionmaking, see Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 713–14 (2014).

316. *See infra* Section II.C.4. Susan Sturm has proposed a model for "participation at the remedial stage" in the formulation of public law remedies, noting that such participation serves "autonomy and dignity values." Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1393–96 (1991); *see* Sturm, *supra* note 231, at 1007–08 (explaining the model of "remedial participation").

317. Meili, *supra* note 1, at 88–92. On collective forms of litigation and empowerment, see, for example, Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1518–19 (2013); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 677 (2018).

318. Hadfield, *supra* note 300, at 648; *see also* Heaton et al., *supra* note 300, at 1293–94 (discussing the results of a survey regarding attitudes to litigation following a shooting).

broader rethinking of challenged practices.[319] Though collective aims may be harbored and shaped by plaintiffs' attorneys,[320] lawyers do not create these aims out of whole cloth.[321]

The next question is why litigants' interest in dignitary redress should matter from a legal perspective—and, in particular, why that interest should affect the definition of appropriate judicial relief.[322] First, the circumscribed approach to federal judicial remedies reflects a particular interpretation of "a real controversy with real impact on real persons."[323] Facts about parties' experiences suggest that the interest in dignitary redress has a genuine and powerful—that is, "real"—impact, and thus warrants greater consideration in courts' decisionmaking.

Second, and relatedly, current doctrine draws on facts about parties' goals in defining success or satisfaction. True, the Supreme Court has differentiated between forms of relief that cause gratification—such as "comfort and joy" or "psychic satisfaction"—and legitimate federal judicial remedies.[324] Yet the Court has also looked to "the benefit the parties sought in bringing suit" when inquiring into parties' "prevailing" status and their "degree of success" for attorney's fees purposes.[325] In a recent case about defendants' "prevailing" status, the Court drew on "[c]ommon sense" understandings of the "objectives" of plaintiffs and defendants.[326] Information about parties' actual goals is therefore relevant to legal analyses of litigation success or satisfaction.

Third, the public's views of the nature of legal redress bear on the effectiveness of the judicial system. If courts define judicial relief in a manner that is systematically in tension with parties' experiences, they may not resolve disputes in a way that addresses the harm that gave rise to the suit.[327] Moreover, assigning inadequate weight to dignity presents a challenge for judicial legitimacy insofar as the judiciary is viewed as insufficiently responsive to litigants' grievances.[328]

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319. *See, e.g.*, Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2046–47 (2008); *see also* NeJaime, *supra* note 120, at 969–1011 (exploring the generative potential of litigation loss for social movements).

320. *See, e.g.*, Meili, *supra* note 1, at 104–09 (observing that class action attorneys sometimes sought to stoke named plaintiffs' interest in collective justice).

321. *See id.* at 102–03 (noting that class action attorneys generally wanted to select plaintiffs who had collective justice aims in the first place).

322. *See* Resnik et al., *supra* note 288, at 369–70.

323. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment).

324. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998).

325. Hensley v. Eckerhart, 461 U.S. 424, 433, 436 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)). For a critique of "subjective" measures of parties' success that rely on an assessment of plaintiffs' personal motivations, see Eaton & Wells, *supra* note 24, at 856–58.

326. CRST Van Expedited, Inc. v. EEOC, 136 S. Ct. 1642, 1651 (2016).

327. For instance, if courts do not treat the intentionality of a legal violation as relevant to the appropriate remedy, they may fail to respond to a common view that deliberate wrongdoing requires punishment beyond compensation. *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 ALA. L. REV. 1095, 1099 (2014).

328. More precisely, judicial unresponsiveness could result in loss of "sociological legitimacy," which rests on the public's acceptance of a "claim of legal authority . . . as deserving of respect or

Granted, the extent to which the federal judiciary's treatment of dignity and respect has affected or will affect its perceived legitimacy is not simple to measure. Further, legitimacy concerns do not require courts to validate all of parties' motivations to sue; courts could properly conclude that certain motivations (for instance, a plaintiff's animus toward the defendant's race or religion) do not carry weight. But parties' interest in dignitary redress adds to the case for courts to recognize the legal significance of dignity and respectful treatment.

C. MAKING THE REMEDIAL CONNECTION

Having highlighted the legal weight that dignity and respect possess, as well as the role of these factors in litigation, this Article makes the connection to judicial remedies. It argues that expressing respect is a legitimate remedial task for federal courts to fulfill. To this end, the current Section carries out four main tasks. The first is to explain the idea of an expressive remedy. The second is to describe when an expressive remedy is distinctively warranted. The third is to address the question of who expresses respect when such a remedy is provided: the defendant or the court? The fourth is to flesh out the idea of an expressive remedy by discussing the relationship between respect-based remedies and dignity-enhancing procedure, as well as the collective dimension of expressive remedies.

1. The Role of Expressive Remedies

A remedy can broadly be defined, in the words of Douglas Laycock and Richard Hasen, as "anything a court can do for a litigant who has been wronged or is about to be wronged."[329] The aim here is not to offer a general theory of remedies, which come in many different varieties—both in terms of their function (for instance, to compensate, prevent harm, make restitution, or punish) and in terms of their classification as legal or equitable.[330] It suffices to draw attention to two features of many, even if not all, remedial determinations.

First, remedies are frequently directed at addressing certain harmful effects of a legal violation—whether by "prevent[ing] harm," "undo[ing] it," or "compensat[ing] for it."[331] Second, pursuing this remedial goal (as earlier noted) requires

obedience." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91, 1849 (2005). Sociological legitimacy, as Fallon observes, is "complexly interrelated" with "legal" legitimacy and "moral" legitimacy. *Id.* at 1790. For further discussion of the legitimacy of judicial institutions, see Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma,* 132 HARV. L. REV. 2240, 2245–46, 2250–72 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) (noting potential tension among different types of legitimacy); and see also Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293, 302 (2018) (observing that "legitimacy is usually acquired slowly and easily diminished").

329. LAYCOCK & HASEN, *supra* note 30, at 1. Some question whether a rights violation can or should be defined independently of the remedy. *See, e.g.*, Levinson, *supra* note 43, at 884 ("[T]he right may be shaped by the nature of the remedy that will follow if the right is violated.").

330. *See* LAYCOCK & HASEN, *supra* note 30, at 1–6.

331. *Id.* at 5. This may not universally be the case; for example, punitive damages may be conceived as a way to "punish wrongdoers," and restitution "to restore to plaintiff all that defendant gained at plaintiff's expense." *Id.* at 4; *see* John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 866 (2013) (arguing that some constitutional remedies

courts to determine which adverse effects of a legal violation warrant judicial remediation.[332] Indeed, for federal courts, the Supreme Court has held that they cannot impose relief extending beyond redress for constitutionally cognizable injury: "The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."[333]

The discussion in the previous Section supports the claim that dignitary harm is the type of harm that federal courts can legitimately—and, more strongly, *should*—seek to remedy. To recap, dignitary harm is normatively troubling and socially significant.[334] Though not every social ill requires a judicial response, a concern for dignitary harm is embedded in important legal doctrines and is part of the relief litigants seek from the civil justice system.[335] Moreover, dignitary harm ought to qualify as a constitutionally cognizable type of injury.[336] Therefore, in identifying the legally relevant effects of a violation, federal courts should take dignitary effects into account.

Just because a type of harm is legally significant does not mean it always ought to be remedied. For example, economic loss is often not recoverable in negligence cases.[337] On the account offered here, courts and legislatures may decide with respect to particular claims that a certain remedy for dignitary harm should not be available (say, that punitive damages are not available for some breaches of contract). But there ought to be a reason for that determination rooted in a considered assessment of the costs that rectifying dignitary harm in a specific context would impose—as distinct from an approach that treats dignitary harm as categorically less amenable to judicial redress than physical or economic harm.

The expressive approach to remedies can also be explained with reference to the "rightful position standard," which "says to choose the remedy that puts the plaintiff back (or keeps the plaintiff) in the position that she would have been in but-for the defendant's wrong."[338] The rightful position may be most familiar in the setting of compensatory damages,[339] but it has also been used to describe the

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can be "justified entirely by public policy goals unrelated to harm suffered by the right-holder, as is the case with the Fourth Amendment's exclusionary rule"). However, some of these remedies could be interpreted to redress harm, if harm is conceptualized in a less tangible manner. *See infra* notes 366–71 and accompanying text.

332. *See supra* notes 32–35 and accompanying text; *see also* Sherwin, *supra* note 24, at 1390 ("[L]egal remedies do not address the full range of consequences following from a legal wrong.").

333. Lewis v. Casey, 518 U.S. 343, 357 (1996) (citing Missouri v. Jenkins, 515 U.S. 70, 88, 89 (1995)).

334. *See supra* Section II.A.

335. *See supra* Section II.B.1.

336. *See supra* notes 270–85 and accompanying text.

337. *See* BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:5 (2d ed.), Westlaw MTLLL.

338. RICHARD L. HASEN, REMEDIES 5 (2d ed. 2010) (emphasis omitted).

339. *See, e.g.*, LAYCOCK & HASEN, *supra* note 30 (describing restoration of the "rightful position," as far as possible, as "the essence of compensatory damages").

aim of equitable remedies, including those in public law.[340] Complete restoration to the rightful position—sometimes associated with making a plaintiff "whole"[341]—may not be possible, especially when harm is challenging to measure in monetary terms.[342] But the rightful position standard can still be a "benchmark for judging various remedies."[343] Like evaluating the harmful effects of a legal violation, identifying the "rightful position" requires a judgment about which deviations from the plaintiff's pre-violation position warrant judicial remediation.[344]

On the expressive account, the rightful position should include the rightful *status*. A dignitary violation changes, or threatens to change, individuals' situations by lowering their status.[345] In these cases, restoring the rightful position, or preventing encroachment on it, should include rehabilitation or preservation of the party's status.[346] For instance (more examples are below), a judgment in a defamation case can help to restore the plaintiff's status as a respected member of society.[347]

The rightful position need not be the sole remedial aim. For example, Fallon and Meltzer have suggested in the context of constitutional remedies that "redress[ing] individual violations" is not the only proper remedial goal.[348] Courts may also seek to "reinforce structural values" and to "keep government generally within the bounds of law."[349] Thus, the goal of providing "individually effective remediation can sometimes be outweighed."[350] On the expressive account, courts are not ultimately bound to impose a remedy that relieves the dignitary effects of a legal violation; other principles may carry greater weight. But

340. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 87 (1995) ("[A]ll remedies" are designed "to restore the victims . . . to the position they would have occupied in the absence of [the defendant's] conduct." (citation omitted)).

341. *See* Hessick, *supra* note 25, at 744.

342. *See* Goldberg & Zipursky, *supra* note 261, at 961; Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 374–75 (2006); Sherwin, *supra* note 24, at 1392–93. Douglas Laycock has argued that courts have defined remedial "adequacy in such a way that damages are never an adequate substitute for plaintiff's loss." DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 4 (1991).

343. HASEN, *supra* note 338.

344. *See* Fallon, Jr. & Meltzer, *supra* note 26.

345. *See, e.g.*, Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 56 (2011) (explaining that insults put their targets in a subordinate status).

346. The account offered here is meant to be compatible with the view that, as Gregory C. Keating puts it, "[i]n tort law itself, remedial responsibilities arise out of failures to discharge antecedent responsibilities not to inflict injury in the first instance." Gregory C. Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY 293, 297 (2012). In other words, the obligation to restore the rightful position damaged by disrespect can be understood to "draw [its] obligatory force from the persisting normative pull of" the obligation not to disrespect the plaintiff at the outset. *Id.* at 309.

347. *See* Post, *supra* note 257, at 712–13.

348. Fallon, Jr. & Meltzer, *supra* note 26, at 1787.

349. *Id.* at 1778–79, 1787.

350. *Id.* at 1779. For an argument that limiting certain remedies (in particular, money damages for constitutional violations) "fosters the development of constitutional law," see John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999).

to the extent courts consider the rightful position in imposing a judicial remedy, they ought to take the rightful status into account.

How, then, can a remedy address the dignitary effects of a legal violation? A powerful mechanism is the expression of respect. In imposing a remedy that recognizes the dignity of the individual whose rights were violated, a court reaffirms the status that the legal violation denied.[351] As noted, a defamation judgment illustrates how a remedy can redress the negative dignitary effects of a legal violation by sending the message that the plaintiff is worthy of respect.[352] Another example involves Fourth Amendment prohibitions on illegal searches.[353] These prohibitions are sometimes tied to dignitary interests; for instance, Justice Sotomayor wrote in dissent in the 2016 case *Utah v. Strieff* about "the humiliations" and "violat[ions]" of "dignity" stemming from suspicionless searches,[354] and she noted that police stops absent adequate cause can be "degrading" and "risk treating members of our communities as second-class citizens."[355] A remedy for an illegal search—ranging from a damages award to an injunction against ongoing government practices to a declaration that the relevant conduct is unlawful—can, by countering the message of second-class citizenship sent by the legal violation, signal respect for the plaintiff's dignity.

A remedy that redresses a dignitary violation may do more than expressing respect. A monetary remedy, such as a large damages award in an excessive force case, can indicate the seriousness with which society treats a dignitary violation and express respect for the victim.[356] Injunctive relief requiring the defendant to take material actions, such as changing the physical layout of a prison, can similarly communicate that the plaintiffs are entitled to greater respect.

Thus, the term "expressive remedy" does not cover only remedies with no benefits other than expressing respect. It refers to a remedy for which a description of the relief provided would be incomplete without reference to its function of expressing respect for the plaintiff's dignity. At the same time, the expressive account provides a justification for a remedy with the primary or even sole beneficial effect of expressing respect. An example is a nominal damages award for a past violation of procedural due process that caused no material harm and is not likely to recur.[357]

Another example of dignitary relief comes from the 2017 Supreme Court case *Sessions v. Morales–Santana*, in which the Court held unconstitutional an immigration law that treated children of certain mothers more favorably than children

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351. In forward-looking relief cases, a remedy can address dignitary harm by protecting against its occurrence.

352. *See supra* note 347 and accompanying text.

353. For discussion of the relationship between dignity and Fourth Amendment doctrine, see, for example, Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1015–18 (2014).

354. Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

355. *Id.* at 2069.

356. *See supra* note 309 and accompanying text.

357. *See* Carey v. Piphus, 435 U.S. 247, 266–67 (1978); *see also infra* Section III.B.

of similarly situated fathers.[358] The discrimination could not stand, the Court stated, "under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens."[359] Yet the Court's remedy was to extend the more stringent rule governing citizenship so that it covered both fathers and mothers equally, not to grant parents of both genders the benefit of the more lenient rule.[360] As a result, the plaintiff remained a non-citizen.[361] In the view of two Justices, it was therefore "unnecessary" for the Court to invalidate the law.[362] However, the Court majority replied, "discrimination itself . . . perpetuat[es] 'archaic and stereotypic notions' incompatible with the equal treatment guaranteed by the Constitution."[363] A plausible way to understand the Court's ruling is that it targeted the dignitary harm arising from being subject to a discriminatory law,[364] even though it did not remedy the harm of being placed in removal proceedings.[365]

Punitive damages and declaratory judgments, too, are well suited to express respect when the plaintiff has suffered dignitary harm. For instance, when a jury hands down a large punitive damages award in an employment dispute involving sexual harassment, it signals that the plaintiff's dignity matters and that the defendant is not entitled to trample on it.[366] This means the plaintiff occupies a certain status, for those who violate the plaintiff's dignity are to be held accountable. It also means the defendant does not occupy the favored position arrogated in

358. Sessions v. Morales–Santana, 137 S. Ct. 1678, 1686 (2017). Thanks to Vicki Jackson for raising this example.

359. *Id.* at 1698.

360. *See id.* at 1701.

361. *See id.* at 1688, 1701.

362. *Id.* at 1701 (Thomas, J., concurring in the judgment in part).

363. *Id.* at 1698 n.21 (majority opinion) (quoting Heckler v. Mathews, 465 U.S. 728, 739 (1984)).

364. *See id.* at 1688; Kristin A. Collins, Comment, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 208 (2017) ("When the Court issued its opinion on June 12, 2017, Morales-Santana may have been relieved of the stigma caused by the gender-discriminatory citizenship statute."). For discussion of the relationship between expressivism and the Supreme Court's jurisprudence on "leveling up" versus "leveling down," see Louis Michael Seidman, *The Ratchet Wreck: Equality's Leveling Down Problem* 44–52 (Georgetown Univ. Law Ctr., 2020), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3348&context=facpub [https://perma.cc/4AMF-FAQ2].

365. A complication is that the discrimination was directed most immediately at Morales–Santana's father, not at Morales–Santana himself. Morales–Santana, however, may still have had a dignitary interest in not being subject to a discriminatory rule.

366. For discussion of connections between punitive damages and respect or expression of a message, see, for example, Colby, *supra* note 24, at 434 ("Punitive damages vindicate the dignity of an individual victim by allowing her to punish the defendant for committing a humiliating or insulting tort upon her."); Galanter & Luban, *supra* note 24, at 1432–34 (describing punitive damages as an expressive defeat); Hershovitz, *supra* note 24, at 27 ("[T]he damages were punitive, so the messages were targeted toward the reprehensibility of the wrongs."); Sebok, *supra* note 24, at 1008 (describing "the private right not to have one's dignity violated" as the right "whose violation grounds [the] award" of punitive damages); and Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 139 (2005) (pointing to one role of punitive damages "as vindicating the plaintiff and raising his status"). Of course, there are other (including more deterrence-oriented) accounts of punitive damages. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 904–47 (1998).

violating the plaintiff's dignity.[367] Punitive damages, then, can alleviate the harmful *intangible* effects of a legal violation[368] even if they do not provide "compensation" in the sense that a defendant returns a material good to the plaintiff.[369] Further, the dynamic involved in punitive damages bears some similarities to the one that occurs when a judge in a criminal case notes the egregiousness of the defendant's conduct in explaining a sentence in court.[370] Though the appropriateness of both punitive damages and judicial denunciations in criminal cases is disputed,[371] these actions can affect the status of the parties in ways that provide dignitary relief.

Turning to declaratory judgments: these remedies can certainly advance material aims, as with adjudication of lucrative patent-related rights.[372] When the plaintiff's dignity has been violated, however, declaratory judgments can also publicly announce that the plaintiff is entitled to respect. Moreover, on the expressive account, threatened dignitary harm should be able to satisfy the need for an "actual controversy," a jurisdictional prerequisite for issuance of a declaratory judgment.[373] If, for example, a city proposes to enact an ordinance that would condemn a certain religion,[374] the prospect of dignitary harm could (on the

367. For discussion of this dynamic in criminal law, see Hampton, *supra* note 204, at 1686–87 and Kleinfeld, *supra* note 215, at 1507–09.

368. For discussion of the relationship between punitive damages and compensation, see, for example, Colby, *supra* note 24, at 435 and Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 197 (2003).

369. Drawing on a distinction between "fair" and "full" compensation in John Goldberg's work, a remedy for dignitary harm could provide a form of "fair compensation" based on a normative assessment of the defendant's conduct even if the remedy does not provide "full compensation" in the sense of indemnifying the plaintiff for his or her losses. *See* John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 465–66 (2006). More generally, the "civil recourse" theory proposed by Goldberg and Zipursky posits that lawsuits "empowe[r] [victims] to act against others who have wronged them." Goldberg & Zipursky, *supra* note 261, at 974; *see also* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 29–30 (2020) (describing how "tort law is structured such that it . . . empowers victims"). The civil recourse account is not necessarily dignitary in the sense discussed here; in particular, victims do not necessarily seek recourse for disrespectful treatment.

370. *See, e.g.*, Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1574–75 (2012) (quoting Judge Chin's statement, in sentencing Bernard Madoff, that "the message must be sent that Mr. Madoff's crimes were extraordinarily evil" and "more is at stake than money").

371. *See, e.g.*, Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 6–7 (2004). As to judicial denunciations, the remarks of Judge Rosemarie Aquilina in sentencing Larry Nassar, formerly of U.S. Gymnastics, for sexual abuse sparked debate about whether she had hewn to the judicial role. *See* Anne E. Gowen, *How the Judge in Larry Nassar's Case Undermined Justice*, TIME (Jan. 26, 2018, 1:15 PM), https://time.com/5119433/larry-nassar-judge-rosemarie-aquilina-justice/.

372. *See* ROBERT A. MATTHEWS, JR., 5 ANNOTATED PATENT DIGEST § 36:8.10 (2020), Westlaw ANPATDIG.

373. 28 U.S.C. § 2201(a) (2018).

374. *See* Catholic League for Religious & Civil Rights v. City of San Francisco, 624 F.3d 1043, 1047–50 (9th Cir. 2010) (holding that Catholic plaintiffs had standing to challenge a city resolution "denouncing their church and doctrines of their religion").

expressive account) ground federal jurisdiction to seek a declaratory judgment action.

The argument here—that the expression of respect is an appropriate role for federal judicial remedies—involves interpretation and justification of certain existing practices, such as punitive damages. But the argument also speaks to what the law should be. Judicial relief recognizing litigants' dignity ought to be not only preserved but also expanded. Before Part III explains how, the Article fleshes out several features of the expressive account: the issue of when an expressive remedy is warranted; the interactions among courts and defendants involved in the imposition of such a remedy; the relationship between an expressive remedy and the dignitary benefits of procedure; and the use of an expressive remedy to provide relief to members of a collective.

2. When an Expressive Remedy Is Warranted

An expressive remedy is an appropriate response to a legal violation that imposes dignitary harm. But when does a legal violation cause dignitary harm? In some sense, all legal claims might be understood to implicate dignity or respect: to violate people's legal rights could be viewed as not according adequate significance to their legitimate interests. But the aim here, as noted, is to capture the particular features of a social experience in which people are treated as though they do not sufficiently matter, are treated in an exclusionary manner, or are unduly exposed.[375]

This Section provides benchmarks to aid the analysis of when a legal violation is especially likely to cause dignitary harm. These factors are distilled from the foregoing discussion of judicial decisions and empirical work demonstrating the relevance of dignity and respect to civil litigation.[376] The issue of when precisely a legal violation imposes dignitary harm depends on social context, and this Article does not attempt to provide a comprehensive list of necessary and sufficient conditions. But the following factors can assist in making the determination.[377] As an institutional matter, these determinations can be made by courts in contexts where they are already tasked with deciding whether parties have received complete relief, as described in Part III below. Legislatures can also draw on these factors in enacting laws providing for remedies that redress dignitary harm.

First, then, intentionality is relevant to whether a legal violation has an especially strong propensity to express disrespect. An act done with the intention to harm—or at least with reckless disregard for the likelihood that harm will result—has a clearer demeaning message.[378] In the words of Justice Oliver Wendell

375. *See supra* notes 195–200 and accompanying text.

376. *See supra* Section II.B.2.

377. These criteria overlap with "dignity's domain" as described by Shapiro. *See* Shapiro, *supra* note 24, at 524–25 (discussing "the nature of the substantive legal claims" and "the identity of the parties to a lawsuit").

378. *See* Sherwin, *supra* note 24, at 1394 ("Deliberate or reckless harm can also be seen as an expression of contempt for the intrinsic worth of the victim.").

Holmes, "[E]ven a dog distinguishes between being stumbled over and being kicked."[379] Intentional behavior is not the only type of conduct that can constitute a form of disrespectful treatment. Drawing on an example in which a negligent driver greatly injured a passerby, Scott Hershovitz suggests that the driver's conduct sent the message "I don't have to watch out for you."[380] But as the driver's conduct moves along a spectrum from negligence to malice, the severity of the disrespect rises concomitantly.

Second, the content of the claimed legal violation affects its propensity to cause dignitary harm.[381] Given the close association between social exclusion and disrespectful treatment, a legal violation that discriminates against members of a group based on a stigmatized trait is particularly likely to impose dignitary harm.[382] Other examples involve actions that subject their target to societal disdain, such as defamation,[383] or to undue exposure, as with violations of privacy.[384]

Third, the identity of the parties affects the extent to which a legal violation imposes dignitary harm.[385] A lawsuit brought by an individual or group of individuals, particularly against a more powerful entity, seems more likely to involve dignitary factors than a suit between large companies.[386] The former type of interaction may well reflect more visceral objections to disrespect,[387] and powerful entities are particularly capable of sending the message that the other party does not bear much weight. Legal violations carried out by state actors, in particular, may be especially likely to cause dignitary harm because they may be perceived as acts endorsed by the community at large.

These criteria can inform courts' efforts to make more concrete the inquiry into when complete relief requires redress for dignitary harm. In addition, the accretion of judicial rulings identifying certain types of harms as dignitary would

379. O. W. HOLMES, JR., THE COMMON LAW 3 (Boston, Little, Brown, and Company 1881); *see also* Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1033 (2010) (finding that "whether a breach was intentional does in fact significantly affect the amount of damages demanded by the promisee").

380. Hershovitz, *supra* note 24, at 22.

381. *See* Shapiro, *supra* note 24, at 524.

382. *See supra* notes 233–42, 297 and accompanying text.

383. *See* Post, *supra* note 257 ("The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society."); *see also supra* note 296 and accompanying text (discussing studies of defamation suits).

384. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 594 (2006) ("[T]he knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance."); Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1886–87 (2019) (describing the role of sexual privacy in promoting dignity and respect).

385. *See* Shapiro, *supra* note 24, at 525.

386. *See supra* notes 288–300 and accompanying text; *cf.* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1315 (2005) ("Intraorganizational cases are significantly more likely to settle . . . than cases brought by individual plaintiffs.").

387. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 148–49 (2011).

create a body of precedent from which later courts could draw. The development of precedent also helps to address the concern that, from an evidentiary perspective, it is too difficult to identify dignitary claims.[388] Judicial decisions or legislative enactments characterizing certain types of harm as dignitary would alleviate the pressure for courts to engage in this determination on a case-by-case basis. In characterizing certain claims as dignitary, courts or legislatures would paint in a broad brush. But they would provide a framework to guide structured inquiry in subsequent cases.

More generally, the purpose of the expressive account is not to produce in advance a set of determinate resolutions to cases, a task that depends heavily on context. The purpose is to reorient thinking about the function of judicial remedies and the complete relief principle so that dignitary effects can be more readily taken into consideration.

3. Courts, Defendants, and the Expression of Respect

When a court awards an expressive remedy, from where does the show of respect come—the defendant or the court? It may seem incongruous to characterize an expression of respect from a court as a remedy for the plaintiff. Judicial remedies, after all, may be viewed as a means of inducing *the defendant* to do something to the plaintiff that rectifies the damage the defendant did, or a means of inducing the defendant not to do something to the plaintiff. Justice Scalia suggested such a view in his opinion for the Supreme Court on prevailing parties: "At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces. . . . Redress is sought *through* the court, but *from* the defendant."[389] Can a ruling from a court, then, rectify dignitary harm? And if the show of respect is to come from the defendant, how can a court mandate that the defendant adopt a certain attitude toward the plaintiff?

As an initial matter, an expressive remedy can take effect through a court's order to a defendant to take some action or to refrain from taking some action. This could happen if, for instance, a court orders a company to pay punitive damages for creating a hostile work environment or orders a police department to stop engaging in illegal searches. Ordering the defendant to act (or not act) in certain ways sends the message that the plaintiff occupies a status higher than that of someone who could rightfully be treated in the way the defendant treated the plaintiff. The defendant need not personally assume a respectful attitude toward the plaintiff, and it is hard to see how the court could order the defendant to do so. To the extent such an attitude is viewed as necessary in order for the show of respect to come from the defendant, then, the show of respect involved in an expressive remedy need not come from the defendant.

388. For an argument against the view that "tangible" harm is more susceptible to evidentiary proof and should thus more readily count as injury in fact, see Bayefsky, *Tangibility*, *supra* note 27, at 2346–52.

389. Hewitt v. Helms, 482 U.S. 755, 761 (1987).

Nonetheless, an expressive remedy requires the defendant to act in the manner that would be warranted if the defendant had viewed the plaintiff with respect. In this way, the court's order imposing a remedy telegraphs to the public, as a matter of social meaning, that the plaintiff's dignity is to be respected.[390] One way to interpret this phenomenon is to say that the show of respect comes from the court. The court's remedy manifests respect, however, precisely because it acts on the defendant in a certain way. In other words, the defendant does not drop out of the picture even if the defendant does not (and cannot be ordered to) adopt a genuinely respectful attitude toward the plaintiff.

This point can be extended to situations in which a remedy does not even require the defendant to take an action with a particular physical or economic result. An example is a declaratory judgment regarding a constitutional violation. Even in these cases—drawing on themes in the work of both Margaret Radin and Emily Sherwin—a judicial remedy can adjust "the relative positions of the claimant and the wrongdoer" from "an outcome in which [these] positions . . . are deemed to be unfair."[391] As a consequence, the defendant's status is lowered from the one the defendant arrogated to himself or herself in committing the legal violation.[392] For example, a declaration that a prison official treated a prisoner in a degrading manner in violation of the Eighth Amendment telegraphs that the prisoner is entitled to greater respect and that the official was not entitled to "lower" the plaintiff in that manner. Even if the court does not order the prison to take material steps (because, say, the prison has since changed its policies, and damages are blocked by immunity), the declaration serves the remedial purpose of signaling that the plaintiff was entitled to respectful treatment that the plaintiff did not receive.

It may be argued that a remedy does not really "act" on a defendant if it does not impose a material sanction. But as Nicholas Parrillo has explained in the context of administrative remedies, the threat of contempt findings against administrative agency officials is taken "quite seriously and personally" even though actual contempt sanctions are rare, because officials "desire to avoid . . . shame."[393] "The desire to avoid such shame is a powerful (if not perfect) motivator, regardless of any material sanction."[394] So too, a remedy communicating that the plaintiff was wrongfully treated with disrespect can act on the defendant even if not through material levers.

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390. *See* Radin, *supra* note 24, at 85 (noting that compensation can be conceived not as "a quid pro quo, but rather a symbolic action that reinforces our commitments about rights and wrongs").

391. Sherwin, *supra* note 24; *see also* Radin, *supra* note 24, at 69 ("[C]ompensation can symbolize public respect for rights and public recognition of the transgressor's fault by requiring something important to be given up on one side and received on the other, even if there is no equivalence of value possible.").

392. *See* Sebok, *supra* note 24, at 1019.

393. *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 777 (2018); *see also* Sunstein, *supra* note 213, at 2030 ("The expectation of shame . . . is usually enough to produce compliance.").

394. Parrillo, *supra* note 393.

Therefore, the message of respect involved in an expressive remedy comes in a meaningful sense from the court, though not without an impact on the defendant.[395] But the question may arise whether *all* remedies from a court communicate respect for the plaintiff. If so, there would be a lack of symmetry between dignitary harm and dignitary relief: not all harms would be dignitary, but all remedies would be expressions of respect. As earlier noted, however, not all harms are dignitary to the same extent.[396] Further, not all court-issued remedies express respect for dignity to the same extent.

To be sure, there is a sense in which any remedy that a court imposes sends the message that the plaintiff's legal rights must be observed. This message could be interpreted as one of "respect," as the word is sometimes used. But respect, for current purposes, refers to *respect for dignity*: the recognition that a person matters, fully belongs to a relevant community, and is entitled to avoid undue exposure.[397] Not all remedies manifest respect, in this sense, to an equal degree. A court is more likely to manifest respect for dignity when it awards punitive damages in a discrimination case between a powerful boss and a former employee than when it awards compensatory breach-of-contract damages in a commercial dispute between two large companies.

A related way to put the point is that "being respected," in the sense at issue here, is not identical to "being right." Any judicial remedy issued after a finding of liability tells a plaintiff that, in some respect, he or she is right and the defendant is wrong. But not all circumstances in which a court says a plaintiff is right are ones in which the court affirms the plaintiff's dignity.

So when does a remedy express respect for dignity? First, a remedy is most likely to send this message when the legal violation is widely considered to impose dignitary harm—due to the intentionality of the violation, the content of the violation, or the identity of the parties.[398] Of course, a judicial remedy could fail to express respect even when the relevant legal violation caused dignitary harm, as when a court issues a small compensatory damages award in a case involving outrageous conduct. But when a legal violation is broadly perceived to cause dignitary harm, a judicial remedy is especially prone to be understood, as a matter of social meaning, to send the message that imposition of this harm was improper and that the plaintiff is entitled to be treated respectfully.

A second marker of a remedy with heightened propensity to express respect is that the remedy does not appear to have the sole aim of compensating for material harm. This can occur when the remedy lacks substantial economic or physical consequences, or when a monetary award (like punitive damages) has a social

395. *See* LAHAV, *supra* note 312, at 32 (describing litigation as a process that involves recognition both from the defendant and from the court); Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1667 (2016) ("Litigation provides participants with an official form of governmental recognition.").

396. *See supra* Section II.C.2.

397. *See supra* Section II.A.

398. *See supra* Section II.C.2.

meaning other than returning to a plaintiff the sum that the plaintiff lost. Not every remedial function other than compensation for material harm is dignitary. But the absence of material effect is a tipoff that expressing respect is plausibly part of a remedy's role.

A third factor bearing on a remedy's propensity to express respect for dignity is the institutional structure that led to imposition of the remedy. A remedy that emanates from a court with broad reach is well placed to send the message that the plaintiff is entitled to a certain status within society at large. The Supreme Court ruling that there was a constitutional right to same-sex marriage, for instance, has frequently been interpreted to signal greater (though not, by any means, universal) societal acceptance of same-sex relationships.[399] A remedy can also be interpreted to embody societal judgments if it results from a jury's verdict.[400]

A fourth factor is the language a court uses in imposing a remedy.[401] Judicial statements referring to breaches of the plaintiff's dignity help to send the message that the plaintiff should have been treated with greater respect. Even if these statements do not technically constitute a *court-ordered* remedy, they are not irrelevant; indeed, language in an opinion can be sufficiently important to its targets that they seek to appeal in order to correct it.[402]

In sum, certain remedies manifest respect for dignity more than others. And there can be a meaningful symmetry between dignitary harm and expressive remedy even though the expression of respect comes, in a relevant sense, from the court.

4. Expressive Remedies, Procedure, and Collectivities

A couple of further points about expressive remedies help to flesh out the account. One relates to procedure. As noted, scholars working on procedural justice have long documented the important ways in which court procedures safeguard dignity.[403] It may be argued, then, that judicial procedures are adequate to treat litigants in a respectful manner independently of remedies.

At the outset, the dignitary value of procedure and the dignitary value of remedies are not either-or propositions. In fact, recognizing the significance of respectful treatment in the procedural domain provides all the more reason to apply this recognition to another kind of judicial action, namely, imposition of remedies. More fundamentally, dignity-enhancing procedures cannot simply take the place of dignity-enhancing remedies.[404] Say that victims of outrageous

399. *See supra* note 238.

400. *See* George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1, 9 (1992).

401. *See* Foster Calhoun Johnson, *Judicial Magic: The Use of Dicta as Equitable Remedy*, 46 U.S.F. L. REV. 883, 918–28 (2012).

402. *See infra* notes 499–507 and accompanying text.

403. *See supra* notes 312–15 and accompanying text.

404. Litigants' perceptions of a suit's outcome are not irrelevant to their judgments regarding litigation's fairness. For example, Lind et al. observed that subjective perceptions of the "outcome

conduct seek punitive damages and undergo a litigation procedure in which their views are heard and pertinent reasons given; nevertheless, they secure only a small compensatory damages award. Those individuals may justifiably sense that litigation failed to provide adequate vindication, and the shortfall in respect results from the character of the remedy. The same is true of plaintiffs who fail to secure a declaratory judgment that a government official violated their constitutional rights—even if the plaintiffs received dignity-enhancing procedure. Thus, the importance of dignity in the procedural domain does not furnish less reason to emphasize this value in the area of remedies.

A second point relates to collective redress. Just as harm to an individual can be based on membership in a collective, the scope of the remedy may extend beyond the individual.[405] To take a non-legal example, if schoolchildren condone the mocking of a Mormon child at school, they do not fix the problem by stopping the mocking of that child while allowing other Mormon children to be mocked. In fact, respectful treatment targeted narrowly at an individual—say, if an employer promotes one woman and continues to discriminate against others—may risk treating that person as a "token" or signaling that the harm is not being taken seriously.[406] In other words, if a plaintiff suffers dignitary harm by virtue of membership in a collective, a remedy that puts the plaintiff back in the rightful position must "effect a change in the status of the group."[407] The question of how and when judicial remedies can account for the status of a collective is addressed in the course of applying the expressive account in Part III. The point here is that the interests of individuals other than the plaintiff should not be excluded in calibrating dignitary relief.

D. OBJECTIONS TO THE EXPRESSIVE ACCOUNT

In the course of explaining the expressive account of federal judicial remedies, several potential objections have been addressed implicitly or explicitly—for instance, that it is impossible to identify circumstances that warrant dignitary relief more than others; that it is incongruous to characterize an expression of respect from a court as a remedy for the plaintiff; and that dignity-enhancing procedure renders expressive remedies unnecessary. This Section considers two further challenges: that the expressive account is incompatible with historical limitations on federal judicial authority, and that it falls afoul of the prohibition on advisory opinions.

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relative to expectations" are correlated with procedural justice judgments. E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L. F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 971 (1990).

405. In the context of racial segregation, Girardeau A. Spann has noted that "[s]egregation inflicts a systemwide injury, and the remedy for that injury must be systemwide as well." Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 1000 (2020).

406. *See* Terry Morehead Dworkin, Aarti Ramaswami & Cindy A. Schipani, *A Half-Century Post-Title VII: Still Seeking Pathways for Women to Organizational Leadership*, 23 UCLA WOMEN'S L.J. 29, 66 (2016).

407. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 87 (1978) (emphasis omitted).

1. The Historical Objection

The Supreme Court has stated that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."[408] It may be contended that the interest in securing respect is "not an acceptable Article III remedy"[409] because courts have not traditionally provided such relief.

At the outset, any suggestion that Article III remedies must correspond one-to-one with historic court orders is subject to plausible critique.[410] The Supreme Court has never denied, for instance, that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[411] Recognizing, however, the relevance of history to the definition of federal judicial remedies: the legal interest in respectful treatment has robust historical grounding in the common law.[412]

Many "dignitary torts" have longstanding foundations. The element of force required for battery at common law could "be satisfied by even the slightest offensive touching."[413] This doctrine was consistent with, in Blackstone's language, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner."[414] Put differently, "[t]he interest protected by" offensive touching battery was "the interest in freedom from a bodily touching which is offensive to a reasonable sense of personal dignity."[415] The dignitary

408. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008) (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)); *see* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797–98 (2021) ("In determining whether nominal damages can redress a past injury, we look to the forms of relief awarded at common law."); Hessick, *supra* note 88, at 278–79 ("The Supreme Court has largely turned to the common law to glean the meaning of Article III."); James E. Pfander, *Standing, Litigable Interests, and Article III's Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 205 (2018) (noting the "Court's devotion to history in defining the role of the federal courts"). The Supreme Court has also emphasized history in cases addressing the equitable powers conferred on federal courts. *See, e.g.*, Grupo Mexicano de Desarrollo, S. A. v. All. Bond Fund, Inc., 527 U.S. 308, 318–19 (1999).

409. *See Steel Co.*, 523 U.S. at 107.

410. *See* Fallon, Jr., *supra* note 88, at 966 ("Since the collapse of the *Lochner* era, it has been widely recognized that modern legislatures should have broad authority to displace common law assignments of private rights and duties."); *see also* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 1003 (2020) (arguing that a statement in the Supreme Court case *Grupo Mexicano* about the historically bounded scope of equity power, "if taken literally, is a patently incomplete description of how our legal system now operates, or for that matter, of how it has operated for over a century").

411. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

412. Judicial accounts of the historical bounds on Article III authority not only refer to federal court precedents, but also emphasize common law tradition. *See Uzuegbunam*, 141 S. Ct. at 797–801; Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000).

413. Johnson v. United States, 559 U.S. 133, 139 (2010).

414. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (Oxford, Clarendon Press 1768).

415. Rollison, *supra* note 265 (citing nineteenth century cases); *see* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 114 (Pa. Oyer & Terminer 1784) ("[T]hough no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal difinition [sic] of [a]ssault and [b]attery.").

tort of defamation also has an extensive history.[416] The Delaware Supreme Court, summarizing the common law as it existed in 1838, stated "that written slander to be actionable, must impute something which tends to disgrace a man, lower him in, or exclude him from society, or bring him into contempt or ridicule."[417]

Exclusion of the legal significance attaching to respectful treatment, then, was not a "traditional, fundamental limitation[] upon the powers of common-law courts."[418] Moreover, the idea that judicial *remedies* could express respect has historical precedent. Punitive (or "exemplary" or "vindictive") damages have served many functions,[419] but one purpose has been to "vindicate" an insulted or humiliated plaintiff.[420] The North Carolina Supreme Court observed in an 1849 case on "exemplary" or "vindictive" damages that "[i]njuries, sustained by a personal insult, or an attempt to destroy character, are matters, which cannot be regulated by dollars and cents."[421] If the act of slander at issue were not punishable by exemplary or vindictive damages, the court continued, "it cannot be told, how soon a high character may be prostrated, and, when it is, damages will not restore it."[422]

The availability of nominal damages at common law also suggests a role for judicial remedies in expressing respect. One purpose of these damages (though not the only one) was to "vindicate[] deprivations of certain 'absolute' rights that are not shown to have caused actual injury."[423] Among suits in which these damages were awarded were those involving torts now called "dignitary"—such as battery, defamation, false imprisonment, and trespass to land—where no monetary damage was proven.[424] Though disrespectful treatment sometimes warranted more

416. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 381 (1974) (White, J., dissenting) (noting the long history of the common law of libel in colonial America); Seth F. Kreimer, *"Spooky Action at a Distance" : Intangible Injury in Fact in the Information Age*, 18 J. CONST. L. 745, 775 (2016) ("Justice Scalia's inclination to bar adjudicating claims of intangible harms to interests founded on 'Psychic Injury' rests uneasily with the common law of defamation.").

417. Rice v. Simmons, 2 Del. (2 Harr.) 417, 429 (1838); *see* BLACKSTONE, *supra* note 414, at 123–26 (characterizing "slanderous words" and "written libels" as among the "injuries affecting a man's reputation or good name" (emphases omitted)).

418. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550–51 (2016) (Thomas, J., concurring) (quoting Honig v. Doe, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting)).

419. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 492 (2008) (citing "retribution and deterring harmful conduct" as the principal modern rationales).

420. *See* Colby, *supra* note 24, at 434; Sebok, *supra* note 368, at 200–01.

421. Gilreath v. Allen, 32 N.C. (10 Ired.) 67, 69 (1849).

422. *Id*. at 70.

423. Carey v. Piphus, 435 U.S. 247, 266 (1978); *see* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 800 (2021) (describing nominal damages as a remedy "for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation"); Pfander, *supra* note 24, at 1620–22 (discussing the availability of nominal damages for violations of constitutional rights). Other historical purposes of nominal damages were to "establish a legal right" that could be lost (as through adverse possession) if the plaintiff did not protect it, *see* HUGH EVANDER WILLIS, PRINCIPLES OF THE LAW OF DAMAGES 34 (1910), and to supply a basis for an award of court costs, *see* 22 AM. JUR. 2D *Damages* § 13, Westlaw (database updated Nov. 2020).

424. *See* RESTATEMENT (FIRST) OF TORTS § 907 cmt. b (AM. LAW INST. 1939); DOBBS, *supra* note 82; Wells, *supra* note 263, at 1029.

than nominal damages,[425] the nominal remedy could still convey the weight society placed on the violation of rights and the importance of accountability.[426]

This is not to argue for a precise correspondence between the types of remedies justified at common law (or in other historical contexts) and the expressive remedies appropriate today. But history does not defeat the view that a judicial action manifesting respect is a proper exercise of federal courts' remedial authority.[427]

2. The Advisory Opinion Objection

The view that expressing respect for the plaintiff's dignity is a legitimate federal court remedial function may be charged with violating "the oldest and most consistent thread in the federal law of justiciability," namely, "that the federal courts will not give advisory opinions."[428] An articulation of this principle in an 1884 Supreme Court decision is as follows: "[N]o court sits to determine questions of law *in thesi*. There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property."[429]

The Supreme Court has treated suits seeking "moral" or "psychic" redress as requests for an advisory opinion. An example is the Court's statement in the attorney's fees context that "[t]he real value of [a] judicial pronouncement — what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion — is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*."[430] Such an effect, the Court stated, does not include "the moral satisfaction of knowing that a federal court concluded that [the plaintiff's] rights had been violated."[431] It may be argued—though the Court has not directly held as much—that a remedy with the sole effect of expressing respect is also a prohibited advisory opinion.

This argument, however, restates rather than justifies an account of federal judicial remedies that excludes dignitary relief. Though many formulations are used to characterize "advisory opinions,"[432] the most relevant one is as follows. A federal lawsuit, the Supreme Court has stated, must "promise [a] concrete benefit

425. *See, e.g.*, *Carey*, 435 U.S. at 262 (discussing defamation per se).

426. *See* Eaton & Wells, *supra* note 24, at 856 & n.205; Fallon, Jr., *supra* note 88, at 969–70; Pfander, *supra* note 24, at 1608.

427. *Cf.* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004).

428. Flast v. Cohen, 392 U.S. 83, 96 (1968) (quoting CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 34 (1963)).

429. Marye v. Parsons, 114 U.S. 325, 330 (1885). For an argument that "advisory opinions should not be viewed as constitutionally forbidden," see Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 129–34 (2007).

430. *Helms IV*, 482 U.S. 755, 761 (1987).

431. *Id.* at 762; *see* Campbell–Ewald Co. v. Gomez, 136 S. Ct. 663, 677–79 (2016) (Roberts, C.J., dissenting) (stating that a plaintiff's desire for "a federal court to say he is right" amounted to a request for an advisory opinion).

432. *See* Comment, *The Advisory Opinion and the United States Supreme Court*, 5 FORDHAM L. REV. 94, 96 (1936); *see also* Fallon, Jr., *supra* note 48, at 681–82 (noting different categories of advisory opinions).

to the plaintiff,"[433] and the court's judgment must resolve "a real and substantial controversy."[434] If respect is not a "concrete benefit," or if the interest in securing respect does not give rise to "a real and substantial controversy," then a remedy that expresses respect resolves only a "dispute of a hypothetical or abstract character."[435]

But then the claim that parties seeking respect are asking for an advisory opinion rests on a particular vision of an Article III remedy—a vision according to which the expression of respect does not qualify. As Ann Woolhandler and Caleb Nelson note, "to distinguish requests for advisory opinions from true 'Cases' and 'Controversies,' a court must distinguish interests that support litigation from those that do not."[436] That task is scarcely value neutral,[437] and this Article has provided reasons to suggest that the exclusion of dignitary interests is misguided. Specifically, respectful treatment has real effects on the status of parties, and these effects are normatively valuable, legally cognizable, and empirically meaningful.[438] Thus, a federal court issuing a remedy that manifests respect is not passing judgment on a hypothetical dispute in which nothing is actually at stake. The merits of the expressive account may, of course, be disputed. But the prohibition on advisory opinions is not an independent argument against this account.

Another challenge to the expressive account, aside from the arguments grounded in history and the ban on advisory opinions, is that it is unworkable. The next Part responds to this challenge as part of the broader task of highlighting the expressive account's implications for concrete doctrinal issues.

III. APPLYING THE EXPRESSIVE ACCOUNT

What would the world look like if the expressive account were adopted? As an initial matter, part of the Article's aim is to interpret certain *existing* remedies, such as punitive damages and nationwide injunctions, through a dignitary lens—and thereby to provide added justification for these remedies. Another goal is to urge expanded consideration of dignitary relief in settings where courts are tasked with determining whether relief is "complete." This Part focuses on the latter goal, and it does so by exploring the same doctrinal settings discussed in Part I: mootness, attorney's fees, and nationwide injunctions. The current Part provides illustrative rather than exhaustive examples of the practical impact that adopting the expressive account would have. The account could also support other results, including the use of court-mandated apologies and legislative creation of causes of action to remedy dignitary harm in particular settings. Discussion of those results, however, is principally left for future work.

433. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 n.5 (1998).

434. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937).

435. *Id*. at 240–41.

436. Woolhandler & Nelson, *supra* note 427, at 722.

437. *See* Fletcher, *supra* note 284, at 231; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1479 (1988).

438. *See supra* Sections II.A–C.

In examining the impact of dignitary considerations on courts' assessments of complete relief, this Part identifies factors that courts can use to determine when a case calls for an expressive remedy. It also notes that the interest in providing dignitary relief can be outweighed, such as on the grounds that this relief is too challenging to administer or too costly. But remedies that express respect, this Part demonstrates, are feasible exercises of federal judicial authority.

A. MOOTNESS AND MONETARY OFFERS

The controversy over whether defendants can moot a suit—including a class action—by paying a monetary sum raises the question whether such a payment suffices for complete relief.[439] The Supreme Court hitherto has not resolved the issue of whether mootness would occur "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[440] The expressive approach would justify the holding that such a plaintiff has not received complete relief because the plaintiff's dignity has not been publicly recognized.

Imagine that a plaintiff sues a bank for fraud, and the defendant makes the deposit just described. The court enters judgment, but that judgment includes the terms of the defendant's proposed injunction. In that injunction, the defendant agrees to be barred from future legal violations but "denie[s] liability and the allegations made in the complaint, and disclaim[s] the existence of grounds for the imposition of an injunction."[441] Has the plaintiff received complete relief?

The expressive account provides reason to answer "no."[442] The monetary payout, coupled with a disavowal of liability, would not redress the dignitary harm that plausibly resulted when—if the plaintiff's allegations are credited—the bank took advantage of its customer and failed to treat the customer as possessing adequate significance.[443] True, the court would also enter judgment against the defendant. But a judgment that imposed an injunction containing the disclaimer of liability would, at best, send mixed messages about public acknowledgment of the wrong. Such a judgment could even be understood to make the court complicit in the denial of public recognition to the plaintiff.[444]

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

440. Campbell–Ewald Co. v. Gomez, 136 S. Ct. 663, 672 (2016). A recent development suggests that momentum may be building for an affirmative answer to this question. Justice Kavanaugh recently stated, in agreement with Chief Justice Roberts, "that a defendant should be able to accept the entry of a judgment for nominal damages against it and thereby end the litigation without a resolution of the merits." Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (Kavanaugh, J., concurring); *see id.* at 808 (Roberts, C.J., dissenting).

441. *Campbell–Ewald Co.*, 136 S. Ct. at 668. This scenario is based on the dispute before the Court in *Campbell–Ewald*, but the facts presented in the current hypothetical are not identical. In particular, the claim here involves fraud rather than, as in *Campbell–Ewald*, a violation of the Telephone Consumer Protection Act. *See id.* at 666–67.

442. *See* Lahav, *supra* note 395 (arguing that settlements "ordinarily cannot achieve" the litigation goal of "recognition from a government official").

443. *See* Meili, *supra* note 1, at 101.

444. Thanks to Teddy Rave for raising this point.

The mismatch between harm and remedy would be exacerbated if it emerged that bank officials had pursued a pattern of defrauding customers and then paying them off. The monetary remedy would then be even more likely to send the message that the defendant does not take the infringement of customers' rights especially seriously, but instead views a payout as the mere cost of doing business.[445] Though the injunction against future practices could signal that fraud warrants legal disapproval in general, the accompanying disclaimer of liability would detract from the message that the defendant treated a particular plaintiff, or set of plaintiffs, with disrespect.

It may be argued that if courts required defendants to admit liability before holding that they have provided complete relief, the admission would not actually express respect because it would stem from a court order and would not be the defendant's sincere view. But a court order, as earlier noted, can send the message that the plaintiff's dignity matters even if the defendant does not personally embrace this message.[446] At a minimum, an offer of judgment that explicitly *disclaims* liability fails to acknowledge adequately that the plaintiff's dignitary interests were infringed.[447]

Several features of the fraud scenario just discussed lead to the conclusion that a monetary offer disclaiming liability does not provide complete relief. First, the substance of the legal violation plausibly involves dignitary harm[448]—as captured, for example, in the words of a class-action plaintiff suing for misrepresentation: "I don't like the way the companies were just shoving things down our throats saying 'Oh, don't worry about it.'"[449] Second, and relatedly, the intentionality of the legal violation enhances the dignitary impact.[450] Though the bank may not be acting with specific intent to send a message of disrespect, fraud is an intentional tort, and a pattern of indifference to the foreseeable and visible effects of the bank's practices on its customers bespeaks at least reckless disregard with respect to the causation of harm. Third, the identity of the parties—individuals, or a set of individuals, facing off against a more powerful corporation—suggests

445. *See, e.g.*, SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011) ("[A] consent judgment that does not involve any admissions and that results in only very modest penalties is just as frequently viewed, particularly in the business community, as a cost of doing business . . . ."), *vacated*, 752 F.3d 285 (2d Cir. 2014).

446. *See supra* Section II.C.3.

447. The idea that an admission or finding of liability is relevant to complete relief is not a recent invention. Justice Thomas, concurring in the judgment in *Campbell–Ewald*, pointed out that at common law, "any would-be defendant who tried to deny liability could not effectuate a tender" offer sufficient to end the case. Campbell–Ewald Co. v. Gomez, 136 S. Ct. 663, 675 (2016) (Thomas, J., concurring in the judgment).

448. *See* Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1, 30 (1989) (arguing that fraud should be treated as a dignitary tort).

449. Meili, *supra* note 1 (describing plaintiffs' anger resulting from a feeling of disrespect).

450. *See supra* notes 378–80 and accompanying text.

that the suit has a greater dignitary valence than one between powerful companies.[451]

To the extent the inquiry into the nature of the suit, intentionality, and the identity of the parties seems overly indeterminate, judicial rulings on the topic could result in greater determinacy over time. Legislatures could also offer guidance on types of suits in which offers of judgment accompanied by disclaimers of liability would or would not provide complete relief. In arriving at these conclusions, the decisions of courts and legislatures could be informed by historical material regarding which claims have traditionally been viewed as raising dignitary concerns or by empirical research on the same issue. The bottom line is that courts should not ignore shortfalls in dignitary relief in considering whether an offer of judgment constitutes a complete remedy.

It may be objected that the expressive account licenses an unworkable view of judicial remedies. Treating defendants' disclaimers of liability as roadblocks to mootness, one could argue, might make defendants less likely to settle,[452] which could prolong costly litigation and clog up the courts. The result could be to hand too much control to plaintiffs[453] and to increase vexatious class action litigation.

In response, the consequences of applying the expressive account to mootness, including in class actions, should not be exaggerated. Parties could still voluntarily settle with a disclaimer of liability from the defendant, just as they could settle for less than the full monetary amount of the claim.[454] But defendants could not deposit a monetary sum in an account signed over to the plaintiff, ask the court to enter judgment, and then claim that the suit is moot because the plaintiff has received complete relief—at least without judicial inquiry into the presence of unsatisfied dignitary interests. Moreover, the expressive account does not block legislative or judicial measures to curb perceived excesses of class action litigation. But it limits courts' ability to deal with these concerns in a way that disregards the messages of respect or disrespect that remedies send.

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451. *See supra* notes 386–87 and accompanying text. If the claim is brought on behalf of a class, the interaction would no longer involve simply an individual and a corporation, and it may be argued that such a suit is fueled more by plaintiffs' attorneys than by customers in search of respect. But the class action in these instances could be viewed as a way to aggregate several individuals' quests for respect—given that many individuals lack the financial resources to bring such suits themselves. *See* Glover, *supra* note 11, at 1162–63; Lahav, *supra* note 317; Resnik, *supra* note 317.

452. *See* Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 350 (2007) (noting that many defendants, "both public and private, want to avoid making [a] formal declaration of wrongdoing").

453. *See* Campbell–Ewald Co. v. Gomez, 136 S. Ct. 663, 682–83 (2016) (Roberts, C.J., dissenting).

454. *Cf.* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("To be against settlement is not to urge that parties be 'forced' to litigate . . . . [It] is only to suggest that when the parties settle, society gets less than what appears, and for a price it does not know it is paying."). Some have argued that settlement can serve public values—for example, as Samuel Issacharoff and Robert Klonoff note, by addressing mass harms. *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1200–02 (2009).

B. MOOTNESS AND NOMINAL DAMAGES

The expressive account of an Article III judicial remedy calls for a distinctive approach to the question of whether a request for nominal damages suffices to defeat a mootness challenge.[455] To recap, the position that nominal damages are not enough to keep a suit alive reflects the concern that a suit requesting only nominal damages is a quest for "purely psychic satisfaction"[456] that "vindicates no interest."[457] Such a suit, the argument runs, is moot because there is "nothing of any practical effect left for [the court] to grant [the plaintiffs]."[458] The Supreme Court's recent *Uzuegbunam* decision rejected this argument, primarily on the ground that it was "against the weight of . . . history."[459] *Uzuegbunam*, however, raised more questions than it answered with respect to the nature of nominal damages and the justiciability of suits seeking this remedy.

A key question is whether the *Uzuegbunam* Court treated nominal damages as redress for the pure violation of a legal right, or as redress for some kind of additional harm.[460] On the one hand, the Court quoted historical pronouncements to the effect that "every violation imports damage" and stated that nominal damages served at common law as a remedy "for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation."[461] These statements might be read to suggest that nominal damages redress the pure violation of a legal right, though they could also be interpreted as points solely concerning historical practice. At any rate, the Court did not explain how, if nominal damages redress the pure violation of a legal right, they are compatible with constitutional standing doctrine's requirement of concrete harm over and above a legal violation.[462]

On the other hand, the Court indicated that "nominal damages are in fact damages paid to the plaintiff"—that is, "money changing hands."[463] The Court also took pains to reject the suggestion "that nominal damages are purely symbolic."[464] These statements suggest that nominal damages do not merely mark a legal violation; indeed, these statements come close to treating nominal damages like a small amount of compensatory damages.[465] But if nominal damages provide compensation for harm, what kind of harm? The Court did not say.

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

456. Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1268 (11th Cir. 2017) (en banc).

457. Morrison v. Bd. of Educ., 521 F.3d 602, 611 (6th Cir. 2008).

458. *Flanigan's*, 868 F.3d at 1264.

459. Uzuegbunam v. Preczewski, 141 S. Ct. 792, 801 (2021).

460. Thanks to Daniel Solove for discussion of this point.

461. *Uzuegbunam*, 141 S. Ct. at 799–800 (citation omitted).

462. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016).

463. *Uzuegbunam*, 141 S. Ct. at 800 (quoting Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1660 (2019)).

464. *Id*. at 800–01.

465. *See id*. at 807 (Roberts, C.J., dissenting).

Chief Justice Roberts' dissent noted the tension between *Uzuegbunam* and the Supreme Court's current standing doctrine.[466] The Chief Justice also warned against "equat[ing] a small amount of actual damages with the token award of nominal damages."[467] But the Chief Justice's solution was to turn to the circumscribed approach of federal judicial remedies. According to his dissent, an award of nominal damages in *Uzuegbunam* "would not change [the plaintiff's] status or condition at all" and would amount to a prohibited advisory opinion.[468]

The expressive account provides a more complete view of why a claim for nominal damages can withstand a mootness challenge. On this account, nominal damages can be vehicles for dignitary redress and, in that capacity, have a real impact on the relations between the parties. In response to conduct that violates bodily integrity even without causing physical harm, such as offensive-touching battery,[469] nominal damages signal that the plaintiff must be accorded greater significance. In response to defamatory conduct that "exclude[s]" the plaintiff "from society,"[470] nominal damages reassert the plaintiff's status as a member of the community with a good name. In response to a violation of procedural due process, nominal damages indicate that the plaintiff's right to be treated with dignity in dispute resolution was infringed even if that infringement did not ultimately cause a material deprivation.[471] More generally, in the context of constitutional rights, nominal damages can be viewed in terms of a paradigm in which hierarchical forms of honor are transformed in modern democracies into an egalitarian register.[472] The landowner's honor, violated through trespass,[473] becomes the dignity of those subject to a constitutional violation.

Therefore, nominal damages can have a "practical effect"[474] and "vindicate[] [an] interest"[475]: the interest in recompense for the disrespect that the legal violation conveyed. Moreover, the "symbolism" of nominal damages is not a knock against their effectiveness as a remedy—contrary to the Supreme Court's suggestion in *Uzuegbunam*.[476] "Symbolic" relief can send a message of respect precisely because it does not provide material benefit.

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466. *Id*. at 808.

467. *Id*. at 807.

468. *Id*. at 804.

469. *See supra* notes 413–15 and accompanying text.

470. Rice v. Simmons, 2 Del. (2 Harr.) 417, 429 (1838).

471. *See* Carey v. Piphus, 435 U.S. 247, 266 (1978); Pfander, *supra* note 24, at 1621–22.

472. *See* WALDRON, *supra* note 23, at 30–33; Siegel, *supra* note 23, at 1739 n.129; Whitman, *supra* note 260, at 1164–66.

473. *Cf*. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1714 (2012) ("If a company deliberately drags a mobile home across a snowy field over the objection of the owner, punitive damages might be available." (citing Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 156 (Wis. 1997))).

474. Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1263–64 (11th Cir. 2017) (en banc).

475. Morrison v. Bd. of Educ., 521 F.3d 602, 611 (6th Cir. 2008).

476. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 800–01 (2021).

Put differently, nominal damages can provide relief for a genuine harm: the denial of respect.[477] In *Uzuegbunam*, for example, nominal damages would provide relief for the dignitary harm resulting from restrictions on students' ability to distribute religious literature at a public college.[478] Though the procedural posture of *Uzuegbunam* may have precluded consideration of dignitary harm in that particular case,[479] the dignitary framework more generally provides a way to explain why nominal damages can redress actual harm. As a consequence, that framework is able to reconcile the practice of awarding nominal damages as a remedy for past harm with the Supreme Court's requirement of "injury in fact."

This is not to say that nominal damages always function as markers of dignitary redress. Sometimes, the imposition of nominal damages may even send the message that a legal violation is not being taken seriously. Judge Posner once wrote: "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."[480] Whether nominal damages send a message of respect or contempt in any given case is a matter of contingent social meaning. Nominal damages may be most likely to express respect when there is little quantifiable harm for which the plaintiff might seek compensation, or when the plaintiff does not seek a compensatory or punitive damages award—for instance, in cases involving violations of constitutional rights that lead to no quantifiable harm.[481] At least in these cases, nominal damages should not be viewed as a trivial remedy.

The expressive account thus offers conceptual support for the Supreme Court's conclusion that a claim for nominal damages does not defeat mootness, at least in the subset of cases where the plaintiff has suffered dignitary harm and a nominal damages award would send the message that the plaintiff is entitled to greater respect. The expressive account does not, however, suggest that the *only* proper reason to award nominal damages is to vindicate dignity. Thus, the expressive view is compatible with the understanding that nominal damages ward off mootness across the board because of the remedy's historical pedigree.

Chief Justice Roberts' dissent in *Uzuegbunam* expressed concern that the Court's opinion "admits of no limiting principle": "If nominal damages can preserve a live controversy, then federal courts will be required to give advisory

477. *See* Eaton & Wells, *supra* note 24, at 862–63.

478. *Uzuegbunam*, 141 S. Ct. at 796–97.

479. In *Uzuegbunam*, the Eleventh Circuit held that the plaintiffs had not adequately pressed a claim to have suffered reputational harm and "personal humiliation." Uzuegbunam v. Preczewski, 781 Fed. App'x 824, 829 (11th Cir. 2019), *rev'd*, 141 S. Ct. 792. Reputation and personal humiliation overlap with dignitary interests, though personal humiliation might refer to the psychological effects of dignitary harm rather than to status injury itself. The expressive account suggests that plaintiffs should plead dignitary harm (if applicable) in seeking nominal damages, and that plaintiffs could not then be charged with failing to "allege[] actual damages." *Uzuegbunam*, 141 S. Ct. at 803 (Roberts, C.J., dissenting).

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

481. *See, e.g.*, Reply Brief for the Petitioners at 22, *Uzuegbunam*, 141 S. Ct. 792 (No. 19-968) ("[E]xamples abound of constitutional injuries that often are not compensable, including unlawful entry of private residences, denial of kosher meals in prison, [and] zoning restrictions on religious institutions.").

opinions whenever a plaintiff tacks on a request for a dollar."[482] The *Uzuegbunam* opinion might be read to suggest that the ability to award nominal damages is an inherent feature of federal judicial authority.[483] But the opinion does not outright foreclose the power of legislatures to restrict the availability of nominal damages. Therefore, to the extent *Uzuegbunam* encourages a rise in the number of nominal damage claims, legislatures might seek to limit parties' ability to avoid mootness by appending a nominal damages claim to their suits. In that event, the expressive approach would favor preserving the capacity of nominal damages to withstand mootness at least when they rectify dignitary harm—for example, with a subset of claims that distinctively raise dignitary concerns.[484]

Overall, the relationship between nominal damages and mootness highlights the difficulties of characterizing "effectual" federal judicial relief.[485] The expressive account calls for recognition that judicial actions that cause dignitary effects, including through awards of nominal damages, are meaningful and legitimate exercises of federal judicial authority. At bottom, the notion that a remedy must have a "practical effect" should not obscure the normatively laden choices involved in determining which effects count.

C. PREVAILING PARTIES AND ATTORNEY'S FEES

Plaintiffs who receive a remedy that expresses respect for their dignity should be able to "prevail" within the meaning of attorney's fee shifting statutes. An example of how this principle would operate comes from cases involving jury findings of sexual harassment. The Eleventh Circuit has held that being "a prevailing party for purposes of" Title VII's fee shifting statute "requires the attainment of something more tangible than a jury finding of sexual harassment."[486] Thus, plaintiffs are not prevailing parties when juries find that defendants have "committed acts of sexual harassment . . . in violation of Title VII," but judgment is not ultimately entered in the plaintiffs' favor.[487] This could happen if, for example, the jury finds no damages are warranted in a suit seeking only damages,[488] or if the plaintiff's recovery is time-barred.[489]

In explaining the absence of prevailing party status in these cases, the Eleventh Circuit has quoted the Supreme Court's statement that "a hollow pronouncement

482. *See Uzuegbunam*, 141 S. Ct. at 803, 808 (Roberts, C.J., dissenting).

483. *See id.* at 799 (majority opinion) (citing historical statements to the effect that "every violation imports damage").

484. *See supra* notes 381–84 and accompanying text.

485. Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248, 1268 (10th Cir. 2004) (McConnell, J., concurring); *cf.* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1007 (2000) (supporting a shift in "the discussion away from constructions of the 'essence' of federal power, as if it existed ex ante or were fixed").

486. Myers v. Cent. Fla. Invs., Inc., 592 F.3d 1201, 1226 (11th Cir. 2010) (quoting Walker v. Anderson Elec. Connectors, 944 F.2d 841, 847 (11th Cir. 1991)).

487. *Walker*, 944 F.2d at 843, 847.

488. *See id.* at 844, 847.

489. *See Myers*, 592 F.3d at 1226; Bonner v. Guccione, 178 F.3d 581, 594, 597 (2d Cir. 1999).

on a matter of law" is "not the stuff of which legal victories are made."[490] That court thus rejected a plaintiff's argument that she had prevailed because "she won a favorable jury determination on the ultimate factual issue in the case and . . . this determination was an important part of 'settling the score' with her employer."[491] According to the Eleventh Circuit—and the Second Circuit, reaching a similar conclusion[492]—"the moral satisfaction of knowing that a federal court concluded that [a plaintiff's] rights had been violated" did not qualify as genuine relief for prevailing party purposes.[493] The Eleventh Circuit cited the Supreme Court's language tying this view to the prohibition on Article III courts' issuance of advisory opinions.[494]

The expressive effects of a jury finding of sexual harassment, however, should not be so readily overlooked. On the expressive account, public recognition of the plaintiff's experience of mistreatment helps to redress the disrespectful treatment to which a sexual harassment plaintiff was subject. A jury finding can express that public recognition, and so should be able to render a plaintiff eligible for prevailing party status even absent a more "tangible" remedy. Put differently, a "judicial pronouncement" properly constitutes a legitimate form of federal judicial relief.

The expressive account invites a slippery-slope challenge: Should "any favorable statement of law in an otherwise unfavorable opinion"[495] justify prevailing party designation? That result might drain defendants' coffers, including those of public entities. And too expansive an application of the "prevailing party" label could make courts reluctant to say anything positive about plaintiffs who will not receive a final judgment in their favor. Further, judges might decline to put special interrogatories to juries if a favorable answer would cause a plaintiff to prevail.

As an initial matter, the expressive account provides reason for courts to avoid taking steps to limit the vindicatory effect of judicial statements or findings. More fundamentally, however, "anything goes" is not the inevitable result of adopting the expressive account. As earlier noted, some judicial actions are more apt to express respect than others.[496] First, certain legal violations, such as sexual harassment, are especially likely to cause dignitary harm.[497] Second, the formality of a statement matters; an official finding carries more dignitary weight than an

490. *See Walker*, 944 F.2d at 847 (quoting *Helms IV*, 482 U.S. 755, 760 (1987)).

491. *Id.* The plaintiff in *Walker* dropped a request for a declaratory judgment prior to trial, a choice that the district court deemed strategic. *Id.* at 844. One might take the view, then, that plaintiffs should ask for declaratory judgments if they are seeking "moral satisfaction." Supreme Court precedent, however, would seem to foreclose the use of declaratory judgments for that purpose. *See Stewart II*, 488 U.S. 1, 3 (1988) (per curiam).

492. *See Bonner*, 178 F.3d at 593–94.

493. *Walker*, 944 F.2d at 847 (quoting *Helms IV*, 482 U.S. at 762).

494. *Id.* at 846–47 (quoting *Helms IV*, 482 U.S. at 761).

495. *Helms IV*, 482 U.S. at 762.

496. *See supra* Sections II.C.2–3.

497. *See, e.g.*, ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 214 (2019) ("[T]he need to be treated with dignity at work . . . implies a civil right to laws forbidding sexual harassment.").

informal judicial comment. Third, a jury finding may be particularly likely to express societal respect, as it better represents (at least, ideally) the view of a cross-section of the community. A fourth consideration is the statement's lasting impact. Prevailing party designation attaches to a plaintiff's success in litigation viewed as a whole.[498] Therefore, a favorable statement contradicted later in litigation may not provide much in the way of respect. In sum, courts are not bereft of criteria to use in determining when respect supports prevailing party designation.

In fact, courts have related experience with line-drawing problems involving parties' reputations. In particular, federal courts of appeals have distinguished between appealable findings of attorney misconduct and non-appealable judicial statements criticizing attorneys. To elaborate, "it is an abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations."[499] Justifications for this rule of appellate standing echo the circumscribed account of Article III remedies: "[a] winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear, such as that his opponent is a lawbreaker."[500] Judicial "[r]eluctance to review language divorced from results" persists regardless of how much "psychic gratification" the review could engender.[501]

In line with the "judgments, not reasoning" rule, many federal courts have declined to permit attorneys to appeal "mere judicial criticism of an attorney's conduct."[502] At the same time, several courts of appeals have held that attorneys may appeal judicial findings that they "engaged in misconduct, even if the court did not impose tangible sanctions."[503] These courts have not been swayed by arguments reminiscent of challenges to broader prevailing party designation—namely, the contention that permitting attorneys to appeal without "tangible" sanctions would "presage 'a breathtaking expansion in appellate jurisdiction'"[504] and make trial judges "more likely to refrain from speaking and writing

498. *See* Sole v. Wyner, 551 U.S. 74, 86 (2007) ("[A] plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under [42 U.S.C.] § 1988(b) if the merits of the case are ultimately decided against her.").

499. *In re* Williams, 156 F.3d 86, 90 (1st Cir. 1998) (citing, *inter alia*, Bolte v. Home Ins. Co., 744 F.2d 572, 573 (7th Cir. 1984)); *see* Jennings v. Stephens, 574 U.S. 271, 277 (2015) ("This Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*." (citation omitted)).

500. Ward v. Santa Fe Indep. Sch. Dist., 393 F.3d 599, 604 (5th Cir. 2004) (alteration in original) (quoting Chathas v. Local 134 IBEW, 233 F.3d 508, 512 (7th Cir. 2000)).

501. United States v. Accra Pac, Inc., 173 F.3d 630, 632 (7th Cir. 1999).

502. Zente v. Credit Mgmt., L.P., 789 F.3d 601, 604 (5th Cir. 2015) (quoting Adams v. Ford Motor Co., 653 F.3d 299, 304 (3d Cir. 2011)).

503. *Id.* (collecting cases); *see* Douglas R. Richmond, *Appealing from Judicial Scoldings*, 62 BAYLOR L. REV. 741, 759–60 (2010) (categorizing "courts' approaches to lawyers' appeals from judicial scoldings"). For a further discussion of the appealability of misconduct findings, see, for example, David A. Simon, *Mo' Money, Mo' Problems: Should Appellate Courts Have Nonparty Jurisdiction over Lawyers' Appeals from Nonmonetary Sanctions?*, 78 U. CIN. L. REV. 183 (2009).

504. *In re Williams*, 156 F.3d at 91 (quoting *Bolte*, 744 F.2d at 573).

candidly."[505] As a result, a judge's reprimand without a monetary penalty is usually appealable,[506] and "a finding of attorney misconduct in an order that is unaccompanied by a formal reprimand or the imposition of monetary penalties" is sometimes appealable as well.[507]

Concepts related to respect have featured in courts' explanations of their willingness to entertain appeals from factual findings of attorney misconduct. A finding of misconduct, the Third Circuit stated, "directly undermine[d] [the attorney's] professional reputation and standing in the community. . . . That is far from an insignificant affront."[508] The Ninth Circuit drew not only on potential harm to the attorney's career but also on the finding's likelihood "to stigmatize [the attorney] among her colleagues."[509]

It is not simple to distinguish "an express finding that a lawyer has committed specific acts of professional misconduct" from "routine judicial commentary or criticism."[510] Yet courts undertake this task. The Second Circuit, for example, has differentiated appealable "findings of violations of specific professional standards" from other judicial comments, such as a "warning" to an attorney "that it was not in his or any attorney's interest to conduct himself in a way that would lead a judge to question his integrity."[511] If courts can determine when stigma provides an adequate basis for appellate standing, then it is unduly pessimistic to suppose courts cannot decide when remedies for stigma justify prevailing party status.

The argument remains that treating plaintiffs as prevailing parties when a remedy relieves the effects of disrespectful treatment would impose high costs on defendants, including governments. But "prevailing" does not mean receiving a large attorney's fees award. After all, courts may decide that a prevailing plaintiff has not attained the "degree of success" needed to justify a substantial award.[512] In sum, the challenges involved in assigning prevailing party status to plaintiffs who secure a judicial expression of respect do not justify abandoning the effort.

D. NATIONWIDE INJUNCTIONS

The controversial remedy of nationwide or "universal" injunctions gains added justification from the expressive account. Complete relief for plaintiffs subject to disrespectful treatment calls for a judicial remedy reaffirming their status in the community. When the disrespectful treatment is based on a trait shared with

505. *Id*.

506. *See Adams*, 653 F.3d at 304–05.

507. *Id*. at 305.

508. *Id*. (citation omitted); *see* Parrillo, *supra* note 393, at 780 ("[W]hen appellate courts overturn criminal convictions for prosecutorial misconduct, they usually avoid revealing the prosecutor's name in the opinion.").

509. United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000).

510. Keach v. County of Schenectady, 593 F.3d 218, 226 (2d Cir. 2010).

511. *Id*. at 225.

512. *See* Hensley v. Eckerhart, 461 U.S. 424, 436 (1983) (identifying the plaintiff's "degree of success" as "the most critical factor" for determining the reasonableness of a fee award).

others, it is appropriate for the remedy to extend beyond the individual parties to a case.

An example comes from the litigation over President Trump's travel ban. District courts issued nationwide injunctions against enforcement of the ban.[513] The Supreme Court, striking down an injunction against the ban on the merits, did not reach the nationwide injunction issue.[514] The expressive account of judicial remedies provides a distinctive way to justify this kind of injunction.

In the travel ban litigation, the plaintiffs' claims included the assertion that President Trump's travel ban violated the Establishment Clause because it stemmed from animus against Muslims.[515] The plaintiffs in both the Supreme Court case and a parallel Fourth Circuit case included individual Muslims[516] who claimed (among other harms) that the travel ban "insulted" and "demeaned" them;[517] treated them "as . . . second class citizen[s]" on account of their "Islamic faith";[518] and "establish[ed] a disfavored faith" in Hawai'i and the United States.[519] These statements describe dignitary harms. The Supreme Court declined to decide whether "the claimed dignitary interest establishes an adequate ground for standing,"[520] as it found another basis for standing (and then ruled against the plaintiffs on the merits).[521]

The issue here is the proper scope of the remedy. If the plaintiffs had succeeded on the merits of the Establishment Clause claim, an injunction only against the treatment of individual plaintiffs would not have fully remedied their dignitary harms. Relief for the stigma imposed by the violation would have required public condemnation of the stigmatic message against adherents to the religion more generally. Justice Sotomayor may have alluded to this phenomenon when she stated in dissent that "[g]iven the nature of the Establishment Clause violation and the unique circumstances of this case, the imposition of a nationwide injunction was 'necessary to provide complete relief to the plaintiffs.'"[522]

To take another example, a federal district court in 2010 issued a nationwide injunction against enforcement of the "Don't Ask, Don't Tell" policy concerning gay, lesbian, and bisexual (LGB) servicemembers.[523] The Obama Administration

513. Trump v. Hawaii, 138 S. Ct. 2392, 2404, 2406 (2018) (citations omitted).

514. *Id.* at 2423.

515. *Id.* at 2406.

516. *Id.*; Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 254 (4th Cir.), *vacated*, 138 S. Ct. 2710 (2018).

517. *Int'l Refugee Assistance Project*, 883 F.3d at 260.

518. *Id.*

519. *Trump*, 138 S. Ct. at 2416 (citation omitted).

520. *Id.*

521. *See id.* at 2416, 2423.

522. *Id.* at 2446 n.13 (Sotomayor, J., dissenting) (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)).

523. *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011) (per curiam); Judgment and Permanent Injunction, *Log Cabin Republicans*, 716 F. Supp. 2d 884 (No. CV 04–08425–VAP (Ex)). Ultimately, the district court's judgment and rulings were vacated as moot after Congress repealed the "Don't Ask, Don't Tell" policy. *See Log Cabin Republicans*, 658 F.3d at 1165–66.

had asked the judge to limit the injunction to the 19,000 members of the plaintiff organization, the Log Cabin Republicans.[524] Here, too, the expressive account provides support for the nationwide scope of the injunction. Gay, lesbian, and bisexual servicemembers were objecting to a policy that, they alleged, stigmatized them based on a feature of their identity.[525] To permit individual members of the plaintiff organization to serve while openly LGB, yet requiring other servicemembers to stay in the closet, would fail to communicate that LGB servicemembers were valued members of the military. Even if it were logistically possible to authorize only some LGB servicemembers to come out, that approach would not have provided complete relief for members of the plaintiff organization.[526]

The principle that a nationwide injunction is appropriate only when needed to provide complete relief for the parties has been labeled indeterminate.[527] The same critique could be leveled at the idea that complete relief for the parties requires respectful treatment, which in turn necessitates relief for nonparties. In which cases does this scenario come to pass?

Certain benchmarks, if not hard and fast lines, can be applied. In determining whether respectful treatment of parties requires relief for nonparties, courts could consider the cohesion of the collective to which individual plaintiffs belong;[528] the societal association of the alleged legal violation with issues of respect, dignity, and stigma; and the extent to which the legal issue is of sufficiently general salience that a judicial ruling will send a widespread message.[529]

These benchmarks undeniably ask courts to make judgments about social meaning. But the Supreme Court embarked on this task in its same-sex marriage jurisprudence (as, arguably, did the dissenters).[530] And it is hard to see how

524. *See Judge to Military: Stop Discharging Gays Under 'Don't Ask, Don't Tell*,' NBC NEWS (Oct. 12, 2010, 3:45 PM), http://www.nbcnews.com/id/39637073/ns/us_news-life/t/judge-military-stop-discharging-gays-under-dont-ask-dont-tell/#.XZlhv0ZKg2w [https://perma.cc/DG4G-CEMR].

525. *See* McVeigh v. Cohen, 983 F. Supp. 215, 221 (D.D.C. 1998). For a vivid description of the harms imposed by this policy, see generally Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141 (1997).

526. *See Log Cabin Republicans*, 716 F. Supp. 2d at 888. Here, the Log Cabin Republicans organization (as distinct from individual members) was the plaintiff. *Id.* But individual servicemembers' harms were still at issue, for the district court found that the organization had "established standing to bring and maintain this suit on behalf of its members." *Id.* To the extent one still questions whether individual members' dignitary harm should factor into the remedy awarded to the plaintiff organization, one could limit the use of dignitary harm to justify an injunction reaching beyond the parties to circumstances involving individual plaintiffs.

527. *See* Bray, *supra* note 9, at 467.

528. This inquiry might be guided by jurisprudence regarding *United States v. Carolene Products Co.* footnote four. *See* 304 U.S. 144, 152 n.4 (1938).

529. *See, e.g.*, NAACP v. Brennan, 360 F. Supp. 1006, 1008, 1018–19 (D.D.C. 1973) (granting a nationwide injunction in "a case of nationwide significance in that it bears directly on the wellbeing and social dignity of migrant and seasonal farmworkers throughout the United States and its territories"); *see also* Siddique, *supra* note 178, at 2145 (observing that courts sometimes issue nationwide injunctions in public law cases "because a case is thought to be of national importance").

530. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("[L]aws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.");

courts, in applying terms like "reasonable" in various contexts, could altogether avoid parsing social expectations. Use of the benchmarks just discussed would not yield a definite answer in every case. Yet it would likely produce different results in, say, an equal protection case and a case concerning the geographic scope of the remedy for trademark infringement.[531] Additionally, the accumulation of court decisions focused on the circumstances under which relief for nonparties is needed to afford adequate respect to parties could, as Zayn Siddique has noted, "promote more consistent and reasoned decisionmaking" in this area.[532]

The discussion here provides no reason to overlook other critiques of nationwide injunctions, such as the view that they incentivize forum shopping;[533] cut off "percolation" among lower federal courts;[534] represent an end run against the class certification requirements of Rule 23;[535] or conflict with the doctrine that "nonmutual offensive issue preclusion does not apply against the federal government."[536] Yet the bounds of complete relief are frequently treated (by courts and commentators) as relevant to federal courts' constitutional authority to impose nationwide injunctions.[537] Hence, the expressive account provides further reason why an injunction extending beyond the parties is a legitimate use of Article III judicial power.

CONCLUSION

This Article has analyzed the appropriate role of federal judicial remedies. In deciding whether parties have received complete relief or litigation satisfaction, courts take a stand on the types of remedies they are empowered to, and ought to, provide. This Article has highlighted divergent understandings of what federal judicial remedies may and should do. Ultimately, the expression of respect for parties' dignity is a constitutionally legitimate and normatively sound remedial function.

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id. at 2642 (Alito, J., dissenting) ("[The *Obergefell* decision] will be used to vilify Americans who are unwilling to assent to the new orthodoxy.").

531. *See* Siddique, *supra* note 178, at 2112–14 (analyzing the use of nationwide injunctions in intellectual property litigation).

532. *Id.* at 2145.

533. *See, e.g.*, Bray, *supra* note 9, at 457–61; Wasserman, *supra* note 165, at 363–64.

534. *See, e.g.*, Bray, *supra* note 9, at 461–62 (observing that nationwide injunctions may prevent "more circuits [from] express[ing] their views, because parties in other circuits might no longer bring their own challenges").

535. *See, e.g.*, *id.* at 464–65; Morley, *De Facto Class Actions*, *supra* note 176, at 540–41.

536. Bray, *supra* note 9, at 464 & n.276 (citing United States v. Mendoza, 464 U.S. 154, 158 (1984)); *see* Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068, 1096–97 (2017) ("Nationwide injunctions circumvent [*Mendoza*'s] holding because . . . they make it very difficult for the government to relitigate an issue before another court."); Morley, *De Facto Class Actions*, *supra* note 176, at 533–34. *But see* Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1, 20–37 (2019) (arguing that *Mendoza* should be overruled).

537. *See supra* notes 171–78 and accompanying text.

At times, however, courts may justifiably leave unsatisfied parties' interests in seeking respect, as the discussion in previous Parts has indicated.[538] Indeed, the concerns regarding expressive remedies that have been mentioned thus far—such as the volume of claims—are not the only ones. Another issue involves the First Amendment implications of remedies requiring expressive action from the defendant.[539] For example, court-mandated apologies could help to remedy dignitary harm, but they could also be subject to First Amendment objections.[540] Though the constitutionality and advisability of court-ordered apologies as a civil remedy in the United States are topics left for future work, the broader point is that there are restrictions on the imposition of expressive remedies.

What happens, then, to the goal of providing complete relief? One might seek to reconcile the expanded scope of a legitimate judicial remedy with the permissibility of curtailing such a remedy by simply defining complete relief as the relief necessary to redress the legal violation, *given* concerns about which judicial actions would be "excessively costly or intrusive,"[541] or constitutionally problematic. If courts take this path, they should at least do so openly.

But another route is for courts to accept that their remedies do not grant complete relief to victims of a legal violation. When complete relief calls for a remedy that confers respect, courts that decline to provide this remedy leave a moral "remainder" even if their decisions are justified in the end. In this sense, the law of remedies, in Paul Gewirtz's terms, is "a jurisprudence of deficiency, of what is lost between declaring a right and implementing a remedy."[542]

Recognizing the existence of a moral "remainder" expresses respect for injured parties by signaling that damage has been done even when courts cannot fix it.[543] Acceptance of this kind of remedial "tragedy" also serves as a reminder that the judicial system, or even law more generally, is not fully capable of repairing the tear in the social fabric[544] that a legal violation has occasioned. This does not mean that trying is worthless, but that other sources of societal amelioration should also be pursued. In the end, even if complete relief is unattainable, the bar should not be lowered by ruling out the expression of respect as a legitimate remedial function for federal courts.

In sum, this Article has undertaken the following tasks. First, it has identified a cluster of views composing a circumscribed approach to the nature of a federal judicial remedy. Second, it has challenged the view that the provision of judicial

538. *See supra* text accompanying notes 454, 485, 495–98, 533–36.

539. More generally, First Amendment doctrine has limited the reach of certain torts protecting various types of dignitary interests. *See, e.g.*, Abraham & White, *supra* note 257, at 363–67; Tilley, *supra* note 257, at 72–76.

540. *See, e.g.*, White, *supra* note 305, at 1298–1300.

541. Fallon, Jr., *supra* note 48, at 704.

542. Gewirtz, *supra* note 35, at 587.

543. On the expressive significance of recognizing tragic choices, see, for example, DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 20 (2010).

544. For discussion of the social fabric metaphor, see Kleinfeld, *supra* note 215, at 1500.

validation is not a proper role for federal courts to play. Third, the Article has pointed to philosophical, legal, and empirical sources that provide grounding for remedies expressing respect for parties' dignity. Finally, it has offered criteria that can guide the determination as to when an expressive remedy is warranted.

Overall, the Article's aims have been to reorient thinking about the proper role of federal judicial remedies and to advance robust deliberation about remedial possibilities. The bounds of federal courts' remedial power ought to be determined with an awareness of the range of genuine alternatives and the stakes of choosing between them.