MODERN AMERICAN REMEDIES:
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PREFACE

This Supplement includes decisions through the end of the Supreme Court’s term on June 27, including its very important 2011 opinion on the scope of injunctions in the California prison litigation, and selected developments in the lower courts. Professors should look at the supplement to page 709, on constructive trusts in bankruptcy, at least a few days before they get to it in class. And at page 733, there is a much clearer statement of the facts in Mort v. United States; on that assignment, students should start with the Update before going to the main volume.

Students, just as no one expects you to memorize all the information in the main volume (see the preface to main volume), no one expects you to memorize all the recent decisions. But reviewing recent developments helps give you a sense of the field and its trajectory. The continuing flow of remedies litigation, especially in the Supreme Court of the United States, illustrates the continuing importance of these issues and the remarkable variety and novelty with which they appear.

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I am grateful to Sidney Helfer for research assistance.

Douglas Laycock
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CHAPTER TWO

PAYING FOR HARM: COMPENSATORY DAMAGES

A. The Basic Principle: Restoring Plaintiff to His Rightful Position

Page 15. At the end of the first paragraph of note 3, add:

3. More facts in Hatahley . . . .

The Threedy article is now published at 24 Am. Indian L. Rev. 1 (2010).

B. Value as the Measure of the Rightful Position

Page 33. After note 1, add:

1.1. Injured pets. The general rule is that the owner of a pet who is killed can recover only the market value of the pet as property. See note 2.e. at page 176 of the main volume. But if the pet is injured, owners can recover the costs of medical care. A handful of cases are collected in Kimes v. Grosser, 126 Cal. Rptr. 3d 581 (Ct. App. 2011), where defendant shot plaintiff’s cat with a pellet gun, and plaintiff spent $36,000 on veterinary care. Plaintiff conceded that the cat had no market value. But the court said he was entitled to go to the jury on whether it was reasonable to spend $36,000 to save the cat. No doubt the willfulness of the wrong would influence the jury, but it did not appear to be part of the reasoning of the court.

C. Expectancy and Reliance as Measures of the Rightful Position

Page 38. At the end of note 3, add:

3. Lost-volume sellers and the common law. The state supreme court has affirmed the judgment, specifically including the finding that Dr. Gianetti was a lost-volume seller. Gianetti v. Norwalk Hospital, 43 A.3d 567 (Conn. 2012).

Page 42. At the end of the first paragraph of note 2, add:

2. Academic alternatives . . . .

The Triantis article is now published at 60 U. Toronto L.J. 643 (2010).

Page 52. At the end of note 3, add:

3. Dura and its impact. . . .

The Court unanimously held that plaintiffs need not prove loss causation at the class certification stage. Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011). The Court summarized loss causation as requiring “a plaintiff to show that a misrepresentation that affected the integrity of the market price also caused a subsequent economic loss,” and further explained that the subsequent price decline must have resulted from public correction of the misrepresentation and not from other factors influencing the market.
D. Consequential Damages

Page 58. At the end of the first paragraph of note 9, add:

9. Actual damages. . . .

The Supreme Court resolved the issue in favor of the government in Federal Aviation Administration v. Cooper, 132 S. Ct. 1441 (2012). The majority collected cases interpreting “actual damages” in a remarkable variety of ways. Emphasizing that the Privacy Act creates a cause of action against the United States, and invoking the principle that waivers of sovereign immunity must be narrowly construed, the Court concluded that “actual damages” means “special damages for proven pecuniary loss,” id. at 1452, not including emotional distress and apparently (this is implicit rather than explicit) not including loss of reputation unless the harm to reputation causes a loss of income or the like. Three dissenters argued that “actual damages” simply means no presumed damages. Justice Kagan did not participate.

There are lengthy discussions of the meaning of special damages and general damages, both generally and in the special context of defamation and privacy torts, responding in part to a congressional decision not to authorize “general damages” in the Privacy Act. The majority argues that emotional distress is a form of general damages, which is generally true; the dissenters argue that general damages for defamation can be presumed, and that it is that meaning of general damages — presumed damages — that Congress declined to authorize.

E. Limits on Damages

1. The Parties’ Power to Specify the Remedy

Page 78. At the end of note 5.b, add:


2. Avoidable Consequences, Offsetting Benefits, and Collateral Sources

Page 99. At the end of note 3, add:


New York eventually passed the amendment to eliminate the illustrations of collateral sources. The law now says that the court must take account of “any collateral source except for life insurance and those payments as to which there is a statutory right of reimbursement.” N.Y. C.P.L.R. §4545(a) (LexisNexis Supp. 2013). The exception for charitable donations still appears in §4545(b). Collateral source is undefined.

The legislature has not done anything to change the matching requirement announced in Oden.
7. Subrogation in practice. . .

A more difficult example is Wos v. E.M.A., 133 S. Ct. 1391 (2013). E.M.A. was profoundly injured in the process of being born; she will require skilled nursing care for her entire life. Her expert witness estimated the cost of this care at $37 million. She and her parents also claimed other expenses, loss of earning capacity, pain and suffering, and emotional distress. The case settled for $2.8 million, based principally on the policy limits of defendants’ malpractice coverage. The settlement did not allocate that total among various items of damage.

North Carolina, which was paying for her medical care, had a statute that irrebuttably attributed one-third of her recovery to medical expenses. The Court held that the Medicaid Act requires a case-by-case allocation, to be based on “how likely E.M.A. and her parents would have been to prevail on [each individual claim] at trial and how much they reasonably could have expected to receive on each claim if successful, in view of damages awarded in comparable tort cases.” Id. at 1400. The Court believed that individual hearings had not been burdensome in states that held them, and suggested, without holding, that rebuttable presumptions might be permissible.

7.1. The impact of ERISA. Many health insurance policies are provided by employers and are subject to the Employee Retirement Income Security Act, which authorizes “appropriate equitable relief” to enforce the terms of an employee benefit plan. 29 U.S.C. §1132(a)(3) (2006). The plans typically provide for subrogation, and the Court has held, under the label “equitable lien by agreement,” that the plan’s claim to reimbursement out of the proceeds of a judgment or settlement is “appropriate equitable relief.” The Court recently held that the employee can assert equitable defenses only if the plan permits them. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013).

McCutchen suffered brain damage and permanent disability in an automobile accident. He recovered $110,000 from the other driver and the state’s uninsured motorist fund; from this amount, he paid 40% plus expenses to his attorneys. US Air paid $66,000 of his medical expenses, and claimed a right to be fully subrogated to what remained of McCutchen’s tort and uninsured motorist recovery. This would leave McCutchen with nothing except US Air’s payment of his medical expenses. The court of appeals held that US Air’s subrogation claim was a permitted equitable claim, but that US Air would be unjustly enriched if it recovered without contributing pro rata to the attorneys’ fees that made the recovery possible — and that a judgment that resulted in unjust enrichment would not be “appropriate” equitable relief. 663 F.3d 671 (3d Cir. 2011). The Supreme Court unanimously rejected that theory; the plan controls.

Justice Kagan managed to affirm by interpreting the plan in light of the common-fund rule: those who recover out of a judgment or settlement obtained by another must contribute pro rata to the attorneys’ fees required to obtain the judgment or settlement. But all the employers will now presumably amend their plans to expressly override that rule. The common-fund rule is considered at pages 894-909 of the main volume.
7.2. Illustrating the common law rule. There is a clear illustration of the common law rules, with a bit of a twist, in Fischer v. Steffen, 797 N.W.2d 501 (Wis. 2011). The parties were in an auto accident. The jury found defendant 100% responsible and awarded $12,000 in medical expenses and $21,000 in pain and suffering. But plaintiffs had already recovered $10,000 of their medical expenses from their own insurer.

Wisconsin adheres to the collateral source rule, and the opinion mentions no relevant legislation. Wisconsin also recognizes subrogation rights, and what the court called “the made whole doctrine,” which says that if there are insufficient assets, the injured plaintiffs get reimbursed in full before their insurance company gets anything. That would solve the Ahlborn problem.

The twist in Fischer is that plaintiffs’ insurer had filed an arbitration proceeding against defendant’s insurer, without plaintiffs’ knowledge or participation, and the arbitrator had held that defendant had not been negligent. So the insurer’s subrogation claim was barred. Even so, the subrogation claim trumped the collateral source rule. Plaintiffs recovered all their pain and suffering and $2,000 in medical expenses from defendant’s insurer, and $10,000 in medical expenses from their own insurer, so they were made whole. Plaintiff’s insurer recovered nothing, because it had lost the arbitration. Two dissenters thought that defendant and her insurer were getting an undeserved $10,000 windfall.

3. The Scope of Liability

Page 109. After note 9, add:


The majority thought that “resulting in whole or in part” from the employer’s negligence means that it is enough that the employer’s negligence played any role, however slight, in causing the injury. But this had not led to absurd results, because there is no negligence unless injury is a foreseeable consequence of the employer’s conduct, and because some cases had been dismissed for lack of cause in fact. The Court criticized the great diversity of judicial formulations of proximate cause, and seemed to endorse (but did not adopt) the Restatement’s change of vocabulary. The Court also cited studies finding that many or most jurors do not understand instructions on proximate cause.

Chief Justice Roberts, dissenting for himself and Justices Scalia, Thomas, and Alito, thought that both the statutory language and the Court’s decision in Rogers were aimed only at the defense of contributory negligence, not at proximate cause. They offered extreme hypotheticals in which some injury was foreseeable and the
railroad’s negligence was a but-for cause of the remote and wholly unforeseeable injury that actually happened.

11. Injury or death to employees. Cantor Fitzgerald is a major financial-services and bond-trading firm. Its offices were at the top of the World Trade Center, and it lost 658 employees on September 11. It sued the airlines for property damage and business interruption damage. The court held, following what appears to be a quite general rule, that the firm could recover for the losses caused by damage to its property, including its leasehold in the office space, but that it could not recover for damages caused by the loss of its employees. In re September 11 Litigation, 760 F. Supp. 2d 433 (S.D.N.Y. 2011).

The stated rule is that defendants owed no duty to the employer not to kill or injure its employees. Stated in more explanatory terms, the employer did not own its employees, who were free to quit at any time. When the employees were killed, the employer’s claim is really a form of wrongful death action, but the wrongful death acts specify next of kin or dependents as the proper plaintiffs. The rule appears to be equally settled when the employees are only injured.

Page 110. At the end of note 4, add:


The American Law Institute has adopted something like the New York vocabulary, which it says is more widespread than the main volume implies. “Except as provided elsewhere in this Restatement, there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties.” Restatement (Third) of Torts: Liability for Economic Harm §3 (Tent. Draft 1, 2012). This rule is defined to be the economic-loss rule. All the other applications of the broad principle stated in note 1 in the main volume are also being restated, but they will be stated as separate rules.

Page 110. After note 6, add:

6.1. The BP oil spill. The Oil Pollution Act requires a party responsible for an oil spill in navigable waters to “establish a procedure for the payment or settlement of claims for interim, short-term damages.” 33 U.S.C. §2705 (2006). These payments do not preclude later recovery for “damages not reflected in the paid or settled partial claim.” Id.

This provision is the original basis for the much publicized Gulf Coast Claims Facility, a $20-billion fund administered by Kenneth Feinberg, who also administered the September 11 claim fund. The Gulf Coast fund paid more than $6 billion in interim and permanent settlements. It was praised by some as efficient and generous, and condemned by others as standardless and unsupervised. For the former view, see Joe Nocera, The Phony Settlement, N.Y. Times A19 (March 10, 2012); for the latter, see George W. Conk, Diving into the Wreck: BP and Kenneth Feinberg’s Gulf Coast Gambit, 17 Roger Williams L. Rev. 137 (2012).

Some plaintiffs went to court instead of to the fund. In January, the court approved class settlements of all claims of individuals and businesses for property damage, economic loss, or medical harms. In re Oil Spill by the Oil Rig “Deepwater Horizon,” 2013 WL 144042 (E.D. La., Jan. 11, 2013) (medical harms), 910 F. Supp.
The medical settlement creates a matrix of objective criteria of injury linked to specified cash awards. Class members will have to show where they fit on the matrix, and prove the objective criteria for eligibility, but issues of liability, causation, measurement of damages, and the like have been reduced to these objective criteria. The property damage and economic loss settlement is structurally similar, but some class members will have to prove causation individually. Some claimants, including BP employees, governmental entities, casinos, real estate developers, and financial institutions, are excluded from the class and left to separate litigation.

According to press accounts, BP valued the combined settlements at $7.8 billion, but they had no cap. John Schwartz, Accord Reached Settling Lawsuit over BP Oil Spill, N.Y. Times A1 (March 3, 2012). BP now claims that the lawyer administering the settlement is misinterpreting its terms and paying out much more money than anticipated, much of it for “fictitious claims.” The district court rejected these arguments. Review of Issue from Panel (Matching Revenue and Expenses), In re Oil Spill by the Oil Rig “Deepwater Horizon,” No. 2:10-md-02179-CJB-SS (E.D. La., March 5, 2013), ECF No. 8812. BP’s appeal was argued in July. Leaner BP Blanches at Bill for Cleanup, N.Y. Times B1 (July 11, 2013).

F. Damages Where Value Cannot Be Measured in Dollars

1. Personal Injuries and Death

Page 150. After note 2, add:

2.1. An update. The trial judge reported, more recently and presumably more accurately, that 94 of 95 personal injury and wrongful death cases had settled, and 18 of 21 property damage cases had settled with the help of mediation led by a different federal judge. In re September 11 Litigation, 760 F. Supp. 2d 433 (S.D.N.Y. 2011).

The press reported that the family in the last wrongful death case insisted on a trial in the hopes of revealing more about the airlines’ fault and holding them publicly accountable. But the case eventually settled for an undisclosed sum and the right to file a detailed compendium of the evidence plaintiffs would have introduced at trial. Benjamin Weiser, Family and United Airlines Settle Last 9/11 Wrongful-Death Lawsuit, N.Y. Times A28 (Sept. 20, 2011).

Of the three remaining property damage claims, one was dismissed, one is the World Trade Center’s claim, at page 18 of the main volume, and one is the Cantor Fitzgerald claim, summarized at supplement to page 109. This account does not include a separate set of claims by first responders, clean-up workers, and neighboring property owners who were injured by hazardous materials at the site.

2. The Controversy over Tort Law

Page 159. At the end of note 1, add:

1. More recent decisions, . . .

The Maryland court has invalidated, under a remedy-for-every-wrong clause, a statute granting immunity to landlords for damages caused by lead-based paint.
Jackson v. Dackman Co., 30 A.3d 854 (Md. 2011). The court said that the legislature could abolish common law remedies and substitute statutory remedies, but that here, the statutory remedy was “totally inadequate and unreasonable.” The plaintiff child had suffered permanent brain damage; the statutory remedy could provide a maximum of $17,000 in compensation if it applied, and in this case, it appeared not to apply. This reasoning suggests that reasonable damage caps may be permitted, and that unreasonably low damage caps may be unconstitutional.

Page 165. After note 8, add:

8.1. The significance of the defendant. Defendant’s apparent wealth is legally irrelevant, but in practice, it is highly significant. This tension was at issue in Hand v. Howell, Sarto & Howell, 2013 WL 2367563 (Ala., May 31, 2013). Hand was seriously injured in a collision with a reporter for the Montgomery Advertiser, a newspaper owned by Gannett, a major publishing company. The reporter was on the job and clearly at fault. Hand’s original lawyers sued only the reporter, and the case settled for $625,000. Hand sued those lawyers, alleging that it was malpractice not to name the Advertiser as an additional defendant.

An accountant retained to testify for Hand estimated his “economic” losses — medical expenses and lost income — at $872,000. The personal injury lawyers who represented him after he fired the original lawyers estimated the settlement value of the case against the Advertiser at $1 to $1.2 million. The reporter was covered by Gannett’s $5 million insurance policy, so the lost settlement value was not a result of policy limits. The new lawyers simply said that a claim against an individual was worth far less than the same claim against the newspaper, which a jury would perceive as a deep pocket. In the malpractice case, Hand said that “every trial lawyer in the country” would agree with this assessment.

The majority said that was irrelevant even if true. The court “must presume that juries will follow the law,” and under the law, the identity, wealth, and corporate status of the defendant are all irrelevant. Id. at *4. Three dissenters (on a court of eight) voted for reality over theory.

Page 168. At the end of note 2, add:

2. The value of a statistical life. . .

Each federal agency sets its own number for the value of a human life, and there is considerable variation from agency to agency. But the trend is that agencies in the Obama Administration are using higher numbers than agencies in the George W. Bush Administration. Binyamin Appelbaum, A Life’s Value? It May Depend On the Agency: Dollar Figure Is Rising, to Varying Degrees, N.Y. Times A1 (Feb. 17, 2011). The Obama people say they are just applying the most recent studies and adjusting for inflation; business groups accuse them of inflating the numbers to justify more regulations. Kip Vicusi, a long-time advocate of these statistical methods, says that “Agencies have been using numbers that I thought were just too low.” The increases are flipping political biases; businesses that liked statistical valuations when they showed that life was cheap are souring on the method. Labor and consumer groups say they still don’t like the method, but that if it is going to be used, then it should set higher values.
Illustrative numbers cited by the *Times*: the Environmental Protection Agency valued a human life at $6.8 million during the Bush years, but $9.1 million in 2010. The Food and Drug Administration valued a life at $5 million in 2008, but $7.9 million in 2010. And some agencies are now suggesting that some deaths may be worth more than others. The EPA says that people might pay more to avoid a slow death from cancer, and perhaps somewhat inconsistently, the Department of Homeland Security says people might pay more to avoid deaths from terrorism.

Page 170. At the end of note 4, add:

4. Trading incommensurables and the feasible level of safety. . . .
The Masur & Posner article is now published at 77 U. Chi. L. Rev. 657 (2010).

3. Dignitary and Constitutional Harms

Page 174. At the end of note 1, add:

1. The strip-search cases. . . .
The law had been against the jailers in these cases, but the law has changed. Florence v. Board of Chosen Freeholders, 132 S. Ct. 1510 (2012), upheld routine strip searches of all arrestees who are placed in the jail’s general population, no matter how trivial the offense. There were four dissents.

The Court reserved judgment on whether arrestees held briefly and separately from the general population (which appear to have been the facts in *Levka)* could be strip searched without reasonable suspicion. And nothing in *Florence* suggests that it would be lawful to strip search women but not men, as in *Levka*. So *Levka* may still be good law even on liability. However that turns out, the opinion is still a great vehicle for exploring the difficulties of proving, rebutting, and measuring damages for emotional distress.

Page 176. At the end of note 2.e, add:

2. Other examples. . . .
e. . . .
The Texas Supreme Court has unanimously reaffirmed the traditional rule in a substantial and wide-ranging opinion. The court characterized the emotional loss from the death of a pet as a form of loss of consortium, which is recoverable in Texas only by statute and only by spouses and children. It would be anomalous if one could recover for the death of a pet but not for the death of a sibling. And a majority of pet-welfare groups argued against liability, fearing a litigation burden on veterinarians and animal shelters that would raise the cost of pet ownership and ultimately result in more abandoned or euthanized pets. The court authorized recovery of the pet’s value to the owner, not including emotional value. Medlen v. Strickland, 397 S.W.3d 184 (Tex. 2013).

For cases allowing recovery of the medical expenses of caring for an injured pet, see supplement to page 33.
G. Taxes, Time, and the Value of Money

2. Interest on Past Damages

Page 200. At the end of note 7, add:

7. Postjudgment interest. . .

In Gianetti v. Norwalk Hospital, 43 A.3d 567 (Conn. 2012), the trial court denied both prejudgment and post judgment interest, and the state supreme court found no abuse of discretion. But the court found that defendant litigated in good faith, and that the damages could not be calculated until the lost-volume-seller issue (supplement to page 38) was finally resolved in 2012. Connecticut appears to take a rather narrow view of when to award interest.

This is the third decision in the state supreme court; the doctor was discharged in 1983, and the first judgment on liability was entered in 1987. Apart from the repeated appeals, I have not been able to learn why a simple suit for breach of contract took twenty-nine years to resolve. The court did not appear to blame the litigation delays on either side.
CHAPTER THREE
PUNITIVE REMEDIES

A. Punitive Damages

1. Common Law and Statutes

Page 226. At the end of note 1, add:
The Calandrillo article is now published at 78 Geo. Wash. L. Rev. 774 (2010).

Page 232. At the end of the second paragraph of note 6, add:
The mandamus petition in Jacobs was dismissed.

2. The Constitution

Page 240. At the end of note 5, add:
   5. Ratios. . . .
   In Hamlin v. Hampton Lumber Mills, Inc., 246 P.3d 1121 (Or. 2011), the court upheld $6,000 in compensatory damages and $175,000 in punitives in an employment discrimination case. The majority collected cases from around the country upholding high ratios, and concluded that ratios are “of limited assistance” when compensatories are small and do not “already serve an admonitory function.” Id. at 536-537. The dissenters thought that the Supreme Court’s approval of greater-than-single-digit ratios in cases with small compensatories was confined to cases of “egregious misconduct.” Id. at 545 (Gillette, J., dissenting).

Page 247. At the end of note 6.a, add:
   a. The Florida tobacco litigation. . . .
The state and federal courts so far agree that the findings from the trial on defendants’ wrongdoing are issue preclusive in the subsequent individual cases. See Philip Morris USA, Inc. v. Douglas, 110 So.3d 419 (Fla. 2013); Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324 (11th Cir. 2010); Waggoner v. R.J. Reynolds Tobacco Co., 835 F. Supp. 2d 1244 (M.D. Fla. 2011). The Eleventh Circuit decision took a very narrow view of what had actually been decided. The Florida Supreme Court took a broader view, and state preclusion law controls on that issue. Defendants argue that the state court’s understanding of preclusion law violates due process; that argument has so far been rejected by the state supreme court and the federal district court.

Page 248. At the end of note 8, add:
   8. Sharing punitives with the state. . . .
The Indiana court has again upheld a statute awarding 75 percent of punitive damages to the state, and capping punitive damages at three times compensatories or
$50,000, whichever is greater. State v. Doe, 987 N.E.2d 1066 (Ind. 2013). Indiana is one of the six states counted in the Sharkey survey cited in the main volume.

9. The state’s share in Philip Morris. An Oregon statute makes 60% of all punitive damage awards payable to the state. Philip Morris refused to pay the state’s share on the ground that the state had released its claim in a 1998 global tobacco settlement of state claims for medical expenses incurred by smokers and paid by states through Medicaid benefits or employee health insurance plans. The court rejected that defense, holding that Oregon’s right to a share of the punitive award to Williams arose from the statute and the private tort judgment, and was not included in the 1998 release of claims for medical expenses. Williams v. RJ Reynolds Tobacco Co., 271 P.3d 103 (Or. 2011).

The opinion also revealed a joint litigation agreement between the Williams family and the state, in which they agreed to cooperate to ensure that Philip Morris paid the entire judgment, and to divide the judgment in different ways depending on the course of the litigation. None of the agreed splits matched the 60/40 split specified by statute. Id. at 107 n.7.

B. Other Punitive Remedies

1. Statutory Recoveries by Private Litigants

Page 259. After note 2.c, add:

3. Constitutionality. Defendants sued for file sharing copyrighted music have argued, without much success so far, that statutory recoveries should be subject to the Court’s constitutional limits on punitive damages. The leading Supreme Court case on constitutional limits on statutory recoveries is still St. Louis, Iron Mountain & Southern Railway v. Williams, 251 U.S. 63 (1919). For what it is worth, the Court said:

That [the due process] clause places a limitation upon the power of the states to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the states still possess a wide latitude of discretion in the matter, and that their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.

Id. at 66-67.

The court of appeals applied this deferential standard to a file-sharing case in Capitol Records, Inc. v. Thomas-Rassett, 692 F.3d 899 (8th Cir. 2012), cert. denied, 133 S. Ct. 1584 (2013). It refused to apply the three “guideposts” from the Supreme Court’s punitive damages cases. The statute gives notice of the possible penalty, thus addressing one of the Supreme Court’s concerns about punitive damages. Statutory recoveries for copyright infringement could not be proportioned to compensatory damages; they were enacted because compensatory damages are so hard to measure. They could not be compared to statutory civil penalties; they were the statutory civil penalty.
The Copyright Act authorizes statutory damages of not less than $750 nor more than $150,000 for each willful violation. 17 U.S.C. §504(c) (2006 & Supp. V 2011). Is that any better notice than the common law of punitive damages? The amount is to be determined in the discretion of the finder of fact, and either side has a right to jury trial. In *Thomas-Rasset*, the record companies proved 24 violations. For reasons not relevant here, the case was tried three times to three different juries, which brought in verdicts of $222,000, $1,920,000, and $1,500,000. Thomas-Rasset may have hurt herself with the juries by destroying her hard drive and giving implausible testimony that might well have been perceived as perjury. The district court held that any award greater than $54,000 ($750 per violation, trebled) would be unconstitutional, and entered judgment for that amount. The court of appeals reversed, and reinstated the $222,000 verdict. The record companies did not ask it to reinstate either of the million-dollar-plus verdicts.

There is a similar holding, with less detailed reasoning, in *Sony BMG Music Entertainment v. Tenenbaum*, 2013 WL 3185436 (1st Cir., June 25, 2013). The court upheld a jury verdict of $675,000, apparently based on $22,500 per song for each of the 30 songs that Sony pursued at trial. Defendant had distributed many more songs than those 30; this fact influenced the court and probably the jury as well.
CHAPTER FOUR
PREVENTING HARM: THE MEASURE OF INJUNCTIVE RELIEF

A. The Scope of Injunctions

1. Preventing Wrongful Acts

Page 268. After note 9, add:

9.1. How high a standard? Almurbati says only that the threatened injury cannot be “remote and speculative.” Putting the point more affirmatively, the Court said in Lyons that plaintiff must be “realistically threatened.” Id. at 109. I used a similar formulation without attribution in note 8; there must be “a substantial or realistic threat.”

In Clapper v. Amnesty International, USA, 133 S. Ct. 1138 (2013), the Court emphasized that the threatened injury “must be certainly impending.” Id. at 1147. It cited several cases for this proposition; it also acknowledged a similar number of cases saying that a “substantial risk” is sufficient. Id. at 1150 n.5. Justice Breyer, dissenting for four, compiled a longer list of cases requiring substantial risk or some similar formulation, and argued that no Supreme Court case had ever required literal certainty in a holding. In Clapper, the majority said that plaintiffs also failed to satisfy the substantial-risk test, and it characterized their threatened injury as “highly speculative” and “highly attenuated.” Id. at 1148.

Supreme Court ripeness doctrine is widely viewed as inconsistent and highly manipulable, so the variety of formulations is no surprise. In Clapper, the Court was visibly influenced by the national security context; plaintiffs sought to challenge key parts of government’s monitoring of electronic communications in its search for terrorists.

9.2. Constitutional and remedial ripeness. Ripeness is a constitutional and jurisdictional doctrine as well as a remedial doctrine. The principal cases in the main volume are written in terms of the law of injunctions; Clapper is written in terms of the law of standing to sue. The doctrines are obviously related, and a case that is not ripe under one doctrine is unlikely to be ripe under the other. But the doctrines emphasize different purposes, and at least in theory, those purposes might occasionally suggest different results.

Constitutional ripeness emphasizes separation of powers, limiting the jurisdiction of courts, and reducing the occasions on which they interfere with judgments committed to the other two branches of government. Remedial ripeness emphasizes the competing interests of plaintiff and defendant and whether an injunction is really needed. These may just be two ways of talking about substantially the same thing, but the choice at least affects the tone of the opinions.

Page 269. After note 13, add:

14. The merits in Almurbati. The Supreme Court subsequently held that courts must defer to a determination of the executive branch that a detainee is not likely to be tortured if transferred to a foreign country. Munaf v. Geren, 553 U.S. 674, 702
There are issues that remain open after Munaf, but this holding would pose another major obstacle to relief to any plaintiffs who succeed in showing a ripe threat of transfer.

Page 275. After note 8, add:

8.1. The Securities and Exchange Commission. The SEC, and probably some other government agencies too, are great fans of obey-the-law injunctions in civil enforcement litigation. And they often get them. But the Eleventh Circuit recently held that SEC cases are subject to Rule 65(d)(1), more or less like any other case. SEC v. Goble, 682 F.3d 934 (11th Cir. 2012).

The court said that some provisions of some statutes are sufficiently specific that an injunction tracking the terms of such a statute complies with the Rule. This was the court’s explanation of McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949), discussed in the main volume at pages 823 and 826-827. McComb enforced an injunction that largely restated key provisions of the Fair Labor Standards Act, and it seems to me to have turned more on the egregiousness of the violations than on the specificity of the statute.

On its reading of McComb, the Eleventh Circuit thought it obvious that the broad anti-fraud provisions of the securities laws are not sufficiently specific to support an obey-the-law injunction. And even for two statutory sections that it viewed as more specific, the court refused to approve an injunction that simply said to obey section such and such. Instead, it required that the specific terms of the provision be set out in the injunction.

Pages 276. At the end of the Note on Individual and Class Injunctions, add:

In Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743 (2010), the Court said that “Respondents in this case do not represent a class, so they could not seek to enjoin [enforcement of] such an [administrative agency] order on the ground that it might cause harm to other parties.” Id. at 2760. This is not quite the same question as who the injunction might explicitly protect, but it is obviously related. Justice Stevens, in a solitary dissent, responded that “although we have not squarely addressed the issue, in my view ‘[t]here is no general requirement that an injunction affect only the parties in the suit.’” Id. at 2770 n.12, quoting Bresgal v. Brock, 843 F.2d 1163, 1169 (9th Cir. 1987). This was a minor point in each opinion, but definitely part of the rationale for resolving at least one issue in the case. The principal issues in Monsanto are described in this supplement to page 428.

Page 280. After the first paragraph of note 6, add:

6. Mootness and monetary relief. . . .

Knox v. Service Employees International Union, 132 S. Ct. 2277 (2012), was a suit to recover the proportion of union dues devoted to political purposes. After cert was granted, the union offered a full refund to any member who asked. Even though plaintiffs sought only a refund, and sought no prospective relief of any kind, the Court said the case was not moot. It cited the voluntary cessation cases for the proposition that “maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.” Id. at 2287. The offer of a refund came
with conditions designed to make it difficult to collect. An application for refund had
to have an original signature and social security number; fax and e-mail applications
were not accepted. “The union is not entitled to dictate unilaterally the manner in
which it advertises the availability of a refund.” Id. at 2288. Four justices disagreed
with all or much of what the Court did on the merits, but there was no dissent from
the mootness holding.

Page 280. After note 6, add:

7. Your claim is moot because you won, so you get nothing. The Court had
occasion to restate the rule that damage claims do not become moot: “Unlike claims
for injunctive relief challenging ongoing conduct, a claim for damages cannot evade
review; it remains live until it is settled, judicially resolved, or barred by a statute of

The holding is in considerable tension with that general proposition. Symczyk
filed a claim on behalf of herself and all others similarly situated under the Fair Labor
Standards Act, 29 U.S.C. § 216(b) (2006), which authorizes such collective actions
independently of the general class action procedures in Federal Rule 23. Before the
trial court decided whether to notify the similarly situated employees, and before any
other employee opted into the case, defendant filed a Rule 68 offer of judgment,
offering to pay the full amount of the individual plaintiff’s allegedly unpaid wages,
plus her “attorneys’ fees, costs, and expenses as determined by the court.” She
deprecated the offer, and the offer expired. But the district court, applying a Third
Circuit rule, held that the mere making of the offer mooted plaintiff’s claim. The
court did not enter judgment in the amount of the offer; it dismissed her claim as
moot, leaving her uncompensated. 2010 WL 2038676 (E.D. Pa., May 19, 2010),
rev’d on other grounds, 656 F.3d 189 (3d Cir. 2011).

The Supreme Court assumed that the individual claim was moot, dubiously
asserting that plaintiff had failed to preserve that issue. On that assumption, the Court
held that her collective action allegations must also be dismissed, because her
individual claim had been correctly held moot before the collective action was
certified. Justice Kagan, dissenting for four, ridiculed the majority’s assumption that
the individual claim was moot, denied that plaintiff had failed to preserve her
objection, and denied that mootness of the individual claim mooted the collective
action.

8. Enforceability. The likelihood that any judgment will be unenforceable, as
where defendant is insolvent or no longer within the jurisdiction, does not make a
case moot. The Court collects diverse authorities to this effect in Chafin v. Chafin,
133 S. Ct. 1017, 1025 (2013), a child-custody dispute in which the child had been
returned to her mother in Scotland pursuant to a trial court decision in the United
States, and a Scottish court had ordered the American father not to remove the child
from Scotland. The Supreme Court of the United States did not assume that that
Scottish authorities would be uncooperative if the American judgment were reversed,
and did not think the case would be moot if it assumed the contrary.
2. Preventing Lawful Acts That Might Have Wrongful Consequences

Page 284. After note 7, add:

8. A federal example. In Already, LLC v. Nike, Inc., 133 S. Ct. 721 (2013), Nike accused Already of trademark infringement, Already counterclaimed for a declaratory judgment that the trademark was invalid, and Nike sought to moot the case by filing with the court a covenant not to sue. Already argued that the case was not moot, in part because investors were refusing to invest additional funds because of fear of further trademark litigation with Nike. Applying the voluntary cessation doctrine, the Court held that there was no reasonable prospect of Nike resuming its trademark litigation. And then it said that irrational fears by potential investors could not suffice to keep a moot case alive.

Page 290. After note 8, add:

8.1. File sharing. The court of appeals held it an abuse of discretion not to issue a prophylactic injunction in Capitol Records, Inc. v. Thomas-Rassett, 692 F.3d 899 (8th Cir. 2012), more fully described in supplement to page 259. The district judge ordered Thomas-Rassett not to download or upload any copyrighted music. The court of appeals directed him to add an injunction against making any copyrighted music available for others to upload from Thomas-Rassett’s computer and then download to their own. The court assumed (the legal issue was disputed) that simply making music available is not an infringement if no one uploads it. But actual uploading can be difficult to prove, and Thomas-Rassett was a willful infringer who had attempted to conceal her misconduct, and thus had demonstrated “a proclivity for unlawful conduct,” and these facts justified the prophylactic provision. She did not oppose the broadening of the injunction.

4. Ending Complex Violations — and Their Consequences — in Large Institutions

a. A Case Study: School Desegregation

Page 325. At the end of note 10, add:

10. Continued enforcement. . . .

The Missouri court rejected Kansas City’s state-law challenges to the funding of charter schools, holding that the diversion of state aid to the KCMSD was not an indirect diversion of KCMSD funds. School District v. State, 317 S.W.3d 599 (Mo. 2010).
b. Other Examples, and the Current Law in the Supreme Court

Pages 325-336. Delete Hutto v. Finney, Lewis v. Casey, and the accompanying notes, and substitute the following:

BROWN v. PLATA
131 S. Ct. 1910 (2011)

Justice KENNEDY delivered the opinion of the Court.

This case arises from serious constitutional violations in California’s prison system. The violations have persisted for years. They remain uncorrected. . . .

After years of litigation, it became apparent that a remedy for the constitutional violations would not be effective absent a reduction in the prison system population. The authority to order release of prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court. 18 U.S.C. §3626(a) (2006). [Appeals from such a three-judge district court lie directly to the Supreme Court.]


I

A

The degree of overcrowding in California’s prisons is exceptional. California’s prisons are designed to house a population just under 80,000, but at the time of the three-judge court’s decision the population was [about 156,000.] The State’s prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet. . . .

Prisoners in California with serious mental illness do not receive minimal, adequate care. Because of a shortage of treatment beds, suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets. A psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “no place to put him.” Other inmates awaiting care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services. Wait times for mental health care range as high as 12 months. In 2006, the suicide rate in California’s prisons was nearly 80% higher than the national average for prison populations; and a court-appointed Special Master found that 72.1% of suicides involved “some measure of inadequate assessment, treatment, or intervention, and were therefore most probably foreseeable and/or preventable.”

Prisoners suffering from physical illness also receive severely deficient care. California’s prisons were designed to meet the medical needs of a population at 100%
of design capacity and so have only half the clinical space needed to treat the current population. A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment. The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with “constant and extreme” chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a “failure of MDs to work up for cancer in a young man with 17 months of testicular pain.”

Doctor Ronald Shansky, former medical director of the Illinois state prison system, surveyed death reviews for California prisoners. He concluded that extreme departures from the standard of care were “widespread,” and that the proportion of “possibly preventable or preventable” deaths was “extremely high.”

These conditions are the subject of two federal cases. The first to commence, Coleman v. Brown, was filed in 1990. Coleman involves the class of seriously mentally ill persons in California prisons. After a 39-day trial, the Coleman District Court found “overwhelming evidence of the systematic failure to deliver necessary care to mentally ill inmates” in California prisons. Coleman v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995). The court appointed a Special Master to oversee development and implementation of a remedial plan of action.

In 2007, 12 years after his appointment, the Special Master in Coleman filed a report stating that, after years of slow improvement, the state of mental health care in California’s prisons was deteriorating. The Special Master ascribed this change to increased overcrowding. Existing programming space and staffing levels were inadequate to keep pace. The need to house the expanding population had also caused a “reduction of programming space now occupied by inmate bunks.” The Special Master concluded that many early “achievements have succumbed to the inexorably rising tide of population, leaving behind growing frustration and despair.”

B

Because plaintiffs do not base their case on deficiencies in care provided on any one occasion, this Court has no occasion to consider whether these instances of delay — or any other particular deficiency in medical care complained of by the plaintiffs — would violate the Constitution . . ., if considered in isolation. Plaintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject sick and mentally ill prisoners in California to “substantial risk of serious harm” . . . . Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[Preventable or more-likely-than-not preventable deaths in the prison system totaled 66 in 2006, 68 in 2007, 66 in 2008, and 46 in 2009. Only data through 2007 was available to the three-judge court.] The three-judge court could not have anticipated [the apparent improvement in 2009], and it would be inappropriate for this Court to evaluate its significance for the first time on appeal. The three-judge court should, of course, consider this and any other evidence of improved conditions when considering future requests by the State for modification of its order.
C

The second action, *Plata v. Brown*, involves the class of state prisoners with serious medical conditions. After this action commenced in 2001, the State conceded that deficiencies in prison medical care violated prisoners’ Eighth Amendment rights. The State stipulated to a remedial injunction. The State failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts. The court found that “the California prison medical care system is broken beyond repair,” resulting in an “unconscionable degree of suffering and death.” The court found: “[I]t is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies in the [California prisons’] medical delivery system.”

Prisons were unable to retain sufficient numbers of competent medical staff, and would “hire any doctor who had ‘a license, a pulse and a pair of shoes.’” Medical facilities lacked “necessary medical equipment” and did “not meet basic sanitation standards.” “Exam tables and counter tops, where prisoners with . . . communicable diseases are treated, [were] not routinely disinfected.”

In 2008, three years after the District Court’s decision, the Receiver described continuing deficiencies in the health care provided by California prisons.

The Receiver explained that “overcrowding, combined with staffing shortages, has created a culture of cynicism, fear, and despair which makes hiring and retaining competent clinicians extremely difficult.” “[O]vercrowding, and the resulting day to day operational chaos of the [prison system], creates regular ‘crisis’ situations which. . . . take time [and] energy . . . away from important remedial programs.” Overcrowding had increased the incidence of infectious disease, and had led to rising prison violence and greater reliance by custodial staff on lock-downs, which “inhibit the delivery of medical care and increase the staffing necessary for such care.”

D . . .

The three-judge court heard 14 days of testimony and issued a 184-page opinion, making extensive findings of fact. The court ordered California to reduce its prison population to 137.5% of the prisons’ design capacity within two years. Assuming the State does not increase capacity through new construction, the order requires a population reduction of 38,000 to 46,000 persons. Because it appears all but certain that the State cannot complete sufficient construction to comply fully with the order, the prison population will have to be reduced to at least some extent. The court did not order the State to achieve this reduction in any particular manner. Instead, the court ordered the State to formulate a plan for compliance and submit its plan for approval by the court.

II

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights.

Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance,
including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.

If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. Courts must be sensitive to the State’s interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals. . . . [But courts] may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.

Courts faced with the sensitive task of remedying unconstitutional prison conditions must consider a range of available options, including appointment of special masters or receivers . . . . When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population. . . .

Before a three-judge court may be convened [to consider such an order], a district court first must have entered an order for less intrusive relief that failed to remedy the constitutional violation and must have given the defendant a reasonable time to comply with its prior orders, §3626(a)(3)(A). . . .

The three-judge court must then find by clear and convincing evidence that “crowding is the primary cause of the violation of a Federal right” and that “no other relief will remedy the violation of the Federal right.” 18 U.S.C. §3626(a)(3)(E). As with any award of prospective relief under the PLRA, the relief “shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs.” §3626(a)(1)(A). The three-judge court must therefore find that the relief is “narrowly drawn, extends no further than necessary . . ., and is the least intrusive means necessary to correct the violation of the Federal right.” Id. In making this determination, the three-judge court must give “substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.” Id. Applying these standards, the three-judge court found a population limit appropriate, necessary, and authorized in this case.

This Court’s review of the three-judge court’s legal determinations is de novo, but factual findings are reviewed for clear error. . . .

A

The State contends that it was error to convene the three-judge court without affording it more time to comply with the prior orders in Coleman and Plata. . . .

2 . . .

When the three-judge court was convened, 12 years had passed since the appointment of the Coleman Special Master, and 5 years had passed since the approval of the Plata consent decree. The State does not claim that either order achieved a remedy. . . .

The State claims instead that . . . other, later remedial efforts should have been given more time to succeed. [There were new orders, or proposals, for construction of new facilities, hiring of new staff, and implementation of new procedures in each case in 2006 and later.]
The failed consent decree in *Plata* had called for... new procedures and... additional staff; and the *Coleman* Special Master had issued over 70 orders directed at achieving a remedy through construction, hiring, and procedural reforms...

Having engaged in remedial efforts for 5 years in *Plata* and 12 in *Coleman*, the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment. When a court attempts to remedy an entrenched constitutional violation through reform of a complex institution..., it may be necessary in the ordinary course to issue multiple orders directing and adjusting ongoing remedial efforts. Each new order must be given a reasonable time to succeed, but reasonableness must be assessed in light of the entire history of the court's remedial efforts...

The *Coleman* and *Plata* courts had a solid basis to doubt that additional efforts to build new facilities and hire new staff would achieve a remedy... A report filed by the *Coleman* Special Master in July 2009 describes ongoing violations, including an “absence of timely access to appropriate levels of care at every point in the system.” A report filed by the *Plata* Receiver in October 2010 likewise describes ongoing deficiencies in the provision of medical care and concludes that there are simply “too many prisoners for the healthcare infrastructure.” The *Coleman* and *Plata* courts acted reasonably when they convened a three-judge court without further delay.

**B**

Once a three-judge court has been convened, the court must find additional requirements satisfied before it may impose a population limit. The first of these requirements is that “crowding is the primary cause of the violation of a Federal right.” 18 U.S.C. §3626(a)(3)(E)(i).

The three-judge court found the primary cause requirement satisfied by the evidence at trial. The court found that overcrowding strains inadequate medical and mental health facilities; overburdens limited clinical and custodial staff; and creates violent, unsanitary, and chaotic conditions that contribute to the constitutional violations and frustrate efforts to fashion a remedy. The three-judge court also found that “until the problem of overcrowding is overcome it will be impossible to provide constitutionally compliant care to California’s prison population.”...

The record documents the severe impact of burgeoning demand on the provision of care. At the time of trial, vacancy rates for medical and mental health staff ranged as high as 20% for surgeons, 25% for physicians, 39% for nurse practitioners, and 54.1% for psychiatrists. These percentages are based on the number of positions budgeted by the State. Dr. Shansky concluded that these numbers understate the severity of the crisis because the State has not budgeted sufficient staff to meet demand...

Even on the assumption that vacant positions could be filled, the evidence suggested there would be insufficient space for the necessary additional staff to perform their jobs... Staff operate out of converted storage rooms, closets, bathrooms, shower rooms, and visiting centers. These makeshift facilities impede the effective delivery of care and place the safety of medical professionals in jeopardy,
compounding the difficulty of hiring additional staff.

This shortfall of resources relative to demand contributes to significant delays in treatment.

Prisons have backlogs of up to 700 prisoners waiting to see a doctor. A review of referrals for urgent specialty care at one prison revealed that only 105 of 316 pending referrals had a scheduled appointment, and only 2 had an appointment scheduled to occur within 14 days. Urgent specialty referrals at one prison had been pending for six months to a year.

Crowding also creates unsafe and unsanitary living conditions that hamper effective delivery of medical and mental health care. Cramped conditions promote unrest and violence.

Increased violence requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care. In 2006, prison officials instituted 449 lockdowns. The average lockdown lasted 12 days, and 20 lockdowns lasted 60 days or longer. During lockdowns, staff must either escort prisoners to medical facilities or bring medical staff to the prisoners. Either procedure puts additional strain on already overburdened medical and custodial staff. Some programming for the mentally ill even may be canceled altogether during lockdowns, and staff may be unable to supervise the delivery of psychotropic medications.

The effects of overcrowding are particularly acute in the prisons’ reception centers, intake areas that process 140,000 new or returning prisoners every year. Crowding in these areas runs as high as 300% of design capacity. Inmates spend long periods of time in these areas awaiting transfer to the general population. Some prisoners are held in the reception centers for their entire period of incarceration.

Numerous experts testified that crowding is the primary cause of the constitutional violations. [The Court quoted testimony by the former warden of San Quentin and three current or former heads of prison systems in other large states.]

2

The State attempts to undermine the substantial evidence presented at trial, and the three-judge court’s findings of fact, by complaining that the three-judge court did not allow it to present evidence of current prison conditions. This suggestion lacks a factual basis.

Both parties presented testimony related to current conditions, including understaffing, inadequate facilities, and unsanitary and unsafe living conditions.

It is true that the three-judge court established a cutoff date for discovery a few months before trial. The court also excluded evidence not pertinent to the issue whether a population limit is appropriate under the PLRA, including evidence relevant solely to the existence of an ongoing constitutional violation.

Both rulings were within the sound discretion of the three-judge court.

The State does not point to any significant evidence that it was unable to present and that would have changed the outcome of the proceedings.
The three-judge court acknowledged that the violations were caused by factors in addition to overcrowding and that reducing crowding in the prisons would not entirely cure the violations. . . . [E]ven a significant reduction in the prison population would not remedy the violations absent continued efforts to train staff, improve facilities, and reform procedures. The three-judge court nevertheless found that overcrowding was the primary cause in the sense of being the foremost cause of the violation. . . .

Overcrowding need only be the foremost, chief, or principal cause of the violation. If Congress had intended to require that crowding be the only cause, it would have said so . . . .

As this case illustrates, constitutional violations in conditions of confinement are rarely susceptible of simple or straightforward solutions. In addition to overcrowding the failure of California’s prisons to provide adequate medical and mental health care may be ascribed to chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures. . . . See also Hutto v. Finney, 437 U.S. 678, 688 (1978) (noting “the interdependence of the conditions producing the violation,” including overcrowding). Only a multifaceted approach aimed at many causes, including overcrowding, will yield a solution. . . .

A reading of the PLRA that would render population limits unavailable in practice would raise serious constitutional concerns. A finding that overcrowding is the “primary cause” of a violation is therefore permissible, despite the fact that additional steps will be required to remedy the violation.

C

The three-judge court was also required to find by clear and convincing evidence that “no other relief will remedy the violation of the Federal right.” §3626(a)(3)(E)(ii).

The State argues that the violation could have been remedied through a combination of new construction, transfers of prisoners out of State, hiring of medical personnel, and continued efforts by the Plata Receiver and Coleman Special Master. The order in fact permits the State to comply with the population limit by transferring prisoners to county facilities or facilities in other States, or by constructing new facilities to raise the prisons’ design capacity. . . . If the State does find an adequate remedy other than a population limit, it may seek modification or termination of the three-judge court’s order on that basis. . . .

Aside from asserting [that these remedies could still work], the State offers no reason to believe it is so. . . .

The common thread connecting the State’s proposed remedial efforts is that they would require the State to expend large amounts of money absent a reduction in overcrowding. The Court cannot ignore the political and fiscal reality behind this case. California’s Legislature has not been willing or able to allocate the resources necessary to meet this crisis absent a reduction in overcrowding. There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall. . . .
The PLRA states that no prospective relief shall issue with respect to prison conditions unless it is narrowly drawn, extends no further than necessary to correct the violation of a federal right, and is the least intrusive means necessary to correct the violation. 18 U.S.C. §3626(a). When determining whether these requirements are met, courts must “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system.” Id.

The three-judge court acknowledged that its order “is likely to affect inmates without medical conditions or serious mental illness.” This is because reducing California’s prison population will require reducing the number of prisoners outside the class through steps such as parole reform, sentencing reform, use of good-time credits, or other means to be determined by the State. Reducing overcrowding will also have positive effects beyond facilitating timely and adequate access to medical care, including reducing the incidence of prison violence and ameliorating unsafe living conditions. According to the State, these collateral consequences are evidence that the order sweeps more broadly than necessary.

The population limit imposed by the three-judge court does not fail narrow tailoring simply because it will have positive effects beyond the plaintiff class. Narrow tailoring requires a “‘fit’ between the [remedy’s] ends and the means chosen to accomplish those ends.” Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). The scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation. This Court has rejected remedial orders that unnecessarily reach out to improve prison conditions other than those that violate the Constitution. Lewis v. Casey, 518 U.S. 343, 357 (1996). But the precedents do not suggest that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because it will have collateral effects.

Nor does anything in the text of the PLRA require that result. The PLRA states that a remedy shall extend no further than necessary to remedy the violation of the rights of a “particular plaintiff or plaintiffs.” 18 U.S.C. §3626(a)(1)(A). This means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court.

This case is unlike cases where courts have impermissibly reached out to control the treatment of persons or institutions beyond the scope of the violation. See Dayton I. Even prisoners with no present physical or mental illness may become afflicted, and all prisoners in California are at risk so long as the State continues to provide inadequate care. Prisoners in the general population will become sick, and will become members of the plaintiff classes, with routine frequency; and overcrowding may prevent the timely diagnosis and care necessary to provide effective treatment and to prevent further spread of disease. Relief targeted only at present members of the plaintiff classes may therefore fail to adequately protect future class members who will develop serious physical or mental illness. Prisoners who are not sick or mentally ill do not yet have a claim that they have been subjected to care that violates the Eighth Amendment, but in no sense are they remote bystanders in California’s
medical care system. They are that system’s next potential victims.

A release order limited to prisoners within the plaintiff classes would, if anything, unduly limit the ability of State officials to determine which prisoners should be released. As the State acknowledges in its brief, “release of seriously mentally ill inmates [would be] likely to create special dangers because of their recidivism rates.”

2

In reaching its decision, the three-judge court gave “substantial weight” to any potential adverse impact on public safety from its order. The court devoted nearly 10 days of trial to the issue of public safety, and it gave the question extensive attention in its opinion. Ultimately, the court concluded that it would be possible to reduce the prison population “in a manner that preserves public safety and the operation of the criminal justice system.”

The PLRA’s requirement that a court give “substantial weight” to public safety does not require the court to certify that its order has no possible adverse impact on the public. A contrary reading would depart from the statute’s text by replacing the word “substantial” with “conclusive.” . . . A court is required to consider the public safety consequences of its order and to structure, and monitor, its ruling in a way that mitigates those consequences while still achieving an effective remedy of the constitutional violation.

This inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such. Courts can, and should, rely on relevant and informed expert testimony when making factual findings. . . .

The three-judge court credited substantial evidence that prison populations can be reduced in a manner that does not increase crime to a significant degree. Some evidence indicated that reducing overcrowding in California’s prisons could even improve public safety [by reducing the extent to which the prison system made criminals worse than when they entered.]

Expert witnesses produced statistical evidence that prison populations had been lowered without adversely affecting public safety in a number of jurisdictions, including certain counties in California, as well as Wisconsin, Illinois, Texas, Colorado, Montana, Michigan, Florida, and Canada.11 . . .

11 Philadelphia’s experience in the early 1990’s with a federal court order mandating reductions in the prison population was less positive, and that history illustrates the undoubted need for caution in this area. One congressional witness testified that released prisoners committed 79 murders and multiple other offenses. See Hearing on S. 3 et al. before the Senate Committee on the Judiciary, 104th Cong., 1st Sess. 45 (1995) (statement of Lynne Abraham, District Attorney of Philadelphia). Lead counsel for the plaintiff class in that case responded that “[t]his inflammatory assertion has never been documented.” Id. at 212 (statement of David Richman). . . .
The court found that various available methods of reducing overcrowding would have little or no impact on public safety. Expansion of good-time credits would allow the State to give early release to only those prisoners who pose the least risk of reoffending. Diverting low-risk offenders to community programs such as drug treatment, day reporting centers, and electronic monitoring would likewise lower the prison population without releasing violent convicts. The State now sends large numbers of persons to prison for violating a technical term or condition of their parole, and it could reduce the prison population by punishing technical parole violations through community-based programs.

III

Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree of judgment. The inquiry involves uncertain predictions regarding the effects of population reductions, as well as difficult determinations regarding the capacity of prison officials to provide adequate care at various population levels. Courts have substantial flexibility when making these judgments. “Once invoked, “the scope of a district court’s equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies.”” *Hutto*, 437 U.S. at 687 n.9, quoting *Milliken II*, quoting *Swann*.

Nevertheless, the PLRA requires a court to adopt a remedy that is “narrowly tailored” to the constitutional violation and that gives “substantial weight” to public safety. 18 U.S.C. §3626(a). When a court is imposing a population limit, this means the court must set the limit at the highest population consistent with an efficacious remedy. The court must also order the population reduction achieved in the shortest period of time reasonably consistent with public safety.

A

The three-judge court concluded that the population of California’s prisons should be capped at 137.5% of design capacity. This conclusion is supported by the record. Indeed, some evidence supported a limit as low as 100% of design capacity. . . . Other evidence supported a limit as low as 130%. . . .

Although the three-judge court concluded that the “evidence in support of a 130% limit is strong,” it found that some upward adjustment was warranted in light of “the caution and restraint required by the PLRA.” . . . [T]he State’s Corrections Independent Review Panel had found that 145% was the maximum “operable capacity” of California’s prisons, although the relevance of that determination was undermined by the fact that the panel had not considered the need to provide constitutionally adequate medical and mental health care, as the State itself concedes. After considering, but discounting, this evidence, the three-judge court . . . imposed a limit of 137.5

This weighing of the evidence was not clearly erroneous. . . . The plaintiffs’ evidentiary showing was intended to justify a limit of 130%, and the State made no attempt to show that any other number would allow for a remedy. . . . The three-judge
court made the most precise determination it could in light of the record before it. The PLRA’s narrow tailoring requirement is satisfied so long as these equitable, remedial judgments are made with the objective of releasing the fewest possible prisoners consistent with an efficacious remedy. In light of substantial evidence supporting an even more drastic remedy, the three-judge court complied with the requirement of the PLRA in this case.

B

The three-judge court ordered the State to achieve this reduction within two years. . . .

The State first had notice that it would be required to reduce its prison population in February 2009, when the three-judge court gave notice of its tentative ruling after trial. The 2-year deadline, however, will not begin to run until this Court issues its judgment. When that happens, the State will have already had over two years to begin complying with the order of the three-judge court. The State has used the time productively. At oral argument, the State indicated it had reduced its prison population by approximately 9,000 persons since the decision of the three-judge court. After oral argument, the State filed a supplemental brief indicating that it had begun to implement measures to shift “thousands” of additional prisoners to county facilities.

Particularly in light of the State’s failure to contest the issue at trial, the three-judge court did not err when it established a 2-year deadline for relief. [Later, when the State submitted its plan to implement the court’s order, it said that it could not safely comply in two years, but that it could safely comply in five years. The three-judge court approved the State’s plan without considering whether the specific measures contained within it would substantially threaten public safety. The three-judge court had left the choice of how best to comply to state prison officials, and the Supreme Court said that the three-judge court was not required to second-guess the state’s exercise of that discretion.]

The three-judge court, however, retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. . . . [T]he three-judge court must remain open to a showing . . . by either party that the injunction should be altered to ensure that the rights and interests of the parties are given all due and necessary protection. . . .

The State may wish to move for modification of the three-judge court’s order to extend the deadline for the required reduction to five years from the entry of the judgment of this Court . . . . The three-judge court may grant such a request provided that the State satisfies necessary and appropriate preconditions designed to ensure that measures are taken to implement the plan without undue delay. . . .

If significant progress is made toward remedying the underlying constitutional violations, that progress may demonstrate that further population reductions are not necessary or are less urgent than previously believed. Were the State to make this showing, the three-judge court in the exercise of its discretion could consider whether it is appropriate to extend or modify this timeline. . . .

These observations reflect the fact that the three-judge court’s order, like all
continuing equitable decrees, must remain open to appropriate modification. They are not intended to cast doubt on the validity of the basic premise of the existing order. The medical and mental health care provided by California’s prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay.

The judgment of the three-judge court is affirmed. . . .

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation’s history . . .

There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa. One would think that, before allowing the decree of a federal district court to release 46,000 convicted felons, this Court would bend every effort to read the law in such a way as to avoid that outrageous result. . . .

The proceedings that led to this result were a judicial travesty. I dissent because the institutional reform the District Court has undertaken violates the terms of the governing statute, ignores bedrock limitations on the power of Article I judges, and takes federal courts wildly beyond their institutional capacity.

I

A . . .

What has been alleged here . . . is the running of a prison system with inadequate medical facilities. That may result in the denial of needed medical treatment to “a particular [prisoner] or [prisoners],” [paraphrasing the statutory focus on the rights of “a particular plaintiff or plaintiffs” – ED.], thereby violating (according to our cases) his or their Eighth Amendment rights. But the mere existence of the inadequate system does not subject to cruel and unusual punishment the entire prison population in need of medical care, including those who receive it.

The Court acknowledges that the plaintiffs “do not base their case on deficiencies in care provided on any one occasion”; rather, “[p]laintiffs rely on systemwide deficiencies . . .” Ante n.3. But our judge-empowering “evolving standards of decency” jurisprudence (with which, by the way, I heartily disagree) does not prescribe (or at least has not until today prescribed) rules for the “decent” running of schools, prisons, and other government institutions. It forbids . . . the denial of medical care to those who need it. And the persons who have a constitutional claim for denial of medical care are those who are denied medical care — not all who face a “substantial risk” (whatever that is) of being denied medical care. . . .

[I]t is inconceivable that anything more than a small proportion of prisoners in the plaintiff classes have personally received sufficiently atrocious treatment that their Eighth Amendment right was violated . . . .

[W]hat procedural principle justifies certifying a class of plaintiffs so they may
assert a claim of systemic unconstitutionality? I can think of two possibilities, both of which are untenable. The first is that although some or most plaintiffs in the class do not individually have viable Eighth Amendment claims, the class as a whole has collectively suffered an Eighth Amendment violation. That theory is contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable.

The second possibility is that every member of the plaintiff class has suffered an Eighth Amendment violation merely by virtue of being a patient in a poorly-run prison system, and the purpose of the class is merely to aggregate all those individually viable claims. Under this theory, each and every prisoner who happens to be a patient in a system that has systemic weaknesses has suffered cruel or unusual punishment, even if that person cannot make an individualized showing of mistreatment. Such a theory of the Eighth Amendment is preposterous. And we have said as much in the past: “If . . . a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care . . . simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.” Lewis, 518 U.S. at 350.

B

Even if I accepted the implausible premise that the plaintiffs have established a systemwide violation of the Eighth Amendment, I would dissent from the Court’s endorsement of a decrowing order. That order is an example of what has become known as a “structural injunction.” . . . [S]tructural injunctions are radically different from the injunctions traditionally issued by courts of equity . . .

Structural injunctions depart from [the] historical practice [of limiting mandatory injunctions to requiring “a single simple act” that requires no continuing supervision]. They turn] judges into long-term administrators of complex social institutions such as schools, prisons, and police departments. Indeed, they require judges to play a role essentially indistinguishable from the role ordinarily played by executive officials. Today’s decision not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it may produce constitutional violations.

This case illustrates one of [the] most pernicious aspects [of structural injunctions]: that they force judges to engage in a form of factfinding-as-policymaking that is outside the traditional judicial role. The factfinding judges traditionally engage in involves the determination of past or present facts based . . . upon a closed trial record. . . . In a very limited category of cases, judges have also traditionally been called upon to make some predictive judgments: which custody will best serve the interests of the child, for example, or whether a particular one-shot injunction will remedy the plaintiff’s grievance. When a judge manages a structural injunction, however, he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views — the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch.
This feature of structural injunctions is superbly illustrated by the District Court’s proceeding concerning the decrowding order’s effect on public safety. . . . Here, the District Court [made] the “factual finding” that “the state has available methods by which it could readily reduce the prison population to 137.5% design capacity or less without an adverse impact on public safety or the operation of the criminal justice system.” It found the evidence “clear” that prison overcrowding would “perpetuate a criminogenic prison system that itself threatens public safety” . . .

The District Court cast these predictions (and the Court today accepts them) as “factual findings,” made in reliance on the procession of expert witnesses that testified at trial. Because these “findings” have support in the record, it is difficult to reverse them under a plain-error standard of review. And given that the District Court devoted nearly 10 days of trial and 70 pages of its opinion to this issue, it is difficult to dispute that the District Court has discharged its statutory obligation to give “substantial weight to any adverse impact on public safety.”

But the idea that the three District Judges in this case relied solely on the credibility of the testifying expert witnesses is fanciful. Of course they were relying largely on their own beliefs about penology and recidivism. And of course different district judges, of different policy views, would have “found” that rehabilitation would not work and that releasing prisoners would increase the crime rate. I am not saying that the District Judges rendered their factual findings in bad faith. I am saying that it is impossible for judges to make “factual findings” without inserting their own policy judgments, when the factual findings are policy judgments.

[T]he dressing-up of policy judgments as factual findings is not an error peculiar to this case. It is an unavoidable concomitant of institutional-reform litigation. When a district court issues an injunction, it must make a factual assessment of the anticipated consequences of the injunction. And when the injunction undertakes to restructure a social institution, assessing the factual consequences of the injunction is necessarily the sort of predictive judgment that our system of government allocates to other government officials.

The District Court also relied heavily on the views of the Receiver and Special Master, and those reports play a starring role in the Court’s opinion today. . . . The use of these reports is even less consonant with the traditional judicial role than the District Court’s reliance on the expert testimony at trial. . . . Relying on the un-cross-examined findings of an investigator, sent into the field to prepare a factual report and give suggestions on how to improve the prison system, bears no resemblance to ordinary judicial decisionmaking. . . .

III

In my view, a court may not order a prisoner’s release unless it determines that the prisoner is suffering from a violation of his constitutional rights, and that his release, and no other relief, will remedy that violation. Thus, if the court determines that a particular prisoner is being denied constitutionally required medical treatment, and the release of that prisoner (and no other remedy) would enable him to obtain medical treatment, then the court can order his release; but a court may not order the release of prisoners who have suffered no violations of their constitutional rights,
merely to make it less likely that that will happen to them in the future.

My approach may invite the objection that the PLRA appears to contemplate structural injunctions in general and mass prisoner-release orders in particular. The statute requires courts to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief” and authorizes them to appoint Special Masters, §3626 (a)(1)(A), (f), provisions that seem to presuppose the possibility of a structural remedy. It also sets forth criteria under which courts may issue orders that have “the purpose or effect of reducing or limiting the prisoner population,” §3626(g)(4).

I do not believe that objection carries the day. In addition to imposing numerous limitations on the ability of district courts to order injunctive relief with respect to prison conditions, the PLRA states that “[n]othing in this section shall be construed to . . . repeal or detract from otherwise applicable limitations on the remedial powers of the courts.” §3626(a)(1)(C). The PLRA is therefore best understood as an attempt to constrain the discretion of courts issuing structural injunctions — not as a mandate for their use.

Justice ALITO, with whom Chief Justice ROBERTS joins, dissenting.

The decree in this case is a perfect example of what the Prison Litigation Reform Act of 1995 (PLRA) was enacted to prevent.

The Eighth Amendment prohibits prison officials from depriving inmates of “the minimal civilized measure of life’s necessities.” Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Federal courts have the responsibility to ensure that this constitutional standard is met, but undesirable prison conditions that do not violate the Constitution are beyond the federal courts’ reach.

I

Both the PLRA and general principles concerning injunctive relief dictate that a prisoner release order cannot properly be issued unless the relief is necessary to remedy an ongoing violation.

The scope of permissible relief depends on the scope of any continuing violations, and therefore it was essential for the three-judge court to make a reliable determination of the extent of any violations as of the time its release order was issued. Particularly in light of the radical nature of its chosen remedy, nothing less than an up-to-date assessment was tolerable.

The three-judge court, however, relied heavily on outdated information and findings and refused to permit California to introduce new evidence.

By the date of the trial before the three-judge court, the death rate had been trending downward for 10 quarters, and the number of likely preventable deaths fell from 18 in 2006 to 3 in 2007, a decline of 83 percent. Between 2001 and 2007, the California prison system had the 13th lowest average mortality rate of all 50 state systems.
II...

[The PLRA’s remedial limitations] largely reflect general standards for injunctive relief aimed at remediying constitutional violations by state and local governments. “The power of the federal courts to restructure the operation of local and state governmental entities is not plenary... Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.” *Dayton I.*

Here, the majority and the court below maintain that no remedy short of a massive release of prisoners from the general prison population can remedy the State’s failure to provide constitutionally adequate health care. This argument is implausible on its face and is not supported by the requisite clear and convincing evidence. . . .

I do not dispute that general overcrowding contributes to many of the California system’s healthcare problems. But it by no means follows that reducing overcrowding is the only or the best or even a particularly good way to alleviate those problems. . . . The release order is not limited to prisoners needing substantial medical care but instead calls for a reduction in the system’s overall population. . . . Although some class members will presumably be among those who are discharged, the decrease in the number of prisoners needing mental health treatment or other forms of extensive medical care will be much smaller than the total number of prisoners released, and thus the release will produce at best only a modest improvement in the burden on the medical care system. . . .

The State proposed several remedies other than a massive release of prisoners, but the three-judge court, seemingly intent on attacking the broader problem of general overcrowding, rejected all of the State’s proposals. In doing so, the court made three critical errors.

First, the court did not assess those proposals and other remedies in light of conditions proved to exist at the time the release order was framed. . . .

Second, the court failed to distinguish between conditions that fall below the level that may be desirable as a matter of public policy and conditions that do not meet the minimum level mandated by the Constitution. . . .

Third, the court rejected alternatives that would not have provided “‘immediate’” relief. But nothing in the PLRA suggests that public safety may be sacrificed in order to implement an immediate remedy rather than a less dangerous one that requires a more extended but reasonable period of time.

If the three-judge court had not made these errors, it is entirely possible that an adequate but less drastic remedial plan could have been crafted. Without up-to-date information, it is not possible to specify what such a plan might provide, and in any event, that is not a task that should be undertaken in the first instance by this Court. But possible components of such a plan are not hard to identify. . . .

Sanitary procedures could be improved; sufficient supplies of medicine and medical equipment could be purchased; an adequate system of records management could be implemented; and the number of medical and other staff positions could be increased. Similarly, it is hard to believe that staffing vacancies cannot be reduced or eliminated and that the qualifications of medical personnel cannot be improved by
any means short of a massive prisoner release. Without specific findings backed by hard evidence, this Court should not accept the counterintuitive proposition that these problems cannot be ameliorated by increasing salaries, improving working conditions, and providing better training and monitoring of performance.

While the cost of a large-scale construction program may well exceed California’s current financial capabilities, a more targeted program, involving the repair and perhaps the expansion of current medical facilities (as opposed to general prison facilities), might be manageable. After all, any remedy in this case, including the new programs associated with the prisoner release order and other proposed relief now before the three-judge court, will necessarily involve some state expenditures.

Measures such as these might be combined with targeted reductions in critical components of the State’s prison population. A certain number of prisoners in the classes on whose behalf the two cases were brought might be transferred to out-of-state facilities.

Finally, as a last resort, a much smaller release of prisoners in the two plaintiff classes could be considered.

III

Before ordering any prisoner release, the PLRA commands a court to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.” §3626(a)(1)(A). This provision unmistakably reflects Congress’ view that prisoner release orders are inherently risky.

[T]he three-judge court in this case concluded that losing 46,000 criminals would not produce a tally like that in Philadelphia [see note 11 of the majority’s opinion] and would actually improve public safety.

This is a fundamental and dangerous error. When a trial court selects between the competing views of experts on broad empirical questions such as the efficacy of preventing crime through the incapacitation of convicted criminals, the trial court’s choice is very different from a classic finding of fact and is not entitled to the same degree of deference on appeal.

* * *

... I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years, we will see.

NOTES ON THE PRISON CASES

1. The prison cases. Beginning in the 1970s, the federal courts supervised the reform of prisons, jails, and mental hospitals in nearly every state. The worst of cruel and unusual conditions were greatly improved, but money, institutional inertia, and political indifference remain substantial obstacles. And inevitably, some provisions of some of these decrees had unintended consequences that were counterproductive. The
Supreme Court had issued narrow opinions in several prison cases, but remarkably, Brown v. Plata is the first Supreme Court case to grapple with the central problem presented by these cases.

2. **The central issue.** The central problem appears to be that California’s voters are not willing to spend nearly enough money to provide facilities and medical care for all the people they wish to imprison. In 2009, with the state facing a projected $42 billion budget deficit, the receiver in Coleman asked for $8 billion to build seven new prison health care centers with a total of 10,000 beds. Malia Wollan, *California Asks Removal of Prison Overseer*, N.Y. Times A18 (Jan. 29, 2009). Of course he didn’t get the money.

The courts were patient. The Coleman litigation was 21 years old, and the Plata litigation ten, by the time of the Supreme Court’s decision. The state was allowed to propose its own plans for reform and for compliance, and in Plata there is a consent decree. The evidence, and the fact finding, was massive and detailed. Justice Alito is new to the problem; he wants to give the state more time. But from the perspective of the district judges, and of the prisoners, the state has already had many years.

No doubt the courts are now deeply involved in what should be an executive branch function. And releasing tens of thousands of prisoners is no doubt an extraordinary remedy. What is the alternative? Should the court order tax increases under Jenkins II and earmark the money for prisons? Should the court give up and let the constitutional violations continue? And if the prisons need not provide medical care, what else do they not need to provide? Would the central issue be any different if the state provided no sanitary facilities? No food? In Hutto v. Finney, 437 U.S. 678 (1978), Arkansas prisoners were fed only 1000 calories a day, and nearly all were losing weight.

3. **The Prison Litigation Reform Act.** The Prison Litigation Reform Act, much discussed in Plata, codified remedial standards in prison cases. Its core provision, 18 U.S.C. §3626(a)(1)(A), is not confined to release orders. It requires that any prospective relief in a prison case “shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs,” that it be “narrowly drawn,” that it extend “no further than necessary to correct the violation of the Federal right,” and that it be “the least intrusive means necessary to correct the violation of the Federal right.” Congress plainly thought that courts were engaged in free-wheeling equity in these cases, but it seems increasingly clear that the Court’s view of appropriate remedies is not far from what Congress codified. The PLRA specifies multiple and sometimes redundant analytic steps, and the Court works its way through each of them. But do you get the sense at any point that the Court wishes it could do more than the Act permits?

The Act might be unconstitutional if it prohibited a remedy necessary to end an ongoing constitutional violation. Note the Court’s brief allusion to that possibility in the fourth paragraph of part II.B.3 of the opinion.

4. **Substantial risk and threatened violations.** The dissents raise issues about the judicial role in these cases that are both important and serious. But in their anger at what they believe to be an outrageous result and a process run amuck, they sometimes misstate what actually happened in the three-judge court. Justice Scalia thinks that no prisoner’s constitutional right is violated until he is denied medical care
(and maybe not even then), so that there can be no such thing as a systemic violation in this context. The phrase “substantial risk” (note 3 of the majority’s opinion) comes from earlier cases holding that the Eighth Amendment is substantively violated by holding a prisoner in unsafe conditions that pose a substantial risk of injury. Helling v. McKinney, 509 U.S. 25 (1993). Justice Scalia dissented, and he plainly continues to reject that holding.

But even without that, injunctions are available to prevent threatened violations of law. That’s the whole point of preventive injunctions. On the facts found by the district courts, doesn’t California threaten to deprive every inmate of medical care every time he needs it? And given that litigation is slow, and that the need for medical care is often urgent, is there any imaginable way to effectively implement Justice Scalia’s one-prisoner-at-a-time-after-he-gets-sick remedy?

5. Recent improvements. Justice Alito focuses on a decline in the death rate after the 2008 trial. Assuming these improvements are real, should we assume that less intrusive remedies are finally working after all these years? Or should we assume that the threat of a large prisoner release has finally gotten the state’s attention and motivated more serious efforts?

Justice Alito also notes that California’s overall prison death rate was relatively low compared to other states. The three-judge court considered that evidence, noting that it did not control for demographics, and that California’s free population also had a low death rate, and concluded that this evidence of gross death rates did not overcome all the other evidence in the case. Coleman v. Schwarzenegger, 2009 WL 2430820 at *54 (E.D. Cal. Aug. 4, 2009).

6. Who would be released? The dissenters emphasize that California has been ordered to release 46,000 “convicted felons.” But there is something very odd in the prison population statistics. The Court says that 140,000 prisoners enter the system every year. Yet there are only 156,000 prisoners altogether. If many of those prisoners are serving long terms, there must be tens of thousands of others who are passing through the system for less than a year at a time. Such short sentences do not suggest that California considers these people serious threats to public safety. Eliminating this enormous flow through of short-term prisoners is one potential source of substantial population reductions that may have only modest effects on public safety. The three-judge court’s opinion does not say that prisoners can be released without danger to the public because rehabilitation works, as Justice Scalia seems to assume; rather, it principally says that many prisoners in the California system are not very dangerous in the first place and can safely be released earlier or dealt with by means other than incarceration.

7. The reports of the receiver and special master. Both sides introduced various reports of the receiver and special master without objection from the other side. Id. at *15 n.20. If the state had asserted its right to cross-examine the receiver, it is hard to imagine that the three-judge court would not have allowed that. But the state apparently never asked. The special master is more like an assistant judge; his findings of fact are reviewed de novo, unless the parties stipulate to a different standard. Fed. R. Civ. Proc. 53(f)(3).

In practice, the special master and the receiver appear to have functioned in similar ways; the special master gathered evidence not just by hearing testimony and
receiving exhibits, but also by inspecting the prisons and gathering data. This is presumably more effective than passively receiving evidence submitted by the parties; the special master may be able to learn things that plaintiffs could not have learned through discovery. But it is not how judicial officers in our system usually function.

8. The remand. The Supreme Court’s opinion came down in May 2011. On June 30, the three-judge court ordered the state to reduce its prison population to 167 percent of design capacity by December, to 155 percent by June 2012, to 147 percent by December 2012, and to 137.5 percent by June 2013 (four years after the three-judge court’s original order), and to file monthly progress reports. The state attempted to comply principally by authorizing the transfer of certain low-risk offenders to county jails. Most of these are also over crowded, and many of them are involved in separate litigation, but the effects at the state level were good. Another 9,000 prisoners were transferred to other states, which housed them at California’s expense. The state also built additional facilities. The state met the 167 percent and 155 percent targets, but missed the 147 percent target. In May 2012, the state announced that it would not reduce the population to 137.5 percent of design capacity, and that it would move to modify the court’s order. It also announced that it intended to terminate the out-of-state program, because it was expensive and it separated inmates from their families. This would take the prison population back up to 162 percent of design capacity.

On January 7, 2013, the state filed motions to vacate the court’s orders and terminate the litigation. To the three-judge court, the state argued that crowding was no longer the primary cause of any deficiencies in medical care. To the single judge in the Coleman litigation (the mental-health case), the state argued that there was no continuing constitutional violation. It did not file a similar motion in the Plata litigation (the general medical case).

On January 8, Gov. Brown issued an executive order terminating his emergency powers over the prisons. (I believe these powers originated in a 2006 declaration of emergency by Gov. Schwarzenegger, but I haven’t been able to connect all the dots.) The significance of revoking these emergency powers is that many possible steps to reduce crowding that the governor might have ordered, including the out-of-state program, would now require legislation. The court can order steps not authorized by state law, but only if it finds that “no other relief will correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(B)(iii) (2006).

The district court extended the deadline for reaching the 137.5 percent target to December 2013. Apart from that, it denied both motions in lengthy opinions from which I have taken these facts. Coleman v. Brown, 2013 WL 1500989 (E.D. Cal., Apr. 11, 2013) (three-judge court); Coleman v. Brown, 2013 WL 1397335 (E.D. Cal., Apr. 5, 2013) (single judge). Both opinions found that there had been significant improvements, but that serious problems remained.

The single judge explicitly refused to rely on the “good faith” of California officials as a basis for terminating the decree. “There is overwhelming evidence in the record that much of defendants’ progress to date is due to the pressure of this and other litigation.” Id. at *23. The three-judge court was more blunt. Apparently counting from the state’s May 2012 announcement that it would not comply, the
court found that “for approximately a year, defendants have acted in open defiance of this Court’s Order” to reduce the prison population. 2013 WL 1500989 at *37. The state’s conduct had been “openly contumacious” despite repeated admonitions to continue compliance efforts pending disposition of whatever motions the state planned to file. Id. at *37. The court expressly questioned Gov. Brown’s good faith, id. at *33, and later noted “the efforts made in good faith by Governor Brown’s predecessors,” id. at *41. This is unusual language for a federal court. It cited Cooper v. Aaron, 358 U.S. 1 (1958), in which the Court insisted on the supremacy of judicial interpretations of the law, and in which the governor of Arkansas played a prominent and defiant role, and United States v. Barnett, 376 U.S. 681 (1964), in which the governor of Mississippi was held in criminal contempt.

Plaintiffs had filed repeated motions to hold defendants in contempt, but the court did not go there. “Being more interested in achieving compliance with our Order than in holding contempt hearings, this Court has exercised exceptional restraint.” 2013 WL 1500989 at *38. The court issued a new and more detailed order aimed at reaching 137.5 percent of design capacity by December 31. The state is required to submit a list of all possible means of reducing prison population, ranked in order of the state’s preference, with the estimated effect on population of each possibility, who within the state has authority to implement each possibility (legislature, governor, or a particular prison official), and other details. Increasingly detailed orders, and allusions to contempt without actual findings of contempt, are familiar tools of judges trying to extract compliance from resistant state officials.

9. Other prison litigation. It had been widely assumed that institutional reform litigation peaked long ago and largely disappeared as the federal courts became more conservative. Plata, and the many California county-jail cases, suggest that that is not so. A substantial survey of the cases confirmed that widespread prison litigation continues. Margo Schlanger, Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 81 N.Y.U. L. Rev. 550 (2006). Professor Schlanger found that there was little decline in prison litigation from the early 1980s to 1996, when the Prison Litigation Reform Act took effect, and that even after the PLRA, the percentage of prisons and jails under judicial supervision dropped only modestly. But the nature of this litigation changed, beginning in the 1980s, to an emphasis on more narrowly targeted complaints, tighter approaches to causation, and more rigorous proof. The PLRA thus confirmed a trend that was already well established.

10. Other legislation. The Civil Rights of Institutionalized Persons Act authorizes the Attorney General to sue states to correct “egregious or flagrant conditions” that violate constitutional rights of persons housed in prisons, mental hospitals, and similar institutions. 42 U.S.C. §1997a(a) (2006). Attorneys General of both parties have maintained an active practice under this section, more by negotiation than by litigation. An overview, with links to complaints, briefs, settlements, litigated decisions, and reports of investigations, is available at http://www.justice.gov/crt/about/spl/corrections.php.
B. Modifying Injunctions

Page 354. After note 2, add:

2.1. The political party litigation. In 1982, the Democratic National Committee and the Republican National Committee entered into a nationwide consent decree that limited the RNC’s targeting of minority voters in its efforts to combat what it perceived as voter fraud. There have been repeated enforcement actions, and repeated modifications, over the years, but the decree remains in effect. And the Third Circuit recently refused another motion to vacate the decree. Democratic National Committee v. Republican National Committee, 673 F.3d 192 (3d Cir. 2012). The court approved a modification under which the decree will expire in 2017 if no further violations are proved, and eight years after the date of the last violation if further violations are proved.

The court took the standard for modification from Rufo, and from Third Circuit precedent interpreting Rufo. It cited Horne v. Flores only once, for the proposition that a decree should be vacated “if a durable remedy has been implemented.” 673 F.3d at 212, quoting Horne, 557 U.S. 433, 450 (2009).

Page 355. After note 3, add:

3.1. The remand. On remand, the district court held a hearing that spread over 22 trial days from September 2010 to January 2011. On March 29, 2013, more than two years after the hearing ended and nearly four years after the Supreme Court’s remand, the court vacated the injunction and ordered the case dismissed. Flores v. Arizona, No. 92-CV-596-TUC-RCC (D. Ariz. Mar. 29, 2013), ECF No. 1082.

The opinion was written for those involved in the case and not for publication, and it is difficult to infer just what was argued on remand. But the opinion reads much more like the opinion in a newly filed case than like the opinion on a motion to modify. There is little or no discussion of funding levels for English-language instruction, although general educational funding appears to have improved somewhat, and the general performance of the Nogales school district had improved. The plaintiffs’ arguments, whether by choice or compulsion, had become quite different. Their principal challenge was to a particular method of instruction, in which English-language learners were given four hours of structured English immersion each day, with some sacrifice of instruction in other subjects.

This “Four Hour Model” was implemented in different ways in different school districts, and the court held that plaintiffs therefore lacked standing to challenge it on a statewide basis. And it held that as implemented in Nogales, the Four Hour Model was based on a valid educational theory and did not violate the Equal Educational Opportunities Act:

Education in this state is under enormous pressure because of lack of funding at all levels. It appears that the state has made a choice in how it wants to spend funds on teaching students the English language. It may turn out to be penny wise and pound foolish, as at the end of the day, speaking English, and not having other educational gains in science, math, etc., will still leave some
children behind. However, this lawsuit is no longer the vehicle to pursue the myriad of educational issues in this state.

_Id._, ¶ 51. Plaintiffs have filed a notice of appeal.

3.2. The motions to modify in the California prison litigation. The three-judge court in the California prison case viewed the state’s motion as simply an attempt to relitigate the order to reduce the prison population to 137.5 percent of design capacity. The changed circumstances to which the state pointed, at least by the court’s account, were simply the passage of time, which was not a change at all; some reduction in prison population, which was wholly anticipated because it was court ordered; and some improvements in medical care, which the court found to be real but not nearly sufficient to end the constitutional violation. It also emphasized _Horne_’s reference to “a durable remedy;” nothing in California’s improvements had yet been shown to be durable, and the state’s recalcitrance cast serious doubt on the durability of anything that had been accomplished.

Page 356. At the end of note 1, add:

1. The modification provisions of the PLRA. . . .

The single judge in the California prison litigation treated the state’s motion under the modification provisions of the PLRA and made the necessary findings. And then he said that _a fortiori_, the state was not entitled to relief under Rule 60(b)(5).

The three-judge court (which included the single judge as one member) said that the PLRA provision did not apply, because California had not waited two years before filing its motion. 2013 WL 1500989 n.23. This argument treated the relevant order as the timetable order issued on June 30, 2011, and not the original order to reduce the prison population issued in 2009. In the alternative, this court also made the findings necessary to keep its orders in effect. But most of the three-judge court’s opinion is written in terms of _Horne_ and Rule 60(b)(5).

Both opinions cite Ninth Circuit authority for the proposition that the burden of proof on a motion to modify or vacate a prison decree remains on defendants, even under the PLRA.
CHAPTER FIVE

CHOOSING REMEDIES

A. Substitutionary or Specific Relief

1. Irreplaceable Losses

   a. Injunctions

Page 389. After note 1.d, add:

2. A Second Circuit formulation. “Harm may be irreparable where the loss is
difficult to replace or measure, or where plaintiff should not be expected to suffer the
loss.” WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 285 (2d Cir. 2012). The court affirmed a
preliminary injunction against capturing over-the-air television signals and
retransmitting them to subscribers over the internet. The damages would be hard to
measure and defendant would be unable to pay any substantial award.

   The idea of losses that “plaintiff should not be expected to suffer” comes up in a
variety of contexts, often involving some personal attachment or long investment of
effort by the plaintiff. As Judge Friendly once put it, in a dispute over termination of
a Ford dealership:

   Of course, Semmes’ past profits would afford a basis for calculating damages
for wrongful termination, and no one doubts Ford’s ability to respond. But
the right to continue a business in which William Semmes had engaged for
twenty years and into which his son had recently entered is not measurable
entirely in monetary terms; the Semmes want to sell automobiles, not to live
on the income from a damages award.

Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970),

b. Specific Performance of Contracts

Page 406. At the end of note 5, add:

5. The aftermath. . . .

   The video has been taken down from You Tube. It is now available at

3. Other Reasons (and More of the Same Reason)

Page 427. After note 4, add:

4.1. The Federal Circuit. The Federal Circuit issued an extensive if belated
response to eBay in Robert Bosch LLC v. Pylon Manufacturing Corp., 659 F.3d 1142
(Fed. Cir. 2011). The court held that eBay abolishes any presumption of irreparable
injury in patent cases, but that the nature of the patent holder’s property right remains
relevant. “While the patentee’s right to exclude alone cannot justify an injunction, it
should not be ignored either.” Id. at 1149. The court treated loss of market share and pricing power as irreparable injury; such damages would be difficult to prove and measure, although the court did not say that. The court also had some doubts about defendant’s ability to pay a damage judgment. It reversed the district court’s refusal to enter an injunction and ordered an injunction on remand. Judge Bryson would have remanded for further consideration.

The court also gave a nod to the distinction between plaintiffs who practice their invention and plaintiffs who do not, but it did not actually commit to that distinction.

4.2. A broader assessment of the impact of eBay. For a more complete analysis of eBay’s impact, see Mark P. Gergen, John M. Golden, & Henry E. Smith, The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions, 112 Colum. L. Rev. 203 (2012). They describe eBay as having “cataclysmic effect” in the lower federal courts. Id. at 205. Federal courts “have now repeatedly declared the eBay test to have swept aside long-settled presumptions about when injunctions should issue.” Id.

Speaking in my own voice now: These presumptions were generally rebuttable, but they simplified litigation and embodied the practical meaning, derived from long experience, of such concepts as irreparable injury and balance of hardships. The reasons that gave rise to the presumptions could produce the same results in individual cases, but to some judges, that may seem like recreating the presumptions. The Supreme Court, of course, seems to have thought it was changing very little by invoking what it thought were “the traditional principles of equity.” State courts have mostly ignored eBay, with a handful of exceptions.

Page 428. At the end of note 6, add:

6. Fixing (or replacing) the damage remedy. . . .

The Federal Circuit understood in Paice that an ongoing royalty is an equitable remedy and not a measure of damages; it addressed the issue explicitly when it held that there is no right to jury trial on the amount of the royalty. Maybe a better way to explain this choice is that the court chooses an ongoing royalty instead of an injunction as a more appropriate equitable remedy. But it remains incoherent to explain a choice between two equitable remedies on the ground that there is an adequate remedy at law.

Page 428. After note 7, add:

8. Monsanto. The Court reaffirmed “[t]he traditional four-factor test” from eBay, in an opinion joined by seven justices, in Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2756 (2010). Even more clearly than in eBay, the Court was troubled by specific things about this injunction; the majority thought the injunction was overbroad, premature, and insufficiently deferential to the agency, and none of these problems cast much light on the meaning of the four-part “test.” And once again, the Court appeared oblivious to any difference between permanent and preliminary injunctions.

a. The facts. Monsanto manufactures Roundup, a widely used herbicide. The company has long worked to develop Roundup-resistant crops, so that farmers could spray the crop and kill only the weeds. This case arose when Monsanto received
approval from the Department of Agriculture to sell genetically modified Roundup-resistant alfalfa. Alfalfa is a major forage crop, principally harvested as hay for feeding cattle and other grass-eating livestock; the human market for alfalfa sprouts is a negligible fraction of production.

Plaintiffs included farmers who grow unmodified alfalfa for seed for sale to organic farmers and to farmers in countries where genetically modified crops are prohibited. They sued under the National Environmental Policy Act, 42 U.S.C. §4331 et seq. (2006), alleging that the agency must prepare an environmental impact statement before authorizing the sale, planting, or harvesting of Roundup-resistant alfalfa. The district court agreed. That court found that Roundup-resistant alfalfa posed no danger to humans or livestock, but that it posed serious risks to crops. The Round-up resistant gene could easily be transmitted to unmodified alfalfa, because alfalfa is pollinated by bees with a range of up to ten miles. This genetic contamination could destroy the business of exporting alfalfa seed or selling seed to organic farmers. And the agency had not evaluated the risk that Roundup-resistant crops would encourage overuse and accelerate the evolution of Roundup-resistant weeds that would plague all farmers. By the time the case got to the Supreme Court, there were widespread reports of Roundup-resistant superweeds. William Neuman & Andrew Pollack, Rise of the Superweeds, N.Y. Times B1 (May 4, 2010).

The district court enjoined any sale, planting, or harvesting of Roundup-resistant alfalfa, with a grandfather clause for crops planted before the injunction was issued, until the agency completed an environmental impact statement. The Supreme Court believed that this injunction went too far, erroneously precluding the agency from considering any partial deregulation in the interim, however limited and however harmless to plaintiffs. Suppose, in the Court’s example, that the agency authorized the planting of Roundup-resistant alfalfa only in isolated areas far removed from any other alfalfa farm. Plaintiffs could not show a threat of irreparable injury from such a partial deregulation, because they could not show any threat of harm at all. Justice Stevens, dissenting, found such hypotheticals wholly implausible, because alfalfa seed is in fact grown in a few highly concentrated areas and because the agency lacked the capacity to enforce any regulations it might issue. Stevens dissented alone. Justice Breyer did not participate, because his brother was the trial judge.

b. Irreparable injury. The debate over the facts is interesting and important, but not our concern. With respect to the four-part test, the Court did not say that environmental harm could sometimes be adequately compensated in damages or that it might not be irreparable injury. Rather, it said that the injunction forbade potential agency action that might cause no harm to plaintiffs at all. And it said that if the agency partially deregulated Roundup-resistant alfalfa in a way that threatened irreparable harm to plaintiffs, they could file a new lawsuit and seek a preliminary injunction to prevent implementation of the new agency action.

c. Public interest. Monsanto revealed another ambiguity in the new four-part test. The Court said that the case was not a class action, so that plaintiffs could not rely on harm to other parties not before the Court. Although the Court emphasized its new four-part test, it appeared to treat as irrelevant the possibility that harm to alfalfa-seed farmers who were not plaintiffs might be harm to the public interest. What if such harm were widespread, or destroyed the export market for alfalfa seed? But in
eBay’s formulation of the four-part test, quoted verbatim in Monsanto, plaintiff must show “that the public interest would not be disserved by a permanent injunction.” Monsanto, 130 S. Ct. at 2756. eBay does not explicitly say that the public interest can weigh in favor of issuing the injunction. Might this mean that benefits to the public interest cannot count in favor of issuing the injunction, but that harm to the public interest is an absolute reason not to issue it? Did Justice Thomas choose that phrasing deliberately in eBay, or might it be inadvertent?

Justice Stevens noted that the plaintiffs included organizations of farmers, consumers, and environmentalists. Id. at 2770 n.12 (Stevens, J., dissenting). Organizations can represent their members without a class certification; his point appeared to be that harm to any member of one of these organizations was equivalent to harm to a party.

d. Permanent and preliminary injunctions again. Monsanto was a final judgment granting an injunction intended to last only until the agency completed its environmental impact statement. No preliminary injunction had been issued in the district court, and the litigation took two years before the permanent injunction was issued. So the permanent injunction features dominated, and the Court treated the injunction as permanent throughout its opinion. But it cited permanent and preliminary injunction cases without distinction. Thus it said that “[t]he traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation,” id. at 2756, and that “[a]n injunction should issue only if the traditional four-factor test is satisfied,” id. at 2757, citing for each statement Winter v. Natural Resources Defense Council, 555 U.S. 7, 30-33 (2008). Winter, reprinted at page 440 in the main volume, is a preliminary injunction case involving a four-factor test that is somewhat different in its verbal formulation and has historically been substantially different in its application. The Court also repeated the old shibboleth that “[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course,” citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-312 (1982). Romero-Barcelo was another final judgment designed to preserve the environmental status quo pending resolution of administrative proceedings, but in Romero-Barcelo, the Court treated the injunction as though it were preliminary.

B. Preliminary or Permanent Relief

1. The Substantive Standards for Preliminary Relief

Page 444. At the end of note 3, add:

3. The four-part test. . . .

On further reflection, the Ninth Circuit has concluded that the sliding scale survives Winter, and that a preliminary injunction can issue on a showing of serious questions going to the merits and a balance of hardships that tips sharply in favor of plaintiffs. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011).

Eighth, Ninth, and Tenth Circuits have considered the effect of *Winter* “either implicitly or explicitly;” only the Fourth “has expressly held that *Winter* invalidates its earlier standard.” Second, there has been no significant change in the rate at which preliminary injunctions are granted in environmental cases. The success rate dropped from about 48% to about 46%, which is little change at most and may be a random blip. Third, Professor Morath found 41 such cases in the three years after *Winter*, and 33 in the three years before *Winter*, so environmentalists did not maintain their success rate by filing fewer cases. Yet she also reports that environmental lawyers who represent plaintiffs view *Winter* as a serious problem.

Page 445. At the end of note 5, add:

5. A more recent case. . . .

A unanimous Court quoted *Nken* for “the four traditional stay factors” in Chafin v. Chafin, 133 S. Ct. 1017 (2013). The context was the return of children to foreign countries in international custody disputes. “[A]pplication of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child’s best interests.” *Id.* at 1027.

2. The Procedure for Obtaining Preliminary Relief

Page 460. After note 5, add:

6. Capable of repetition, yet evading review. *Carroll* relies on a well-settled exception to the usual rule of refusing to decide cases that have become moot. If a dispute is capable of repetition *between the same two parties*, yet so short lived that it tends to evade judicial review, the case can still be decided on appeal because the underlying controversy between the parties continues. The rule was reaffirmed without dissent in Turner v. Rogers, 131 S. Ct. 2507 (2011).

Page 468. At the end of note 9, add:

9. Stays and injunctions pending appeal. . . .


Page 469. At the end of note 11, add:

11. Appeals that suddenly turn final. . . .

In *Munaf v. Geren*, 553 U.S. 674, 691-692 (2008), the Court invoked an older line of cases to similar effect. Most of these cases say that if it is clear on appeal from the preliminary injunction that plaintiff has not stated a claim on which relief can be granted, the appellate court can grant final judgment for defendant and order the complaint dismissed. But the Court also cited one famous constitutional case in which both the district court and the Supreme Court issued opinions that appear to
finally resolve the legal issue against the defendant, effectively ending the litigation, even though the only order actually issued and affirmed was a preliminary injunction. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584-585 (1952).

C. Prospective or Retrospective Relief

1. Suits Against Officers in Their Official Capacities

Page 478. After note 8, add:

9. Suits by state agencies. A state agency may sue officials of its state under Ex parte Young, Virginia Office of Protection and Advocacy v. Stewart, 131 S. Ct. 1632 (2011). The possibly unprecedented case arose because Congress offered the states money to create independent agencies to investigate abuse and neglect of persons who are mentally ill or developmentally disabled. These agencies must be free of political control and authorized to litigate without oversight by the Attorney General or other state officials. It is this unusual legislation that created the possibility that one state agency might sue to enforce a federal right against the head of another state agency. Most states created private agencies to perform these functions, but Virginia and seven others created independent state agencies.

Justice Scalia’s opinion for the Court said that whatever other federalism issues might be lurking in the case, they had nothing to do with sovereign immunity or the limits of Ex parte Young. He repeated his simple two-part formulation from Verizon Maryland. Justices Kennedy and Thomas joined in the opinion of the Court but filed a concurring opinion that once again took a cautious view of Ex parte Young. Chief Justice Roberts, joined by Justice Alito, dissented, rejecting the Verizon Maryland test and arguing that it was an unconstitutional affront to the dignity of the state to have this intramural dispute resolved in federal court. Justice Kagan did not participate.

Page 482. After note 10, add:

10.1. Subdividing the Family and Medical Leave Act. The Family and Medical Leave Act, 29 U.S.C. §2612(a)(1) (2006 & Supp. V 2011), guarantees employees up to twelve weeks of unpaid leave to care for a family member, or to deal with an exigency resulting from a family member’s military service, or because the employee himself is sick. The Supreme Court held that the provision for the employee’s own illness is not Fourteenth Amendment legislation. Coleman v. Court of Appeals, 132 S. Ct. 1327 (2012). The Court upheld the family leave provisions in Hibbs on the ground that women disproportionately bear the burden of caring for families. But the four-justice plurality in Coleman said that that rationale does not apply to the sick-leave provision, because both men and women get sick.

Four dissenters argued that the sick-leave provision was also included to protect women, and that it had originated in an effort to provide gender-neutral protection for pregnant women and those who had just given birth. Congress also feared that a family-leave provision would increase sex discrimination at the hiring stage, because employers might anticipate that it would be disproportionately used by women.
Requiring sick leave as well would reduce that incentive, because it would be used more or less equally by both sexes.

Justice Scalia concurred in the judgment. Finding the debate between the two groups of four irresolvable and irrelevant, he proposed to tighten the standard for what counts as Fourteenth Amendment legislation.

Page 483. After note 11, add:

11.1. Sossamon. In Sossamon v. Texas, 131 S. Ct. 1651 (2011), the Court held that a statute authorizing “appropriate relief against a government” was not sufficient to authorize damage suits against states. The result is hardly surprising, but Justices Sotomayor and Breyer dissented, and the Eleventh Circuit had gone the other way. The statute was the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc et seq. (2006).

Page 483. After note 15, add:

15.1. Municipalities. Municipalities are not sovereign and are not protected by the Eleventh Amendment. They can be sued in their own name in federal court, and their officials can be sued. But under the principal federal source of state and local liability, 42 U.S.C. §1983 (2006), municipalities cannot be sued for the wrongdoing of their agents or employees. They can be sued only for their official policies or customs. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). Federal suits against municipalities are further explored in note 4 at page 525 and supplement.

Page 484. After the second paragraph of note 16, add:

16. Waivers of immunity. . . .

This circuit split can be described in more general terms as follows: when a state removes to federal court, does it waive its immunity in all circumstances, or only when it would not also have been immune in state court? Some circuits have added other variations. For an updated account of the split, see Bergemann v. Rhode Island Department of Environmental Management, 665 F.3d 336 (1st Cir. 2011).

2. Suits Against Officers in Their Personal Capacities

Page 492. After note 2, add:

2.1. Working for the government but not as an employee. A private attorney, retained by the city to lead an investigation of a firefighter suspected of abusing sick leave, is entitled to qualified immunity. Filarsky v. Delia, 132 S. Ct. 1657 (2012). The Court thought that the reasons for immunity apply to anyone conducting government business, whether full-time or part-time and whether as an employee or an independent contractor. The Court distinguished Wyatt v. Cole on the ground that the defendant there was pursuing only private interests. The Court characterized Richardson v. McKnight as a narrow holding based on the view that the private employer’s profit motive tended to ensure that its employees would not be unduly timid in performing their duties.
At the end of note 8.a., add:

a. Specificity. . . .

In Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011), the government arrested the plaintiff as a material witness, allegedly with no intention of calling him as a witness, because it suspected him of supporting terrorism but had no evidence sufficient to get an arrest warrant. The Court again emphasized specificity, holding that it was not clearly settled that pretextual use of material witness warrants is unconstitutional, and it was irrelevant that the Ninth Circuit thought that the unconstitutionality of the practice could be deduced from clearly established general principles. The Court also said that dictum in one district court opinion was not sufficient to clearly establish anything, even if the defendant in the later case was referenced by name in the dictum in the earlier case. The Court was unanimous that the relevant law had not been clearly settled. Four Justices said that what the government had done was not unconstitutional, at least not on the plaintiff’s theory. Justices Kennedy, Ginsburg, Breyer, and Sotomayor said the government’s actions may well have been unconstitutional on other theories that remained open on remand. Justice Kagan did not participate.

In Ryburn v. Huff, 132 S. Ct. 987 (2012), the Court unanimously and summarily reversed a finding of no immunity. In a fact-intensive opinion, the Court held that reasonable police officers could have believed there was an imminent threat of violence that justified them in entering plaintiffs’ house without a search warrant.

After note 8.d., add:

e. New decisions that unsettle settled law. In Reichle v. Howards, 132 S. Ct. 2088 (2012), plaintiff sued two Secret Service agents for arresting him while on a rope line greeting Vice President Cheney. He was charged with “harassment,” but the charges were dismissed. Plaintiff offered evidence, sufficient to present a triable issue of fact, that he was arrested in retaliation for criticizing the Iraq war while in the line. But the court of appeals also found that the agents had probable cause to arrest him for making a false statement when they interviewed him.

It was clearly settled in the Tenth Circuit that law enforcement officers are liable if they make an arrest in retaliation for an exercise of the arrestee’s free speech rights, even if they have probable cause for the arrest. But in Hartman v. Moore, 547 U.S. 250 (2006), the Supreme Court held that there is no liability for a retaliatory prosecution if there was probable cause to prosecute.

The Tenth Circuit held that Hartman’s decision on retaliatory prosecution did not change the law of retaliatory arrest in the Tenth Circuit. The Supreme Court reversed, noting that retaliatory arrests and prosecutions had traditionally been treated similarly and that a reasonable officer might have thought Hartman applied, or would apply, to retaliatory arrests. So the law was no longer clearly settled when plaintiff was arrested.

Hartman was decided on April 26, 2006; plaintiff in Reichle was arrested on June 16, 2006. So the odds are good that the agents knew nothing about Hartman when they made the arrest. No matter; it was decided before they acted, so they got the benefit of it.
Page 495. After note 9, add:

9.1. The sequence of decision in the Supreme Court.

a. Camreta. When a court of appeals holds that a defendant official has violated the law, but dismisses the claim on qualified immunity grounds because the law was not clearly established, the defendant official can seek review in the Supreme Court, and the Court can review the constitutional holding. Camreta v. Greene, 131 S. Ct. 2020 (2011). Justice Kagan’s opinion for the Court said that the official may have a continuing stake in the case if he remains in the same office and his conduct of that office is effectively restrained by a holding that what he did was illegal. And the plaintiff may have a continuing stake if she is at risk of being subjected to the same illegal behavior again.

On the plaintiff’s continuing stake, the Court seemed to apply a looser standard than that of City of Los Angeles v. Lyons. While a child, plaintiff had been interviewed at school, without a warrant and without a parent present, in an investigation of alleged sexual abuse; the Ninth Circuit held that this was an unconstitutional seizure of her person. She presumably could not have sued for an injunction because she was not at sufficient risk of being similarly treated again. Perhaps the risk of repetition sufficient to avoid mootness is a lower threshold than the risk of repetition sufficient to create standing to sue. If not, this new rule will not authorize Supreme Court review in the cases where it is most necessary to reach the constitutional issue. The Court did not fully explore how much stake plaintiff must retain, because here it was clear that she retained none: she had grown up, was about to graduate from high school, had moved out of the Ninth Circuit, and had no intention of returning.

The Court vacated as moot not the Ninth Circuit’s judgment, but that portion of its opinion discussing the merits of the constitutional question. The usual rule is that the Court reviews judgments, not opinions, so this disposition highlights the anomalous nature of these cases.

Justices Kennedy and Thomas dissented, arguing for the normal standards of jurisdiction and justiciability in qualified immunity cases. But they hinted that perhaps the solution should be to allow plaintiffs to recover nominal damages and no attorneys’ fees. There is a full argument for the nominal-damages solution in James E. Pfander, Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages, 111 Colum. L. Rev. 1601 (2011).

Justice Scalia, concurring, said he would be happy to consider barring the lower courts from reaching the constitutional question when they dismissed on immunity grounds, but these defendants had not asked for that relief.

b. al-Kidd. Camreta offered a major discussion of the issue. Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011), just did it. And the posture was a little different. The court of appeals had denied a motion to dismiss, holding that the former Attorney General’s conduct had been unconstitutional and that the law had been clearly established when he acted. The Court reversed on both grounds. First it held that the alleged conduct had not been unconstitutional, at least on plaintiff’s theory. Then it held that even if the conduct had been unconstitutional, the law would not have been clearly established.
Page 495. At the end of note 10, add:

10. **Interlocutory appeals. . .**

If a qualified immunity motion is denied because immunity depends on disputed issues of fact, interlocutory appeal is not available. Johnson v. Jones, 515 U.S. 304 (1995). And normal rules of appellate procedure apply to any appeal after final judgment. Ortiz v. Jordan, 131 S. Ct. 884 (2011). So if defendant moves for summary judgment on qualified immunity, the court denies the motion, and defendant does not take an immediate appeal — either because he chooses not to or because he cannot under Johnson — and the trial court eventually enters a final judgment for plaintiffs (typically after a trial), the only appeal is from the final judgment, and that appeal is subject to the usual rules on preservation of error.

There is nothing surprising about this holding, but some courts of appeals had been ruling otherwise. They had been reviewing the summary judgment motion after final judgment, and sometimes throwing out an error-free trial result on the ground that the trial should never have been held because the trial court should have granted the motion for summary judgment.

Page 496. After note 1, add:

1.1. **Another rationale for immunity rules.** For a masterful overview and critique of the Court’s body of immunity rules, see John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207 (2013), further discussed in this supplement to 530. He offers a different argument for a (reformed) version of qualified immunity: Strict liability for damages for all constitutional violations would severely inhibit the development of constitutional law. If every extension of constitutional doctrine led to damage liability, even for violations that occurred before the extension was announced, courts would be reluctant to expand constitutional rights or adapt them to new situations. It therefore makes sense to limit damage liability to cases where defendants had reasonable notice of the constitutional rule they violated. But he thinks that the current emphasis on a factually similar precedent, especially as qualified immunity is applied in some of the courts of appeals, goes far beyond what is required for reasonable notice.
CHAPTER SIX
REMEDIES AND SEPARATION OF POWERS

A. More on Governmental Immunities

1. Consented Suits Against the Government

Page 513. At the end of note 6, add:

6. Hurricane Katrina. . . .

The government did appeal, and the losing plaintiffs from outside the Lower Ninth Ward and St. Bernard Parish also appealed. The court of appeals initially affirmed on all claims. In re Katrina Canal Breaches Litigation, 673 F.3d 381 (5th Cir. 2012). With respect to the discretionary function exception, the court accepted the district court’s view that the Corps had not made a public-policy judgment, but rather, had misapplied “objective scientific principles.” Id. at 391. The decision was unanimous.

On petition for rehearing, the same panel unanimously changed its mind. 696 F.3d 436 (5th Cir. 2012). Now the court said that the government “need not have actually considered any policy implications; instead, the decision must only be ‘susceptible to policy analysis.’” Id. at 451, quoting Spotts v. United States, 613 F.3d 559, 572 (5th Cir. 2010). The court now seemed to doubt that the key mistake had really been a scientific misjudgment, but it did not say that any of the district court’s findings of fact were clearly erroneous. Plaintiffs’ cert petition presents one question: “Did the Fifth Circuit err when, in direct conflict with the Eighth and Ninth Circuits, it held that the discretionary function exception to the FTCA shields the government from liability for negligence that results when the failure to follow objective, scientific principles causes a decisionmaker to forgo action resulting in harm to persons or property?” Petition for Certiorari, Lattimore v. United States, No. 12-1092, available at 2013 WL 860360 (March 7, 2013).

7. Bernie Madoff. Victims of Bernie Madoff’s massive Ponzi scheme have sued the United States, alleging that the scheme would have been exposed much sooner if the Securities and Exchange Commission had exercised even a minimal level of competence. So far, all the courts have said that how to go about investigating fraud is a discretionary function. The cases are collected in Baer v. United States, 2013 WL 3481485 (3d Cir., July 1, 2013).

Page 514. After note 2, add:

2.1. The intentional-tort exception. The intentional-tort exception figured in two recent Supreme Court cases.

a. Sexual assault by prison guards. The Tort Claims Act:

shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law
enforcement officers of the United States Government, the [Tort Claims Act] shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

28 U.S.C. §2680(h) (2006) (boldface emphasis added). The law-enforcement proviso was enacted in response to Bivens v. Six Unknown Agents, excerpted at page 530 of the main volume, which implied a cause of action for damages for an unconstitutional search by federal agents. Some of the lower courts read additional requirements into the proviso, limiting the waiver of immunity to specific contexts, usually involving investigation or arrest.

The Court unanimously rejected all those cases in Milbrook v. United States, 133 S. Ct. 1441 (2013), where a prisoner alleged that he was sexually assaulted by a guard. The Court said that these rules narrowing the waiver of immunity had no basis in the statutory text. In fact, they had so little basis that the Solicitor General confessed error and agreed that immunity had been waived. The Court had to appoint an amicus to hear an argument in defense of the lower courts’ rule.

b. Unconsented medical treatment. It is far more common for the government to be tenacious in asserting its immunity. An example is Levin v. United States, 133 S. Ct. 1224 (2013). Levin was a veteran being treated in a Navy hospital. He alleged that he became alarmed at conditions in the operating room and withdrew his consent to surgery, and that the surgeon proceeded anyway. Both sides agreed that the surgery went badly. Levin sued for battery, one of the intentional torts covered by the intentional-tort exception, and in this medical context, not covered by the law-enforcement proviso.

The case turned on the provisions of the Medical Malpractice Immunity Act, 10 U.S.C. §1089 (2012), often called the Gonzalez Act. Section 1089(a) makes the Tort Claims Act the exclusive remedy for any medical malpractice by personnel of the armed forces, the Department of Defense, or the CIA. Section 1089(e) says: “For purposes of this section, the provisions of section 2680(h) [the intentional-tort exception] of title 28 shall not apply” to any claim for a negligent or wrongful act in the course of medical treatment. The Court unanimously held that the surgeon is immune and the United States is substituted as defendant under §1089(a), the intentional-tort exception does not apply under §1089(e), and the case should proceed to the merits. The three statutory sections may seem complicated when compressed to a paragraph, but working through them seems very straightforward. Yet the government had persuaded both lower courts that §1089(e) did not unambiguously waive immunity for battery; it merely made clear that the government’s immunity from intentional tort claims did not mean that the surgeon was liable instead.

The Gonzalez Act is one of a number of statutes immunizing particular federal employees in particular contexts and substituting the United States as the defendant. This approach was generalized in the Westfall Act, described in the next note in the main volume. But as Levin illustrates, the older and more specific provisions remain on the books.
Page 516. At the end of note 4.a, add:

a. Claims based on federal law. . . .

In United States v. Bormes, 133 S. Ct. 12 (2012), the Court unanimously reaffirmed a line of cases holding that “[w]here a specific statutory scheme provides the accoutrements of a judicial action, the metes and bounds of the liability Congress intended to create can only be divined from the text of the statute itself.” Id. at 19. And therefore, the substantive statute must waive sovereign immunity; the waiver in the Tucker Act is irrelevant.

There is an obvious potential for a Catch-22 here. If the substantive statute does not create a cause of action, the Tucker Act is no help, because it does not create a cause of action either. And if the substantive statute does create a cause of action — at least if it creates it in any detail — the Tucker Act is no help, because it cannot supplement or expand the substantive statute.

In Bormes, the Fair Credit Reporting Act created a cause of action for damages against “any person” who violated its terms, and defined “person” to include “any . . . government or governmental subdivision or agency.” 15 U.S.C. §1681a(b) (2006). The Court remanded for consideration of whether this language was sufficient to waive sovereign immunity.

2. Suits Against Officers — Absolute Immunity

Page 523. After the first paragraph of note 2, add:

2. Investigative activities. . . .

The Court recently emphasized that an officer in Malley’s situation will usually be protected by qualified immunity, and that it is the rare case where a reasonable officer should recognize the invalidity of a judicially approved warrant. Messerschmidt v. Millender, 132 S. Ct. 1235 (2012). The dissenters in Messerschmidt thought the officer had used a report of a specific assault, committed with a specific weapon, to authorize a general search of the suspect’s residence for any evidence of gang affiliation or other weapons violations. The majority spun a theory of how a reasonable officer might have thought it was all related; without holding the warrant valid, they did conclude that a reasonable officer might have thought it valid.

Page 524. After note 3, add:

3.1. Grand-jury testimony. The Court unanimously held that an investigator in the prosecutor’s office has absolute immunity for his allegedly perjured testimony to the grand jury. Rehberg v. Paulk, 132 S. Ct. 1497 (2012). He was the only witness before the grand jury, so plaintiff argues that he was the complaining witness and within the rule of Kalina. The Court held him immune, and within the rule of witnesses at trial. Unlike the prosecutor in Kalina, and unlike the complaining witness at common law, defendant here was just a witness, without the power to decide whether to initiate a prosecution. The opinion offers a succinct overview of absolute immunity in general and of witness immunity in particular.
At the end of note 4, add:

4. Other remedies for prosecutorial misconduct. . . .

In 2010, the City of Long Beach settled with Goldstein for “nearly $8 million.” Andrew Blankstein, Long Beach to Pay Man $8 Million, L.A. Times 3 (Aug. 12, 2010).

And Goldstein’s claim against Los Angeles County is still pending. Goldstein v. City of Long Beach, 715 F.3d 750 (9th Cir. 2013). The district court had dismissed on the ground that the relevant policy maker, the district attorney, had acted as a state official and not as a county official. This argument for sheltering local governments from liability originated in McMillian v. Monroe County, 520 U.S. 781 (1997), which held that Alabama sheriffs are officials of the state. But here, despite an arguably inconsistent decision from the Supreme Court of California, the court held that the district attorney was an official of the county. There may be a cert petition; if not, or if it is denied, the case will presumably return to the district court for consideration of liability.

4.1. Another egregious example. In Connick v. Thompson, 131 S. Ct. 1350 (2011), Thompson served eighteen years, fourteen of them on death row, for an armed robbery and murder he did not commit. The case focused primarily — exclusively in the majority’s view of the case — on the prosecutor’s failure to turn over a blood sample that exonerated Thompson of the armed robbery. The state courts then vacated the murder conviction, because the armed robbery conviction had made it impossible, as a strategic matter, for Thompson to testify in his own defense at the murder trial. On a new trial, the jury acquitted of murder in 35 minutes.

Thompson then sued for damages, and a jury awarded $14 million. Thompson’s theory was that the prosecutor’s office, as a governmental agency, was liable for a policy of failing to train prosecutors about their obligation to disclose exculpatory evidence. So the applicable rules were not the prosecutor’s absolute immunity in his personal capacity, but the rules on municipal liability. Earlier cases established that a municipality could be liable for a policy of deliberate indifference to constitutional rights, including a policy of failure to train. Proof of such a policy usually requires a pattern of similar violations, but the Court has left open the possibility that such a policy could be proved by one violation that was sufficiently obvious or egregious.

The Supreme Court reversed the damage award. It found no unconstitutional policy of inadequate training, because it said that Thompson had not relied on a pattern of failing to disclose, and because the one violation involving the blood sample did not by itself show such a policy. Justice Ginsburg, dissenting for herself and Justices Breyer, Sotomayor, and Kagan, found many other examples of evidence that should have been disclosed, and a culture of deliberate indifference to the obligation to disclose such evidence.

4.2. More on municipal liability. The Court has unanimously held that Monell applies to suits for injunctions as well as to suits for damages. That is, plaintiff can get an injunction against a municipality under §1983 only if a policy or custom of the municipality violates federal law. Los Angeles County v. Humphries, 131 S. Ct. 447 (2010).
Page 530. After note 5, add:

6. An overview. John Jeffries finds the Court’s immunity doctrines in constitutional cases incoherent:

There is no liability rule for constitutional torts. There are, rather, several different liability rules, ranging from absolute immunity at one extreme to absolute liability at the other. . . . Most defendants — including federal, state, and local officers — are neither absolutely immune nor strictly liable. Instead, they are protected by qualified immunity, a fault-based standard approximating negligence as to illegality.

This fracturing of constitutional torts into disparate liability rules does not reflect any plausible conception of policy. Although the Court occasionally makes functional arguments about one or another corner of this landscape, it has never attempted to justify the overall structure in those terms. Nor could it. The proliferation of inconsistent policies and arbitrary distinctions renders constitutional tort law functionally unintelligible. Blame may be cast on the shadow (though certainly not the terms) of the Eleventh Amendment, on the incorporation into constitutional tort doctrine of bits and pieces of the common law, and on accidents of timing and personnel: when and under what circumstances did particular issues come to the Court? However sympathetic one may be [to the difficulties caused by such factors,] the fact remains that constitutional tort doctrine is incoherent. It is so shot through with inconsistency and contradiction as to obscure almost beyond recognition the underlying stratum of good sense.


He would sharply limit absolute immunity to the bounds of its core justifications. Simplifying somewhat, those bounds would be legislative work on generally applicable legislation that can be challenged in litigation with the executive branch, prosecutorial misconduct in the courtroom and constrained by the adversary process, and judicial decisions subject in fact to correction on appeal. He would eliminate any distinction between state and local government, preferably by interpreting §1983 to override sovereign immunity in constitutional cases. He would reform and generalize qualified immunity: governments and government officials should be liable in damages when they reasonably should have known that their conduct was unconstitutional. He collects cases of obvious unconstitutionality where defendants were held immune because there was no case with sufficient factual similarity to satisfy current judicial understandings of the clearly-established-law test; he would impose liability in such cases.

He does not discuss Goldstein or Thompson, but he does discuss the lack of deterrence for violations of the duty to disclose exculpatory evidence. And he collects studies finding rampant violations of that duty. Id. at 227 n.68.
B. Creating Causes of Action

Page 535. After note 2, add:

2. Employees in private prisons. Relying heavily on Wilkie v. Robbins, the Court has held that no Bivens action lies against employees of a private corporation that operates a prison under contract with the government. Minneci v. Pollard, 132 S. Ct. 617 (2011). Defendants allegedly withheld medical care and in other ways aggravated injuries plaintiff suffered in an accident in the prison. The Court found that state-law tort remedies, which are generally unavailable against federal employees, would be available against employees of a private corporation and would be adequate. These remedies “may sometimes prove less generous” than a Bivens remedy, but “in general,” they would “provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations.” Id. at 625. The Court reserved the possibility of a case in which state remedies were not comparable in this way. Justice Ginsburg dissented.

Page 543. After note 6, add:

6.1. The same idea in other contexts. More generally, the Court will confine plaintiffs to a cause of action and remedy created by Congress if it believes that Congress meant the statutory remedy to be exclusive, and if the statutory remedy is specified in reasonable detail, the Court will generally infer that it is meant to be exclusive. A recent example is Elgin v. Department of the Treasury, 132 S. Ct. 2126 (2012). Plaintiffs sought to enjoin enforcement of a law that bars from government employment any male who failed to register for the stand-by draft. The Court held that the administrative remedies under the Civil Service Reform Act, 5 U.S.C. §1101 et seq. (2012), were exclusive — even though the agency could not consider the constitutional claim. The Federal Circuit would be able to consider the constitutional claim when it reviewed the agency’s action.

6.2. Age discrimination. The Court has agreed to decide whether the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (2006 & Supp. V 2011), precludes a state employee from suing for age discrimination under §1983 and the Equal Protection Clause. Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), cert. granted, 133 S. Ct. 1600 (2013). What is at stake here is an effective remedy. State employees cannot recover lost pay under the Age Act, because the state has sovereign immunity and the Act does not authorize suits against state agents. The Court invalidated Congress’s attempt to override immunity, on the ground that the Age Act bars much discrimination that is not unconstitutional. Kimel v. Florida Board of Regents, 528 U.S. 62 (2000). But if age discrimination in a particular case is unconstitutional, the victim can sue the responsible state officials in their personal capacities, and they will have only qualified immunity. The resulting judgment may be collectible because the state is likely to indemnify the defendants.

Here’s a case where Congress attempted to create a damage remedy against states, and the Supreme Court held that remedy unconstitutional. It would be perverse to hold that the attempted congressional remedy does, or was intended to, preempt an otherwise available constitutional remedy. But the Court did just that in Seminole

Page 543. After note 7, add:

7.1. The Supremacy Clause? The Supreme Court failed to resolve a claim that even when a federal statute creates no individual rights enforceable under Gonzaga, intended beneficiaries of the statute can sue under the Supremacy Clause, alleging that the federal law preempts inconsistent state law. Douglas v. Independent Living Center, Inc., 132 S. Ct. 1204 (2012). The four most conservative justices thought there could be no such claim. The majority did not decide, remanding the case for further consideration in light of new administrative developments. The federal agency had approved the allegedly inconsistent state law, and the agency determination was entitled to deference. The implication seemed to be that it might be easier to reject this Supremacy Clause claim on the merits than to decide whether plaintiffs could sue under the Supremacy Clause. But having been so prominently debated, the issue is likely to recur.

D. The Right to Jury Trial

Page 569. After note 1, add:

1.1. CIGNA. There is another elaborate discussion of ERISA remedies in CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011). There is much good sense in the core of the discussion, and some confusion in the dicta.

For any change in retirement plans, the plan administrator is required to disclose the changes to the employees in comprehensible form in a plan summary. When CIGNA made substantial changes to its plan, its disclosures assured the employees that CIGNA was saving no money from these changes and that no employee would be worse off because of them. In fact, the company was saving $10 million a year, and most employees were made worse off in multiple ways. The company could have imposed these changes with full disclosure, but that presumably would have caused employee unrest.

The lower courts held that they could enforce the retirement plan as it would have been if it had conformed to the disclosures, and that they could do this under §1132(a)(1)(B), which authorizes suits by beneficiaries to enforce plans. But the Supreme Court held that this section authorized enforcement only of the plan as written, and that the disclosures were not part of the plan.

The district court had also noted the possibility of “other appropriate equitable relief” under §1132(a)(3). The Supreme Court remanded for further consideration of this theory, with a substantial analysis suggesting that what the district court had done “closely resembles three other traditional equitable remedies.” Id. at 1879.

First, it might be reformation of the plan. Reformation, taken up in section 7.C, judicially amends documents to conform to the parties’ mutual understanding of what the documents said or to what one side fraudulently represented that they said.

Second, it might be estoppel, which prevents a party from denying now what he earlier represented as true. This book treats estoppel as a remedial defense in section 11.C; the Court also, and plausibly, treated it as an equitable remedy.
And third, the district court’s order of back benefits to employees who had already retired might be a “surcharge” of the trustee of the retirement plan, the traditional equitable label for actions to recover money or property due under a trust. Here the trust analogy again appeared to be dispositive.

And while detrimental reliance was an element of estoppel, it was not an element of reformation or surcharge. So the plan could be reformed, and the trustee surcharged under the plan as reformed, without a showing that the employees could have done anything different if they had received proper disclosures. Whether those remedies were appropriate on the facts of the case was left for the district court on remand, but the Supreme Court’s view seemed pretty clear. Justices Scalia and Thomas thought the entire analysis of §1132(a)(3) was an advisory opinion that should not have been issued.

Less helpfully, the Court also repeated the dictum that “injunctions, mandamus, and restitution” are typical forms of equitable relief. And it mysteriously referred to the relief provided in §1132(a)(1)(B) as an “exception” to the general rule that “the remedies available to those courts of equity were traditionally considered equitable remedies.” 131 S. Ct. at 1879. Of course all remedies in equity were equitable; that is tautological. And the right to sue for trust benefits, codified in §1132(a)(1)(B), was an equitable remedy available in equity. The exception to which the Court referred was quite narrow: if it were time for the trust to terminate, so that undistributed assets were payable directly to a beneficiary and not to be held in continuing trust, the beneficiary had the option of suing at law for a simple money judgment, or in equity to surcharge the trustee. Restatement (Third) of Trusts §95 & cmts. a, b; id. §100 (2012). The legal option, obviously, was a legal remedy; the equitable option, also obviously, remained an equitable remedy.

1.2. Implementing CIGNA. There are no reported proceedings on remand from CIGNA. But three courts of appeals have held that CIGNA authorizes surcharge of employers to give individual employees benefits they were expressly promised but later denied, allegedly because the plan did not authorize those benefits. Kenseth v. Dean Health Plan Inc., 2013 WL 2991466 (7th Cir., June 13, 2013); Gearlds v. Entergy Services, Inc., 708 F.3d 448 (5th Cir. 2013); McCravy v. Metropolitan Life Insurance Co., 690 F.3d 176 (4th Cir. 2012). Kenseth had surgery that the plan had preapproved; then the plan refused to pay. Gearlds alleged that he took early retirement in reliance on oral and written representations that he would have retiree medical insurance; the company later found him ineligible for coverage. McCravy paid for life insurance on a family member; when that family member died, the company discovered that he had been ineligible for coverage. It may be that each of these cases involved a mistake by a rank-and-file company employee. In Gearlds and McCravy there was a written representation; in Kenseth, the representation was oral, but the plan representative’s written record of what she had said matched the plaintiff’s account of the conversation. There is not yet a case turning on a disputed oral representation.

Page 572. After note 4, add:

Marshall, 131 S. Ct. 2594 (2011). This was the latest installment in the long-running litigation by and on behalf of Anna Nicole Smith to recover her share of the estate of the fabulously wealthy husband she married when she was 26 and he was 89.

She filed for bankruptcy, and her deceased husband’s son filed a defamation claim against her in the bankruptcy court. Smith filed a counterclaim for tortious interference with the gift her husband had allegedly intended to make to her. The question in the Supreme Court was whether her counterclaim could be adjudicated in the bankruptcy court. The Court said no.

*Langenkamp and Katchen* were explained not as cases of a counterclaim against a creditor who filed a claim in the bankruptcy court, but as cases of a counterclaim that was based on bankruptcy law and that could be adjudicated in the course of adjudicating the creditor’s claim. Smith’s state-law tort claim was not based on bankruptcy law. And although it was sufficiently related to her stepson’s claim that the lower courts had held it to be a compulsory counterclaim, it presented significant issues of law and fact not presented by the stepson’s claim. (Try not to be confused by the fact that the stepson was nearly thirty years older than his stepmother.)

Recognizing that its discussions of “the public rights exception” had “not been entirely consistent,” the Court held that Smith’s common law tort claim was not a claim of public right. “[W]hat makes a right ‘public’ rather than private is that the right is integrally related to particular federal government action.” *Id.* at 2613. The Court considered several other factors mentioned in earlier public-right cases, and said that Smith’s claim did not satisfy any of them. It also emphasized that bankruptcy courts are courts (although not Article III courts), and that they decide a broad range of issues, so they are unlike administrative agencies with special expertise. So the administrative agency cases might be different from the bankruptcy cases.

Justice Scalia, concurring, thought the long list of factors from earlier cases was wholly unworkable. He would have held, quoting his concurring opinion in *Granfinanciera*, that “a matter of public rights . . . must at a minimum arise between the government and others.”

Justice Breyer, dissenting for himself and Justices Ginsburg, Sotomayor, and Kagan, read *Langenkamp and Katchen* as your editor read them in note 3, and as Congress apparently read them when it authorized bankruptcy court jurisdiction over all counterclaims. 28 U.S.C. §157(b)(2)(C) (2006). Justice Breyer thought the majority’s opinion was entirely too formalistic, and that it relied too much on older cases and gave little weight to more recent cases. He would have held that even private disputes can be committed to non-Article-III tribunals sitting without juries if there is no threat to the independence of the judiciary. Letting bankruptcy courts adjudicate counterclaims was constitutional, even as applied to common law tort claims like the one at issue here, because of a list of practical considerations that bore little resemblance to the majority’s list of factors.
CHAPTER SEVEN

PREVENTING HARM WITHOUT COERCION:
DECLARATORY REMEDIES

A. Declaratory Judgments

1. The General Case

Page 586. After note 10, add:

11. Burden of proof. The Court has agreed to decide whether a declaratory judgment plaintiff proceeding under Medimmune bears the burden of proving that it is not infringing. Medtronic, Inc. v. Boston Scientific Corp., 695 F.3d 1266 (Fed. Cir. 2012), cert. granted, 133 S. Ct. 2393 (2013). Normally, the burden of proving infringement is on the patent holder. And the Federal Circuit agreed that merely reversing the party alignment in a declaratory judgment action does not shift the burden of proof. It would seriously undermine the purpose of declaratory judgment acts if a difference in the burden of proof might produce different results in the same dispute, depending on who sued whom.

The Federal Circuit said that cases where the declaratory-judgment plaintiff has a license are different. In what the court took to be the usual case, if a plaintiff sues for a declaratory judgment that it is not infringing, the patent holder will counterclaim for infringement, and the party claiming infringement should bear the burden of proof. But in this case, there will be no counterclaim, because Medtronic is protected by its license. The only party seeking affirmative relief is Medtronic, and it should bear the burden of proof. The court found at least some support for this distinction in state-court insurance cases.

Suppose that instead of getting a license to reduce its liability risk, Medtronic simply refrained from producing the allegedly infringing product. It could file a declaratory-judgment action, alleging that it would produce the product as soon as the patent dispute was resolved in its favor, and that it was deterred by the patent holder’s threats of litigation. There could be no counterclaim for infringement in that case either. So this is not a narrow dispute about claims by alleged infringers who pay for a protective license. The Federal Circuit’s reasoning would apply to many other declaratory actions as well.

Keep in mind that the burden of proof matters only to issues of fact. In many declaratory judgment actions, the parties can stipulate the facts and disagree only about the law.

12. Mootness. A declaratory judgment claim can become moot in the same ways that an injunction claim can become moot. In Already, LLC v. Nike, Inc., 133 S. Ct. 721 (2013), the Court applied the voluntary cessation rule from injunction cases to a declaratory judgment claim. Already is more fully described in this supplement to page 284.
2. The Special Case of Interfering with State Enforcement Proceedings

Page 594. After note 3, add:

3.1. Litigation with a state agency, but not directed to enforcement. The Supreme Court has agreed to decide whether the Eighth Circuit properly invoked Younger abstention when the pending litigation was, in petitioner’s labels, remedial rather than coercive. Sprint Communications Co. v. Jacobs, 690 F.3d 864 (8th Cir. 2012), cert. granted, 133 S. Ct. 1805 (2013). The phone company that provides service to a person placing a call often has to pay access fees to the phone company that provides service to the person receiving the call. Sprint claims that under federal law, it does not have to pay these access fees on calls placed over the internet instead of through phone lines. It also claims not to owe the fees under various state-law theories.

Sprint filed a claim with the Iowa Utilities Board, presenting its state-law claims and arguing that the Federal Communications Commission has exclusive jurisdiction over the federal claim. The Board resolved both the state and federal claims, on the merits and against Sprint. Sprint filed suit in federal court to enjoin enforcement of the Board’s order. See Verizon Maryland, Inc. v. Public Service Commission, 535 U.S. 635 (2002), summarized at page 478 of the main volume, illustrating this remedy and unanimously rejecting a sovereign-immunity defense. Sprint also filed a petition for review of the Board’s order in state court, presenting its state-law claims and also, in an “abundance of caution,” presenting its federal claim. The court of appeals ordered Younger abstention because of the pending state litigation. Sprint argues that the state litigation is not enforcement litigation. Whether or not the Board is specifically seeking judicial enforcement of its order, it is at least defending the validity of its order in the state litigation.

Sprint claims that most other circuits would not abstain on these facts. Sprint’s claim suggests that the second sentence at the top of page 594 of the main volume may be overbroad. Perhaps it is not enough that a state agency is party to the litigation; perhaps the state agency must be the plaintiff (or perhaps a counter-claimant), seeking to enforce state law. We will see what the Supreme Court says.

Page 603. At the end of note 2, add:

2. Rooker-Feldman. . . .

The Court repeated its narrow understanding of Rooker-Feldman in Skinner v. Switzer, 131 S. Ct. 1289 (2011), a case in which a convicted criminal defendant sued to force DNA testing of key evidence in the case.

B. Quiet Title and the Like

Page 606. After note 13.c, add:

d. Plaintiff not claiming an interest in the property. The Supreme Court has held that a suit seeking to divest the United States of title to land is not a quiet title suit if the plaintiff does not himself claim an interest in the land. Match-E-Be-Nash-
She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012). This odd question was created by an intersection of Indian law and sovereign immunity law.

The United States acquired a parcel of land in trust for the tribe, which planned to build a casino on the lot. A neighbor opposed to the casino for the usual anti-development reasons (aesthetics, traffic, etc.) sued to reverse the transaction, disputing the government’s authority on the theory that the tribe had not been a federally recognized tribe when Congress passed the statute authorizing such purchases. He relied on the waiver of sovereign immunity in the Administrative Procedure Act (main volume at 516), but that waiver does not apply if any other waiver of immunity implicitly excludes the plaintiff’s claim. The Quiet Title Act, 28 U.S.C. §2409 (2006), waives immunity to quiet title suits against the United States, but that waiver does not apply to Indian trust lands. So if Patchak’s suit was a quiet title action, immunity was not waived; if it was something else, immunity was waived.

All agreed that Patchak was seeking to divest the government of title, but he claimed no right, title, or interest in himself, and the Court held that this was not a quiet title suit. Justice Sotomayor dissented.

C. Reformation

Page 615. After note 9, add:

10. A Supreme Court example. The Court appeared to authorize reformation of a retirement plan, on the basis of deceptive disclosures about the plan in plan summaries issued to employees, in CIGNA v. Amara, 131 S. Ct. 1866 (2011). The case is described in this supplement to page 569.
CHAPTER EIGHT

BENEFIT TO DEFENDANT AS THE MEASURE OF RELIEF:
RESTITUTION

A. Restitution from Innocent Defendants — and Some Who Are Treated As
Innocent

1. Introducing Restitution — Mistake

Page 622. At the end of note 5, add:

5. The Restatement (Third). . . .

Despite a firm belief and firm intention that the section numbers were final, a few
of them have been shuffled. In the final published version, what had been §26
became §30, and what had been §§27-30 each moved up one, becoming §§26-29.
The change was made for good reasons, and I will note the new numbers where the
main volume refers to any of the affected sections.

Page 623. At the end of note 8, add:

8. Measuring restitution. . . .

On remand, Owner failed to prove that he had also paid the taxes on the property.
Neighbor’s liability for restitution was limited to 12 years, on the theory that he might
have figured out what was happening if he had investigated a mysterious extra tax
bill that he received in 1993. This extra tax bill was in fact wholly unrelated to the
property at issue; this part of the holding looks suspiciously like an attempt to split
the difference. The court awarded Neighbor an equitable lien on the property to
secure the judgment. Buckett v. Jante, 787 N.W.2d 60 (Wis. Ct. App. 2010).
Equitable liens are taken up at page 726 of the main volume.

Page 626. At the end of note 3, add:

3. Specific grounds. . . .

Section 29 became §28 in the final published version.

Page 633. At the end of note 3, add:

3. Joint ownership of property. . . .

Section 27 became §26 in the final published version.

B. Recovering More Than Plaintiff Lost

1. Disgorging the Profits of Conscious Wrongdoers

Page 656. After note 1, add:

1.1. Antitrust. A district court has held, in what it said was a case of first
impression, that the United States can recover profits earned through a violation of
States v. Keyspan Corp., 763 F. Supp. 2d 633 (S.D.N.Y. 2011). The court was
approving a consent decree, and it does not appear that the defendant opposed approval, but nonetheless, the court wrote a substantial opinion. Perhaps disgorgement claims have not been used in antitrust because they were unfamiliar and not expressly authorized in statutory text, or perhaps they are rarely attractive under an Act that provides for trebling of compensatory damages.

Page 662. After note 6.c, add:

c-1. Design patents. Disgorgement of defendant’s profits survives, in bizarre fashion, with respect to design patents, which cover “ornamental” features of a product. 35 U.S.C. §171 (2006). One who infringes a design patent “shall be liable to the owner to the extent of his total profit.” 35 U.S.C. §289 (2006). The lower courts have interpreted “total profit” to mean total profit from the product, without apportionment, and not total profit attributable to the patented design. This interpretation is not textually compelled; the next sentence, which preserves other remedies, says that plaintiff “shall not twice recover the profit made from the infringement.” The italicized language implies causation, and therefore apportionment, and the two sentences could be read together. But the no-apportionment rule is supported by legislative history from 1887. That legislation was inspired by a case about a carpet pattern, where the design may have been the product’s only distinctive feature.


3. Breach of Contract

b. Rescission

Page 692. After note 5, add:

6. Rescission and damages? A plaintiff claiming restitution may have incidental or consequential damages that are not compensated by recovery of what he gave to defendant. For example, a buyer may have paid shipping costs in addition to the price. When the sale is rescinded and the purchase price returned, he still has lost the shipping costs. Or he may have spent money trying to repair the goods before rescinding, or the defective goods may have damaged his other property. Sellers and parties to other kinds of contracts may suffer similar losses. Finally, the party who rescinds loses his expected profit from the contract. Courts have generally allowed recovery of nonduplicative damages, but they have split on lost profits. The cases are reviewed in 1 Palmer, Restitution §3.9. With respect to contracts for the sale of goods, UCC §2-721 provides that rescission does not bar recovery of damages; there is no exception for lost profits.
A recent article argues on economic grounds that it should not be difficult to rescind, but that any recovery following rescission should be limited to restitution of what plaintiff transferred to defendant. Richard R.W. Brooks & Alexander Stremitzer, *Remedies On and Off Contract*, 120 Yale L.J. 690 (2011). They think that the right to rescind provides inexpensive and efficient incentives to higher quality performance. They are ambivalent about whether rescission plus reliance damages erodes those benefits, but emphatic that rescission plus expectancy damages undoes them.

C. Restitutionary Rights in Specific Property

1. Constructive Trusts

Page 709. At the end of note 8, add:

8. *Omegas* in other circuits. . . .

The holding in *Omegas* depends on the argument that when Congress recodified the law of bankruptcy in 1978, it implicitly repealed the then-existing law of constructive trusts in bankruptcy by failing to explicitly codify it. Supporting and opposing this premise leads to a series of detailed arguments about the meaning of various sections of the Bankruptcy Code and their relationship to underlying principles of law and equity. Those arguments are summarized in notes 9-12. Some professors will want you to read those notes and think about them; some will be happy for you to stop at note 8 and not get into the Bankruptcy Code. Your own professor should tell you which camp she’s in.

2. Tracing the Property

Page 724. At the end of note 5.b, add:

b. Bernard Madoff. . . .

The court of appeals affirmed on the essential disputed point — that the rights and liability of Madoff’s customers should be based on their cash investment net of withdrawals, and not on the last fictitious statement of their supposed holdings. 654 F.3d 229 (2d Cir. 2011). The Supreme Court denied multiple cert petitions.

Page 725. At the end of note 6.a, add:

a. Life insurance and divorce. . . .

These cases, and similar state statutes (some protecting the first spouse, some the second), are often preempted by federal law. Pre-emption can arise when federal benefits are at issue; more generally, ERISA (the Employee Retirement Income Security Act) can preempt with respect to insurance with private employers. The most recent example, which cites some of the others, is Hillman v. Maretta, 133 S. Ct. 1943 (2013). In *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001), the Court reserved judgment on whether ERISA preempts state-law rules that bar killers from inheriting from their victim, briefly noted in note 1 at 655 of the main volume. The Court hinted that these rules might be so old and well established that they could survive.
3. Equitable Liens and Subrogation

Page 730. At the end of note 4, add:


Section 28 became §27 in the final published version.

Page 733. In Mort v. United States, delete the section of the opinion headed “Background,” and substitute the following:

BACKGROUND

[This case arose out of a series of loan transactions secured by real property in Nevada. Simplifying slightly:

Dec. 12, 1990: DeLee Trust borrows $30,000 from the Kerns; gives mortgage on property.
Aug. 24, 1992: IRS files tax lien for $33,000 in unpaid income tax.
Nov. 13, 1992: Trust borrows $38,000 from the Belmonts; gives mortgage on property. Uses loan proceeds to pay off Kerns and to pay off a state tax lien.
Fidelity National Title fails to discover federal tax lien and insures title for the Belmonts’ interest in the property
Dec. 21, 1992: Belmonts sell their note, mortgage, and rights under the title policy to the Morts for $38,000.
Aug. 12, 1993: IRS seizes the property pursuant to its tax lien.

So to summarize, the four liens on the property were filed in this order:

Kern
IRS
Belmont
Mort]

The Morts then filed a complaint in the United States District Court for the District of Nevada seeking injunctive relief and a declaratory judgment that their trust deed interest was superior to the federal tax lien [because they were subrogated to the Kern mortgage, which had priority over the IRS tax lien.] The district court dismissed the Morts’ complaint without prejudice, concluding that the Morts could not bring their claim for equitable subrogation without first pursuing their legal remedies against the title insurer. 874 F. Supp. 283 (D. Nev. 1994) . . .]
D. Defenses and the Rights of Third Parties

1. Bona Fide Purchasers

Page 745. At the end of note 5.a., add:
   a. Common law and equity.

There is a similar holding in Federal Trade Commission v. Network Services Depot, Inc., 617 F.3d 1127 (9th Cir. 2010). The court emphasized that once an attorney is on notice that the money used to pay his fees might be proceeds of wrongdoing, it is not enough to merely ask the client and take his word for it.
CHAPTER NINE

ANCILLARY REMEDIES: ENFORCING THE JUDGMENT

A. Enforcing Coercive Orders: The Contempt Power

1. The Three Kinds of Contempt

Page 766. At the end of note 2.a., add:

a. Procedural protections. . .

John Robertson beat his girlfriend in two separate incidents in 1999. After the first incident, she obtained a civil protective order, i.e., an injunction ordering him not to assault her, harass her, communicate with her, or come near her. The United States Attorney for the District of Columbia, a direct representative of the federal government, prosecuted Robertson for aggravated assault in the first incident; that case ended in a guilty plea and an agreement not to prosecute the second incident. The girlfriend, represented by the Corporation Counsel of the District, a representative of the local government, then initiated a criminal contempt prosecution for the second incident. In a decision clearly at odds with Dixon, the D.C. Court of Appeals held that the criminal contempt proceeding was an essentially private proceeding that did not violate the plea agreement. In re Robertson, 940 A.2d 1050 (D.C. 2008).

The Supreme Court granted cert to hear this case, then dismissed the writ as improvidently granted. Robertson v. United States ex rel. Watson, 560 U.S. 272 (2010). The Chief Justice, joined by Justices Scalia, Kennedy, and Sotomayor, filed a lengthy and passionate dissent arguing that the judgment below fundamentally misunderstood the law of criminal contempt. Plaintiff’s alternate theory in the case, and perhaps the reason why the writ was dismissed, was the dual sovereignty doctrine. Separate prosecutions for the same offense by a state and the federal government do not violate the Double Jeopardy Clause, on the ground that each prosecution is brought by a separate sovereign who is not bound by the actions of the other. However plausible or implausible that rule is with respect to the states, it seems quite implausible to suppose that the District of Columbia could be a separate sovereign and not be bound by the actions of the federal government. The District is a federal instrumentality subject to the plenary authority of Congress, and its powers of local self-government are delegated by Congress. The status of the District is an aside for our purposes, but the other issue is central: The D.C. court’s private-proceeding theory strikes at the heart of the distinction between criminal and civil contempt.
3. How Much Risk of Abuse to Overcome How Much Defiance?

b. Anticipatory Contempt

Page 790. After note 7.c, add:

7.1. A recent example. The issue arose again in Brown v. City of Upper Arlington, 637 F.3d 668 (6th Cir. 2011). Plaintiff got a temporary restraining order in state court to prevent the city from cutting down a large tree, located on city property but in front of plaintiff’s home. The city removed the case to federal court. When the TRO expired at the end of its allotted time, the federal judge said: “I would expect that between now and the time the Court issues its decision,” if the City decides to take action it will notify the court and plaintiff’s counsel immediately. Id. at 670. “The City agreed.” Id. And the City literally kept its word.

On October 29, the court rejected plaintiff’s federal claims on the merits and dismissed the case with leave to refile the state-law claims in state court. Plaintiff’s lawyer immediately notified the City’s lawyer that he would refile in state court no later than October 31. On the morning of October 30, the City cut down the tree. The trial judge held the City in contempt and ordered it to replace the tree and pay plaintiff’s attorneys’ fees.

The court of appeals reversed. The court treated it as obvious that no order had been violated, and plaintiff seemed to concede that “none of these conventional grounds” for contempt applies. Id. at 672. Plaintiff relied principally on Chambers v. NASCO, which the court distinguished on the ground that if the City had interfered with the jurisdiction of any court, it was the state courts, not the federal district court.

Neither Griffin nor §401 is cited, and of all the cases debated in Griffin, only Merrimack is cited. Merrimack is distinguished on the ground that the Supreme Court was punishing contempt of the lower court’s injunction, which was still in effect and not vacated by a mere opinion before the issuance of the mandate.

4. The Rights of Third Parties

Page 813. At the end of note 2, add:

2. Persons in active concert. . . .

There is a careful analysis of Alemite and Merriam in National Spiritual Assembly of the Bahá’ís Under the Hereditary Guardianship, Inc. v. National Spiritual Assembly of the Bahá’ís, Inc., 628 F.3d 837 (7th Cir. 2010), emphasizing the remand in Merriam to consider the possibility that the brother there was a key employee who had been so involved in the original litigation “that it can fairly be said that he has had his day in court in relation to the validity of the injunction.” Bahá’ís, 628 F.3d at 852, quoting Merriam, 639 F.2d at 36.

The Bahá’ís court also rather clearly believed it settled that successors in interest are subject to contempt for violating an injunction against their predecessor in interest. That is the subject of the next note in the main volume.
6. Drafting Decrees

Page 821. At the end of note 3, add:

3. Two opportunities for defendants.

Defendants can raise specificity issues on direct appeal following a default judgment. City of New York v. Mickalis Pawn Shop LLC, 645 F.3d 114, 143 (2d Cir. 2011), citing cases from the Second and Seventh Circuits. The opinion is also a nice review of how not to draft an injunction. “An injunction is overbroad when it seeks to restrain the defendants from engaging in legal conduct, or from engaging in illegal conduct that was not fairly the subject of litigation.” Id. at 145. In addition to violating these restrictions, the injunction ordered defendants to “adopt those practices that in the opinion of the Special Master serve to prevent” various harms the injunction sought to prevent, and it enjoined “failure to cooperate with the Special Master.” Id. The court held that these delegations of authority violated Rule 65(d). The City defended the injunction principally on the ground that twenty other defendants had agreed to substantially identical injunctions in settlements.

B. Collecting Money Judgments

1. Execution, Garnishment, and the Like

Page 841. After note 5, add:

6. A regulatory response. The United States now pays most federal benefits electronically, and the electronic label on most benefits that federal law exempts from garnishment now begins with XX: for example, XXSOC SEC. Banks are now required to search for that code and to protect from garnishment either the amount of any exempt benefit deposited within the sixty days preceding the search, or the balance in the account on the day of the search, whichever is less. They are required to search the records within two days of receiving a garnishment order. The labeling of deposits is explained in Garnishment of Accounts Containing Federal Benefit Payments, 76 Fed. Reg. 9939, 9941 (Feb. 23, 2011); the bank regulation is Garnishment of Accounts Containing Federal Benefit Payments, 31 C.F.R. §212.1 et seq. (2011).

Page 844. After note 8, add:

8.1. Empirical studies. An emerging set of empirical studies examine state-court collection litigation, out-of-court collection by hounding debtors to pay, and “informal bankruptcy,” in which debtors stop paying but do not file for bankruptcy. Consumer debt-collection suits are examined in Richard M. Hynes, Broke But Not Bankrupt: Consumer Debt Collection in State Courts, 60 Fla. L. Rev. 1 (2008). The study focuses mostly on Virginia, with comparisons to earlier, less detailed data from other states. Virginia is at one end of the continuum of state variation, with a very high litigation rate. The searchable electronic data compiled by the courts are incomplete, and the sample sizes in the follow up on individual case files appear to be small, so numbers reported from this study should be taken as approximate. But Professor Hynes was
able to conclude with reasonable confidence that there was more than one civil lawsuit for every ten Virginians in 2005, that more than 60% of these cases were consumer debt collection actions, and that nearly 25% more were landlords suing to evict tenants. Nearly all the debt collection cases ended in default judgments. The median judgment in a debt action was only $685. There were about 175,000 garnishment actions, or about one for every four debt collection actions.

Only a very small fraction of these consumer defendants file for bankruptcy; there were 33,000 consumer bankruptcies in Virginia in 2011. Amanda E. Dawsey, Richard M. Hynes, & Lawrence M. Ausubel, *Non-Judicial Debt Collection and the Consumer’s Choice Among Repayment, Bankruptcy, and Informal Bankruptcy*, 87 Am. Bankr. L.J. 1 (2013). And it appears that even in creditor-friendly Virginia, creditors sue on only a small fraction of bad debts. Data from mandatory reporting by payday lenders indicate that at least that class of creditors sues on only a little more than ten percent of the debts it writes off. But even when they do not sue, creditors try to collect by repeatedly calling and writing the debtor, sometimes within the bounds of laws against harassing or deceptive tactics, and sometimes not.

The picture that emerges is of a dual system. Middle-class debtors file for bankruptcy when their situation gets bad enough. They can raise the cash to pay the lawyer; they are more likely to have stable addresses and employment, so their creditors can find them, and they are more likely to have assets to protect. Lower-income debtors do not file for bankruptcy. They can’t afford it, and they are harder to find and harder to collect from. When they can’t pay, they can try to ignore or wait out their creditors, and take their lumps from any effective collection steps the creditor invokes against them. And very few debtors were sued by more than one creditor.

According to court records, only 23% of these judgments were satisfied within five years, and by then, most creditors had abandoned collection efforts. The actual collection rate may be higher. The courts depend on the parties to report payments, but these judgment debtors are unsophisticated and the penalty on judgment creditors who fail to report payments is only $50, to be collected only if the judgment debtor takes effective steps to complain.

The litigation rate is high in Virginia because Virginia is creditor friendly. Filing fees are low, and garnishment is permitted. Because filing is cheap, and most debtors default, the expected value of a collection suit may be positive even if the odds of collection are small. Exemptions are also generally low, but one sheriff told Professor Hynes that he could not remember ever levying execution on a consumer’s tangible assets.

There is evidence that consumer debt collection is a very large fraction of all litigation in many states. But litigation rates vary remarkably, from more than 17,000 per 100,000 population in Maryland to 323 per 100,000 in Hawaii. Some of these differences are artifacts of how the data are compiled, but many of these differences are real. Some states, such as Texas, have such generous exemptions that the prospect of collecting a judgment against a consumer is close to zero. Some states, such as California, appear to have deliberately limited creditor access to small-claims court. Both Texas and California have very low civil-litigation rates. But Virginia may be
reasonably representative of states where filing is cheap and wage garnishment is available.

The description of the Fair Debt Collection Practices Act in note 8 is not quite accurate. I neglected to note that the original lender, and any holder who acquires the debt before it is in default, is exempt from the Act. Some states have similar laws that applies to these exempt creditors; some do not. In states where original lenders are relatively free to harass debtors, bankruptcy filings are somewhat higher, but default rates are not much different. That is, the right to harass some debtors more intensely does not appear to extract much in the way of additional payments, but it does drive some debtors to file for bankruptcy.

Page 845. At the end of note 10, add:


The court of appeals has affirmed the coercive contempt order. 396 Fed. Appx. 635 (11th Cir. 2010). Now what? Maybe the Cook Islands banks have a way for an imprisoned contemnor to say he really means it when he asks for the money. Or maybe not. If they really don’t, does Solow have to be released because it is now impossible for him to comply with the court’s order? The court clearly was not buying that, in part because it found his testimony not credible. If he stays in jail, and the money stays in the Cook Islands, will he eventually have to be released on the ground that coercion has failed? See the issue of perpetual coercion, in the main volume at 775.

Page 845. After note 11, add:

12. Arrest warrants? The press reports widespread use of arrest warrants to collect debt. Jessica Silver-Greenberg, Welcome to Debtors’ Prison, 2011 Edition, Wall St. J. C1 (Mar. 17, 2011). But the reporter appears to be confused about the basis for these warrants, just as many of the debtors subject to them are probably confused. Courts may order debtors to appear in court for post-judgment proceedings; they may order debtors to respond to post-judgment discovery; or they may order debtors to turn over specific assets known to be in their possession or control. A debtor who fails to obey such a direct order may be jailed for contempt. But American courts do not order ordinary debtors to pay and then jail them when they cannot or will not do so.

2. Coercive Collection of Money

Page 853. After note 3, add:

3.1. Due process. A defendant at risk of incarceration in a civil contempt proceeding to collect child support is not entitled to court-appointed counsel. But he is entitled to other procedural safeguards. Turner v. Rogers, 131 S. Ct. 2507 (2011). The Court suggested notice to defendant that ability to pay is a crucial issue, a form to elicit financial information, an opportunity at a hearing to respond to questions about his financial status, and an express finding by the court that defendant has the ability to pay. The Court said that other safeguards would be acceptable if they provided as much protection as these four safeguards provide in combination.
Justices Thomas, Scalia, Roberts, and Alito would not have reached any question other than the right to counsel, and Thomas and Scalia seemed to think that the Court’s procedural safeguards were a bad idea. They emphasized that deadbeat dads often have hidden income that is revealed only by the threat of going to jail. Turner had held eight jobs in three years, which made it difficult for wage withholding orders to keep up, and he had sold drugs for two years while paying no child support. *Id.* at n.6 (Thomas, J., dissenting). Both the majority and the dissent emphasized that the plaintiff in the case was a single Mom who was also poor and unrepresented by counsel. The Court reserved the question of cases in which plaintiff was a government agency.

**Page 857. After note 1, add:**

1.1 The measure of damages in criminal cases. The victims’ losses in criminal cases are generally determined with a minimum of procedure. In federal court, the initial determination is made by the prosecutor and probation officer as part of the pre-sentence report. 18 U.S.C. §3664 (2006). The victim, the defendant, and the government are entitled to be heard on the pre-sentence report, but their procedural rights are limited. These laws seem to aspire to rough justice rather than detailed calculation. But of course there are disputes and appeals about the measure of compensation.

The Supreme Court has agreed to resolve a circuit split about the scope of liability for criminal defendants in child pornography cases. In *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012), *cert. granted as Paroline v. United States*, 2013 WL 497856 (June 27, 2013). The federal child pornography law has its own victim restitution provision, which states, in six lettered subsections, that defendant shall be ordered to pay the victim’s medical expenses, rehabilitation expenses, temporary housing and childcare expenses, lost income, attorney’s fees, “and (F) any other losses suffered by the victim as a proximate result of the offense.” The issue is whether the proximate cause requirement in (F) also applies to (A) through (E). Grammatically, it does not, and the Fifth Circuit enforced the statute literally. But every circuit except the Fifth has held that the proximate cause requirement applies to all six subsections. The explicit or implicit reasoning is that proximate cause is such a fundamental legal principle that Congress could not have meant to dispense with it without more explicitly saying so. On this view, it is far more likely that the statute is badly drafted than that it is a conscious repeal of proximate cause.

Defendant and the United States agree with the circuits other than the Fifth; one of the victims does not. Amy Unknown says that she will require counseling throughout her life, because images of her sexual abuse by her uncle are among the most widely traded and viewed child pornography images in the world, and she lives with that knowledge and with the fear that she will be recognized. And she says that defendant Paroline is liable for the entire cost of that counseling, because he had two images of her on his computer. She is apparently requesting about $3.5 million in restitution from every defendant who has any of her images on his computer. Defendant of course says that this is wholly disproportionate and unrelated to any harm he may have caused; Amy of course says that apportioning harm to individual
defendants is wholly impractical. If she is right, then Paroline potentially has similar liability to every other victim with an identifiable image on his computer.

The argument has focused on the proximate-cause language. But the statute makes joint and several liability available or not, apparently in the discretion of the trial court, and that might be another way to solve the problem.

3. Preserving Assets Before Judgment

Page 868. After note 3, add:

4. The English experience. Mareva injunctions are now called “freezing injunctions” after a procedural reform. E-mail exchanges with English solicitors, and a recent article on the practice, suggest that the English bar views the current law as appropriately flexible and as reasonably balanced between the legitimate interests of plaintiffs and defendants. The targets are most commonly foreign entities or businesses that are already defunct; an operating business is often allowed to continue to transfer assets in ordinary course of business, including for legal fees. For a broad assessment, see the opening paragraph of Paul McGrath, The Freezing Order: A Constantly Evolving Jurisdiction, 31 Civ. Just. Q. No. 1, at 12 (2012).
CHAPTER TEN
MORE ANCILLARY REMEDIES:
ATTORNEYS’ FEES AND THE COSTS OF LITIGATION

A. Fee-Shifting Statutes

Page 883. At the end of note 1.b., add:


Despite the limitation to cases where government’s position is not substantially justified, fees are awarded in nearly half of all social security cases and a majority of veterans’ benefit cases. The great bulk of awards under the Act are modest amounts for claims under these two programs. Astrue v. Ratliff, 130 S. Ct. 2521, 2530-31 nn.1-2 (2010) (Sotomayor, concurring).

Page 883. After note 1.c., add:

d. Something new in Texas. A recent Texas statute offers a new variation. Tex. Govt. Code §22.004(g) (West Supp. 2012) directs the state supreme court to “adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence.” Tex. Civ. Prac. & Remedies Code §30.021 (West Supp. 2012) provides that whenever a court grants or denies a motion to dismiss under these newly mandated rules, it “shall award costs and reasonable and necessary attorney’s fees to the prevailing party.”

How the court can determine without evidence that a claim has no basis in fact would seem to be a problem. The court responded with Tex. R. Civ. Proc. 91a, promulgated in 2013. It says, among other things, that “A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.”

Page 885. After the first paragraph of note 9, add:


The Court has agreed to decide whether contract cases are different. Central Pension Fund v. Ray Haluch Gravel Co., 695 F.3d 1 (1st Cir. 2012), cert. granted, 2013 WL 506457 (June 17, 2013). The contract at issue is a collective bargaining agreement, governed by federal common law.

The theory of Budinich is that the fee award is not part of the merits, so that the judgment on the merits is final when everything except the fee award is final. But some courts of appeals have held that when fees are awarded pursuant to contract, the fees are part of the merits because they are part of the scope of contractual liability. Of course one could say the same thing about statutory liability and fees awarded pursuant to statute. Whatever one thinks of Budinich, at least it is clear, and it is hard to see any advantage to creating distinctions and competing rules in this area.
Page 890. After note 1, add:

1.1 Partially prevailing defendants. In Fox v. Vice, 131 S. Ct. 2205 (2011), the Court faced the problem of defendants entitled to fees because some, but not all, of plaintiff’s claims were frivolous. The Court unanimously announced a but-for standard: defendant can recover those fees that would not have been incurred but for the frivolous claims. So if frivolous and non-frivolous claims are factually related, defendants can recover no fees for work that would have been done even if the frivolous claim had not been filed.

Page 891. At the end of note 2, add:

2. The requirement of relief on the merits. . . .

The Fourth Circuit bizarrely held that plaintiffs were not prevailing parties where they got an injunction ordering defendants to comply with the law in the future, but no damages for the past. Lefemine v. Wideman, 672 F.3d 292, 302-303 (4th Cir. 2012). The idea seemed to be that the injunction gave them only what they were already entitled to under the First Amendment. But all injunctions (with the arguable exception of the prophylactic terms of prophylactic injunctions) enforce pre-existing rights that defendant had been violating. The Supreme Court unanimously and summarily reversed. 133 S. Ct. 9 (2012).

Page 891. At the end of note 5, add:

5. Preliminary relief. . . .

The Ninth Circuit has held that a preliminary injunction based on a finding of probable success on the merits, followed by a settlement that permanently protects the rights temporarily protected by the preliminary injunction, makes the plaintiff a prevailing party entitled to fees. Higher Taste, Inc. v. City of Tacoma, 2013 WL 2378570 (9th Cir., June 3, 2013). The court noted that other cases had distinguished preliminary injunctions designed merely to preserve the status quo, without a preliminary finding on the merits.

Page 892. After note 7, add:

7.1. Pushing the limit further. In Zessar v. Keith, 536 F.3d 788 (7th Cir. 2008), the court granted plaintiff’s motion for summary judgment, holding a statute unconstitutional, and asked the parties to submit proposed terms for a final judgment enjoining enforcement of the statute. Before any injunction was issued, the legislature amended the statute to conform to the summary judgment opinion. The court of appeals reversed a grant of attorneys’ fees. The opinion on the summary judgment motion was only an opinion; the case was mooted by the amendment of the statute; and plaintiff was not a prevailing party.

National Rifle Association, Inc. v. City of Chicago, 646 F.3d 992 (7th Cir. 2011), was a proceeding on remand from McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). In McDonald, the Court upheld plaintiffs’ claim that the Second Amendment applies to the states. Once that was established, the challenged local gun-control ordinances were obviously unconstitutional under the Second Amendment standards announced in District of Columbia v. Heller, 554 U.S. 570 (2008). Before a final
judgment could be entered on remand, the defendant cities repealed their ordinances. A distinguished district judge denied attorneys’ fees in reliance on Zessar.

This literal interpretation of Buckhannon was too much for the court of appeals. “If a favorable decision of the Supreme Court does not count as ‘the necessary judicial imprimatur,’ what would?” National Rifle, 646 F.3d at 994, quoting Buckhannon, 532 U.S. at 605. The common sense of that opinion is impeccable. But why doesn’t common sense require the same result in Hardt and Zessar? In Hardt itself, the Supreme Court reversed, but without reintroducing any measure of common sense to the prevailing-party requirement. Instead, it held that the ERISA provision authorizing fees for Hardt did not require her to be a prevailing party. 560 U.S. 242 (2010). The statute simply said that “the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party.” 29 U.S.C. §1132(g)(1) (2006). Under that language, it was enough that Hardt achieved “some success on the merits,” and the Court unanimously agreed that she had.

Page 892. At the end of note 8, add:

8. The reach of Buckhannon... The National Childhood Vaccine Injury Act creates a no-fault compensation system for persons injured by covered vaccines. Claimants are paid from a fund administered by the government. The Act prohibits attorneys from charging any fee to claimants. Instead it provides that the court “shall” award attorneys’ fees to prevailing plaintiffs, and that “the special master or court may award an amount of compensation to cover petitioner’s reasonable attorneys’ fees and other costs incurred in any proceeding if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.” 42 U.S.C. §300aa-15(f)(4)(A) (2006).

The Supreme Court unanimously enforced this unusual statute according to its terms. Sebelius v. Cloer, 133 S. Ct. 1886 (2013). The plaintiff filed a claim after new medical research linked her muscular sclerosis to the hepatitis-B vaccine. The Federal Circuit rejected her argument that the lack of medical information should toll (delay the running of) the statute of limitations, and that issue was not before the Supreme Court. It seems likely that her argument for tolling was made in good faith and had a reasonable basis; that issue was left for the trial judge on remand. The Supreme Court rejected some implausible arguments that the provision for fees to losing litigants should not apply when the claim was not timely filed. For more on tolling statutes of limitations, see section 9.E.

Page 893. At the end of note 5, add:

5. Reasonable hours... Trial judges can get away with impressionistic gross adjustments to claimed fees as long as nobody appeals. But if someone does appeal, the courts of appeals find it difficult to meaningfully review such adjustments. The Ninth Circuit recently described such gross adjustments as “an unfortunately common mistake,” complaining that its “requirement that district courts show their work is frequently forgotten.” Padgett v. Loventhal, 706 F.3d 1205, 1208-1209 (9th Cir. 2013). Plaintiffs in Padgett filed many claims and prevailed on one, recovering $1.00 in
nominal damages and $200,000 in punitive damages. They sought $3.2 million in fees, and a stunning $900,000 in costs. The district court accurately summarized the controlling legal principles for fee awards to partially prevailing plaintiffs, and without further explanation, awarded $500,000 in fees and $100,000 in costs. On defendants’ appeal, the Ninth Circuit remanded for further explanation.

B. Attorneys’ Fees from a Common Fund

Page 900. At the end of note 2, add:

2. Fees from common funds as restitution. . . .

Section 30, cited here and also in note 5, became §29 in the final published version.

Page 902. At the end of note 3, add:

3. The reach of Dague. . . .

Page 908. After note 1, add:

1.1. Except where a statute otherwise provides. Rule 54(d) is explicitly subject to contrary statutes; it would be subject to contrary statutes even if it didn’t say so. The Fair Debt Collection Practices Act provides: “On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney’s fees reasonable in relation to the work expended and costs.” 15 U.S.C. §1692k(a)(3) (2006). The Court held that this language does not provide “otherwise” than Rule 54(d) — that is, it does not require bad faith as a condition to awarding costs — because it does not state a rule for the case in which a plaintiff files a good-faith claim and loses. Marx v. General Revenue Corp., 133 S. Ct. 1166 (2013). The Court viewed the bad-faith language as limiting the provision for attorneys’ fees, and as not intended to implicitly change the quite different rule for costs. Justices Sotomayor and Kagan dissented.

Page 908. At the end of note 2, add:

2. What is included? . . .
The Court has held that the fees of “interpreters” includes only those who translate oral speech, and does not include the fees of those who translate documents. Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997 (2012). This holding was based on the alleged plain meaning of “interpreters” as distinguished from “translators.”

The Fourth Circuit has held that the costs of searching and extracting electronic files, making them searchable, indexing metadata, and preparing the files for conversion to non-editable TIFF or PDF files, all in response to allegedly overbroad discovery requests, are not taxable as costs of “the costs of making copies of any materials where the copies are necessarily obtained for use in the case.” Only the final steps of converting the files to TIFF or PDF and copying to compact disks for delivery to the plaintiff constituted “making copies.” These final steps cost $218; the

In Marx v. General Revenue, further described in this supplement to note 1, defendant claimed $7,779 in costs for a case with a one-day trial; these consisted of witness fees, witness travel expenses, and the court reporter’s fees for deposition transcripts. The trial court allowed $4,543 of this. The district court opinion is unreported, so we get no details. I note the amounts because even $4,543 is obviously significant for a plaintiff who was unable to pay her student loans and was complaining about unfair debt collection practices.

C. Ethical Issues in Fee Awards

Page 919. At the end of note 4.d., add:

d. Assigning fees to the lawyer. . . .

The Court held unanimously that the fees are payable to the client and that the government can offset the fees against debts the client owes the government. Astrue v. Ratliff, 130 S. Ct. 2521 (2010).
CHAPTER ELEVEN

REMEDIAL DEFENSES

A. Unconscionability and the Equitable Contract Defenses

Page 932. At the end of note 2, add:

2. Who decides? . . .

The employer in Rent-A-Center required employees to sign a free-standing arbitration agreement. One clause of that agreement provided that the arbitrator would have “exclusive authority” to decide any question of “enforceability,” including “any claim” that “any part” of the agreement is “void or voidable.” Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2777 (2010). The employee, whose substantive claim alleged racial discrimination, claimed that the arbitration agreement was unconscionable because it applied only to claims the employee would raise and not to claims the employer would raise, it limited discovery, and it required the employee to pay half the arbitrator’s fees.

As the majority applied the Buckeye rule to this agreement, all these issues were for the arbitrator. These were challenges to the validity of the contract as a whole, not challenges to the single clause providing that the arbitrator would decide questions of enforceability. A challenge to that clause would be for the court, but if that clause were valid, then all the rest was for the arbitrator. Justices Stevens, Ginsburg, Breyer, and Sotomayor dissented.

In Nitro-Life Technologies, L.L.C. v. Howard, 133 S. Ct. 500 (2012), the Court summarily reversed the Oklahoma court for declaring that covenants not to compete in an employment contract were void and unenforceable under state law. The contract also had an arbitration clause, and the legality of the covenants not to compete was for the arbitrator.

Page 934. After note 6, add:

6.1. Federal preemption. The Supreme Court appears to have brought this entire body of law to a halt in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). The Federal Arbitration Act expressly preserves state-law defenses that apply to any contract, and the Supreme Court has offered unconscionability as an illustration of that provision. See Muhammad at the top of page 926 of the main volume. But such a doctrine cannot be “applied in a fashion that disfavors arbitration.” Concepcion, 131 S. Ct. at 1747. And “California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.” Id. This is in some ways a disparate impact opinion. The majority thought that class arbitration lost the advantages of arbitration — its informal and inexpensive nature — and that companies would not want class arbitration with no possibility of appeal, so that holding class waivers unconscionable defeated the purposes of arbitration. Justice Breyer dissented for himself and Justices Ginsburg, Sotomayor, and Kagan.

AT&T’s arbitration clause was in some ways generous. AT&T paid the expenses for nonfrivolous claims, arbitration occurred in the customer’s home county, and if a customer recovered more than AT&T’s last written settlement offer, AT&T would
pay a minimum of $7,500 plus double the customer’s attorneys’ fees. A customer could elect small claims court instead of arbitration. (Why is this even an arbitration clause, and not just a class action waiver?)

But AT&T’s clause did not solve the central problem of making small claims worth pursuing. In *Concepcion*, AT&T advertised free cell phones to those who would sign a two-year service contract. Then it charged $30.22 in sales tax on the free phones. So the Concepcions had a claim for $30.22. And if AT&T offered the Concepcions $30.22 before the arbitrator issued an award, then all they could recover was $30.22. This surely means that they could not hire a lawyer, and that it made no sense even to invest their own time in pursuing the matter pro se, and therefore, that AT&T need not worry about many consumers ever taking any effective action over its $30 deception. So AT&T would be safe from any claim where the damages were fixed or could be estimated in advance with reasonable accuracy. A viable claim for punitive damages would change this calculus.

*Muhammad* now serves as an illustration of state-court reasoning in the law of unconscionability. But its specific holding about the unconscionability of class-action waivers embedded in arbitration clauses appears to no longer be good law.

### 6.2. A different view of the matter.

For the view that *Concepcion* may not be as sweeping as these notes suggest, see Michael Helfand, *Purpose, Precedent, and Politics: Why Concepcion Covers Less Than You Think*, 4 Y.B. Arb. & Mediation 126 (2012). He thinks that the opinion may be read as focused on the sweep of California’s unconscionability rule and not applicable to all unconscionability holdings, that Justice Thomas’s concurrence for the fifth vote may limit the opinion’s reach, and that state courts may be able to resist because of Justice Thomas’s view that the Federal Arbitration Act does not apply to state courts.

There may be a hint to that effect in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012). The Court unanimously and summarily reversed the West Virginia court’s holding that pre-dispute arbitration clauses are unenforceable in personal injury and wrongful death cases. The state court had also held, in the alternative, that the clauses were unconscionable. But the Supreme Court thought that holding had been influenced by the state court’s view that the clauses violated public policy. It remanded for further consideration of “whether, absent that public policy, the arbitration clauses . . . are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA.” *Id.* at 1204.


### 6.3. Another federal theory eliminated.

Earlier Supreme Court cases upholding arbitration of statutory claims had consistently emphasized that the arbitration must be capable of effectively vindicating the statutory right. The drafters of form contracts could not require explicit waiver of a statutory right, and they could not achieve that result indirectly by requiring an arbitration process that could not enforce the right. But the Court has never found that standard violated. And in American
Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), the Court found no violation of the effective-vindication standard even though both sides appeared to agree that plaintiff’s antitrust claim was not viable in arbitration. The restaurants’ individual damages were about $38,000, but to prove that claim would require an economists’ expert report that could easily cost a million dollars.

The American Express arbitration agreement contains a class action waiver. It precludes joinder of more than one plaintiff. It contains a confidentiality clause that precludes plaintiffs in separate arbitrations from sharing evidence or experts. It precludes any shifting of litigation costs to American Express even on successful claims. American Express refused to enter into any kind of stipulation that would simplify the economic proof required in arbitration.

The Court did not deny that the American Express arbitration clause effectively barred the restaurant’s claim. But it said that the Arbitration Act’s “command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims,” and that the Act “favor[s] the absence of litigation when that is the consequence of a class-action waiver.” Id. n.5. That would not seem to leave much of the effective-vindication principle, but formally the Court said that that principle applies only to the right to pursue a claim, and not to the ability to prove it.

Justice Kagan for three dissenters said that the Arbitration Act favored simpler and less expensive resolution of claims, not immunity from claims. And in the antitrust context, the Court’s decision meant that a monopolist could use its market power to require customers to agree to an arbitration system that effectively waives their right to complain about the monopoly. Justice Sotomayor was recused, so the case was decided 5-3 on the usual ideological lines.

6.4 Other grounds for holding arbitration clauses unconscionable. A California court has held that unconscionability review of arbitration clauses survives Concepcion where the alleged ground of unconscionability is something other than a class action waiver. Sanchez v. Valencia Holding Co., 135 Cal. Rptr. 3d 19 (Ct. App. 2011), review granted, 272 P.3d 976 (Cal. 2012). The arbitration clause, buried in an auto dealer’s form contract, was drafted so as not to apply to the principal claims the dealer might have, to permit de novo review of significant awards against the dealer but not of most awards against the consumer, and to deter consumers from seeking review when available by imposing liability for costs in an amount that could not be known in advance.

B. Unclean Hands and in Pari Delicto

Page 938. At the end of the first paragraph of note 1, add:

1. Two defenses. . . .

The cases on whether to apply unclean hands to actions at law are collected in T. Leigh Anenson, Limiting Legal Remedies: An Analysis of Unclean Hands, 99 Ky. L.J. 63 (2011).
C. Estoppel and Waiver

1. Equitable Estoppel

Page 946. After the first paragraph of note 6, add:

6. Estoppel and expectancy. . . .

In CIGNA v. Amara, 131 S. Ct. 1866 (2011), the Court described estoppel as an “equitable remedy” that “operates to place the person entitled to its benefit in the same position he would have been in had the representations been true.” Id. at 1880, quoting James W. Eaton, Handbook of Equity Jurisprudence (West 1901). The case is more fully described in supplement to page 569.

D. Laches

Page 961. At the end of note 1, add:

1. The special facts of Harjo. . . .

There is a new set of 18-year-old plaintiffs, and the case is again pending before the Trademark Trial and Appeal Board. Tamlin H. Bason, House Bill Would Amend Trademark Act to Clarify That “Redskin” Is Disparaging Term, 81 U.S.L.W. 1412 (Apr. 2, 2013). The new case is Blackhorse v. Pro-Football, Inc. (No. 92046185 (hearing held March 7, 2013)).

E. Statutes of Limitations

1. Continuing Violations

Page 973. After note 6, add:

6.1. ERISA. The Court has agreed to decide when the statute of limitations begins to run on an ERISA claim for disability benefits. Heimeshoff v. Hartford Life & Accident Insurance Co., 496 Fed. Appx. 129 (2d Cir. 2012), cert. granted, 133 S. Ct. 1802 (2013). ERISA is the Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq. (2006). Some circuits say the statute does not begin to run until the employee exhausts administrative remedies and the insurer finally denies the claim, principally because until then, the employee could not file a lawsuit. The Second Circuit, borrowing Connecticut law, allows the insurer to define an earlier date, and a shorter time period, in the benefits plan, so long as that date is reasonable and the time is not less than a year. Several circuits apparently apply similar rules. Heimeshoff’s lawyer appears to have known that the plan shortened the statute from six years to three, but not to have known that the plan said the three years ran from when the proof of claim was due.

2. The Discovery Rule

Page 980. After note 1, add:

1.1. Multiple injuries from one wrong. A much-litigated issue in latent disease cases is what to do when defendant’s wrongdoing causes one injury or disease early,
and a much more serious injury or disease years later. Plaintiff suffers injury, and often discovers the cause of that injury, when the first disease is diagnosed. Early cases were divided, but the dominant rule has come to be that limitations runs anew with respect to the second disease. Some of the cases are collected in Poosh v. Philip Morris USA Inc., 250 P.3d 181, 183 n.1 (Cal. 2011), where a long-term smoker contracted chronic obstructive pulmonary disease in 1989, periodontal disease in 1990, and lung cancer in 2003.

Page 981. After note 4, add:

4.1. The Securities and Exchange Commission. The Court unanimously refused to apply the discovery rule to claims by the SEC seeking civil penalties for fraud. Gabelli v. SEC, 133 S. Ct. 1216 (2013). A quite general statute of limitations, dating to 1839, says that a claim for “any civil fine, penalty, or forfeiture” must be filed with five years after the claim accrues. 28 U.S.C. §2462 (2006).

The Court treated the discovery rule as having originated in fraud cases, and treated it as generally available in fraud suits by victims. But it said the SEC is different. Ordinary citizens do not spend their time searching for fraud; they have no reason to investigate until they discover facts suggesting a violation. But the SEC’s principal task is to investigate for fraud. This statute of limitations applied only to government agencies, and it had never been subjected to the discovery rule. The Court concluded by emphatically urging caution in implying exceptions to statutes of limitation — a passage that will now be regularly quoted by defendants in these cases.

Page 983. After note 10, add:

10.1. Other tolling rules. In Holland v. Florida, 130 S. Ct. 2549 (2010), the Court reaffirmed earlier cases holding that “limitations periods are customarily subject to equitable tolling.” Id. at 2560, quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990). Irwin said there is a “rebuttable presumption of equitable tolling,” even in claims against the United States. Id. at 95-96. The Court quoted the rebuttable presumption language in Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817 (2013), but it said the presumption does not apply to administrative appeals. Auburn Regional, more fully described in this supplement to note 13, was unanimous.

Justice Scalia agreed with this presumption in his dissenting opinion in Holland. So he does not think that there can be every exceptions must be set out in the statutory text and that none can ever be inferred. Rather, he must think that the discovery rule in particular is not an appropriate tolling rule. Less controversial tolling rules include minority and mental disability. In Holland, the Court held that the one-year period for filing petitions for post-conviction review under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §2244(d)(1) (2006), may be tolled for some vaguely defined level of egregious malpractice by a prisoner’s court-appointed attorney, although not by the mere negligence that is the usual reason lawyers blow the statute of limitations.
Page 983. After note 12, add:

12.1. Disclosure of short-swing profits. The Securities and Exchange Act requires corporate insiders to disclose their purchases and sales of their corporation’s securities, and provides that any profits on securities held for less than six months must be disgorged to the corporation. 15 U.S.C. §78p (2006 & Supp. V 2011). The statute of limitations says that “no such suit shall be brought more than two years after the date such profit was realized.” §78p(b). Defendants argue that this is a statute of repose, not subject to tolling rules, and alternatively, that it should be tolled no longer than the time at which plaintiff discovered or should have discovered the violations. The Ninth Circuit has long held that the statute is tolled until defendants make the required disclosures.

The Supreme Court split four-four, with Chief Justice Roberts not participating, on whether the limitations period is a statute of repose or subject to tolling rules. Credit Suisse Securities (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1421 (2012). But the eight justices sitting unanimously rejected the Ninth Circuit’s tolling rule. Defendants in Simmonds argued that they were not subject to §78p, so that they would never file the disclosure forms, and the statute of limitations would never run. But their actions were generally public (they were underwriters of initial public offerings), and plaintiff obviously knew about her alleged cause of action, because she had already filed suit. The Court remanded the case for further consideration under ordinary tolling rules.

Page 984. After the penultimate paragraph of note 13, add:


The Court addressed the issue again in Henderson v. Shinseki, 131 S. Ct. 1197 (2011), where a mentally ill war veteran missed the deadline for appealing a denial of veterans’ benefits. The Court said that “[f]iling deadlines . . . are quintessential claim-processing rules.” Id. at 1203. But “Congress is free to attach the conditions that go with the jurisdictional label to a rule that we would prefer to call a claim-processing rule.” Id., citing Bowles. The opinion was unanimous, except that Justice Kagan did not participate. So the reconciliation of the cases, at least for now, appears to be that time limits are not jurisdictional unless Congress says otherwise. And Congress “need not use magic words to speak clearly on this point.” Id. So a bright-line rule appears to be out of reach. On the case before it, Congress had not indicated any intention to subject veterans to a time limit with jurisdictional consequences.

In Sebelius v. Auburn Regional Medical Center, 133 S. Ct. 817 (2013), the Court summarized the rule much as in the preceding paragraph, and described this as a “readily administrable bright line,” quoting Arbaugh v. Y & H Corp., 545 U.S. 500, 516 (2006). Perhaps this characterization is unduly optimistic, but Justice Ginsburg wrote it for a unanimous Court.

Auburn Regional claimed it had been systematically underpaid by a company hired by the government to process Medicare claims from hospitals, and that the contractor had concealed the violation by reporting only the results of its calculations and not the underlying data. The statute of limitations for seeking review of the contractor’s decisions was 180 days. The Court held that the statute was not “jurisdictional” and that it could be extended. But it deferred to an administrative
regulation providing that the time limit could be extended “for good cause,” but not for more than three years. In effect, the regulation was a general tolling rule subject to a three-year statute of repose, which the Court enforced.

14. Returning abducted children. The International Child Abduction Remedies Act, 42 U.S.C. §11601 et seq. (2006) is the U.S. implementation of the Convention on the Civil Aspects of International Child Abduction, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=24. The abductor in these cases is typically a parent seeking to avoid a custody decree, or the risk of custody litigation, in the child’s home country. If the complaining parent sues more than one year after the abduction, the abducting parent can defend on the ground that the child has become settled in the new country to which the child was taken.

The Court has agreed to decide whether this one-year period is subject to equitable tolling where the abducting parent conceals the child’s location, so that the complaining parent cannot know where to sue. Lozano v. Alvarez, 697 F.3d 41 (2d Cir. 2012), cert. granted, 2013 WL 56044 (June 24, 2013). In addition to the usual arguments about whether and when to toll statutes of limitations, the abducting parent argues that this provision is not a statute of limitations at all. It does not bar suits after one year; it simply creates a defense that may arise after a year but that could not plausibly arise in less than a year. And even if this defense is proved, the court retains discretionary power to return the child to her original home country. All these provisions are in the Convention itself, not in the implementing legislation.
CHAPTER TWELVE

FLUID-CLASS AND CY PRES REMEDIES

Page 1001. After note 3, add:

3.1. The Fifth Circuit agrees. The Fifth Circuit has joined this trend. “Because the settlement funds are the property of the class, a cy pres distribution to a third party of unclaimed settlement funds is permissible ‘only when it is not feasible to make further distributions to class members,’” or when the class claims are liquidated and the class members’ claims have been “100 percent satisfied.” Klier v. Elf Atochem North America Inc., 658 F.3d 468, 475 (5th Cir. 2011), quoting American Law Institute, Principles of the Law of Aggregate Litigation §3.07 cmt. a (2010).

In an example of the 100-percent-satisfied branch of the doctrine, the First Circuit has approved an $11.4 million cy pres distribution out of a $40-million settlement, where those class members who filed claims had already received full payment of their estimated damages. In re Lupron Marketing and Sales Practices Litigation, 677 F.3d 21 (1st Cir. 2012). Lupron is a cancer drug, and the cy pres distribution went to cancer centers for research on the cancers treated with Lupron.

3.2. The Third Circuit ups the ante. The Third Circuit joined the trend, and may have toughened the emerging requirements, in In re Baby Products Antitrust Litigation, 708 F.3d 163 (3d Cir. 2013). Plaintiffs’ expert estimated that Toys R Us and its co-conspirators had inflated the price of certain baby products by 18 percent. The settlement refunded 20 percent of the purchase price, trebled under the antitrust laws, to any customers with some documentary evidence that they had purchased one of the products from Toys R Us. The settlement paid $5 to anyone who claimed to have purchased one of the products but had no evidence. Few claims with documentary evidence were filed, with the result that $3 million went to the class, $14 million to counsel, and $18.5 million to cy pres.

The court of appeals was troubled by those proportions. It approved cy pres settlements in principal, but vacated the district court’s approval of this settlement. Noting that some of the products cost up to $300, so that 20 percent trebled would be $180, the court thought that the reason consumers failed to file claims must have been that the documentation requirements were too stringent. It remanded without suggesting what lesser documentation requirements might be feasible.

The court also said that cy pres distributions are less valuable than distributions to the class and should be discounted for purposes of awarding attorneys’ fees.

Page 1002. After note 4.e., add:

f. AOL subscribers. Without disclosing that it was doing so, AOL added advertising at the end of every e-mail message sent by any of its 66 million subscribers. Damages were unquantifiable; unjust enrichment was $2 million, which would have been less than 3 cents per class member. The case settled for a promise of repeated disclosures at six-month intervals, with a right to opt out of having advertising attached to one’s e-mails, and charitable contributions of $110,000, principally directed to the Legal Aid Foundation of Los Angeles, the Boys and Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center.
The court of appeals disapproved, because two of the charities were local but the class was national, and because none of the charities had anything to do with the underlying claims. The court rejected the parties’ argument that the class was so diverse that no more appropriate charity was available. “The parties should not have trouble selecting beneficiaries from any number of non-profit organizations that work to protect internet users from fraud, predation, and other forms of online malfeasance.” Nachshin v. AOL, LLC, 663 F.3d 1034, 1041 (9th Cir. 2011). And if no such charity could be found, the district court should consider giving the money to the government.