

**Modern American Remedies:  
Cases and Materials  
Fifth Edition**

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**2020 Teachers' Update**

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## PREFACE

This Update includes decisions through the end of the Supreme Court's term on July 9, 2020. As in the main volume, quotations appearing in this Update remove internal quotation marks and citations without notice for ease of reading. Always check the original source before quoting material reprinted here. Unless otherwise noted, citations to statutes are as they existed in spring 2020.

Students, just as no one expects you to memorize all the information in the 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.

We are grateful to Timothy Duong and Patrick Randall for excellent research assistance.

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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 note 2, add:**

##### **2. The rightful position. . . .**

The Supreme Court endorsed the rightful position standard in *Babb v. Wilkie*, 140 S. Ct. 1168, 1178 (2020): “‘Remedies generally seek to place the victim of a legal wrong . . . in the position that person would have occupied if the wrong had not occurred.’ R. Weaver, E. Shoben, & M. Kelly, *Principles of Remedies Law* 5 (3d ed. 2017).” The context was a holding that a discrimination plaintiff could not get reinstatement or damages for loss of employment unless the discrimination was the but-for cause of plaintiff losing the job.

#### E. Limits on Damages

##### **1. The Parties’ Power to Specify the Remedy**

**Page 82. At the end of note 5, add:**

##### **5. Another confidentiality agreement. . . .**

Daniels (legally known as Stephanie Clifford) sued in a California court for a declaration that the hush money agreement was not enforceable. After removing to federal court, the defendants, including President Trump, signed covenants not to sue under the agreement in an effort to moot the case. The effort succeeded and the court never addressed the enforceability of the liquidated damages provision or any other part of the agreement. The court dismissed for lack of subject matter jurisdiction and remanded to state court defendants’ claim that they were entitled to recover the \$130,000 they had paid Daniels for her silence. [Order Granting Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction and Remanding Case to Los Angeles Superior Court](#), *Clifford v. Trump*, No. 2:18-cv-02217-SJO-FFM, Doc. 109 (Mar. 7, 2019). Nothing further has been reported from that lawsuit.

##### **2. Avoidable Consequences, Offsetting Benefits, and Collateral Sources**

**Page 100. At the end of note 6, add:**

New York’s highest court clarified (or limited) *Oden* in *Andino v. Mills*, 106 N.E.3d 714 (N.Y. 2018). The court in *Andino* held that a retired New York City police officer’s accident disability retirement benefits were a collateral source that a court must offset against the injured retiree’s jury award for future lost earnings and pension. “*Oden* does not require a direct match between the jury’s damage award and the collateral source in the sense that there must be an exact dollar equivalence, but only that the collateral source replace a category of loss reflected in the jury award.” The disability pension in *Oden* did not match lost salary, because plaintiff was free to work while receiving that pension. But in *Andino*, plaintiff was not free to work while receiving a disability pension, until she reached normal retirement age. So the disability pension replaced lost salary up to normal retirement age, and replaced regular pension after normal retirement age.

## **F. Taxes, Time, and the Value of Money**

### **1. The Impact of Taxes**

**Page 141. At the end of note 2, add:**

#### **2. Payroll taxes. . . .**

The Supreme Court appears to have resolved the dispute in *BNSF Railway Co. v. Loos*, 139 S. Ct. 893 (2019). Michael Loos, a BNSF employee, was injured on the job. He sued under the FELA, and a jury awarded him \$126,212.78, of which \$30,000 was attributable to wages lost during the time Loos was unable to work. The Court held that FELA damages awarded for lost wages are taxable as compensation under the Railroad Retirement Tax Act, 26 U.S.C. §3201 *et seq.* That Act, and its companion, the Railroad Retirement Act, 45 U.S.C. §231 *et seq.*, create a separate retirement system for railroad workers that substitutes for Social Security. BNSF was required to withhold \$3,765 in railroad retirement taxes from the judgment. And contrary to the assumption in note 2 in the main volume, the Court strongly implied that Social Security taxes would be treated the same way. Justices Gorsuch and Thomas dissented.

## **G. Damages Where Value Cannot Be Measured in Dollars**

### **3. Dignitary and Constitutional Harms**

**Page 221. At the end of note 2, add:**

#### **2. Proving the damages. . . .**

Apart from the occasional plaintiff who succeeds in proving emotional distress, *Carey* has given rise to a large body of law that greatly favors government defendants. Government employees who are fired without the procedures they were promised, and a wide range of other plaintiffs who lose alleged rights or government benefits without a hearing, generally must prove that they would have succeeded at the hearing in order to collect more than nominal damages. A recent example is *Nnebe v. Daus*, 306 F. Supp. 3d 552, 557 & n.1 (S.D.N.Y. 2018), awarding nominal damages for summary revocation of taxi-driver licenses. The Second Circuit remanded the case for the trial court to consider a question related to class certification. *Nnebe v. Daus*, 931 F.3d 66, 88 n.26 (2d Cir. 2019). The court wrote that while it did not “express [any] view on the class certification and damages issues, we note that the deprivation of a hearing alone does not necessarily proximately cause a loss of income, since a hearing in a particular case may well have led to a continued suspension in any event.”

A few state courts have rejected *Carey* in cases of employees fired without the procedures promised in their employment contract. The Utah court feared that under *Carey*

the employer could discharge an employee summarily and then omit or delay the contractual termination procedures with impunity so long as it was in possession of evidence which, when ultimately provided, would justify the discharge. In that circumstance, the employee, without notice of the reason for his dismissal and without any opportunity to refute the charges, would remain in an indefinite and painful state of limbo, uncertain about his ultimate right to reinstatement or back pay.

Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981). We owe these examples, and greater awareness of the volume of government-employee cases, to Stephen Yelderian, *Damages for Privileged Harms*, 106 Va. L. Rev. --- (forthcoming 2020). The idea is that the suspension in *Carey* was likely “privileged,” because unless the student could have prevailed at the hearing, the school could have inflicted that harm without violating the law. Compare Justice Frankfurter’s argument about *Bigelow*, in the main volume at 133.

## CHAPTER THREE

### PUNITIVE REMEDIES

#### A. Punitive Damages

##### 1. Common Law and Statutes

**Page 240. At the end of note 8, add:**

**8. Other federal claims. . . .**

The Court in *Exxon* permitted the award of punitive damages under the general maritime law (though it was equally divided on whether a corporation could be held vicariously liable for managerial conduct). In *Dutra Group, Inc. v. Batterton*, 139 S. Ct. 2275 (2019), however, the Court held that punitive damages were not available in some maritime cases. Batterton, who worked on Dutra Group’s vessel, suffered a disabling injury to his hand, and he brought an “unseaworthiness” claim, which today has evolved into a kind of strict liability claim. The Court rejected punitive damages for unseaworthiness claims, holding the historic lack of punitive damages in such cases “practically dispositive.”

In *Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020), the Supreme Court unanimously upheld the imposition of \$4.3 billion in punitive damages against the Republic of Sudan for its actions in materially supporting the 1998 Al Qaeda terrorist bombings of United States embassies in Kenya and Tanzania. At the time of the bombings, the Foreign Sovereign Immunities Act barred punitive damages claims even against states that were sued for violating federal law by supporting acts of terrorism. Congress later changed federal law to expressly allow punitive damages in such cases. Sudan argued as a matter of statutory interpretation that the amended law could not be applied retroactively. The Court disagreed, noting that Congress in its later statutes clearly and expressly authorized punitive damages in suits for past state-sponsored terrorist conduct. Sudan had argued against retroactivity citing constitutional concerns; the Court responded that Sudan should have raised any constitutional arguments directly.

##### 2. The Constitution

**Page 253. After note 5, add:**

**5.1. The Johnson & Johnson litigation.** Consumer products manufacturer Johnson & Johnson has been plagued by lawsuits alleging that its baby powder causes cancer. J&J says its product is safe and that the lawsuits are based on bad science, but it has taken the product off the market in the United States. It still sells its baby powder elsewhere in the world.

In *Ingham v. Johnson & Johnson*, 2020 WL 3422114 (Mo. Ct. App. June 23, 2020), the court upheld \$25 million in compensatory damages for each of 20 women — \$500 million in total — who said they had used J&J’s baby powder and contracted ovarian cancer as a result. The court also upheld punitives equal to 5.72 times compensatories against J&J, plus another 1.8 times compensatories against a subsidiary. The subsidiary was liable to all the plaintiffs, J&J to only some, so the total judgment is more than \$1.6 billion. Thousands of other claims remain outstanding.

The court said ratios of punitives to compensatories considerably greater than one were justified, despite the large compensatories, because J&J’s behavior had been highly reprehensible,

and because J&J's vast net worth — \$63.2 billion — made large judgments necessary to deter. J&J says it will appeal to the state supreme court.

**Page 254. At the end of note 6.a, add:**

**a. The Florida tobacco litigation. . . .**

The Supreme Court again refused to hear an appeal raising due process claims related to the use of factual findings from the class action against the tobacco companies in individual follow-on cases. *Philip Morris USA Inc. v. Boatwright*, 217 So. 3d 166 (Fla. Dist. Ct. App. 2017), *cert. denied*, 139 S. Ct. 1263 (2019). As of early in 2019, about 2,300 individual cases remained from the former *Engle* class members. Martina Barash, [\*Philip Morris, Other Tobacco Companies Rebuffed Again by SCOTUS\*](#), Bloomberg L. (Feb. 25, 2019). The Eleventh Circuit recently upheld as not excessive a verdict of \$15.8 million in compensatory damages and \$25.3 million in punitives, divided between two tobacco companies. *Kerrivan v. R.J. Reynolds Tobacco Co.*, 953 F.3d 1196 (11th Cir. 2020). The opinion collects other large verdicts in *Engle* follow-on cases for purposes of comparative review.

**B. Other Punitive Remedies**

**2. Civil Penalties Payable to the Government**

**Page 270. At the end of note 4, add:**

**4. The Excessive Fines Clause. . . .**

**d. Against the states.** In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Supreme Court unanimously held that the Eighth Amendment's Excessive Fines Clause was incorporated against the states, meaning that defendant could invoke the Clause to challenge the penalties imposed on him. The Court called the protection against excessive fines

a constant shield throughout Anglo-American history. Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago. Even absent a political motive, fines may be employed in a measure out of accord with the penal goals of retribution and deterrence, for fines are a source of revenue, while other forms of punishment cost a State money.

*Id.* at 689. The Stuarts were the absolutist British kings of the seventeenth century, who provoked two revolutions and one regicide. Simon Jenkins, *A Short History of England: The Glorious Story of a Rowdy Nation* 132-46 (2011). Indiana did not argue seriously against incorporation. Instead it argued that the Court should overrule *Austin*'s holding that in rem forfeitures fall within the Clause's protection when they are at least partially punitive. The Court held that this question was not properly before it.

## CHAPTER FOUR

### PREVENTING HARM: THE MEASURE OF INJUNCTIVE RELIEF

#### A. The Scope of Injunctions

##### 1. Preventing Wrongful Acts

Page 288. After note 4, add:

**5. The continuing battle over universal injunctions.** As states and other opponents of the Trump Administration have sought nationwide or universal injunctions against Administration policies, both the Vice President and Attorney General have publicly spoken out against nationwide injunctions, and the Trump Administration has asked the Supreme Court to block or limit their use. The Department of Justice also issued a memorandum instructing DOJ lawyers to oppose their use. Memorandum from the Attorney General, [Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions](#) (Sept. 13, 2018).

Echoing Justice Thomas's concurring opinion in *Trump*, Justice Gorsuch, joined by Justice Thomas, expressed serious doubts about the power of courts to issue universal injunctions:

Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies. Injunctions like these thus raise serious questions about the scope of courts' equitable powers under Article III.

It has become increasingly apparent that this Court must, at some point, confront these important objections to this increasingly widespread practice. As the brief and furious history of the regulation before us illustrates, the routine issuance of universal injunctions is patently unworkable, sowing chaos for litigants, the government, courts, and all those affected by these conflicting decisions. Rather than spending their time methodically developing arguments and evidence in cases limited to the parties at hand, both sides have been forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide stakes, and all based on expedited briefing and little opportunity for the adversarial testing of evidence.

This is not normal. Universal injunctions have little basis in traditional equitable practice. Their use has proliferated only in very recent years. And they hardly seem an innovation we should rush to embrace. By their nature, universal injunctions tend to force judges into making rushed, high-stakes, low-information decisions. The traditional system of lower courts issuing interlocutory relief limited to the parties at hand may require litigants and courts to tolerate interim uncertainty about a rule's final fate and proceed more slowly until this Court speaks in a case of its own. But that system encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids this Court's own decisionmaking process.



The rise of nationwide injunctions may just be a sign of our impatient times. But good judicial decisions are usually tempered by older virtues.

Nor do the costs of nationwide injunctions end there. There are currently more than 1,000 active and senior district court judges, sitting across 94 judicial districts, and subject to review in 12 regional courts of appeal. Because plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide. The risk of winning conflicting nationwide injunctions is real too. And the stakes are asymmetric. If a single successful challenge is enough to stay the challenged rule across the country, the government's hope of implementing any new policy could face the long odds of a straight sweep, parlaying a 94-to-0 win in the district courts into a 12-to-0 victory in the courts of appeal. A single loss and the policy goes on ice—possibly for good, or just as possibly for some indeterminate period of time until another court jumps in to grant a stay. And all that can repeat, *ad infinitum*, until either one side gives up or this Court grants certiorari. What in this gamesmanship and chaos can we be proud of?

Department of Homeland Security v. New York, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring in the grant of a stay).

Scholarly debate continues as well. See, for example, John C. Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Yale J. Reg. Bulletin 37 (2020); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 Harv. L. Rev. 920 (2020); Samuel Bray, *A Response to the Lost History of the “Universal” Injunction*, Yale J. Reg.: Notice & Comment (Oct. 6, 2019), <https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/>; Mila Sohoni, *A Reply to Bray’s Response to The Lost History of the “Universal” Injunction*, Yale J. Reg.: Notice & Comment (October 10, 2019), <https://www.yalejreg.com/nc/a-reply-to-brays-response-to-the-lost-history-of-the-universal-injunction-by-mila-sohoni/>; Michael T. Morley, *Article III and the History of Nationwide Injunctions*, 72 Ala. L. Rev. (forthcoming 2020), <https://ssrn.com/abstract=3592115>; Howard Wasserman, *“Nationwide” Injunctions are Really “Universal” Injunctions and They are Never Appropriate*, 22 Lewis & Clark L. Rev. 335 (2018).

Writing for a court majority in *City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020, as amended), Judge Rovner weighed into the Sohoni-Bray dispute over historical equity practice related to universal injunctions. The context was a lawsuit over a Trump Administration decision to withhold certain funding for local law enforcement efforts from “sanctuary cities,” including Chicago, that did not cooperate with federal authorities on certain immigration matters. A district court had issued a nationwide injunction against the federal government withholding the funds.

In a lengthy opinion, the appeals court explained why relief in this case should be limited to Chicago. But along the way in dicta it offered a strong defense of universal injunctions. Relying on Professor Sohoni’s analysis as well on an amicus brief submitted by leading historians, the court concluded that universal injunctions have a long history in American law. “Those historians examined the relief provided in equity from the 18th century onward, such as bills of peace as well as ordinary bills for injunctions including injunctions to abate nuisances, and concluded that ‘equity courts had the equitable powers to issue nationwide injunctions in the early republic,’ and ‘have long issued injunctions that protect the interests of non-parties.’ In fact, the historians noted periods of time in which the equitable remedies were much more drastic, extending as far as enjoining non-parties (which it noted would not be accepted today) and including a period of time

in which injunctions were so broad they were called ‘omnibus injunctions’ and ‘Gatling-gun injunctions.’” *Id.* at 914. (quoting Brief of Amici Curiae Legal Historians In Support of Plaintiff and Appellee the City of Chicago (No. 18-2885), 2018 WL 6173238).

Despite recognizing that universal “injunctions present real dangers, and will be appropriate only in rare circumstances,” the court described the importance of preserving a court’s ability to issue injunctions protecting nonparties:

Absent the ability to grant injunctive relief that extends beyond the particular party, courts will have little ability to check the abuse of power that presents the most serious threat to the rule of law — such as that which is swift in implementation, widespread in impact, and targeted toward those with the least ability to seek redress. Although circumspection is appropriate in ascertaining whether such relief is appropriate, an outright ban of such injunctions is neither required by history nor desirable in light of the range of situations — some as unpredictable and impactful as the sudden travel ban — that courts may confront.

Judge Manion concurred in the judgment.

The Supreme Court ducked the issue in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020). This was the decision vacating the Trump Administration’s repeal of regulations protecting from deportation young adults who were brought into the country as children and who lacked legal immigration status. Two lower courts had issued nationwide injunctions against enforcement of the repeal; a third lower court simply vacated the repealing regulation under the Administrative Procedure Act. The Supreme Court affirmed this third judgment, and said that because the repeal had been vacated, it was “unnecessary to examine the propriety of the nationwide scope of the injunctions” in the other two cases. *Id.* at 1916 n.7. Justice Ginsburg, joined by Justice Sotomayor, endorsed the power to “set aside agency action” as a basis for universal injunctions in *Little Sisters of the Poor v. Pennsylvania*, 2020 WL 3808424, at \*35 n.28 (U.S. July 8, 2020) (Ginsburg, J., dissenting).

A large fraction of federal policies subject to legal challenge are initiated by agencies issuing regulations subject to the Administrative Procedure Act. If vacating such a regulation has the same effect as a nationwide injunction, but is not subject to the same analysis, this would seem to open an enormous loophole in any efforts the Court may make to limit nationwide injunctions.

A footnote in a Supreme Court case discussing the severability of an unconstitutional provision of a federal law barring automated “robocalls” to cell phones, except calls attempting to recover debt owed to the government, suggests another limitation on the debate of universal injunctions:

The term “invalidate” is a common judicial shorthand when the Court holds that a particular provision is unlawful and therefore may not be enforced against a plaintiff. To be clear, however, when it “invalidates” a law as unconstitutional, the Court of course does not formally repeal the law from the U. S. Code or the Statutes at Large. Instead, in Chief Justice Marshall’s words, the Court recognizes that the Constitution is a “superior, paramount law,” and that “a legislative act contrary to the constitution is not law” at all. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The Court’s authority on this front “amounts to little more than the negative power to disregard an unconstitutional enactment.” *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

Justice THOMAS’s thoughtful approach to severability . . . would simply enjoin enforcement of a law as applied to the particular plaintiffs in a case. Under either the

Court's approach or Justice THOMAS's approach, an offending provision formally remains on the statute books (at least unless Congress also formally repeals it). Under either approach, the formal remedy afforded to the plaintiff is an injunction, declaration, or damages. One difference between the two approaches is this: Under the Court's approach, a provision is declared invalid and cannot be lawfully enforced against others. Under Justice THOMAS's approach, the Court's ruling that a provision cannot be enforced against the plaintiff, plus executive respect in its enforcement policies for controlling decisional law, plus vertical and horizontal *stare decisis* in the courts, will mean that the provision will not and cannot be lawfully enforced against others. The Court and Justice THOMAS take different analytical paths, but in many cases, the different paths lead to the same place.

*Barr v. American Association of Political Consultants*, 2020 WL 3633780, at \*9 n.8 (U.S. July 7, 2020). This was written in the context of a Supreme Court decision, which of course has instant and nationwide effect as precedent. The opinion of a single district judge is not binding precedent on anybody, and the government does not necessarily accept such a decision as a governing rule of law. It will comply with the terms of the injunction, and it matters whether those terms protect the plaintiff in the case or everyone similarly situated.

The Court granted cert on the universal injunction issue in *Little Sisters*, but decided the case on other grounds. Justice Ginsburg, dissenting, would have upheld the universal injunction under the Administrative Procedure Act, see *supra*, and also because in her view, a nationwide injunction was necessary to provide complete relief to the named plaintiffs. Pennsylvania and New Jersey alleged that they would incur additional expense because women would lose employer-provided contraception under the challenged regulations. But 800,000 women in those two states worked in other states, so an injunction limited to employers within the two states would not solve the problem. 2020 WL 3808424, at \*35 n.28 (July 8, 2020) (Ginsburg, J., dissenting). She did not endorse universal injunctions more broadly than these two rationales. But these rationales, and especially the first one, are quite broad.

**Page 293. At the end of note 9, add:**

**9. Nominal damages. . . .**

The Supreme Court has agreed to review the Eleventh Circuit's rule in *Uzuegbunam v. Preczewski*, 781 F. App'x 824 (11th Cir. 2019), *cert. granted*, 2020 WL 3865254 (July 9, 2020). The facts are parallel to those in *Flanagan*. Campus police stopped plaintiff from distributing literature outside a college's "free-speech zone." Plaintiff sued for an injunction and damages; the college abandoned its restrictive policy. The lower courts held that the claims for an injunction and nominal damages were moot, and that plaintiff had not adequately pleaded compensatory damages. The cert petition presented only the nominal damages claim.

**Page 293. After note 10, add:**

**11. Voluntary cessation to avoid a bad precedent.** The Supreme Court granted cert in *New York State Rifle & Pistol Association v. City of New York*, 140 S. Ct. 1525 (2020), to consider whether a provision of New York City gun laws violated gun owners' Second Amendment rights. After the cert grant, New York City amended its rules to allow the conduct at issue in the lawsuit, no doubt to avoid a likely adverse ruling at the Court. The Court held that the city's conduct mooted the case and remanded to the lower courts for further proceedings, including a possible damages

claim. Justice Alito, joined by Justice Gorsuch and in part by Justice Thomas, dissented, accusing the majority of allowing its docket to be “manipulated.” *Id.* at 1527 (Alito, J., dissenting). Alito claimed the decision was not moot for two reasons. “First, the changes in City and State law do not provide petitioners with all the injunctive relief they sought. Second, if we reversed on the merits, the District Court on remand could award damages to remedy the constitutional violation that petitioners suffered.” *Id.* at 1528.

The case was a preview of things to come. The Court soon thereafter denied cert in 10 cases raising Second Amendment questions. Adam Winkler, [John Roberts May Not Be the Ally Gun-Rights Advocates Hoped For](#), *The Atlantic* (June 16, 2020). Justice Thomas, joined in part by Justice Kavanaugh, dissented from the denial of cert in one of them. *Rogers v. Grewal*, 140 S. Ct. 1865 (2020).

## **2. Preventing Lawful Acts That Might Have Wrongful Consequences**

**Page 305. At the end of note 9, add:**

### **9. Meeting your friends? . . .**

California is moving away from the use of gang injunctions in the face of falling crime rates and criticism of their overbreadth. James Queally, [California Moving Away from Gang Injunctions Amid Criticism, Falling Crime Rates](#), *L.A. Times* (July 8, 2018).

**CHAPTER FIVE**  
**CHOOSING REMEDIES**

**A. Substitutionary or Specific Relief**

**1. Irreplaceable losses**

**a. Injunctions**

**Page 397. After note 1.f, add:**

**g. Death.** Death of course is the ultimate irreparable injury, or so it would seem. A death row inmate in federal prison, Wesley Ira Purkey, filed a last-minute request for a preliminary injunction blocking his execution, arguing that the method of execution was unconstitutional. In arguing for the execution to go forward, the Department of Justice challenged Purkey’s claim of irreparable injury: “While there is no question that Purkey will not be able to litigate the merits of his claims should his scheduled execution proceed, it is not clear that would constitute irreparable harm in the context of a challenge to the method of execution—rather than to the lawfulness of the execution itself.” Defendants’ Opposition to Plaintiff Wesley Ira Purkey’s Motion for a Preliminary Injunction at 1, *Roane v. Barr* (In the Matter of the Fed. Bureau of Prisons’ Execution Protocol Cases), 2019 WL 6691814 (D.D.C Nov. 20, 2019), <https://www.scribd.com/document/436130893/DOJ-opposition-to-stay-of-execution-Purkey>, *vacated and remanded*, 955 F.3d 106 (D.C. Cir. 2020). The DOJ also argued that even if there were irreparable injury, a preliminary injunction was inappropriate because Purkey was not likely to succeed on the merits of his challenge to the execution protocol.

A federal district court blocked the execution of Purkey and four other inmates. *Roane v. Barr* (In the Matter of the Federal Bureau of Prisons’ Execution Protocol Cases), No. 19-mc-145 (TSC), 2019 WL 6691814 (D.D.C. Nov. 20, 2019). The court rejected the government’s argument on irreparable injury. “Here, absent a preliminary injunction, Plaintiffs would be unable to pursue their claims, including the claim that the 2019 Protocol lacks statutory authority, and would therefore be executed under a procedure that may well be unlawful. This harm is manifestly irreparable.” *Id.* at \*8. It also rejected the government’s argument on likelihood of success on the merits. The government then sought a stay first from the D.C. Circuit then from and the Supreme Court. Both denied relief, but the Supreme Court directed the D.C. Circuit to decide the government’s appeal “with appropriate dispatch.” *Barr v. Roane*, 140 S. Ct. 353 (2019). On the merits, the D.C. Circuit on a 2-1 vote reversed the district court, issuing three different opinions. *Roane v. Barr* (In the Matter of the Federal Bureau of Prisons’ Execution Protocol Cases), 955 F.3d 106 (D.C. Cir. 2020). The appellate opinions did not address the issue of irreparable harm. The Supreme Court denied a stay and cert, paving the way for federal executions to restart. Justices Ginsburg and Sotomayor dissented on the cert denial. *Bourgeois v. Barr*, 2020 WL 3492763 (U.S. June 29, 2020).

### 3. Other Policy Reasons

**Page 436. At the end of note 3, add:**

#### **3. Prior restraints against unprotected speech. . . .**

John Bolton, a former National Security Advisor for President Trump, wrote a very critical book, *The Room Where It Happened*, about his experiences working for the Trump Administration. Bolton clashed with the government over a prepublication security review of the material in his book, with Bolton alleging that he had satisfied all the reviewer’s objections and that the review was then held up for political reasons. After his publisher had announced that the book would soon be on sale, after the book had been shipped to bookstores around the world, and after advance copies of the book had been shared widely with the media, the government sought an order against Bolton seeking to have him direct his publisher to stop distribution and collect all copies of the book.

A federal district court denied a TRO against publication of the book, even though it found that the government was likely to succeed in showing that Bolton violated the law by publishing the book before prepublication review was completed. The court held that the government could not show that an injunction would prevent irreparable injury, because it was too late to retrieve the book. “Reviews of and excerpts from the book are widely available online. As noted at the hearing, a CBS News reporter clutched a copy of the book while questioning the White House press secretary. By the looks of it, the horse is not just out of the barn—it is out of the country.” *United States v. Bolton*, 2020 WL 3401940, \*4 (D.D.C. June 20, 2020).

Although the court framed its order in terms of lack of irreparable injury, it also could have written that the request was moot (see pages 290-93 in the main volume), or that it was barred by laches, a doctrine taken up in Chapter 11, which allows courts to deny requests for equitable relief that come too late. The court also alluded to the First Amendment implications of the government’s requested order. “For reasons that hardly need to be stated, the Court will not order a nationwide seizure and destruction of a political memoir.” *Id.* at \*4. And it concluded that it should not issue a “toothless” injunction. *Id.* at \*5.

Bolton is far from out of the woods, given the finding that he likely illegally published the manuscript. The government also sought a constructive trust over all of Bolton’s profits from the book, an issue taken up in Chapter 8. In a famous earlier case involving a breach of a prepublication review requirement for books by former CIA agents, the Supreme Court approved such a constructive trust remedy. *Snepp v. United States*, 444 U.S. 507 (1980).

An attempt to enjoin publication of a critical book by President Trump’s niece, Mary Trump, seems headed for a similar outcome. Publication is scheduled for a few days after we finalize this supplement, and the lawsuit appears to have come too late. That litigation is in state court in New York. It is unclear whether the rest of the Trump family can recover Mary Trump’s profits under New York law or whether her nondisclosure agreement is even enforceable.

**Page 438. At the end of note 6, add:**

#### **6. Developments in the lower courts. . . .**

In a recent article, Professor Volokh counts 31 states and five federal circuits that allow anti-libel injunctions in at least some circumstances. Eugene Volokh, *Anti-Libel Injunctions and the Criminal Libel Connection*, 168 U. Pa. L. Rev. 74, 137 app. A. (2019). As a matter of both First Amendment law and sound policy, Volokh recommends what he terms a “hybrid permanent injunction” against libelous speech. In the context of his example of Don having falsely accused

Paula of cheating him, Volokh favors an injunction along the lines of “Don may not libelously accuse Paula of cheating him.” He believes that such an injunction, by including the term “libelously,” would have a “narrower chilling effect” and would not allow Don to be “punished for criminal contempt unless, at the contempt hearing, his speech is found to be libelous.” He would not allow the findings in the proceeding that issued the injunction to be claim or issue preclusive in the contempt proceeding, and he would not allow the use of imprisonment in coercive civil contempt. He would require jury trial for imprisonment in criminal contempt, and he would require jury trial either at the injunction stage or the contempt stage before any fines in coercive civil contempt. These safeguards would graft significant free-speech exceptions on to the existing law of contempt, briefly summarized at pages 276-277 of the main volume and explored in depth in chapter 9.

**Page 438. At the end of note 7, add:**

**7. Are prior restraints special? . . .**

In *Sindi v. El-Moslimany*, 896 F.3d 1 (1st Cir. 2018), the First Circuit unanimously upheld the trial court’s remitted damage award of \$720,000 for claims that included defamation and intentional infliction of emotional distress resulting from false statements about the credentials and work of a scientist. On a 2-1 vote, however, the court reversed a permanent injunction barring the defendants from uttering six false statements about the defendant, including the statement that plaintiff was fraudulently awarded her Ph.D. Judge David Barron, dissenting, believed that defendants had not adequately preserved on appeal their objection to the injunction. He saw no “reason for the majority to address these debatable and defaulted First Amendment arguments when the majority suggests that the much less consequential, albeit still defaulted, argument that the record did not show that an injunction was necessary to prevent irreparable harm could on its own suffice to justify the invalidation of the injunction.” *Id.* at 49. Wouldn’t continued repetition of false statements that had already damaged plaintiff’s reputation and cost her a job and other opportunities count as irreparable harm?

In *Shak v. Shak*, 144 N.E.3d 274 (Mass. 2020), the highest court in Massachusetts reversed an order related to a nasty divorce proceeding barring the ex-couple from posting disparaging comments about each other on social media. The court accepted the argument that the state has a compelling interest in preventing children from being exposed to disparaging comments between their parents, but found the order a First Amendment violation.

Assuming for the sake of discussion that the Commonwealth’s interest in protecting a child from such harm is sufficiently weighty to justify a prior restraint in some extreme circumstances, those circumstances do not exist here. No showing was made linking communications by either parent to any grave, imminent harm to the child. The mother presented no evidence that the child has been exposed to, or would even understand, the speech that gave rise to the underlying motion for contempt. As a toddler, the child is too young to be able to either read or to access social media. The concern about potential harm that could occur if the child were to discover the speech in the future is speculative and cannot justify a prior restraint.

*Id.* at 179-80.

#### 4. eBay Inc. v. MercExchange LLC: A New Federal Standard for Permanent Injunctive Relief?

**Page 446. At the end of note 7, add:**

##### 7. A broader assessment. . . .

Elizabeth A. Rowe, *eBay, Permanent Injunctions, and Trade Secrets*, 77 Wash. & Lee L. Rev. 553 (2020), examined 150 federal trade secret cases between 2000 and 2014 with damages totaling \$2 billion. “All were successful on their trade secret claims and received damages but most did not receive a permanent injunction.” Many plaintiffs received no injunction because they didn’t ask for one. Professor Rowe found that courts are not necessarily strictly applying the four factors from *eBay*, and that the injunctions issued and the opinions (if any) explaining the injunction decisions were generally perfunctory. In those cases where courts denied an injunction and gave a reason, the lack of irreparable harm seemed to have been the factor most often articulated as the reason for the denial. Damages for the past are not inconsistent with an injunction for the future, and they do not necessarily indicate that future damages can be reasonably proved and measured. But a large award of damages may suggest to some judges that they have granted an adequate remedy.

### B. Preliminary or Permanent Relief

#### 1. The Substantive Standards for Preliminary Relief

**Page 454. After the second paragraph of note 4, add:**

##### 4. A mess in the lower courts. . . .

The Eighth Circuit has adhered to its view that plaintiff need not prove “a greater than fifty percent likelihood” of success on the merits, but only “a fair chance of prevailing.” *Jet Midwest International Co. v. Jet Midwest Group, LLC*, 953 F.3d 1041, 1044-45 (8th Cir. 2020). It did not discuss *Winter*; it cited and quoted several of its own cases, all of which predate *Winter*.

**Page 459. After note 14, add:**

**15. A mistaken concession?** The federal Bureau of Alcohol, Tobacco, Firearms, and Explosives enacted a new rule outlawing “bump-stock-type devices,” which turn semi-automatic weapons into machine guns by allowing continuous firing with a single pull of the trigger. 27 C.F.R. §§ 447.11, 478.11, 479.11. A group of gun owners sought a preliminary injunction against enforcement of that part of the new rule requiring current possessors of such devices to “destroy the devices or abandon them at an ATF office prior to” the March 26, 2019 effective date of the regulation.” *Gun Owners of America v. Barr*, 2019 WL 1395502, at \*1 (6th Cir. Mar. 25, 2019). The trial court denied a preliminary injunction, and the gun owners took their case to the Sixth Circuit. *Id.*

In opposing the grant of the preliminary injunction, the government “concede[d] that the plaintiffs will suffer irreparable harm if . . . the Final Rule is not enjoined.” But the government argued that the public interest supported denying a stay pending appeal. The Sixth Circuit refused to overturn the district court’s refusal to grant a preliminary injunction, as did the Supreme Court without comment. 139 S. Ct. 1406 (2019).

Putting aside the public interest, might the government’s concession in the Sixth Circuit have been wrong at the preliminary injunction stage? Owners who complied with the new rule by



turning in or destroying their bump stocks (how many will that be?) could replace their bump stocks later if the rule were struck down. So the real harm is not permanent loss of bump stocks, but temporary loss plus the cost of replacement. But as the next section discusses, the government would certainly be immune from any suit for those damages. The harm pending trial on the merits could not be repaired, but neither was it very serious. And magnitude of harm matters at the preliminary injunction stage.

## 2. The Procedures for Obtaining Preliminary Relief

**Page 481. At the end of note 10, add:**

### **10. Stays and injunctions pending appeal. . . .**

The Trump Administration has dramatically increased the frequency with which the government seeks stays and other emergency relief from the Supreme Court, and it has often gotten such relief in 5-4 votes splitting the Court along the usual ideological lines. Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019). “[T]he data are conclusive: Solicitor General Francisco has indeed been *far* more aggressive in seeking to short-circuit the ordinary course of appellate litigation — on multiple occasions across a range of cases — than any of his immediate predecessors. To take one especially eye-opening statistic, in less than three years, the Solicitor General has filed at least twenty-one applications for stays in the Supreme Court (including ten during the October 2018 Term alone). During the sixteen years of the George W. Bush and Obama Administrations, the Solicitor General filed a total of eight such applications — averaging one every *other* Term.” *Id.* at 125.

Justice Sotomayor has been especially critical of this behavior: “it appears the Government has treated this exceptional mechanism as a new normal.” *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3, 4 (2019) (Sotomayor, J., dissenting). In *Wolf v. Cook County*, 140 S. Ct. 681, 683-684 (2020), Justice Sotomayor expanded on her criticism in a case involving the Administration’s changes to the “public charge” rule involving the deportation of undocumented immigrants — a rule intended to exclude immigrants who are likely to depend on government-provided welfare benefits:

Claiming one emergency after another, the Government has recently sought stays in an unprecedented number of cases, demanding immediate attention and consuming limited Court resources in each. And with each successive application, of course, its cries of urgency ring increasingly hollow. . . .

[T]his Court is partly to blame for the breakdown in the appellate process. That is because the Court — in this case, the New York cases, and many others — has been all too quick to grant the Government’s “reflexiv[e]” requests. But make no mistake: Such a shift in the Court’s own behavior comes at a cost.

Stay applications force the Court to consider important statutory and constitutional questions that have not been ventilated fully in the lower courts, on abbreviated timetables and without oral argument. They upend the normal appellate process, putting a thumb on the scale in favor of the party that won a stay. . . . They demand extensive time and resources when the Court’s intervention may well be unnecessary — particularly when, as here, a court of appeals is poised to decide the issue for itself.

Perhaps most troublingly, the Court’s recent behavior on stay applications has benefited one litigant over all others. This Court often permits executions — where the risk

of irreparable harm is the loss of life — to proceed, justifying many of those decisions on purported failures “to raise any potentially meritorious claims in a timely manner.” Yet the Court’s concerns over quick decisions wither when prodded by the Government in far less compelling circumstances — where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of a 20-year status quo in one State. I fear that this disparity in treatment erodes the fair and balanced decisionmaking process that this Court must strive to protect.

## C. Prospective or Retrospective Relief

### 1. Suits Against Officers in Their Official Capacities

#### Page 489. After note 3, add:

**3.1. Declaratory judgments.** In a dispute over a temporary and private display at the state capitol, the district court entered a declaratory judgment as follows: “IT IS FURTHER DECLARED that defendants violated [plaintiff’s] First Amendment rights and engaged in viewpoint discrimination as a matter of law when the [plaintiff’s] exhibit was removed from the Texas Capitol building under the circumstances of this case.” *Freedom from Religion Foundation v. Abbott*, 955 F.3d 417, 423 (5th Cir. 2020). The Fifth Circuit held that this “backwards-looking, past-tense declaratory judgment” is retrospective relief barred by sovereign immunity and *Edelman*, even though there was a continuing controversy about future displays. *Id.* at 425.

#### Page 496. After note 10, add:

**10.1. The Copyright Act.** In the Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511, Congress authorized suits against states for copyright infringement, explicitly overriding any claim of sovereign immunity. In *Allen v. Cooper*, 140 S. Ct. 994 (2020), the Supreme Court held that neither the Copyright Clause nor the Fourteenth Amendment authorized Congress to override state sovereign immunity. The Court held that its decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), involving a similar law authorizing suits for patent infringement, and struck down by the Court on the same grounds, “compel[led]” the same result in the copyright context.

#### Page 497. At the end of note 13, add:

#### 13. Sister states. . . .

The parties in *Hyatt* made a third trip to the Supreme Court, which finally overruled *Hall* in *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485 (2019). On a 5-4 vote, the Court held that a state may not be sued by a private party without its consent in the courts of a different state. The majority declared that *Hall*’s holding was “contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution. *Stare decisis* does not compel continued adherence to this erroneous precedent.” The Court split along its now common conservative-liberal line. Justice Breyer, for the four dissenters, concluded his discussion of the value of *stare decisis* with the following: “Today’s decision can only cause one to wonder which cases the Court will overrule next.”

**Page 498. At the end of note 16, add:**

**16. Municipalities. . . .**

The Supreme Court denied Maricopa County’s cert petition without comment. *Maricopa County v. United States*, 139 S. Ct. 1373 (2019). The correct citation to the Ninth Circuit opinion is 889 F.3d 648 (9th Cir. 2018).

Gage County, Nebraska, population 21,000, is on the losing end of a \$28-million judgment, plus attorneys’ fees, for using manufactured evidence and manipulated false confessions to wrongfully convict six people of a murder they had nothing to do with. They collectively served 77 years in prison before they were exonerated by DNA evidence and pardoned; a state investigation identified the real killer. The sheriff at the heart of the scheme was held to be a policy maker. The final judgment was affirmed in *Dean v. Searcey*, 893 F.3d 504 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 1291 (2019). The county has increased property taxes and sales taxes in its effort to raise the money to pay, but those taxes will raise only \$4 to \$5 million a year. It has unsuccessfully sought a bailout from the state, and considered whether to file for bankruptcy. Its struggles are reviewed in Jack Healy, *A Rural County Owes \$28 Million for Wrongful Convictions. It Doesn’t Want to Pay*, N.Y. Times (Apr. 1, 2019).

One victim says it isn’t fair that the citizens have to pay, “but it wasn’t fair what they did to us either.” One resentful taxpayer says, “I wasn’t even born” when it all happened. And despite all the evidence, many local citizens still insist that the victims were guilty.

The county’s insurer refused to provide a defense and refused to pay. The state supreme court recently resolved a key coverage issue in favor of the county, but other issues remain. *Gage County v. Employers Mutual Casualty Co.*, 937 N.W.2d 863 (Neb. 2020). The coverage limit of an umbrella policy is not stated in the opinion, but it probably isn’t anywhere near \$28 million.

**2. Suits Against Officers in Their Personal Capacity (and the Doctrine of Qualified Immunity)**

**Page 509. After note 6.a.iv., add:**

**a. Specificity. . . .**

v. The Court continues to apply qualified immunity aggressively. In *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019), the Court unanimously granted a cert petition and summarily reversed in part and vacated and remanded in part a Ninth Circuit decision holding that two police officers, who had been sued for use of excessive force, were not entitled to qualified immunity. As to one of the officers, the Ninth Circuit had offered no reasoning for its holding. *Id.* at 502. As to the other officer, the Ninth Circuit had applied the clearly established law test at too high a level of generality in deciding whether the officer used excessive force in taking down a suspect during a call for a domestic disturbance:

The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the “right to be free of excessive force” was clearly established.

*Id.* at 503.

Justice Thomas recently attacked the qualified immunity doctrine in a dissent from a denial of cert *Baxter v. Bracey*, 140 S. Ct. 1862 (2020). The undisputed facts proved that police unleashed

a dog that bit the plaintiff who had already surrendered after being caught in the act of burglary. The plaintiff brought a §1983 claim for excessive force in violation of the Fourth Amendment. The Sixth Circuit held the claim barred by qualified immunity and the Supreme Court refused to hear the case. Justice Thomas in dissent argued that the qualified immunity doctrine lacked support in the text of §1983. He also asserted that “[t]here is likely no basis for the objective inquiry into clearly established law that our modern cases prescribe. . . . [W]e at least ought to return to the approach of asking whether immunity was historically accorded the relevant official in an analogous situation at common law.” He also suggested in footnote 2 an openness to reconsidering a line of cases beginning with *Monroe v. Pape*, 365 U.S. 167 (1961), holding that §1983 applies even when state officials engage in action not authorized by state law. Reversing *Monroe* would mean an end to most §1983 claims, because state laws say, or could be rewritten to say, that unauthorized use of force and other unconstitutional conduct are contrary to state law.

**Page 511. At the end of note 6.g, add:**

**g. Places outside the law? . . .**

The Supreme Court took up the case again in *Hernández v. Mesa*, 140 S. Ct. 735 (2020), rejecting a *Bivens* claim in the context of a cross-border shooting. See this Update to Page 561.

**Page 514. At the end of note 13, add:**

**13. The new attacks on qualified immunity: empirical evaluation. . . .**

Professors Nielson and Walker offer a defense of qualified immunity on federalism grounds, pointing to what they consider to be extensive reliance by state and local governments on the doctrine. They also believe that eliminating the doctrine would curtail experiments within states in crafting alternative remedies for deprivation of civil rights. Aaron Nielson & Christopher Walker, *Qualified Immunity and Federalism*, 108 Geo. L.J. (forthcoming 2020), <https://ssrn.com/abstract=3544897>. They contend that eliminating qualified immunity would greatly harm the finances of state and local governments.

Professor Schwartz responds in Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 Geo. L.J. (forthcoming 2020), <https://ssrn.com/abstract=3565362>. She disagrees that eliminating qualified immunity would have ruinous financial consequences for state and local governments and contests the reliance points. She further argues that governments can use indemnification to avoid adverse consequences and that eliminating qualified immunity would greatly improve civil rights litigation.

In the midst of the George Floyd protests in the spring of 2020, national attention focused strongly on the role of qualified immunity in allowing police misconduct to go unpunished. An extensive report from Reuters detailed how Supreme Court qualified immunity doctrine has shielded police officers in egregious cases of police brutality. Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta, & Guillermo Gomez, [\*For Cops Who Kill, Special Supreme Court Protection\*](#), Reuters (May 8, 2020). Multiple bills have been introduced in both houses of Congress to abolish or reform qualified immunity, but they reportedly face stout Republican opposition in the Senate. Luke Broadwater and Catie Edmondson, [\*Police Groups Wield Strong Influence in Congress, Resisting the Strictest Reform\*](#), N.Y. Times (June 25, 2020).

## CHAPTER SIX

### REMEDIES AND SEPARATION OF POWERS

#### A. More on Governmental Immunities

##### 1. Consented Suits Against the Government

**Page 533. At the end of note 10, add:**

**10. What is *not* a discretionary function these days? . . .**

The Supreme Court granted cert in *Thacker*, but only on the question of the scope of TVA’s sovereign immunity. It reversed the lower court’s determination that “TVA remains immune for all tort suits arising from its performance of so-called discretionary functions,” because the legislation creating the TVA says that it can sue and be sued. This is a far more general waiver of sovereign immunity than the Tort Claims Act (see note 8 in the main volume at 538), and the exceptions in the Tort Claims Act are not exceptions to a sue-and-be-sued clause. Instead “the TVA is subject to suits challenging any of its commercial activities. The law thus places the TVA in the same position as a private corporation supplying electricity.” *Thacker v. Tennessee Valley Authority*, 139 S. Ct. 1435, 1438-1439 (2019). But even with a sue-and-be-sued clause, “the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties.” The Court emphasized that this judicially implied exception is narrow, available only when allowing the suit to proceed would cause “grave interference” with a governmental function. It remanded the case for further consideration, but it is hard to see how fishing an electric line out of the water could be anything different from what would have to be done by “a private corporation supplying electricity.”

**Page 534. At the end of the second paragraph of note 2, add:**

**2. The Federal Tort Claims Act. . . .**

In *Daniel v. United States*, 139 S. Ct. 1713 (2019), the Supreme Court denied cert in a case asking the Court to overrule *Feres*. Justices Ginsburg and Thomas dissented. Justice Thomas, writing only for himself, quoted an earlier statement of Justice Scalia that “*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received.” The decedent in the case was a Navy Lieutenant who died from complications of childbirth in a naval hospital.

**Page 535. After note 3, add:**

**3.1. A big claim with no immunity?** Devin Kelley was an Air Force veteran with a dishonorable discharge, who had shown repeated evidence of mental illness and criminality while in the service. In 2018, he murdered 26 people and wounded 20 others at the Sutherland Springs First Baptist Church in Texas. The Air Force was required to report his history to the National Instant Criminal Background Check System; it had failed to do so. Its failures were systematic; it had failed to report in some 60 percent of all cases. Kelly bought his guns from a dealer who ran the required background check; if the Air Force had reported as required, he would not have been able to buy those guns. Survivors and families of those murdered sued the Air Force for various forms of negligence.

The government did not claim that failing to report was a discretionary function; reporting appears to have been a ministerial duty. Rather, the government claimed that the suit was essentially one for misrepresentation, because its negligence had led the Background Check System to misrepresent Kelley’s status. Misrepresentation claims are one of the exceptions in the block quote at the top of 535, and while the other exceptions listed there are intentional torts, the cases hold that either intentional or negligent misrepresentation is within the exception.

A federal district court rejected the government’s argument. *Holcombe v. United States*, 388 F. Supp. 3d 777 (W.D. Tex. 2019). The plaintiffs’ claims did not sound in misrepresentation, but in operational negligence. No plaintiff claimed to have relied, even indirectly, on any government representation.

The government also argued that it should be immune under the Brady Act, which created the Background Check System. That Act provides that neither a local government nor any government employee required to report can be liable for failing to prevent the illegal purchase of a weapon. 18 U.S.C. § 922(t)(6). The statutory text conspicuously does not immunize the United States, but the government argued that sovereign immunity is the default, and has to be clearly waived, and it is not waived in the Brady Act. Plaintiffs and the district court responded that immunity was waived in the Tort Claims Act..

The Fourth Circuit rejected immunity claims under the FTCA and Brady Act on somewhat similar facts in *Sanders v. United States*, 937 F.3d 316 (2019). This case arose out of Dylann Roof’s murder of nine people at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina. There, the Background Check System found a somewhat cryptic and not entirely accurate record of Roof’s arrest for a drug offense, which should have disqualified him from buying a gun. The System failed to adequately follow up, and erroneously told the gun dealer that Roof was eligible to buy guns. The Fourth Circuit remanded the case to the district court for further proceedings.

## **2. Suits Against Officers—Absolute Immunity**

**Page 554. At the end of note 4, add:**

### **4. Presidential immunity. . . .**

In *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019), a federal district court, distinguishing *Knight* and other cases, issued a universal preliminary injunction against government defendants, including the President in his official capacity, barring them from terminating a designation of “Temporary Protected Status” granted to Haitian nationals in the wake of a 2010 earthquake. The designation allows the Haitians to stay in the United States until the government properly revokes this status. The court held that defendants likely had not followed proper procedures in revoking the status and may have been motivated by animus against non-white immigrants. “Here, injunctive relief against the President does not invade the province of executive discretion . . .; rather, enjoining the President and other executive officials from violating the TPS statute is akin to performing a ministerial duty and ensuring executive officials follow the laws enacted by the Congress.”

In *Trump v. Vance*, 2020 WL 3848062 (U.S. July 9, 2020), the Court held that the President has no categorical or absolute immunity that entitles him to block a subpoena from a *state* prosecutor, directed to his accountants and demanding his financial records. But he might have as-applied defenses if particular demands interfered with performance of his presidential duties; any issues of that sort were left open on remand.

But in the companion case, *Trump v. Mazars USA, LLP*, 2020 WL 3848061 (U.S. July 9 2020), the Court held that lower courts had given insufficient attention to separation of powers concerns arising from a House of Representative’s subpoena for the President’s financial records. The House did not say that it needed the records to consider impeachment; it said it needed them to consider legislation. The Court rejected the President’s argument that the subpoena should be subject to the same standards of necessity as the subpoena for records of the President’s conversations with close aides in *United States v. Nixon*, and it rejected the House’s argument that it had essentially unlimited power to gather information. It said the House could not subpoena records for law enforcement purposes, or simply to expose private wrongdoing, because that is not a legislative function. The lower courts should “carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers,” *id.* at \*12, and three more specific factors that appeared to help implement this overarching factor.

## **B. Creating Causes of Action**

**Page 561. At the end of note 8, add:**

### **8. Is *Bivens* worth the trouble? . . .**

Professors Pfander, Reinert, and Schwartz used Freedom of Information Act requests to identify successful *Bivens* actions over a 10-year period. They found that in over 95 percent of the cases, “individual defendants contributed no personal resources to the resolution of the claims. Nor did the responsible federal agency pay the claims through indemnification.” James E. Pfander, Alexander A. Reinert, & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 *Stan. L. Rev.* 561, 561 (2020). Instead, judgments were paid from the Judgment Fund, money that Congress appropriates each year to pay judgments against the United States. These findings mean that the risk of liability creates no significant deterrence either against individual employees or against the agency that employs them.

In *Hernández v. Mesa*, 140 S. Ct. 735 (2020), described further the main volume at pages 510-511, the Supreme Court refused to extend *Bivens* in the context of a cross-border shooting — one with the shooter in the United States and victim in Mexico. The Court cited separation of powers concerns. “Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. Because of the distinctive characteristics of cross-border shooting claims, we refuse to extend *Bivens* into this new field.”

Professor Stephen Vladeck, who is counsel of record in *Hernandez*, wrote an article tracing the pre-*Bivens* history of federal officials being held liable for damages in state courts under state law. Stephen I. Vladeck, *Constitutional Remedies in Federalism’s Forgotten Shadow*, 107 *Calif. L. Rev.* 1043 (2019).

**Page 562. After note 10, add:**

**11. *Bivens* and the Tort Claims Act.** The Tort Claims Act provides that a judgment in favor of the United States is a bar to any suit against a federal employee based on the same facts. The Court has agreed to decide whether that bar applies when the Tort Claims suit is dismissed for lack of jurisdiction. *King v. United States*, 917 F.3d 409 (6th Cir. 2019), *cert. granted as* *Brownback v. King*, 2020 WL 1496620 (March 30, 2020). The Sixth Circuit held that what the officer was accused of doing would not have been a tort under Michigan law, and therefore, the court lacked jurisdiction over the Tort Claims suit. Because the Tort Claims Act includes both a waiver of

sovereign immunity and a grant of jurisdiction, issues that would normally go to the merits are sometimes treated as jurisdictional.

**Page 565. After note 6, add:**

**6.1. “Appropriate relief.”** The Religious Freedom Restoration Act provides that a victim of a violation of the act “may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.” 42 U.S.C. §2000bb-1(c). “Government” is defined to include federal officials and any person acting under color of federal law. The Court has agreed to decide whether this statute authorizes damages against federal employees. *Tanvir v. FNU Tanzin*, 894 F.3d 849 (2d Cir. 2018), *reh’g en banc denied*, 915 F.3d 898 (with opinions), *cert. granted*, 140 S. Ct. 550 (2019). Plaintiffs say the provision is modeled on §1983 and that it authorizes damages, subject to the qualified immunity rules. The government says that the language is insufficiently explicit and that damages are never appropriate. FNU stands for “first name unknown.”

**C. The Right to Jury Trial**

**Page 587. After note 5, add:**

**6. A simplified approach?** Professor Bray argues for a simplified approach to the right to jury trial:

There are certain categories of suits that were equitable in 1791 and are still identifiable today. These were not, and are not, “Suits at common law” and so in these categories there should be no federal constitutional right to a jury trial. Three such categories are described here: (1) plaintiff’s suit is in equity’s exclusive jurisdiction, (2) plaintiff seeks an equitable remedy, and (3) plaintiff employs an equitable device for aggregating cases, such as interpleader or class action. Apart from these categories, there should be a presumption of a right to a jury trial. That presumption would be rebuttable, though in practice it would be rebutted only rarely.

Samuel L. Bray, *Equity and the Seventh Amendment*, <https://ssrn.com/abstract=3237907> (2019), unpublished draft at 5. His first category might require some tweaking of Supreme Court precedent in the ERISA cases and perhaps elsewhere; his third category would require the wholesale overruling of the cases requiring a jury trial in class actions for damages.



## CHAPTER SEVEN

### PREVENTING HARM WITHOUT COERCION: DECLARATORY RELIEF

#### D. Declaratory Relief at Law

**Page 637. At the end of note 1, add:**

**1. Nominal damages as a way to reach the merits. . . .**

The Court has agreed to resolve this dispute in *Uzuegbunam v. Preczewski*, 781 F. App'x 824 (11th Cir 2019), *cert. granted*, 2020 WL 3865254 (July 9, 2020), described in this supplement to page 293.

## 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 646. Replace note 9.a with the following:

##### 9. Law and Equity. . . .

a. **Why no constructive trust?** There are important restitutionary remedies that originated in equity, including constructive trust. Plaintiff needs a constructive trust when she seeks to recover a specific asset from a specific fund. Blue Cross sought a constructive trust, but the court denied that relief, because Blue Cross didn't allege the existence of specific property from a specific fund upon which to impose a trust. Blue Cross instead got a simple money judgment in restitution, to be collected from defendants' general assets in the same legal way as a damage judgment would be collected. On these facts, Blue Cross got a legal remedy that could simply be described as a judgment in restitution or a judgment in unjust enrichment.

#### B. Recovering More Than Plaintiff Lost

##### 1. Disgorging the Profits of Conscious Wrongdoers

Page 679. After note 9.c, add:

9.1. **Reforming the SEC's version of disgorgement.** In *Liu v. Securities & Exchange Commission*, the Court took up the issue it had reserved in *Kokesh*. The statute authorizes the SEC to seek and obtain "equitable relief," which the statute does not define or specify. 15 U.S.C. §78u(d)(5). The defendant fraudsters argued that *Kokesh* had held disgorgement to be a penalty, that equity does not enforce penalties, and that therefore, disgorgement is not equitable relief and is unavailable to the SEC. The SEC argued that equitable relief is vaguely defined and capable of expansion, and that it could include joint and several liability for the gross receipts of all conspirators, with no credit for expenses.

The Court held, in an opinion by Justice Sotomayor, that disgorgement is basically a new name for the equitable remedy traditionally known as accounting for profits. And that remedy, with modest exceptions, is limited to the net profits, not gross receipts. And again with modest exceptions, each wrongdoer is liable only for his own net profits, not the profits received by others. And the SEC cannot just keep the profits for itself; it must make reasonable efforts to distribute any money recovered to the defrauded investors. So interpreted and so limited, disgorgement is equitable relief authorized by the statute. It may still be a penalty for statute of limitations purposes; the Court did not address that question.

Justice Thomas dissented. He seemed to think that disgorgement is not just a new name, but a new remedy, not historically available and therefore not included within the phrase "equitable relief." He also thought that it is poorly defined and broader than the historic scope of accounting for profits. In places, he seemed to think that accounting for profits is more limited than it has been in most of the cases. Accounting for profits is taken up in the next principal case and in the main volume at 686.

**9.2. Injunctions to Pay Restitution?** The Court has granted cert in two consolidated cases that appear to have been held pending the decision in *Liu*. Federal Trade Commission v. AMG Capital Management, LLC, 910 F.3d 417 (9th Cir. 2018), *cert. granted*, 2020 WL 3865250 (July 9, 2020), and Federal Trade Commission v. Credit Bureau Center, LLC, 937 F.3d 764 (7th Cir. 2019), *cert. granted*, 2020 WL 3865251 (July 9, 2020).

Section 13(b) of the FTC Act, 15 U.S.C. §53(b), authorizes the Commission to obtain a temporary restraining order, preliminary injunction, or permanent injunction, whenever it has reason to believe that any person “is violating, or is about to violate,” any law that the FTC enforces. These injunctions have long ordered violators to refund money wrongfully taken from consumers. The Ninth Circuit affirmed such an injunction in *AMG*. But in *Credit Bureau*, the Seventh Circuit said that “injunction” obviously does not mean or include monetary relief. The Court has agreed to resolve the dispute. Pre-merger equity courts long granted restitution as incidental relief accompanying an injunction. The FTC argues, with precedential support beyond just the FTC cases, that a reparative injunction can directly order the return of ill-gotten funds.

The Trump Administration may be refusing to support the FTC, but it has not so far prevented the FTC from litigating on its own behalf. The Solicitor General filed a brief in response to AMG’s cert petition that did not oppose the petition, but merely said that the case should be held for *Liu*. The FTC’s petition in *Credit Bureau* is signed only by counsel for the FTC, and not by the Solicitor General or anyone at the Department of Justice.

**Page 688. At the end of note 5.a, add:**

**5. Remedies for infringement of intellectual property. . . .**

**a. Trademark. . . .**

The Supreme Court resolved a six-six circuit split over whether the current version of Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), allows for the recovery of a defendant’s profits when there has been no showing of willful trademark infringement. *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020). The statutory language reads:

When . . . a violation under section 1125(a) or (d) of this title [covering trademark infringement and cyberpiracy of trademarks respectively], or a willful violation under section 1125(c) of this title [covering trademark dilution], shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled . . . subject to the principles of equity, to recover (1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

The Court refused to read a willfulness requirement into the statute, but suggested willfulness may still be relevant to the award of profits. Justice Gorsuch, offering a textualist interpretation for the majority, emphasized that the relevant part of the Lanham Act contains no express willfulness requirement, while other parts of the Lanham Act do have such a requirement or other rules about mental states. *Romag Fasteners*, 140 S. Ct. at 1495. The Court also rejected Fossil’s argument that the reference in Section 1125 that courts should decide such cases consistent with “principles of equity” required a willfulness requirement: “it seems a little unlikely Congress meant ‘principles of equity’ to direct us to a narrow rule about a profits remedy within trademark law.” As stated, that seems right. But “principles of equity” should have directed the Court to the much broader principle that restitution of profits is generally available only against conscious wrongdoers and defaulting fiduciaries.

Surveying the complex history of courts' awarding of profits in pre-Lanham Act cases, the Court concluded that a defendant's mental state "is relevant to assigning an appropriate remedy." *Id.* at 1497. Justice Alito, joined by Justices Breyer and Kagan, concurred, calling willfulness "a highly important consideration in awarding profits under §1117(a), but not an absolute precondition." *Id.* Justice Sotomayor, concurring in the judgment, went further, arguing that "a district court's award of profits for innocent or good-faith trademark infringement would not be consonant with the 'principles of equity' referenced in §1117(a) and reflected in the cases the majority cites." *Id.* at 1498.

## CHAPTER NINE

### ANCILLARY REMEDIES: ENFORCING THE JUDGMENT

#### A. Enforcing Coercive Orders: The Contempt Power

##### 1. The Three Kinds of Contempt

Page 794. At the end of note 1, add:

##### 1. The basic distinctions. . . .

The Supreme Court clarified the required state of mind for civil compensatory contempt, at least in the bankruptcy context and apparently more generally, in *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019). At the end of a bankruptcy proceeding, a bankruptcy court typically enters a “discharge order” releasing the debtor from liability for most prebankruptcy debts. The order prevents creditors from attempting to collect any debt covered by the order. In *Taggart*, a creditor attempted to collect from a debtor after a discharge order, and the bankruptcy court held the creditor in civil compensatory contempt under a strict liability standard. The Ninth Circuit, reversing, said that the appropriate standard for judging the creditor’s state of mind was subjective good faith.

The Supreme Court, unanimously reversing the Ninth Circuit, rejected both standards and applied a standard of objective reasonableness:

[A] court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor’s conduct. In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor’s conduct might be lawful.

*Id.* at 1799.

“This standard reflects the fact that civil contempt is a ‘severe remedy,’ and that principles of ‘basic fairness requir[e] that those enjoined receive explicit notice’ of ‘what conduct is outlawed’ before being held in civil contempt.” *Id.* at 1802.

The Court rejected the Ninth Circuit’s subjective good faith standard as

inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

*Id.* at 1802-03. The Court added that subjective bad faith also could be grounds for civil contempt.

The Court’s reliance on “traditional civil contempt principles,” and not on anything specific to the Bankruptcy Code, suggests that the statements from lower courts in the second paragraph of note 1 in the main volume are no longer operative. But plausible claims of objective doubt as to

what the injunction prohibits may arise far more frequently with respect to discharge orders than with respect to other injunctions. Injunctions are supposed to individuate the law’s command, specifying what defendant is required to do or refrain from doing in the circumstances of the particular case. But “discharge orders are written in general terms and operate against a complex statutory backdrop . . . .” *Id.* at 1803. The order typically says only that the bankrupt debtor is discharged, *id.* at 1799; the statute says that this operates as an injunction against further collection efforts, 11 U.S.C. §524(a)(2); and the statute also lists 19 categories of debts that are excepted from the discharge, 11 U.S.C. §523. The scope of these exceptions is the subject of vast amounts of litigation, and the law leaves that litigation to later collection efforts; the discharge order does nothing to further specify the scope of the discharge. So *Taggart* applies traditional principles of civil contempt to a very untraditional injunction.

**Page 797. At the end of note 7, add:**

**7. A high-profile example with twists: Sheriff Joe Arpaio. . . .**

The Supreme Court denied without comment a writ of mandamus seeking to block the appointment of a special prosecutor. *In re Arpaio*, 139 S. Ct. 1620 (2019). The Ninth Circuit denied rehearing en banc on the appointment of the special prosecutor, with substantial concurring and dissenting opinions. *United States v. Arpaio*, 906 F.3d 800 (9th Cir. 2018). The majority emphasized the court’s inherent power to protect its authority by appointing a special prosecutor, noting that that authority is codified in Federal Rule of Criminal Procedure 42. The dissenters argued that it was sufficient to appoint an amicus to defend the judgment below, and that the court’s authority to appoint a special prosecutor is exhausted once the government initiates a contempt prosecution—even if it later or immediately drops that prosecution. The majority thought it clear that the court had the authority to see that the prosecution actually be prosecuted.

On the merits, the Ninth Circuit affirmed the district court’s judgment dismissing Arpaio’s criminal proceeding with prejudice, and denying vacatur of the district court’s verdict finding Arpaio guilty of criminal contempt. *United States v. Arpaio*, 951 F.3d 1001 (9th Cir. 2020).

**2. How Much Risk of Abuse to Overcome How Much Defiance**

**a. Perpetual Coercion?**

**Page 810. At the end of note 6, add:**

**6. Too stubborn to be coerced. . . .**

Thompson, the treasure hunter, remains in jail. He told a court in November 2018 that “I’m supposed to have the keys to my freedom by telling where the coins are, but I don’t know where the coins are . . . . I put them in an off-shore trust. The trustee can put them anywhere he wants.” Federal district judge Algenon L. Marbley did not buy it. “As long as you are content to be a master of misdirection and deceit to the court, I am content to let you sit.” The judge is also fining Thompson \$1,000 for each day he sits in jail on top of a \$250,000 punishment for failing to reveal the location of the coins. Eric Barton, [\*Treasure Hunter Tommy Thompson Sold \\$50 Million Worth of Gold—and He’s in Jail Until He Admits Where It Is\*](#), *Fort Lauderdale Illustrated* (Feb. 18, 2019). The trustee story here is obviously different from the memory-failure story in the main volume, but maybe he recovered enough to remember the off-shore trust. If the trustee story were true, we assume that Thompson could ask the trustee where the coins are.

Thompson unsuccessfully argued to the Sixth Circuit that he could not be held for more than 18 months under 28 U.S.C. §1826, the recalcitrant-witness statute described in note 8 of the main volume. *United States v. Thompson*, 925 F.3d 292 (6th Cir. 2019). The Sixth Circuit appeared to agree that if the district court were keeping Thompson in jail solely because he refused to testify as to the location of the coins, the district court might have been subject to §1826’s 18-month limit on jailing a witness for refusing to testify or provide information. *Id.* at 298. But Thompson in his plea agreement also agreed to what the Sixth Circuit termed “non-testimonial” conduct in “assisting” civil plaintiffs in “identifying and recovering assets,” and the district court had ordered Thompson to comply with this plea agreement. *Id.* at 301-02. Such conduct included executing “a limited power of attorney to permit the parties to ‘probe’ the contents of a Belizean trust.” *Id.* at 303. The Sixth Circuit held that §1826’s 18-month limit did not apply to his refusal to perform these non-testimonial obligations. *Id.* The court’s reasoning would presumably also apply to an explicit order to turn over the coins.

**Page 810. At the end of note 8, add:**

**8. Recalcitrant witnesses. . . .**

Former U.S. Army intelligence analyst Chelsea Manning was sentenced to 35 years in prison in 2013 for unauthorized disclosure of classified materials to WikiLeaks. President Obama commuted her sentence in 2017. The release did not end her legal troubles. Manning was jailed in coercive civil contempt for 62 days in 2019 for failing to disclose information about WikiLeaks to a federal grand jury. Authorities released her after the grand jury’s term expired, but just days later she headed back to jail after she refused to speak with another grand jury. Jacey Fortin, [\*Chelsea Manning Ordered Back to Jail for Refusal to Testify in WikiLeaks Inquiry\*](#), N.Y. Times (May 16, 2019). Manning was released in March 2020 but is still being required to pay \$256,000 in fines because of her refusal to speak to the second grand jury. Charlie Savage, [\*Chelsea Manning Is Ordered Released From Jail\*](#), N.Y. Times (Mar. 12, 2020).

**6. Drafting Decrees**

**Page 860. At the end of note 1, add:**

**1. Rule 65(d)(1) again. . . .**

A 2-1 Seventh Circuit panel held that an opinion and order granting a preliminary injunction was defective under Rule 65(d)(1) because the order itself was not contained in a separate document. *MillerCoors LLC v. Anheuser-Busch Companies LLC*, 940 F.3d 922 (7th Cir. 2019). The court ordered a limited remand for the purpose of having the court enter the order on a separate piece of paper. The dissenting judge wrote that nothing in the rule required that an order be on a separate document from the opinion explaining the basis for the order and that remand for this purpose made no pragmatic sense. “We need not remand for formalistic compliance with an imagined and non-jurisdictional rule that no party has raised.” *Id.* at 924 (Hamilton, J., dissenting).

The Seventh Circuit has applied the same rule to declaratory judgments, this time invoking Rule 58. *Intl FCStone Financial Inc. v. Jacobson*, 950 F.3d 491 (7th Cir. 2020). Rule 58 expressly requires that “[e]very judgment and amended judgment must be set out in a separate document.” And Rule 54(a) defines “judgment” to include “any order from which an appeal lies,” which of course includes preliminary injunctions. But the court in *MillerCoors* had not relied on Rule 58, and Judge Hamilton’s dissent thought it would be completely unworkable to apply Rule 58 to

every appealable order — for example, an order denying a motion to modify a preliminary injunction.

The kernel of actual policy underlying these formalities is that when trial judges are sloppy about the orders they issue, the parties can be confused about what they are required to do or when the time for appeal runs, and appellate judges have to waste time sorting out the resulting disputes. Judge Hamilton did not dispute that, but he thought a good thing can be carried too far. The lesson for lawyers is to carefully attend the details. You don't want to be the one who provokes some such punctilious response from an irritated judge.

## **B. Collecting Money Judgments**

### **1. Execution, Garnishment, and the Like**

**Page 877. At the end of note 1, add:**

#### **1. What if a solvent defendant won't pay? . . .**

The dispute between AGI and BI ended with a global settlement of all claims. Biolitec voluntarily dismissed its sixth appeal. *AngioDynamics, Inc. v. Biolitec AG*, Nos. 18-1368 & 18-1466 (1st Cir. Mar. 25, 2019). The trial court vacated the various contempt orders and the arrest warrant against the CEO, with AGI's consent. [Agreed Motion to Vacate Civil Contempt Orders and Arrest Warrant at 1, \*AngioDynamics, Inc. v. Biolitec AG\*, No. 3:09-cv-30181 Doc. 674 \(D. Mass. Apr. 24, 2019\)](#) (with handwritten notation of order). The orders do not reveal what AGI received in exchange for all this, but presumably it was a substantial partial payment.

**Page 880. At the end of the first paragraph of note 9, add:**

#### **9. Harassment. . . .**

But a law firm whose only role is to foreclose a mortgage in a nonjudicial foreclosure proceeding (which is permitted in about half the states) is not subject to most of the Act. *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029 (2019). This unanimous opinion was principally based on the negative implications of a sentence providing that such a firm is a debt collector for purposes of a single subsection. *Id.* at 1036-1037.

### **3. Preserving Assets Before Judgment**

**Page 906. At the end of note 1, add:**

#### **1. Freidman's other problems. . . .**

It turns out that the collapse of taxi medallion prices was driven not just by Uber and Lyft, but also by a bubble driven by price manipulators and predatory lenders in the years before Uber and Lyft. And one of the major manipulators was apparently Evgeny Freidman. He bought medallions at inflated prices in the belief that such purchases would drive up the market price and increase the value of the other medallions that he already owned. Brian M. Rosenthal, [‘They Were Conned’: How Reckless Loans Devastated a Generation of Taxi Drivers](#), N.Y. Times (May 19, 2019). The scheme is further detailed in Brian M. Rosenthal, [The Epic Rise and Hard Fall of New York's Taxi King](#), N.Y. Times (Dec. 5, 2019). Freidman was sentenced to five years' probation on the tax-fraud charges in exchange for his cooperation in the government's prosecution of Michael Cohen.



## CHAPTER TEN

### MORE ANCILLARY REMEDIES: ATTORNEYS' FEES AND THE COSTS OF LITIGATION

#### B. Attorneys' Fees from a Common Fund

##### Page 948. After note 1, add:

**1.1. Clarification and oddities in Texas.** The Texas court committed to the lodestar in all fee-shifting cases, both statutory and contractual, unless the statute or contract requires some other method. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). The decision followed a long evolution from a vague list of factors; the seeming coexistence of the factors and the lodestar in supreme court opinions had generated confusion in the lower courts.

The list of factors had survived in part because fee awards in Texas are treated as part of the merits and submitted to the fact finder, including the jury in jury trials. See the main volume at 928. Vagueness in the rule enabled the attorney or her expert witness to testify in conclusory terms about the reasonableness of the fees. Such testimony will no longer suffice; the witness must testify to the tasks performed and when, and how much time was spent on each task. Billing records are not formally required, but as the court acknowledged, they will be necessary in all but the simplest cases. And because Texas has two-way fee-shifting in contract cases, both sides must often prove up their fees; presumably, the jury will now get two sets of billing records, authenticated by live testimony.

Fees for post-trial motions and appeals are awarded conditionally, and the time required can only be estimated. The jury in *Rohrmoos* awarded \$800,000 for work in the trial court, an additional \$150,000 if there were an appeal to the court of appeals, and an additional \$75,000 if there were a further appeal to the state supreme court. The court vacated this award because the testimony in support of it did not have nearly enough detail to comply with the newly clarified rule.

##### Page 952. At the end of note 13, add:

###### **13. Social Security cases. . . .**

On the merits, the Supreme Court unanimously held that the 25 percent cap applies only to court representation, and not to total representation of Social Security claimants. *Culbertson v. Berryhill*, 139 S. Ct. 517 (2019). This will cost Social Security claimants more, but it will also enable them to attract more and better counsel.

##### Page 954. At the end of note 3, add:

###### **3. Except where a statute otherwise provides. . . .**

The Copyright Act gives district courts discretion to award “full costs” for violations. 17 U.S.C. § 505. The Ninth Circuit had read the word “full” in the statute to allow a district court to award expenses beyond the six categories of costs allowed in the general federal costs statutes, 28 U.S.C. §§ 1821 & 1920. The Supreme Court unanimously reversed, holding that costs under the Copyright Act are limited to the six categories of costs listed in Title 28. *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019). The opinion casts doubt on the more expansive approach to costs seen in some of the lower courts.

## CHAPTER ELEVEN

### REMEDIAL DEFENSES

#### **B. Unclean Hands and *In Pari Delicto***

**Page 989. At the end of note 1, add:**

**1. Two defenses. . . .**

Gilead and Merck competed selling drugs to treat Hepatitis C. Gilead sued for a declaration that Merck’s treatment patents were invalid and that Gilead was not infringing Merck’s patent. Merck counterclaimed for infringement. *Gilead Sciences, Inc. v. Merck & Co., Inc.*, 888 F.3d 1231, 1233 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 797 (2019). After preliminary rulings that favored Merck, Gilead eventually stipulated that it had infringed, and the jury awarded \$200 million in damages. The district court then held a bench trial on Gilead’s “equitable defenses,” including unclean hands, and ruled that Merck could not collect its damages because of both its pre-litigation business conduct and its litigation tactics. The Federal Circuit affirmed, without discussing whether unclean hands could be used to defeat a legal remedy such as damages, and without acknowledging that it had recently been reversed on the related question of whether another equitable defense, laches, could be applied to claims for damages from patent infringement. See the main volume at 1014. The Supreme Court denied cert, despite an amicus brief by Professor Samuel Bray arguing that if the Federal Circuit decision were allowed to stand, the “right to trial by jury in patent cases will be severely undermined by the reconsideration of damage awards via equitable defenses,” and that the decision would “cause confusion throughout the lower courts about whether equitable defenses apply to claims for legal remedies.” [Brief for Samuel L. Bray As Amicus Curiae Supporting Petitioners](#) at 4-5, *Merck & Co., Inc. v. Gilead Sciences, Inc.*, 139 S. Ct. 797 (2019) (No. 18-378).

#### **D. Laches**

**Page 1010. At the end of note 2, add:**

**2. Prejudice and preventive injunctions. . . .**

The Arizona Libertarians did not give up their legal fight after the district court denied a preliminary injunction. Eventually the district court granted summary judgment for the state on the merits and the Ninth Circuit affirmed that the law did not violate the party’s constitutional rights. But it took another three years to get that final resolution. *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085 (9th Cir. 2019), *cert. denied*, 2020 WL 3146696 (U.S. June 15, 2020).

#### **E. Statutes of Limitation**

**1. Continuing Violations**

**Page 1023. At the end of note 5, add:**

**5. Tolling rules. . . .**

In *McDonough v. Smith*, 139 S. Ct. 2149 (2019), the Court held that when a §1983 claim accrues, and therefore when the statute of limitations begins to run, is a question of federal law,

even though the number of years is borrowed from a state statute. McDonough, a former election official, was prosecuted for ballot tampering. The first trial ended in a mistrial and the second in an acquittal. McDonough alleged that the prosecution was based on fabricated evidence, and he brought a §1983 suit against the special prosecutor. The Court held that the 1983 action against the special prosecutor accrued upon McDonough's acquittal at the second trial, and not at the earlier times when the fabricated evidence was first used against him or when he first learned that the evidence was fabricated. The Court analogized the claim to accrual rules applicable to common law tort actions for malicious prosecution, and it distinguished the very harsh results in similar false imprisonment claims, summarized at page 1040 of the main volume.

Justice Thomas, joined by Gorsuch and Kagan, dissented, arguing that McDonough did not clearly articulate the constitutional basis for his fabricated evidence claim, and that until he did so, it was impossible to evaluate either his analogy to malicious prosecution or his argument that the prosecutor engaged in a continuing violation. (The majority did not reach the continuing violation argument.) The dissenters also noted that McDonough brought a separate state-law malicious prosecution claim, which the trial court dismissed on grounds of absolute immunity, and it was unclear how the §1983 fabricated evidence claim was different. They would have dismissed the writ as improvidently granted.

## **2. The Discovery Rule**

**Page 1032. At the end of note 10, add:**

### **10. Codification. . . .**

The Court in *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019), appeared to further close the door on reading discovery rules into federal statutes that do not expressly state the discovery rule. At issue was a limitation in the Fair Debt Collection Practices Act authorizing private civil actions against debt collectors who engage in certain prohibited practices. An action under the FDCPA may be brought “within one year from the date on which the violation occurs.” 15 U.S.C. §1692k(d). The Court wrote that “atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision,” citing other statutes that explicitly included the discovery rule. The Court distinguished the general discovery rule, which it entirely and unanimously rejected, from what it called the “equitable, fraud-specific discovery rule.” But it held that plaintiff had not preserved the equitable issue for appeal.

Justice Ginsburg, dissenting, thought the equitable rule had been preserved and that it applied where the underlying claim was for fraud and also where defendant fraudulently concealed the claim. The defendant in the FDCPA case had sued plaintiff on a debt allegedly barred by the statute of limitations. She would not have treated that as a fraud. Defendant had served the debt-collection complaint on a person found at an old address where plaintiff no longer lived, filed a false affidavit of service, and had allegedly done so knowingly. Then it got a default judgment on the time-barred debt when plaintiff, who knew nothing of the case, failed to appear. She would have treated the deliberate failure to serve process and the false affidavit as frauds that supported application of the equitable doctrine.

The Employee Retirement Income Security Act of 1974 (ERISA) requires plaintiffs with “actual knowledge” of an alleged fiduciary breach to file suit within three years of gaining that knowledge rather than within the 6-year period that would otherwise apply. 29 U.S.C. §1113. In *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020), the Court held that a

plaintiff does not necessarily have “actual knowledge” of the information contained in disclosures that he receives but does not read or cannot recall reading.

In *Sulyma*, the plaintiff alleged that Intel invested his retirement funds in unduly risky investments with excessive fees. Intel says that it disclosed all these investments in various plan documents that were sent to all employees, including fact sheets on individual investments. But plaintiff says he never read those disclosures or at least has no memory of ever seeing them. The Court rejected Intel’s argument that it need not prove a plaintiff’s “actual knowledge,” and remanded for resolution of the factual dispute over plaintiff’s knowledge.

**Page 1033. At the end of note 14, add:**

**14. “Jurisdictional” time limits. . . .**

The Supreme Court unanimously held that the 14-day deadline for seeking immediate appeal from an order granting or denying class certification is not subject to equitable tolling. *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). Justice Sotomayor’s opinion confirmed that Rule 23(f) is a claims processing rule rather than a jurisdictional rule. And because the rule is not jurisdictional, failure to comply could be waived or forfeited by the opposing party. But the Court held that even a claim processing rule can be “mandatory” and not subject to tolling. “Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility.” *Id.* at 714. The Court found that Rule 23(f) afforded no such flexibility, based in part on an analysis of several related procedural rules.

The Court did clarify that the 14-day period for filing an appeal would run anew after the denial of a timely filed petition for reconsideration in the district court. The problem for the plaintiff here was that his motion for reconsideration had not been filed within the time allowed by the rules, but only within the more generous deadline set by the trial judge at a status conference.

And in *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), the Supreme Court unanimously held that an employer could waive an employee’s failure to allege a ground of discrimination in her charge before the Equal Employment Opportunity Commission, a normal prerequisite for suing the employer on that ground under Title VII, the principal federal employment-discrimination statute. The Court held that the charge-filing requirement is a mandatory, non-jurisdictional claim processing rule that a party can waive. The case did not involve any of the statute’s time limits and whether they could be tolled or extended, but rather the omission of a legal theory from the charge filed with the EEOC.

The Court’s efforts to solve the problem of allegedly jurisdictional time limits is reviewed in detail, from 2004 forward, in Ziv Schwartz, *How the Supreme Court Failed to Mitigate the Harsh Consequences of Jurisdictional Labels*, 90 Miss. L.J. (forthcoming 2021), <https://ssrn.com/abstract=3593523>. Schwartz says that the jurisdictional label is largely gone, but that many of the harsh consequences remain. He blames the Court’s inconsistency and lack of clarity, and to some extent its failure to distinguish timing rules from other prerequisites to litigation.

## CHAPTER TWELVE

### FLUID-CLASS AND CY PRES REMEDIES

**Page 1054. At the end of note 6, add:**

**6. The Supreme Court steps in, in a case where plaintiffs recovered nothing. . . .**

The Supreme Court declined to reach the merits, remanding the case to consider potential standing problems under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (a case described further in the main volume at page 266). *Frank v. Gaos*, 139 S. Ct. 1041 (2019).