Criminal Law

CASES AND MATERIALS
FOURTH EDITION

2020 SUPPLEMENT

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CHAPTER 1

THE NATURE AND STRUCTURE OF CRIMINAL LAW

[A] THE CORE AND PERIPHERY OF CRIMINAL LAW

[1] THE FAMILIARITY OF CRIMINAL LAW

Page 3: Add to the end of the section:

Society's perception of criminal law has potentially and hopefully been transformed by the police killing of George Floyd and the mostly peaceful demonstrations that followed worldwide. There is increased recognition of the systemic racism embedded in the criminal justice system and the country's failure to provide equal justice for all. Movements such as Black Lives Matter have attempted to address these injustices and advance solutions. As you study criminal law, please keep in the forefront of your analysis how your generation of lawyers can work to bring to our country a criminal justice system that reflects the kind of society our ideals aspire to.

Below is the prepared statement presented by George Floyd's bother, Philonise, before the House Judiciary Committee on June 10, 2020.

> Chairman Jerrold Nadler and members of the Committee:
>
> Thank you for the invitation to be here today to talk about my big brother, George. The world knows him as George, but I called him Perry. Yesterday, we laid him to rest. It was the hardest thing I ever had to do. I'm the big brother now. So it was my job to comfort our brothers and sisters, Perry's kids, and everyone who loved him. And that's a lot of people. I have to be the strong one now, because it's what George would have done.
>
> And me being the big brother now is why I'm here today. To do what Perry always did for us – to take care of the family and others. I couldn't take care of George that day he was killed, but maybe by speaking with you today, I can help make sure that his death isn't in vain. To make sure that he is more than another face on a T-shirt. More than another name on a list that won't stop growing.
>
> George always made sacrifices for his family. And he made sacrifices for complete strangers. He gave the little that he had to help others. He was our gentle giant. I was reminded of that when I watched the video of his murder. He was mild mannered; he didn't fight back. He listened to the officers. He called them 'sir.' The men who took his life, who suffocated him for eight minutes and 46 seconds. He still called them 'sir' as he begged for his life.
>
> I can't tell you the kind of pain you feel when you watch something like that. When you watch your big brother, who you've looked up to your whole entire life, die. Die begging for your mom.

I'm tired. I'm tired of the pain I'm feeling now and I'm tired of the pain I feel every time another black person is killed for no reason. I'm here today to ask you to make it stop. Stop the pain. Stop us from being tired. George's calls for help were ignored. Please listen to the call I'm making to you now, to the calls of our family, and to the calls ringing out in the streets across the world. People of all backgrounds, genders and race have come together to demand change. Honor them, honor George, and make the necessary changes that make law enforcement the solution – and not the problem. Hold them accountable when they do something wrong. Teach them what it means to treat people with empathy and respect. Teach them what necessary force is. Teach them that deadly force should be used rarely and only when life is at risk.

George wasn't hurting anyone that day. He didn't deserve to die over twenty dollars. I am asking you, is that what a black man's life is worth? Twenty dollars? This is 2020. Enough is enough. The people marching in the streets are telling you enough is enough. Be the leaders that this country, this world, needs. Do the right thing.

The people elected you to speak for them, to make positive change. George's name means something. You have the opportunity here to make your names mean something, too.

If his death ends up changing the world for the better. And I think it will. I think it has. Then he died as he lived. It is on you to make sure his death isn't in vain. I didn't get the chance to say goodbye to Perry while he was here. I was robbed of that. But I know he's looking down on us now. Perry, look at what you did, big brother. You're changing the world. Thank you for everything. For taking care of us when you were on Earth, for taking care of all of us now. I hope you found mama and can rest in peace and power.

Additional information about George Floyd's death and police use of force appears below in the material supplementing Page 938. For additional reading, see, for example, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010), and BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015).

CHAPTER 2

PUNISHMENT

[C] METHODS OF PUNISHMENT

[3] CAPITAL PUNISHMENT

Page 93: Add Note 6:

6. Conditions of Confinement on Death Row. In *Porter v. Clarke*, 923 F.3d 348, 368 (4th Cir. 2019), the Fourth Circuit held that the conditions of confinement on Virginia's death row violated the Eighth Amendment because prolonged solitary confinement "deprived inmates of the basic human need for 'meaningful social interaction and positive environmental stimulation,'" thus "pos[ing] a substantial risk of serious psychological and emotional harm." Death-row prisoners in Pennsylvania filed a similar lawsuit, arguing that several states, including California, Missouri, and North Carolina, have "integrated death-sentenced prisoners into general population or allowed them additional time in a group setting without additional risk of violence." The case was settled when Pennsylvania agreed to end solitary confinement on its death row. *See* Samantha Melamed, *Death Row Inmates Get Rights of All Pa. Inmates,* PHILA. INQUIRER, Nov. 19, 2019, at B1; *Death Row Inmates Sue over Solitary Confinement*, PITTSBURGH POST-GAZETTE, Jan. 26, 2018, at A1.

[D] SEVERITY OF PUNISHMENT

[1] ON SENTENCING

Page 99: Add to Note 1:

Under a provision in the 2018 First Step Act authorizing prisoners to ask a federal judge to overturn a Bureau of Prisons decision denying compassionate release, Bernard Ebbers was released in December 2019 after serving 13 years of his sentence. Ebbers died less than two months later. Bernie Madoff, who has served 11 years of his sentence, also asked to be released from prison on the grounds that he suffers from chronic liver failure and has less than 18 months to live. But Judge Denny Chin denied the request, explaining that the 150-year prison sentence he imposed on Madoff reflected the judge's "'intent that he live out the rest of his life in prison.'" *See* Justin George, *Bernie Madoff Asks Judge for Medical Release from Prison*, WASH. POST, Feb. 8, 2020, at A3; Jack Nicas, *Judge Denies Madoff in Request for Release*, N.Y. TIMES, June 4, 2020, at B2. (Other provisions of the First Step Act are described below in the material supplementing Page 123.)

[2] SENTENCING DISCRETION

[b] SENTENCING GUIDELINES AND BEYOND

Page 109: Add after the carryover paragraph:

In *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court held that the Federal Sentencing Guidelines may not be challenged as unconstitutionally vague. Noting that "the system of purely discretionary sentencing that predated the Guidelines was constitutionally permissible," the Court reasoned that, "[i]f a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be." *Id.* at 894.

Page 109: Add after the second paragraph:

In *United States v. Haymond*, 139 S. Ct. 2369 (2019) (plurality opinion), the Court considered the constitutionality of a federal statute imposing a five-year mandatory minimum sentence if a judge found by a preponderance of the evidence that a defendant had committed one of several listed crimes while serving the period of supervised release that followed completion of a prison sentence. The mandatory minimum sentence was required "without regard to the length of the prison term authorized for the defendant's initial crime of conviction." A plurality of the Court, in an opinion written by Justice Gorsuch, found *Alleyne* to be controlling and therefore concluded that the statute violated *Apprendi*. Even though the statute did not alter the defendant's original prison sentence, which he had already completed, the plurality noted that "'postrevocation sanctions' are 'treat[ed] ... as part of the penalty for the initial offense.'" Concurring in the judgment, Justice Breyer agreed with Justice Alito's dissent that "the role of the judge in a supervised-release proceeding is consistent with" the judge's role in a "traditional" parole revocation proceeding and therefore disagreed with the plurality's decision to "transplant the *Apprendi* line of cases to the supervised-release context." But Justice Breyer voted to strike down the statute because it looked "less like ordinary revocation" of supervised release and "more like punishment for a new offense."

[c] SENTENCING UNDER THE MODEL PENAL CODE AND ITS PROPOSED REVISIONS

Page 110: Add to the first paragraph:

The American Law Institute adopted the proposed revisions to the Model Penal Code's sentencing provisions in 2017. *See* Model Penal Code: Sentencing (2017). The numbering of the sections in the final version varies somewhat from the provisions in the proposed drafts described in the casebook on pages 110-12. In addition, the major substantive changes to those draft provisions are described below.

The considerations relevant in sentencing a defendant "when reasonably feasible" now include "preservation of families." In addition, this provision replaces "restoration of crime victims and communities" with "restitution to crime victims." *Id.* § 1.02(2)(a)(ii).

The overall purposes of "the sentencing system" now include "ensur[ing] that adequate resources are available for carrying out sentences." In addition, this provision omits the goal of encouraging intermediate sanctions. *Id.* § 1.02(2)(b).

Page 111: Add to the second paragraph:

The final version of the new MPC sentencing provisions now limits fines to three times (rather than five times) the amount of "pecuniary gain" realized by the defendant or "the loss or damage" incurred by the victim. *Id.* § 6.08(1)(h).

Page 111: Add to the fourth paragraph:

In the final version of the new MPC sentencing provisions, the provisions on "restorative justice" – now called "victim-offender conferencing" – are not "drafted in the form of model legislation." Instead, they are included as an Appendix entitled "Principles for Legislation," which is meant to recommend "principles" that a state legislature "should seek to effectuate when authorizing such experimentation." *Id.* § 6.16.

Page 112: Add to the first paragraph:

Likewise, the provisions granting prisoners the automatic right to move to modify their sentences every 10 or 15 years are not "drafted in the form of model legislation," but are included in the Appendix entitled "Principles for Legislation" in the final version of the new MPC sentencing provisions. *Id.* § 11.02. Also included in this Appendix are provisions for adopting "a framework for 'control release' from prison, jail, probation, and postrelease supervision when correctional populations exceed … operational capacities." *Id.* § 11.04.

The procedures allowing motions to modify a sentence based on a prisoner's age, health, family circumstances, etc. remain in the final version. *See id.* § 11.03. In addition, the new MPC sentencing provisions afford credits for good behavior that are available to any prisoner who has not been found to have committed a crime or a "serious violation" of prison rules by a preponderance of the evidence. Credits are also available for "satisfactory participation in vocational, educational, or other rehabilitative programs." *Id.* § 11.01.

Page 112: Add to the second paragraph:

The sections on sentencing hearing procedures in the final version of the MPC sentencing revisions include provisions on victims' rights and appellate review of sentences. *See id.* §§ 10.08, 10.10. The latter section allows appellate courts to exercise their "independent judgment" to modify any "disproportionately severe" sentence. *Id.* § 10.10(5)(b). In addition, it instructs appellate judges to conduct de novo review of the "extraordinary departures" from the sentencing guidelines described on page 111 of the casebook. *Id.* § 10.10(5)(e).

[3] PROPORTIONALITY

Page 123: Add to Note 5:

In a 2017 memo, then-Attorney General Jeff Sessions reversed the Obama administration's stance on mandatory minimum sentences, instructing federal prosecutors to "charge and pursue the most serious, readily provable offense" in each case, i.e., the offense that "carr[ies] the most substantial guidelines sentence, including mandatory minimum sentences." The backlog of federal prisoners seeking clemency is almost 13,000. *See* Beth Reinhard & Anne Gearan, *Clemency Is Often Tied to Connections*, WASH. POST, Feb. 4, 2020, at A1.

The First Step Act, a sentencing reform bill that received bipartisan support in Congress, was signed into law at the end of 2018. The statute expands job training and other programs aimed at reducing recidivism rates among federal prisoners. It also shortens mandatory minimum sentences for some nonviolent drug offenses, including lowering the federal mandatory three-strikes penalty from life in prison to 25 years, and it gives judges greater leeway to avoid mandatory minimum sentences in some cases. The statute allows prisoners sentenced before the 2010 reduction in the sentencing disparity between crack and powder cocaine to petition for reconsideration of their sentences. *See* Nicholas Fandos, *Senate Approves Prison Overhaul*, N.Y. TIMES, Dec. 19, 2018, at A1.

Page 123: Add to Note 6:

The Fourth Circuit affirmed the district court's ruling that Lee Malvo was entitled to resentencing under *Miller v. Alabama* and *Montgomery v. Louisiana*. S*ee Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018). The Supreme Court granted cert, but dismissed the case when the Virginia legislature passed a statute making juvenile offenders eligible to seek parole after serving 20 years in prison. *See Mathena v. Malvo*, 140 S. Ct. 919 (2020); Adam Liptak, *D.C. Sniper Seeks to Halt His Appeal*, N.Y. TIMES, Feb. 25, 2020, at A12.

The Court has agreed to consider whether the Eighth Amendment requires a judge to find that a juvenile is permanently incorrigible before imposing a sentence of life without parole. *See Jones v. Mississippi*, No. 18-1259 (cert. granted, Mar. 9, 2020).

CHAPTER 3

THE ACT REQUIREMENT

[B] OMISSIONS

Page 139: Add to Note 3:

In a federal civil rights suit filed after the tragic shooting at the Marjory Stoneman Douglas High School in Parkland, Florida, a federal district judge held that police officers, including the school resource officer, Scot Peterson, had no constitutional duty to protect the students from Nikolas Cruz, who shot and killed 17 people and injured 17 others. *See L.S. v. Peterson*, 2018 U.S. Dist. Lexis 210273 (S.D. Fla. Dec. 12, 2018). But a state court refused to dismiss a negligence suit filed against Peterson by the parents of one of the slain students, finding that Peterson, who remained outside after allegedly hearing 70 shots coming from inside the school, had a special relationship to the students and therefore a duty to act to protect them. *See Peterson v. Pollack*, 290 So. 3d 102 (Fla. Dist. Ct. App. 2020).

Page 141: Add to Note 7:

Noor Salman, the widow of Omar Mateen, the man who killed 49 people at the Pulse nightclub in Orlando, Florida, in 2016, was acquitted of charges that she aided and abetted a terrorist act and obstructed justice. Although the foreperson of the jury told reporters the jurors thought Salman was at least generally aware of her husband's plans, they did not find that she had done anything to intentionally assist him. After 11 hours of questioning without a lawyer, Salman told law enforcement officials that she had driven with her husband to scout the nightclub, but there was evidence contradicting her statement and defense counsel argued that she was coerced to make a false confession. *See* Patricia Mazzei, *Orlando Gunman's Wife Is Acquitted in Shootings*, N.Y. TIMES, Mar. 31, 2018, at A16.

[D] STATUS CRIMES

Page 158: Add to Note 5:

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit struck down a disorderly conduct ordinance and a camping ordinance that prohibited sleeping outdoors on public property. The court found that the Eighth Amendment's ban on cruel and unusual punishment bars "the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter" elsewhere. *Id.* at 616. Noting that "'human beings are biologically compelled to rest, whether by sitting, lying, or sleeping,'" the court concluded that, "just as the state may not criminalize the state of being 'homeless in public places,' the state may not 'criminalize conduct that is an unavoidable consequence of being homeless – namely sitting, lying, or sleeping on the streets.'" *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136-37 (9th Cir. 2006)). "'[S]o long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],'" the court held, homeless persons who have "no option of sleeping indoors" cannot be punished for "'involuntarily

sitting, lying, and sleeping in public' … on the false premise they had a choice in the matter." *Id.* (quoting *Jones*, 444 F.3d at 1138).

CHAPTER 4

MENS REA

[A] INTRODUCTION

Page 164: Add to the end of the carryover paragraph:

For an empirical study finding that mock jurors typically view MPC recklessness as a sufficiently culpable mens rea for criminal punishment, even when the criminal law requires proof of knowledge, see Matthew R. Ginther et al., *Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt*, 71 VAND. L. REV. 241 (2018).

[B] LEVELS OF CULPABILITY

[2] THE MODEL PENAL CODE

Page 184: Add to Note 8:

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), the Supreme Court analyzed the mens rea required by the intersection of two federal weapons statutes: 18 U.S.C. § 922(g), which prohibits nine categories of people, including felons and "alien[s] ... illegally or unlawfully in the United States," from possessing "any firearm or ammunition"; and 18 U.S.C. § 924(a)(2), which imposes a maximum ten-year sentence on anyone who "knowingly violates" certain subsections of § 922, including § 922(g). Concluding that "the word 'knowingly' applies both to the defendant's conduct and to the defendant's status," the Court rejected the lower courts' interpretation of the statutes and held that the prosecution must prove not only that "the defendant knew he possessed a firearm" but also that "he knew he belonged to the relevant category of persons barred from possessing a firearm," in Rehaif's case that he was an undocumented immigrant.

Justice Breyer's opinion for the seven Justices in the majority began with the observation that, "[i]n determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" The Court then cited MPC § 2.02(4) in observing that "the presumption in favor of scienter … applies with equal or greater force when Congress includes a general scienter provision in the statute itself," and quoted *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009), for the proposition that, "[a]s 'a matter of ordinary English grammar,' we normally read the statutory term '"knowingly" as applying to all the subsequently listed elements of the crime.'" Characterizing "the defendant's status" as "the 'crucial element' separating innocent from wrongful conduct," the Court reasoned that "[a]pplying the word 'knowingly' to the defendant's status in § 922(g) … helps to separate wrongful from innocent acts." For example, the Court noted, "[a]ssuming compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent," and an immigrant "who was brought into the United States unlawfully as a small child" might be "unaware of his unlawful status."

Justice Alito, joined by Justice Thomas, dissented, describing the Court's analysis as "'knowingly' perform[ing] a jump of Olympian proportions, taking off from § 924(a)(2), sailing backward over more than 9,000 words in the U.S. Code, and then landing – conveniently – at the beginning of the enumeration of the elements of the § 922(g) offense." Given the phrasing of the relevant subsection of § 922(g), which makes weapons possession "unlawful for any person … who, being an alien[,] … is illegally or unlawfully in the United States," the dissent argued that "[t]he most natural reading" of an "amalgamat[ion]" of § 924(a)(2) and § 922(g) that "minimizes the changes in the language of the two provisions" would require the defendant to "know only that he is an alien, not that his presence in the country is illegal or unlawful." Assuming "Congress wanted to require proof of *some mens rea*," the dissent continued, "there is no reason why we must or should infer that Congress wanted the same *mens rea* to apply to all the elements of the § 922(g) offense." Without referring to the MPC, the dissenters asked, "[w]hy not require reason to know or recklessness or negligence" rather than "actual knowledge," "one of the highest degrees of *mens rea*?"

Although the majority pointed out that "'knowledge can be inferred from circumstantial evidence'" and expressly left open "what precisely the Government must prove to establish a defendant's knowledge of status in respect to other § 922(g) provisions not at issue here," the dissent responded that "[w]hether a defendant falls into one of the § 922(g) categories often involves complicated legal issues, and demanding proof that a defendant understood those issues would seriously undermine the statute's goals." Citing by way of example the subsection of § 922(g) prohibiting weapons possession by someone who has been "adjudicated as a mental defective," the dissenters wondered, "[i]f a person has been found by a court to present a 'danger ... to others' due to mental illness or incompetency, should he escape the reach of § 922(g) because he does not know that a court has so found?" Similarly, the dissent doubted that Congress intended for the subsection of § 922(g) applicable to persons "convicted … of a misdemeanor crime of domestic violence" to be limited "only to those abusers who actually know" their prior conviction "falls within the complicated definition of a 'crime of domestic violence'" – a definition that has generated disagreement among the Justices in recent cases. And even the majority observed that its interpretation of the statutes would afford a defense to someone who had been sentenced to probation on a prior charge but did not realize the crime was "'*punishable* by imprisonment for a term exceeding one year'" and thus a felony.

Page 187: Add to Note 1:

In 2018, then-Senator Orrin Hatch introduced the Mens Rea Reform Act of 2018, which would have taken a more moderate, incremental approach to mens rea reform than the legislation proposed in 2015. The 2018 bill, which was not enacted by the 115th Congress, would have created a National Criminal Justice Commission responsible for reporting to Congress which federal criminal statutes do not include a mens rea requirement and recommending which of those should be strict liability crimes. *See* Mens Rea Reform Act of 2018, S. 3118, 115th Cong. (2018).

[C] DEFENSES BASED ON MENS REA

[2] MISTAKE OF LAW

Page 197: Add before the last paragraph of Note 5:

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which is described above in the material supplementing Page 184, the Court rejected the argument that the maxim "ignorance of the law is no excuse" foreclosed affording a defense to immigrants who did not know they were "illegally or unlawfully in the United States" and therefore barred from possessing a firearm. Quoting MPC § 2.04, the Court noted that a mistake of law constitutes a defense "if the mistake negates the 'knowledge ... required to establish a material element of the offense.'" Thus, the Court explained, "the maxim does not normally apply where a defendant 'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct,' thereby negating an element of the offense." Although "[t]he defendant's status as an alien 'illegally or unlawfully in the United States' refers to a legal matter," the Court continued, "this legal matter is what the commentators refer to as a 'collateral' question of law" and "[a] defendant who does not know that he is an alien 'illegally or unlawfully in the United States' does not have the guilty state of mind that the statute's language and purposes require."

CHAPTER 5

"STRICT LIABILITY" AND PUBLIC WELFARE OFFENSES; VICARIOUS AND CORPORATE LIABILITY

[A] "PUBLIC WELFARE" CRIMES AND VICARIOUS LIABILITY

Page 244: Add to the end of Note 6:

In *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which is described above in the material supplementing Page 184, the Court held that, in criminal cases involving the federal weapons statutes that ban certain individuals from knowingly possessing weapons, the prosecution must prove "both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." Noting the "longstanding" "presumption in favor of scienter," the Court cited *Staples*, *Balint*, and *Morissette* in observing that "we have typically declined to apply th[at] presumption … in cases involving statutory provisions that form part of a 'regulatory' or 'public welfare' program and carry only minor penalties." Pointing out that the weapons statutes at issue in *Rehaif* "are not part of a regulatory or public welfare program, and … carry a potential penalty of 10 years in prison that we … described as 'harsh'" in *X-Citement Video*, the Court concluded that "this exception to the presumption in favor of scienter does not apply." "[A]ssuming without deciding that statutory or legislative history could overcome the longstanding presumption in favor of scienter," the Court continued, the legislative history "here is at best inconclusive."

The *Rehaif* dissent, by contrast, relied on *Feola*, arguing that "[t]he reason for the rule exempting knowledge of jurisdictional elements supports the conclusion that knowledge of § 922(g)'s status element is also not required." "Just like a status element," the dissenters observed, a jurisdictional element can "drastically increase the punishment for a wrongful act" and can "sometimes transform lawful conduct into criminal conduct." By way of example, the dissent noted that the jurisdictional element in *Feola* "double[d] the possible prison sentence that would have been applicable to simple assault," and, "[i]n a State that chooses to legalize marijuana, possession is wrongful only if the defendant is on federal property."

CHAPTER 6

HOMICIDE

[B] INTENTIONAL HOMCIDE

[2] VOLUNTARY MANSLAUGTER: HEAT OF PASSION

Page 307: Add to Note 12(b):

For criticism of the trans panic defense raised by some men who are charged with killing trans women and wish to raise a heat of passion defense, see Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411 (2020).

[C] UNINTENTIONAL HOMICIDE

[1] SECOND-DEGREE MURDER: DEPRAVED HEART/EXTREME INDIFFERENCE

Page 315: Add to Note 2:

Nathaniel Hendren, a St. Louis police officer, pleaded guilty to involuntary manslaughter in the Russian-Roulette-style killing of his girlfriend, Katlyn Alix, who was also a police officer. Hendren put one round into a revolver and spun the cylinder, and the two officers then took turns firing at each other, with Alix going first. Hendren, who had allegedly played Russian Roulette with previous girlfriends, was sentenced to seven years in prison. *See* Joel Currier, *Ex-St. Louis Officer to Serve 7-Year Term for Killing Fellow Cop in Russian Roulette Shooting*, ST. LOUIS POST-DISPATCH, Feb. 29, 2020, at A1.

[2] INVOLUNTARY MANSLAUGHTER: CRIMINAL NEGLIGENCE/RECKLESSNESS

Page 327: Add to the end of the Notes and Questions:

The utility Pacific Gas & Electric faced involuntary manslaughter charges when its failure to properly maintain a faulty power line led to the deadliest and most destructive wildfire in California history, which claimed more than 80 lives and destroyed almost 14,000 homes in 2018. PG&E pled guilty to 84 counts of involuntary manslaughter and one count of unlawfully starting a fire and was ordered to pay the maximum fine of $3.5 million and an additional $500,000 in costs. The utility, which is in bankruptcy proceedings, also agreed to pay $13.5 billion to settle more than 70,000 claims filed against it by wildfire victims. *See* Joseph Serna & Matt Hamilton, *PG&E Pleads Guilty in Wildfire Deaths*, L.A. TIMES, Mar. 24, 2020, at A1; Ivan Penn & Peter Eavis, *PG&E Says It's Guilty in 84 Deaths from Fire*, N.Y. TIMES, June 17, 2020, at B1.

Thirty-six counts of involuntary manslaughter were brought against two men in connection with the 2016 Ghost Ship fire at an Oakland warehouse that was being used to house artists. The fire broke out in the warehouse, which was not zoned for residential use, during a concert attended by almost 100 people. Prosecutors argued that the defendants had blocked off one of the two exits

and "convert[ed] the Ghost Ship building into a death trap through a series of illegal construction projects and shoddy electrical work." The jury acquitted Max Harris, the warehouse's "creative director," but could not read a verdict as to the property manager, Derick Almena, who is awaiting a new trial. *See* James Queally, *Ghost Ship Jury Assigns No Guilt in Fire*, L.A. TIMES, Sept. 6, 2019, at A1.

Page 336: Add to Note 7(c):

In the first federal manslaughter prosecution of a woman based on prenatal conduct that led to the death of her child, a divided Eighth Circuit reversed the district court's decision dismissing the indictment. The court of appeals concluded that the federal manslaughter statute, 18 U.S.C. § 1112, was intended to apply when injuries suffered in utero cause the death of a baby who is born alive. *See United States v. Flute*, 929 F.3d 584 (8th Cir. 2019). The defendant's motion for rehearing en banc was withdrawn after prosecutors dropped the charges, but the Eighth Circuit refused to vacate the panel's opinion. *See United States v. Flute*, 951 F.3d 908 (8th Cir. 2020).

Page 338: Add to Note 7(g):

According to a whistleblower complaint, The Boeing Company chose not to install certain safety features on its 737 Max jets because of concerns about increased costs and delayed production schedules. Two of the jets crashed in Indonesia and Ethiopia, killing a total of 346 people. A report issued by the House Committee on Transportation and Infrastructure concluded that a "'culture of concealment' at Boeing and 'grossly insufficient' federal oversight" contributed to the two crashes. Boeing has suspended production of the 737 Max, and the Justice Department is investigating the case. *See* Natalie Kitroeff et al., *Boeing Rejected Safety System for 737 Max Jet, Engineer Says*, N.Y. TIMES, Oct. 3, 2019, at B1; Ian Duncan & Michael Laris, *House Report Faults Boeing, FAA in Crashes*, WASH. POST, Mar. 7, 2020, at A2.

Page 338: Add Note 7(h):

Prosecutors dismissed involuntary manslaughter charges that had been filed against Nick Lyon, the former director of the Michigan Department of Health and Human Services, and other state officials in connection with the contaminated water crisis in Flint, Michigan. In 2014, the city's source of drinking water was switched in a cost-saving move and lead leeched into the water supply, causing an outbreak of Legionnaires' disease that killed at least 12 people. The prosecutors, who were appointed by a new State Attorney General, planned to conduct a more thorough investigation and promised that criminal charges are forthcoming. *See* Mitch Smith, *Prosecutors in Michigan Dismiss Pending Charges in Flint Pollution Inquiry*, N.Y. TIMES, June 14, 2019, at A19; Leonard N. Fleming, *Flint Water Probe Remains 'on Track,' Prosecutors Say*, DETROIT NEWS, Apr. 18, 2020, at B1.

[D] FELONY MURDER

[1] THE POLICY ISSUES SURROUNDING FELONY MURDER

Page 347: Add to Note 4:

In *Commonwealth v. Brown*, 81 N.E.3d 1173 (Mass. 2017), the Massachusetts Supreme Judicial Court joined the group of states foreclosing prosecutors from using felony murder to establish the malice necessary to support a murder conviction. Although the court upheld the constitutionality of the felony murder rule, it ruled that felony murder would no longer be recognized as "an independent theory of liability for murder" in that state. Instead, felony murder would serve only as "an aggravating element of murder," allowing a first-degree murder conviction "where the murder was committed in the course of a felony punishable by life imprisonment even if it was not committed with deliberate premeditation or with extreme atrocity or cruelty." *Id.* at 1178.

In 2018, the California legislature narrowed that state's first-degree felony murder rule to apply only to certain defendants: "the actual killer"; an individual who, "with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted" the killer in committing first-degree murder; and "a major participant in the underlying felony [who] acted with reckless indifference to human life." Cal. Penal Code § 189(e). These new limitations do not apply when the defendant "knew or reasonably should have known that the victim was a peace officer" acting in the line of duty. *Id.* § 189(f). But they allow an estimated 400 to 800 prisoners who were convicted under the previous, broader felony murder rule to petition to have their convictions vacated or their sentences reduced. *See* Megan Cassidy, *New Law Gives Murder Convicts Hope for Freedom*, S.F. CHRON., Oct. 4, 2018, at A1. Prosecutors' challenges to the constitutionality of the new felony murder rule have been rejected by the state courts. *See People v. Solis*, 259 Cal. Rptr. 3d 854 (Cal. Ct. App. 2020).

[2] LIMITATIONS ON THE FELONY MURDER DOCTRINE

[a] INHERENTLY DANGEROUS FELONIES

Page 354: Add to the third paragraph of Note 4:

On instructions from the California Supreme Court, a state appellate court considered a defendant's claim that the state's second-degree felony murder rule is unconstitutionally vague. A divided court affirmed the conviction, reasoning that the underlying felony in that case, manufacturing methamphetamine, had previously been held to be inherently dangerous and that the trial judge had "relied on real-world, concrete [expert] evidence" in determining that the felony was inherently dangerous in the abstract. *In re White*, 246 Cal. Rptr. 3d 670, 681 (Cal. Ct. App. 2019) (emphasis omitted). The California Supreme Court declined to hear the case. *See In re White*, 2019 Cal. Lexis 6117 (Aug. 14, 2019).

[E] THE DEATH PENALTY

[1] THE POLICY CONSIDERATIONS UNDERLYING THE DEATH PENALTY

Page 375: Add to the first paragraph:

The number of states that impose the death penalty has now declined to 28. In 2018, the Washington Supreme Court struck down that state's capital punishment statute under the state constitution on the grounds that the death penalty was "imposed in an arbitrary and racially biased manner." *State v. Gregory*, 427 P.3d 621, 627 (Wash. 2018). Then, in 2019, the New Hampshire legislature voted to repeal the death penalty in that state, overriding the governor's veto. *See* Zoe Greenberg, *N.H. Legislators Repeal Death Penalty*, BOS. GLOBE, May 31, 2019, at B1. And the Colorado legislature passed a bill abolishing the death penalty in 2020. *See* Saja Hindi, *Colorado Abolishes Death Penalty*, DENVER POST, Mar. 24, 2020, at A1.

Page 376: Add to the carryover paragraph:

In 2019, California Governor Gavin Newsom imposed a moratorium on the death penalty in that state. *See* Phil Willon, *Newsom to Halt Death Penalty*, L.A. TIMES, Mar. 13, 2019, at A1.

For research on the reasons for the recent reductions in capital sentences, see Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1256 (2019) (concluding that the decline is more strongly correlated with states' creation of state-wide public defender offices to represent capital defendants than with either lower homicide rates or the option of a life imprisonment without parole sentence); Brandon L. Garrett et al., *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 562 (2017) (analyzing all death sentencing between 1990 and 2016, and finding that "death sentences are strongly associated with urban, densely populous counties" and with "counties that have large black populations"; that homicide rates are related to death sentencing in several ways; and that "death sentencing is associated with inertia or the number of prior death sentences within a county").

Page 389: Add to the first paragraph of Note 2:

Although the California Supreme Court upheld the constitutionality of the 2016 referendum, it ruled that the provisions that "appear to impose strict deadlines on the resolution of judicial proceedings must be deemed directive rather than mandatory" "in order to avoid serious separation of powers problems." *Briggs v. Brown*, 400 P.3d 29 (2017).

Page 392: Add to Note 4:

In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Court rejected a method of execution challenge brought by a Missouri prisoner who alleged he suffered from a rare disease that caused tumors and was likely to make death by lethal injection unusually painful. Speaking for five members of the Court, Justice Gorsuch's majority opinion made clear that the standards articulated in *Baze v. Rees* and *Glossip v. Gross* apply to all challenges to methods of execution, whether facial or as-applied challenges. The Court also held that Bucklew had not met the burden imposed by *Glossip v. Gross* to identify "a feasible and readily implemented alternative method of execution the State refused to adopt without a legitimate reason, even though it would significantly reduce a substantial risk of severe pain." *Id.* at 1129.

In the last part of the opinion, the Court observed that the "'important interest in the timely enforcement of a sentence'" had "been frustrated in this case." *Id.* at 1133. The Court went on to say:

> The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay."… If litigation is allowed to proceed, federal courts "can and should" protect settled state judgments from "undue interference" by invoking their "equitable powers" to dismiss or curtail suits that are pursued in a "dilatory" fashion or based on "speculative" theories.

Id. at 1134.

Page 393: Add to Note 5:

Nebraska became the first state to use fentanyl, the drug at the center of the opioid epidemic, in a lethal injection. Fentanyl, which was part of a previously untested four-drug cocktail used to execute Carey Moore, can lead to unconsciousness and stop breathing. *See* Mitch Smith, *Potent Opioid with Deadly Track Record Gets Put to a New Use*, N.Y. TIMES, Aug. 15, 2018, at A10. In previous cases, fentanyl manufacturers have sued to block states from using the drug in executions. *See Alvogen, Inc. v. State*, 2018 Nev. Dist. Lexis 966 (Nev. Dist. Ct. Sept. 28, 2018).

Page 404: Add to the end of the carryover paragraph:

See also Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. – (forthcoming) (finding even greater racial disparities in execution rates in the cases included in the Baldus study – executions were 17 times more likely in cases involving white victims than in those involving African-American victims – and concluding that "[a]rbitrariness is exaggerated, not improved through appellate review"); Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement* Furman*'s Narrowing Requirement*, 66 UCLA L. REV. 1394 (2019) (analyzing 1,900 homicide convictions in California between 1978 and 2002, and reporting that six of California's expansive list of 32 statutory aggravating factors have a disparate impact based on race, even after controlling for culpability, including the two most frequently used aggravating circumstances in California cases that led to a death sentence: robbery, which was present or found less frequently in cases involving white defendants; and multiple victims, which was present or found more frequently in cases involving white defendants).

Page 406: Add to Note 5:

On remand after the Supreme Court's decision in *Buck v. Davis*, Duane Buck was sentenced to life in prison. *See* Alex Arriaga, *Texas Death Row Inmate Duane Buck Has Sentence Reduced to Life After Supreme Court Orders Retrial*, TEX. TRIB., Oct. 3, 2017.

In *Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (per curiam), the Court held that a death row inmate should be allowed to reopen his habeas petition in order to challenge his conviction on the grounds that one of the jurors was biased against him because of his race. The prisoner, Keith Tharpe, introduced a sworn affidavit from the juror which stated that "'there are two types of black people: 1. Black folks and 2. N******'"; that Tharpe "'wasn't in the "good" black folks category'" and "'should get the electric chair for what he did'"; and that, "'[a]fter studying the Bible, I have wondered if black people even have souls.'" *Id.* at 546. On remand, the Eleventh Circuit refused to allow Tharpe to reopen his habeas petition on procedural grounds, and the Supreme Court denied cert. *See Tharpe v. Sellers*, 898 F.3d 1342 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 911 (2019).

In *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), the Court reversed a capital conviction on the grounds that the prosecution had not provided a race-neutral explanation for striking an African-American woman from the jury during the defendant's sixth trial on murder charges. Writing for seven members of the Court, Justice Kavanaugh's majority opinion relied on "[f]our critical facts": (1) in Flowers' six trials, all of which were tried by the same lead prosecutor, the prosecution used peremptory challenges to strike 41 of the 42 African-American prospective jurors; (2) the prosecution struck five of the six African-American prospective jurors at the sixth trial; (3) "in an apparent effort to find pretextual reasons to strike black prospective jurors," the prosecution "engaged in dramatically disparate questioning of black and white prospective jurors" at the sixth trial, directing 145 questions to the five African-American prospective jurors who were struck but only 12 questions to the 11 white members of the jury; and (4) the prosecution offered "a series of factually inaccurate explanations for striking black prospective jurors," including reasons for striking one African-American woman who was "similarly situated to white prospective jurors" who were seated on the jury. The lead prosecutor has recused himself from the case, and Flowers was released on bail while the State Attorney General's office decides whether to retry him a seventh time. *See* Mihir Zaveri, *Prosecutor Recuses Himself for 7th Try at Murder Trial*, N.Y. TIMES, Jan. 8, 2020, at A12.

[2] THE CONSTITUTIONALITY OF THE DEATH PENALTY AND CAPITAL SENTENCING PROCEDURES

Page 414: Add to the end of Note 7:

See also Guyora Binder, Brenner Fissell & Robert Weisberg, *Unusual: The Death Penalty for Inadvertent Killing*, 93 IND. L.J. 549, 552-53 (2018) (reporting that only 18 states impose the death penalty for "inadvertent felony murder," only five of the 487 prisoners executed in those 18 states since 1973 killed with a "culpability … arguably below recklessness," and only 15 of the 1755 inmates who were on death row at the end of 2016 in those 18 states were "sentenced for arguably

inadvertent killings," and therefore concluding that the Eighth Amendment bans executing inadvertent killers).

Page 414: Add to Note 8:

In *Panetti v. Davis*, 863 F.3d 366, 375 (5th Cir. 2017), the Fifth Circuit held that Panetti was entitled to appointed counsel and "funding for experts and other investigative resources," given that "a decade has now passed since the last determination of whether this concededly mentally ill petitioner is competent to be executed."

In *Madison v. Alabama*, 139 S. Ct. 718 (2019), the Court was asked to decide whether a prisoner was competent to be executed if he understood that he had been sentenced to die for a murder conviction even though, because he had had several strokes and suffered from vascular dementia, he had no memory of the crime he had committed more than 30 years earlier. In a five-to-three decision, the Court, in an opinion written by Justice Kagan, held that the Eighth Amendment does not bar executing a prisoner whose "mental disorder has left him without any memory of committing his crime … because a person lacking such a memory may still be able to form a rational understanding of the reasons for his death sentence." But the Court also thought that the same Eighth Amendment standards should apply both to prisoners "suffering from dementia" and to those "experiencing psychotic delusions … because either condition may impede the requisite comprehension of [their] punishment." *Id.* at 722. Because the Court was uncertain whether the court below had rejected Madison's claim based on "the incorrect view" that "only delusions, and not dementia, can support a finding of mental incompetency," the Court remanded the case to the state supreme court. *Id.* at 729.

Page 417: Add to Note 9:

On remand, the Fifth Circuit held that Kevan Brumfield was intellectually disabled and therefore ineligible for the death penalty under *Atkins*. *See Brumfield v. Cain*, 808 F.3d 1041 (5th Cir. 2015).

By contrast, the Texas Court of Criminal Appeals found on remand that Bobby Moore was not intellectually disabled under the standards set out in the most recent version of the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF DISORDERS. Moore filed a cert petition challenging the decision, and the prosecution agreed that he was intellectually disabled under Supreme Court precedent. The State Attorney General, however, filed a motion to intervene, arguing that the state court's decision was correct. In a per curiam opinion joined by six Justices, the Supreme Court concluded that the state court's ruling was inconsistent with its 2017 decision in the case, finding "too many instances in which, with small variations, it repeats the analysis we previously found wanting." *Moore v. Texas*, 139 S. Ct. 666, 670 (2019) (per curiam). Given that these "improper" parts of the lower court's analysis were "critical to its ultimate conclusion," the Court "agree[d] with Moore and the prosecutor that … Moore has shown he is a person with intellectual disability." *Id.* at 670, 672. On remand, the Texas Court of Criminal Appeals observed that "[t]here is nothing left for us to do but to implement the Supreme Court's holding" and sentenced Moore to life in prison. *Ex parte Moore*, 587 S.W.3d 787, 789 (Tex. Crim. App. 2019).

Page 421: Add to Note 1:

In *Hidalgo v. Arizona*, 138 S. Ct. 1054 (2018), the Court denied cert in a case challenging the constitutionality of the Arizona death penalty statute, which makes all defendants convicted of first-degree murder eligible for a death sentence and defines first-degree murder broadly to include all premeditated killings and any felony murder committed in the course of 22 underlying felonies (including transporting marijuana for sale). The defendant's argument was based on an empirical study which reported that at least one of the statute's aggravating circumstances could be found in 98% of the first-degree murder cases brought over a 10-year period in Maricopa County. Four Justices, in a statement written by Justice Breyer, took the position that the state supreme court had "misapplied" Supreme Court precedent in upholding the statute and that the defendant had raised "a possible constitutional problem," but they ultimately agreed with the decision to deny review because the record in the case was not fully developed. *Id.* at 1057 (statement respecting the denial of certiorari). *See also* David C. Baldus et al., Furman *at 45: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. EMPIRICAL LEGAL STUD. 693 (2019) (analyzing 1900 California homicides committed between 1978 and 2002, and finding that at least one of the state's 32 aggravating circumstances could be found in 95% of first-degree murder cases and 59% percent of second-degree murder and voluntary manslaughter cases but that death sentences were imposed in only 4.3% of these death eligible cases).

Page 424: Add to Note 2:

In *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016) (per curiam), the Court made clear that its holding in *Payne v. Tennessee* did not implicitly overturn the portion of *Booth v. Maryland* holding that the testimony a victim's family members provide at a capital sentencing hearing may not include "characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).

Page 430: Add to Note 7:

Shortly after taking office, Alabama Governor Kay Ivey signed legislation amending that state's death penalty statute so that judges may no longer override a jury's decision against imposition of the death penalty. Under the statute, Ala. Code § 13A-5-46, a death sentence requires a unanimous jury finding of a statutory aggravating circumstance, but only 10 votes in favor of execution. *See It's About Time, Alabama*, L.A. TIMES, Apr. 13, 2017, at A12.

Following the Florida Supreme Court's decision in *Perry v. State*, the Florida legislature amended the death penalty statute to require that the jury must unanimously find beyond a reasonable doubt that a statutory aggravating factor exists and must unanimously recommend a death sentence after determining that the aggravating factors outweigh the mitigating factors. *See* Fla. Stat. § 921.141. But the Florida Supreme Court recently "recede[d]" from its previous interpretation of *Hurst*, reading the Supreme Court's opinion as dealing with "eligibility" for the death penalty and not "selection" of a particular sentence. The two state supreme court justices who were in the minority in *Perry* joined with two new appointees to the court in holding that the Sixth Amendment requires a unanimous jury finding beyond a reasonable double only on the existence of a statutory aggravating factor. *See Poole v. State*, 292 So. 3d 694 (Fla. 2020).

The U.S. Supreme Court also seemingly endorsed that view in *McKinney v. Arizona*, 140 S. Ct. 702 (2020). By a vote of five-to-four, the Court held that a state appellate court may reweigh the aggravating and mitigating circumstances when a death sentence is reversed because a relevant mitigating circumstance was not properly considered at the capital sentencing hearing. Relying on its holding in *Clemons v. Mississippi*, 494 U.S. 738 (1990), that an appellate court may rebalance the aggravating and mitigating circumstances after one of the statutory aggravating circumstances has been rejected on appeal, the *McKinney* majority found "no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side." The Court also dismissed the defendant's argument that *Clemons* was no longer good law in light of *Ring* and *Hurst*, noting that those cases require a jury to "find the aggravating circumstance that makes the defendant death eligible" but do not mandate that the jurors "weigh the aggravating and mitigating circumstances or … make the ultimate sentencing decision." *McKinney*, 140 S. Ct. at 707.

Page 431: Add to Note 8:

An empirical study surveying almost 500 people who reported for jury duty in Orange County, California – one of only 16 counties in the country that imposed five or more death sentences between 2010 and 2015 – found that 35% or more of the prospective jurors could be excluded from jury service under the *Witherspoon/Witt* standard and that almost a quarter of them said they would be reluctant to find the defendant guilty in a capital case. *See* Brandon Garrett et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. F. 417 (2017).

CHAPTER 7

RAPE

[B] FORCIBLE RAPE

[2] MENS REA

Page 473: Add to Footnote 20:

In 2017, Secretary of Education Betsy DeVos withdrew the Obama administration's 2011 "Dear Colleague Letter." The Secretary promised that the Department of Education would engage in rulemaking on campus sexual assault and issued interim guidance in the form of "Q&A on Campus Sexual Misconduct." *See* United States Department of Education Office for Civil Rights, Q&A on Campus Sexual Misconduct (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

The Department of Education issued proposed rules in 2018 and then, after considering more than 120,000 public comments, issued final regulations that go into effect in August of 2020. Under the new rules, colleges and universities are required to investigate only formal complaints of sexual assault that are made to "officials with the authority to take corrective action" and that involve conduct "occur[ing] within [the school's] programs and activities." The rules also require colleges and universities to hold live hearings before a neutral decisionmaker in sexual assault cases. The accuser and the accused student have the right to cross-examine each other through a third party, such as an adviser or lawyer, and both parties must be given access to all the evidence used to determine the facts of the case and the right to appeal. Although the regulations require a presumption of innocence, they give schools the option of choosing which standard of proof – preponderance of the evidence or clear and convincing evidence – to apply. Primary and secondary schools are not required to hold live hearings, and students in those schools may report claims to any school staff member. Victims' rights groups plan to challenge the new rules in court. *See* Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES, May 7, 2020, at A24.

Page 481: Add to Note 9:

On appeal, the California Court of Appeal unanimously upheld Brock Turner's conviction, finding sufficient evidence to support the jury's verdict. *See People v. Turner*, 2018 Cal. App. Unpub. Lexis 5406 (Cal. Ct. App. Aug. 8, 2018). In 2018, the trial judge who sentenced Turner became the first California judge to lose a recall vote in more than 80 years. *See* Maggie Astor, *Judge in Sex Assault Case Is Recalled*, BOS. GLOBE, June 7, 2018, at A2. Turner's victim, Chanel Miller, has published a memoir detailing her experiences. *See* CHANEL MILLER, KNOW MY NAME (2019).

[3] ACTUS REUS

Page 505: Add to Note 5:

The New Hampshire Supreme Court affirmed Owen Labrie's conviction, rejecting his claim that there was insufficient evidence to support his conviction for knowingly using a computer to "seduce, solicit, lure, or entice" a minor to commit a sexual offense. *See State v. Labrie*, 198 A.3d 263 (N.H. 2018). The court also rejected a second appeal that argued ineffective assistance of counsel. *See State v. Labrie*, 211 A.3d 1196 (N.H. 2019).

Page 517: Add to Note 13:

The American Law Institute has approved two additional provisions of the proposed revisions to the Model Penal Code sections governing sex offenses. The first now defines "sexual penetration" as "an act involving penetration, however slight, of the anus or genitalia by an object or body part, except when done for legitimate medical, hygienic, or law-enforcement purposes." Model Penal Code: Sexual Assault and Related Offenses § 213.0(1) (Tentative Draft No. 3, 2017). The second adds a definition of "oral sex": "a touching of the anus or genitalia of one person by the mouth or tongue of another person." *Id.* § 213.0(2). In place of the prior draft's references to "sexual penetration," the new draft defines the various sex offenses to prohibit acts of penetration or oral sex.

In addition, the most recent draft of the proposed revisions would change the mens rea for *aggravated forcible rape* to require that the defendant acted knowingly. *See id.* § 213.1(2).

The latest draft also makes *sexual penetration or oral sex without consent* a fifth-degree felony, punishable by a maximum of three years in prison, rather than a fourth-degree felony punishable by up to five years. But the crime is still a fourth-degree felony if "the act occurs in disregard of the other person's expressed unwillingness, or is so sudden or unexpected that the other person has no adequate opportunity to express unwillingness before the act occurs." *Id.* § 213.4(2).

CHAPTER 8

THEFT

[B] LARCENY

[1] THE HISTORY AND ELEMENTS OF LARCENY AND THE TYPE OF PROPERTY THAT CAN BE STOLEN

Page 541: Add to the end of Note 4(a):

The Supreme Court has agreed to resolve the conflict among the lower courts on the question whether the CFAA provision prohibiting "exceed[ing] authorized access" to a computer covers cases where an individual is allowed to access information on a computer for some purposes but does so for an impermissible purpose. *See Van Buren v. United States*, No. 19-783 (cert. granted, Apr. 20, 2020).

[D] FALSE PRETENSES

Page 614: Add to the end of Note 1:

In *Kelly v. United States*, 140 S. Ct. 1565 (2020), the Court reversed federal fraud convictions in a case that grew out of the notorious "Bridgegate" scandal, where public officials changed the lane alignment on the George Washington Bridge in order to punish the mayor of Fort Lee, New Jersey, for not endorsing then-Governor Chris Christie for re-election. Bridget Kelly, Christie's deputy chief of staff, and William Baroni, Deputy Executive Director of the Port Authority, were convicted on charges that they engaged in wire fraud and defrauded a federally funded program when they falsely claimed the lanes were changed to conduct a traffic study. Citing its prior decision in *Skilling*, a unanimous Supreme Court reversed the convictions on the ground that the two federal fraud statutes prohibited deceptive attempts to obtain money or property and the defendants were seeking "political payback" rather than money or property. For the view that the Court's ruling "clearly establishes that a scheme that has only an incidental effect on property interests is not a covered offense" and may have an impact on the "Varsity Blues" prosecutions alleging corruption in the college admissions process, see Steven D. Gordon, *'Bridgegate' Decision May Impact 'Varsity Blues' Prosecutions*, BLOOMBERG LAW, May 29, 2020, https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-bridgegate-decision-may-impact-varsity-blues-prosecutions.

CHAPTER 9

AGGRAVATED PROPERTY CRIMES

[A] ROBBERY

Page 631: Add to Note 3:

In *Stokeling v. United States*, 139 S. Ct. 544 (2019), the Supreme Court held that Florida's robbery statute, which requires proof that the defendant used force sufficient to overcome the victim's resistance, "necessitates the use of 'physical force'" and is therefore categorically a "violent felony" under the federal Armed Career Criminal Act (ACCA). The five Justices in the majority rejected the dissenters' view that the crime should not qualify as a violent felony because the Florida appellate courts had interpreted the robbery statute to apply in cases involving only "slight" or "minimal" force, such as "a pickpocket who attempts to pull free after the victim catches his arm." Justice Thomas' majority opinion reasoned that the Florida statute mirrored the common-law definition of robbery, as well as the definition of the crime in many states, and "declined to construe the [ACCA] in a way that would render it inapplicable in many States."

Page 637: Add to Note 12:

In 2017, after serving nine years of his sentence, O.J. Simpson was released on parole because of his age (70 years at that time) and his good behavior in prison. *See* Richard Pérez-Peña, *Simpson Gets Parole After Nine Years*, BOS. GLOBE, July 21, 2017, at A2.

[B] EXTORTION

Page 649: Add to the end of Note 5:

Michael Avenatti, the celebrity lawyer best known for representing adult film star Stormy Daniels in lawsuits against President Donald Trump, was convicted of charges including attempted extortion when he threatened to reveal that Nike had funneled money to NCAA men's basketball recruits in violation of league rules unless Nike paid him $22.5 million. Avenatti, who prosecutors claimed engaged in "'an old fashioned shakedown,'" faces up to 40 years in prison. He plans to appeal the conviction. Avenatti is also facing other charges, including embezzlement of funds from Daniels. *See* Rebecca R. Ruiz, *Jury Convicts Avenatti in Nike Extortion Case*, N.Y. TIMES, Feb. 15, 2020, at A17.

Page 657: Add Note 3:

3. Journalistic Blackmail? Jeff Bezos, the founder of Amazon and owner of The Washington Post, wrote a blog post accusing The National Enquirer of threatening to publish photographs of him, including a "'below the belt selfie,'" unless he stated publicly that the newspaper's disclosure of his extramarital affair was not "'politically motivated or influenced by political forces.'" Federal prosecutors are reportedly investigating Bezos' allegations. *See* Peter J. Henning, *Proving Jeff Bezos' Claims of Blackmail and Extortion Could Be Tricky*, N.Y. TIMES,

Feb. 25, 2019; *see also* Lukas I. Alpert & Laura Stevens, *Bezos Accuses Tabloid of Blackmail*, WALL STREET J., Feb. 8, 2019, at A1; Corinne Ramey & Joe Palazzolo, *Jeff Bezos Sued by Girlfriend's Brother*, WALL STREET J., Feb. 3, 2020, at A3.

As the Second Circuit observed in *United States v. Jackson* (casebook page 652), 18 U.S.C. § 875(d) criminalizes the "intent to extort from any person ... any money or other thing of value" in "any communication containing any threat to injure the property or reputation ... of another." Should a statement from Bezos exonerating the newspaper's motives constitute a "thing of value"? Was The National Enquirer's threat to disclose intimate nude pictures classic blackmail or simply a newspaper exercising its First Amendment right to solicit quotations?

[D] BURGLARY

Page 689: Add to Note 5:

In *United States v. Stitt*, 139 S. Ct. 399, 403-04 (2018), the Court held that the burglary of "a structure or vehicle that has been adapted or is customarily used for overnight accommodation" – such as a mobile home, trailer, or tent – can qualify as a "burglary" under the federal Armed Career Criminal Act.

Page 691: Add to Note 8:

A majority of states have expanded the common-law crime of burglary to include "remaining-in" burglary, cases where the defendant initially entered legally but then illegally remained in the building with the intent to commit a crime – for example, entered a department store legally but stayed without permission after the store closed. In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court defined burglary for purposes of the federal Armed Career Criminal Act (ACCA) as the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Then, in *Quarles v. United States*, 139 S. Ct. 1872 (2019), the Court followed the approach taken in a number of states and held that remaining-in burglary under the ACCA does not require that the defendant have "the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure," but includes cases where the defendant "forms the intent to commit a crime *at any time* while unlawfully remaining." "Put simply," the Court explained, "for burglary predicated on unlawful *entry*, the defendant must have the intent to commit a crime at the time of entry," but "[f]or burglary predicated on unlawful *remaining*, the defendant must have the intent to commit a crime at the time of remaining, which is any time during which the defendant unlawfully remains."

CHAPTER 11

ATTEMPT AND SOLICITATION

[A] ATTEMPT

[2] THE ELEMENTS OF ATTEMPT

Page 749: Add to Note 6:

In *State v. Sawyer*, 187 A.3d 377 (Vt. 2018), a recent case applying the common law's physical proximity test, the Vermont Supreme Court found insufficient evidence that Jack Sawyer, who told police he had planned to commit a mass shooting at his former high school, had satisfied the actus reus requirement for the crime of attempt. Sawyer had written about his plans in a journal, had selected a date for the shooting, had a shotgun and 17 rounds of ammunition in his possession, planned to buy a handgun and observe the school resource officer's daily routine, and told police that "he wanted to exceed the body count from the Virginia Tech shooting." Reasoning that, under Vermont law, an attempt is "'the direct movement toward the commission [of the crime] after the preparations are made'" – "a preparatory act 'such as would be likely to end, if not extraneously interrupted, in the consummation of the crime'" – the court noted that its precedent made clear that, "despite a showing of the intent to commit the offense, obtaining the tools necessary to complete an intended crime did not constitute an attempt to commit that crime." Concluding that Sawyer had committed "no act that was the 'commencement of the consummation' of the crimes he [was] charged with," the court held that he could not be detained without bail. As a result of the court's ruling, the prosecution dropped the felony charges against Sawyer and charged him with the misdemeanor offenses of criminal threatening and carrying a dangerous weapon.

Within weeks of the court's decision, the Vermont legislature passed a bill criminalizing "domestic terrorism," defined as willfully "taking a substantial step to commit a violation" of the state's criminal laws with the intent either to "cause death or serious bodily injury to multiple persons" or to "threaten any civilian population with mass destruction, mass killings, or kidnapping." The statute defines a "substantial step" as "conduct that is strongly corroborative of the actor's intent to complete the commission of the offense." 13 Vt. Stat. Ann. § 1703. In addition, the legislature passed gun-control legislation that expanded background checks for firearms purchases, banned bump stocks, raised the minimum age for purchasing a gun to 21, limited the size of magazines to 10 rounds, and allowed police to take weapons away from individuals deemed to pose a significant threat to themselves or others. *See Vermont Evolves on Guns, Led by GOP Governor*, BOS. GLOBE, Apr. 13, 2018, at A10.

CHAPTER 12

ACCOMPLICE LIABILITY

[E] ACCESSORY AFTER THE FACT AND OBSTRUCTION OF JUSTICE

Page 821: Add to Note 1:

In *Marinello v. United States*, 138 S. Ct. 1101, 1104 (2018), the Court relied on *Aguilar* in holding that a similarly worded statute involving obstruction of "the due administration" of the federal tax code requires proof that the defendant was aware of a pending tax-related proceeding, such as "a particular investigation or audit." The Court rejected the argument that the statute broadly "cover[s] routine administrative procedures that are near-universally applied to all taxpayers, such as the ordinary processing of income tax returns."

Page 822: Add to the end of Note 1:

In March of 2019, Special Counsel Robert S. Mueller, III submitted a report to the Attorney General in connection with the investigation of an alleged conspiracy between Russia and the Trump presidential campaign to interfere with the presidential election. The report concluded that, while "Russia's … interference operations in the 2016 U.S. presidential election … violated U.S. criminal law" and "the investigation identified numerous links between individuals with ties to the Russian government and individuals associated with the Trump Campaign,… the evidence was not sufficient to charge that any member of the Trump Campaign conspired with representatives of the Russian government to interfere in the 2016 election." 1 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 9 (March 2019) [hereinafter MUELLER REPORT], *available at* file:///C:/Users/kxk47/AppData/Local/Temp/report.pdf.

With respect to allegations that President Trump was guilty of criminal obstruction of justice related to the investigation, while the Report "does not conclude that the President committed a crime, it also does not exonerate him." 2 MUELLER REPORT, *supra*, at 8. The Report noted that "[t]he evidence we obtained about the President's actions and intent present difficult issues that would need to be resolved if we were making a traditional prosecutorial judgment." *Id.* But the Report declined to make such a judgment on the assumption that a president cannot be charged with a crime while in office outside of impeachment proceedings conducted by Congress.

The Report's executive summary of "the factual results of the obstruction investigation" outlined "[t]he key issues and events we examined," summarizing 11 instances of potential obstruction of justice by President Trump:

> **The Campaign's response to reports about Russian support for Trump.** During the 2016 presidential campaign, questions arose about the Russian government's apparent support for candidate Trump. After WikiLeaks released politically damaging Democratic Party emails that were reported to have been hacked by Russia, Trump publicly expressed skepticism that Russia was responsible for the hacks at the same time that he and

other Campaign officials privately sought information [redacted because of Harm to Ongoing Matter] about any further planned WikiLeaks releases. Trump also denied having any business in or connections to Russia, even though as late as June 2016 the Trump Organization had been pursuing a licensing deal for a skyscraper to be built in Russia called Trump Tower Moscow. After the election, the President expressed concerns to advisors that reports of Russia's election interference might lead the public to question the legitimacy of his election.

Conduct involving FBI Director Comey and Michael Flynn. In mid-January 2017, incoming National Security Advisor Michael Flynn falsely denied to the Vice President, other administration officials, and FBI agents that he had talked to Russian Ambassador Sergey Kislyak about Russia's response to U.S. sanctions on Russia for its election interference. On January 27, the day after the President was told that Flynn had lied to the Vice President and had made similar statements to the FBI, the President invited FBI Director Comey to a private dinner at the White House and told Comey that he needed loyalty. On February 14, the day after the President requested Flynn's resignation, the President told an outside advisor, "Now that we fired Flynn, the Russia thing is over." The advisor disagreed and said the investigations would continue.

Later that afternoon, the President cleared the Oval Office to have a one-on-one meeting with Comey. Referring to the FBI's investigation of Flynn, the President said, "I hope you can see your way clear to letting this go, to letting Flynn go. He is a good guy. I hope you can let this go." Shortly after requesting Flynn's resignation and speaking privately to Comey, the President sought to have Deputy National Security Advisor K.T. McFarland draft an internal letter stating that the President had not directed Flynn to discuss sanctions with Kislyak. McFarland declined because she did not know whether that was true, and a White House Counsel's Office attorney thought that the request would look like a quid pro quo for an ambassadorship she had been offered.

The President's reaction to the continuing Russia investigation. In February 2017, Attorney General Jeff Sessions began to assess whether he had to recuse himself from campaign-related investigations because of his role in the Trump Campaign. In early March, the President told White House Counsel Donald McGahn to stop Sessions from recusing. And after Sessions announced his recusal on March 2, the President expressed anger at the decision and told advisors that he should have an Attorney General who would protect him. That weekend, the President took Sessions aside at an event and urged him to "unrecuse." Later in March, Comey publicly disclosed at a congressional hearing that the FBI was investigating "the Russian government's efforts to interfere in the 2016 presidential election," including any links or coordination between the Russian government and the Trump Campaign. In the following days, the President reached out to the Director of National Intelligence and the leaders of the Central Intelligence Agency (CIA) and the National Security Agency (NSA) to ask them what they could do to publicly dispel the suggestion that the President had any connection to the Russian election-interference effort. The President also twice called Comey directly, notwithstanding guidance from McGahn to avoid direct contacts with the Department of Justice. Comey had previously assured the

President that the FBI was not investigating him personally, and the President asked Comey to "lift the cloud" of the Russia investigation by saying that publicly.

The President's termination of Comey. On May 3, 2017, Comey testified in a congressional hearing, but declined to answer questions about whether the President was personally under investigation. Within days, the President decided to terminate Comey. The President insisted that the termination letter, which was written for public release, state that Comey had informed the President that he was not under investigation. The day of the firing, the White House maintained that Comey's termination resulted from independent recommendations from the Attorney General and Deputy Attorney General that Comey should be discharged for mishandling the Hillary Clinton email investigation. But the President had decided to fire Comey before hearing from the Department of Justice. The day after firing Comey, the President told Russian officials that he had "faced great pressure because of Russia," which had been "taken off" by Comey's firing. The next day, the President acknowledged in a television interview that he was going to fire Comey regardless of the Department of Justice's recommendation and that when he "decided to just do it," he was thinking that "this thing with Trump and Russia is a made-up story." In response to a question about whether he was angry with Comey about the Russia investigation, the President said, "As far as I'm concerned, I want that thing to be absolutely done properly," adding that firing Comey "might even lengthen out the investigation."

The appointment of a Special Counsel and efforts to remove him. On May 17, 2017, the Acting Attorney General for the Russia investigation appointed a Special Counsel to conduct the investigation and related matters. The President reacted to news that a Special Counsel had been appointed by telling advisors that it was "the end of his presidency" and demanding that Sessions resign. Sessions submitted his resignation, but the President ultimately did not accept it. The President told aides that the Special Counsel had conflicts of interest and suggested that the Special Counsel therefore could not serve. The President's advisors told him the asserted conflicts were meritless and had already been considered by the Department of Justice.

On June 14, 2017, the media reported that the Special Counsel's Office was investigating whether the President had obstructed justice. Press reports called this "a major turning point" in the investigation: while Comey had told the President he was not under investigation, following Comey's firing, the President now was under investigation. The President reacted to this news with a series of tweets criticizing the Department of Justice and the Special Counsel's investigation. On June 17, 2017, the President called McGahn at home and directed him to call the Acting Attorney General and say that the Special Counsel had conflicts of interest and must be removed. McGahn did not carry out the direction, however, deciding that he would resign rather than trigger what he regarded as a potential Saturday Night Massacre.

Efforts to curtail the Special Counsel's investigation. Two days after directing McGahn to have the Special Counsel removed, the President made another attempt to affect the course of the Russia investigation. On June 19, 2017, the President met one-on-one in the Oval Office with his former campaign manager Corey Lewandowski, a trusted advisor

outside the government, and dictated a message for Lewandowski to deliver to Sessions. The message said that Sessions should publicly announce that, notwithstanding his recusal from the Russia investigation, the investigation was "very unfair" to the President, the President had done nothing wrong, and Sessions planned to meet with the Special Counsel and "let [him] move forward with investigating election meddling for future elections." Lewandowski said he understood what the President wanted Sessions to do.

One month later, in another private meeting with Lewandowski on July 19, 2017, the President asked about the status of his message for Sessions to limit the Special Counsel investigation to future election interference. Lewandowski told the President that the message would be delivered soon. Hours after that meeting, the President publicly criticized Sessions in an interview with the New York Times, and then issued a series of tweets making it clear that Sessions's job was in jeopardy. Lewandowski did not want to deliver the President's message personally, so he asked senior White House official Rick Dearborn to deliver it to Sessions. Dearborn was uncomfortable with the task and did not follow through.

Efforts to prevent public disclosure of evidence. In the summer of 2017, the President learned that media outlets were asking questions about the June 9, 2016 meeting at Trump Tower between senior campaign officials, including Donald Trump Jr., and a Russian lawyer who was said to be offering damaging information about Hillary Clinton as "part of Russia and its government's support for Mr. Trump." On several occasions, the President directed aides not to publicly disclose the emails setting up the June 9 meeting, suggesting that the emails would not leak and that the number of lawyers with access to them should be limited. Before the emails became public, the President edited a press statement for Trump Jr. by deleting a line that acknowledged that the meeting was with "an individual who [Trump Jr.] was told might have information helpful to the campaign" and instead said only that the meeting was about adoptions of Russian children. When the press asked questions about the President's involvement in Trump Jr.'s statement, the President's personal lawyer repeatedly denied the President had played any role.

Further efforts to have the Attorney General take control of the investigation. In early summer 2017, the President called Sessions at home and again asked him to reverse his recusal from the Russia investigation. Sessions did not reverse his recusal. In October 2017, the President met privately with Sessions in the Oval Office and asked him to "take [a] look" at investigating Clinton. In December 2017, shortly after Flynn pleaded guilty pursuant to a cooperation agreement, the President met with Sessions in the Oval Office and suggested, according to notes taken by a senior advisor, that if Sessions unrecused and took back supervision of the Russia investigation, he would be a "hero." The President told Sessions, "I'm not going to do anything or direct you to do anything. I just want to be treated fairly." In response, Sessions volunteered that he had never seen anything "improper" on the campaign and told the President there was a "whole new leadership team" in place. He did not unrecuse.

Efforts to have McGahn deny that the President had ordered him to have the Special Counsel removed. In early 2018, the press reported that the President had directed

McGahn to have the Special Counsel removed in June 2017 and that McGahn had threatened to resign rather than carry out the order. The President reacted to the news stories by directing White House officials to tell McGahn to dispute the story and create a record stating he had not been ordered to have the Special Counsel removed. McGahn told those officials that the media reports were accurate in stating that the President had directed McGahn to have the Special Counsel removed. The President then met with McGahn in the Oval Office and again pressured him to deny the reports. In the same meeting, the President also asked McGahn why he had told the Special Counsel about the President's effort to remove the Special Counsel and why McGahn took notes of his conversations with the President. McGahn refused to back away from what he remembered happening and perceived the President to be testing his mettle.

Conduct towards Flynn, Manafort, [redacted because of Harm to Ongoing Matter]. After Flynn withdrew from a joint defense agreement with the President and began cooperating with the government, the President's personal counsel left a message for Flynn's attorneys reminding them of the President's warm feelings towards Flynn, which he said "still remains," and asking for a "heads up" if Flynn knew "information that implicates the President." When Flynn's counsel reiterated that Flynn could no longer share information pursuant to a joint defense agreement, the President's personal counsel said he would make sure that the President knew that Flynn's actions reflected "hostility" towards the President. During Manafort's prosecution and when the jury in his criminal trial was deliberating, the President praised Manafort in public, said that Manafort was being treated unfairly, and declined to rule out a pardon. After Manafort was convicted, the President called Manafort "a brave man" for refusing to "break" and said that "flipping" "almost ought to be outlawed." [Redacted because of Harm to Ongoing Matter.]

Conduct involving Michael Cohen. The President's conduct towards Michael Cohen, a former Trump Organization executive, changed from praise for Cohen when he falsely minimized the President's involvement in the Trump Tower Moscow project, to castigation of Cohen when he became a cooperating witness. From September 2015 to June 2016, Cohen had pursued the Trump Tower Moscow project on behalf of the Trump Organization and had briefed candidate Trump on the project numerous times, including discussing whether Trump should travel to Russia to advance the deal. In 2017, Cohen provided false testimony to Congress about the project, including stating that he had only briefed Trump on the project three times and never discussed travel to Russia with him, in an effort to adhere to a "party line" that Cohen said was developed to minimize the President's connections to Russia. While preparing for his congressional testimony, Cohen had extensive discussions with the President's personal counsel, who, according to Cohen, said that Cohen should "stay on message" and not contradict the President. After the FBI searched Cohen's home and office in April 2018, the President publicly asserted that Cohen would not "flip," contacted him directly to tell him to "stay strong," and privately passed messages of support to him. Cohen also discussed pardons with the President's personal counsel and believed that if he stayed on message he would be taken care of. But after Cohen began cooperating with the government in the summer of 2018, the President publicly criticized him, called him a "rat," and suggested that his family members had committed crimes.

> **Overarching factual issues.** We did not make a traditional prosecution decision about these facts, but the evidence we obtained supports several general statements about the President's conduct.
>
> Several features of the conduct we investigated distinguish it from typical obstruction-of-justice cases. First, the investigation concerned the President, and some of his actions, such as firing the FBI director, involved facially lawful acts within his Article II authority, which raises constitutional issues … . At the same time, the President's position as the head of the Executive Branch provided him with unique and powerful means of influencing official proceedings, subordinate officers, and potential witnesses – all of which is relevant to a potential obstruction-of-justice analysis. Second, unlike cases in which a subject engages in obstruction of justice to cover up a crime, the evidence we obtained did not establish that the President was involved in an underlying crime related to Russian election interference. Although the obstruction statutes do not require proof of such a crime, the absence of that evidence affects the analysis of the President's intent and requires consideration of other possible motives for his conduct. Third, many of the President's acts directed at witnesses, including discouragement of cooperation with the government and suggestions of possible future pardons, took place in public view. That circumstance is unusual, but no principle of law excludes public acts from the reach of the obstruction laws. If the likely effect of public acts is to influence witnesses or alter their testimony, the harm to the justice system's integrity is the same.
>
> Although the series of events we investigated involved discrete acts, the overall pattern of the President's conduct towards the investigations can shed light on the nature of the President's acts and the inferences that can be drawn about his intent. In particular, the actions we investigated can be divided into two phases, reflecting a possible shift in the President's motives. The first phase covered the period from the President's first interactions with Comey through the President's firing of Comey. During that time, the President had been repeatedly told he was not personally under investigation. Soon after the firing of Comey and the appointment of the Special Counsel, however, the President became aware that his own conduct was being investigated in an obstruction-of-justice inquiry. At that point, the President engaged in a second phase of conduct, involving public attacks on the investigation, non-public efforts to control it, and efforts in both public and private to encourage witnesses not to cooperate with the investigation. Judgments about the nature of the President's motives during each phase would be informed by the totality of the evidence.

Id. at 3-7. Following the release of the Mueller Report, Attorney General William Barr took the view that President Trump had not engaged in the obstruction of justice. *See* Mark Mazzetti & Katie Benner, *Mueller Report Finds No Collusion on Russia*, BOS. GLOBE, Mar. 25, 2019, at A1. *But see* Charlie Savage, *Evaluating the Clues Left on Obstruction*, N.Y. TIMES, Apr. 24, 2019, at A13 (concluding that the Mueller Report "suggests there is sufficiently plausible evidence to ask a grand jury to consider charging Mr. Trump with attempted obstruction" with respect to some of the 11 instances described above); *Statement by Former Federal Prosecutors*, MEDIUM (May 6, 2019), https://medium.com/@dojalumni/statement-by-former-federal-prosecutors-8ab7691c2aa1

(last visited June 10, 2020) (open letter signed by more than 1,000 former federal prosecutors, who believe that the actions described in the Mueller Report "would, in the case of any other person not covered by the Office of Legal Counsel policy against indicting a sitting President, result in multiple felony charges for obstruction of justice").

The Supreme Court has agreed to review the D.C. Circuit's ruling that the House Judiciary Committee was entitled to access some of the redacted portions of the Mueller Report, as well as secret grand jury transcripts, to use in its impeachment investigation. Federal Rule of Criminal Procedure 6(e)(3)(E)(i) permits a judge to allow the disclosure of secret grand jury materials "in connection with a judicial proceeding," and the question before the Court is whether a congressional impeachment trial is a "judicial proceeding" within the meaning of the rule. *See Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (cert. granted, July 2, 2020).

In two cases challenging subpoenas issued for President Trump's financial records, the Supreme Court held, first, that a sitting president is not absolutely immune from state criminal processes and that the Constitution does not "categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting President." The Court's decision thus allows the Manhattan District Attorney to subpoena President Trump's personal accountant for his financial and tax records, although the President may still challenge the subpoena on the grounds that it is "overly broad or unreasonably burdensome" or would interfere with his official duties. *Trump v. Vance*, 140 S. Ct. – (2020).

But the Court reversed two lower court decisions allowing House Committees to subpoena the President's financial records for use in considering legislation concerning financial disclosure requirements for presidential candidates and ways to strengthen national security and fight foreign influence over the country's political process. Although the Court rejected the President's position that congressional subpoenas seeking unprivileged private financial records have to meet the strict standards for subpoenas seeking communications between the President and close advisers that are protected by executive privilege, the Court remanded the cases to the lower courts on the ground that they had not paid sufficient attention to "the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the President." *Trump v. Mazars USA, LLP*, 140 S. Ct. – (2020).

For further discussion of the issue of presidential obstruction of justice, see, for example, Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. U. L. REV. 905, 906-07 (2019) (predicting that the courts will "almost certainly … recognize total immunity from the criminal process for the President with respect to official conduct," and arguing that "nothing in the Constitution … expressly prohibits or limits the President from issuing a self-pardon"); Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1278, 1282-83 (2018) (maintaining that a president obstructs justice "when he uses his office" – for example, by "intervening in an investigation" – "to pursue personal, pecuniary, and narrowly partisan objectives" and that, "if a president pardons someone in order to obstruct justice, the president may be guilty of a crime even if the pardon itself is valid").

CHAPTER 13

CONSPIRACY

[B] THE SCOPE OF CONSPIRACY LIABILITY

[2] THE STRUCTURE OF CONSPIRACIES: SINGLE VERSUS MULTIPLE CONSPIRACIES, AND "CHAINS" VERSUS "WHEELS"

Page 865: Add to Note 7:

See also Peter J. Henning, *Was the College Admissions Scandal a Conspiracy, or Did Prosecutors Overreach?*, N.Y. TIMES, Apr. 29, 2019 (questioning whether federal prosecutors may have "overreached in trying to link in a single conspiracy [to engage in money laundering and mail and wire fraud] 19 of the 33 parents" charged in the widely publicized college admissions scandal, and noting that "it is difficult to see … [a] 'rim'" in this wheel conspiracy that "can link … into one agreement" parents who may not have known one another, who allegedly bribed officials at different colleges, and whose "success … did not depend on the presence of others").

[C] MODERN APPLICATIONS OF CONSPIRACY LAW

[1] CONSPIRACY CHARGES IN POST 9/11 TERRORISM CASES

Page 870: Add to the end of the second paragraph:

The Supreme Court denied certiorari in Al Bahlul's case. *See Al Bahlul v. United States*, 138 S. Ct. 313 (2017).

CHAPTER 14

JUSTIFICATION

[B] SELF-DEFENSE

Page 895: Add to Note 7:

South Africa's Supreme Court of Appeal agreed with the prosecution's challenge to the six-year prison sentence imposed on Oscar Pistorius. The court more than doubled the sentence, to 15 years, leaving Pistorius to serve more than 13 years after he was credited for the time he had already spent in prison or under house arrest. *See* Alan Cowell, *Murder Sentence for Olympic Amputee Is Increased to 15 Years in South Africa*, N.Y. TIMES, Nov. 25, 2017, at A4.

Page 905: Add to Footnote 5:

For an extensive discussion of the *Norman* case based on the trial transcript and public records, see Martha R. Mahoney, *Misunderstanding Judy Norman: Theory as Cause and Consequence*, 51 CONN. L. REV. 671 (2019).

Page 921: Add to Note 1:

In 2017, the Florida legislature expanded the immunity granted by the state's stand-your-ground law. The new version of the statute requires prosecutors in the pretrial immunity hearing to shoulder the burden of proving by clear and convincing evidence that the defendant did not act in self-defense, a burden that previously was imposed on the defense by a preponderance of the evidence. *See* Fla. Stat. § 776.032. In *Love v. State*, 286 So. 3d 177 (Fla. 2019), the Florida Supreme Court held that the amended statute applied to pending cases so long as the immunity hearing was held after the statute's effective date.

Page 921: Add to Note 2:

Amber Guyger, an off-duty white Dallas police officer, was charged with murder when she entered the apartment one floor above her own and shot the resident of that apartment, Botham Jean, an Afro-Caribbean accountant who was sitting on the living room sofa watching television and eating a bowl of ice cream. Guyger testified that she thought she was in her own home and that Jean was an intruder. Even though she was in the wrong apartment and claimed she didn't notice the illuminated apartment number on the door or Jean's red doormat, the judge instructed the jurors that they could consider the castle doctrine. But the jury rejected Guyger's self-defense claim, convicting her of murder and sentencing her to 10 years in prison. *See* Marina Trahan Martinez, *Ex-Officer Is Guilty of Murder in Neighbor's Death*, N.Y. TIMES, Oct. 2, 2019, at A11; Reis Thebault & Brittany Shammas, *Officer Who Fatally Shot Neighbor Found Guilty of Murder*, WASH. POST, Oct. 2, 2019, at A3.

[C] OTHER USES OF DEFENSIVE FORCE

[2] LAW ENFORCEMENT

Page 936: Add to Note 1:

For an article that discusses law enforcement's use of robots to kill suspected felons and argues that, even when police are authorized to use deadly force, the Constitution still governs the type and magnitude of lethal force that is used, see Melissa Hamilton, *Excessive Lethal Force*, 111 NW. U. L. REV. 1167 (2017).

Page 937: Add to Note 3:

In 2019, the California legislature enacted one of the country's most restrictive laws governing police use of deadly force. The law allows deadly force "only when necessary in defense of human life." Specifically, the officer must "reasonably believe[], based on the totality of the circumstances" – i.e., "all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force" – that deadly force is necessary either (1) to "defend against an imminent threat of death or serious bodily injury" to the officer or a third person or (2) to "apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended." Cal. Penal Code § 835a. The former version of the statute allowed police to use reasonable force to effect an arrest or prevent an escape. The amendments were prompted by the 2018 death of Stephon Clark, a 23-year-old African-American man who was shot by two Sacramento police officers while he was in his grandmother's backyard holding a cell phone that the officers mistook for a gun. *See* Anita Chabria, *'Stephon Clark's Law' Is Official*, L.A. TIMES, Aug. 20, 2019, at B1.

Page 938: Add to Note 5:

For an empirical study finding that about one of every 1,000 African-American men in the United States will die at the hands of the police, see Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROCEEDINGS OF NAT'L ACAD. SCI. 16,793 (2019). *See also* Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 951 (2020) (pointing out that police have killed more than 1000 civilians every year since 2013 and concluding, based on a study of the almost 4000 such killings that occurred from 2015 through 2018, that African-Americans are more than twice as likely to be the victims of police killings than other racial or ethnic groups "even when there are no other obvious circumstances during the encounter that would make the use of deadly force reasonable" and that killings of Latinx individuals are "higher compared to whites and other racial or ethnic groups in some but not all circumstances").

Michael Slager was sentenced to 20 years in prison in connection with the shooting of Walter Scott. The Fourth Circuit affirmed his sentence, and the Supreme Court denied his petition for review. *See United States v. Slager*, 912 F.3d 224 (4th Cir.), *cert. denied*, 139 S. Ct. 2679 (2019).

The civil suit filed by Michael Brown's family was settled for $1.5 million. *See News Briefing*, CHI. TRIB., June 24, 2017, at C6.

Concluding that Jason Van Dyke was unreasonably afraid when he shot Laquan McDonald, the jury convicted Van Dyke of second-degree murder and 16 counts of aggravated battery with a firearm in connection with the teenager's death. Although prosecutors sought a sentence of 18 to 20 years, Van Dyke was sentenced to just under seven years in prison. The prosecution asked the state supreme court to order that he be resentenced, but the court declined to consider the case. Van Dyke is appealing his conviction. His partner and two other officers were acquitted of conspiracy and obstruction of justice charges based on allegations that they falsified reports describing the shooting, but four other officers were fired for covering up the circumstances surrounding McDonald's death. The four officers are challenging their termination. *See* Megan Crepeau et al., *Van Dyke Convicted, Taken into Custody*, CHI. TRIB., Oct. 6, 2018, at C1; Megan Crepeau et al., *Top Court Rejects Bid to Resentence Van Dyke*, CHI. TRIB., Mar. 20, 2019, at C1; Jeremy Gorner, *4 Cops Fired in McDonald Slaying*, CHI. TRIB., July 19, 2019, at C1.

The Justice Department declined to file civil rights charges against Daniel Pantaleo in connection with the death of Eric Garner, but New York City's Civilian Complaint Review Board initiated disciplinary proceedings against the officer. The hearing ended with Pantaleo's decision not to testify, and a police administrative judge decided that he committed reckless assault and violated police department policy banning chokeholds. The police commissioner subsequently fired Pantaleo and denied him retirement benefits. Pantaleo is challenging that decision in court. *See* Ashley Southall, *Daniel Pantaleo, Officer Who Held Eric Garner in Chokehold, Is Fired*, N.Y. TIMES, Aug. 19, 2019; Ben Chapman, *Officer Fired over Garner Death Sues to Get Job Back*, WALL STREET J., Oct. 25, 2019, at A11.

In a case reminiscent of Garner's, George Floyd died after a Minneapolis police officer, Derek Chauvin, placed his knee on Floyd's neck for almost nine minutes, including almost three minutes after the man became unresponsive. Floyd, who was unarmed, had been arrested for trying to pass a counterfeit $20 bill to buy cigarettes. He had been handcuffed but reportedly was resisting arrest when Chauvin pulled him out of a police car and placed his knee on Floyd's neck, ignoring Floyd's repeated statements that he couldn't breathe and onlookers' pleas on Floyd's behalf. The four officers involved were fired after a bystander's video of the death was released. Chauvin has been charged with felony murder based on the underlying felony of assault (Minnesota does not recognize the merger exception to felony murder) as well as depraved-heart murder and involuntary manslaughter. The other three officers have been charged as accomplices to felony murder and to involuntary manslaughter. Floyd's death led to weeks of protests around the world and calls for police department reforms. *See What We Know About the Death of George Floyd in Minneapolis*, N.Y. TIMES, June 1, 2020; *Live Updates on George Floyd Protests: Congress to Debate Police Reforms*, N.Y. TIMES, June 8, 2020.

Protests also surrounded the death of Breonna Taylor, an EMT in Louisville, Kentucky, after police officers executing a no-knock warrant used a battering ram to enter her apartment after midnight. The officers believed that a suspected drug dealer, who had already been located by police elsewhere in the city, had used Taylor's apartment to receive mail and store drugs and drug money. There is a dispute whether the police did identify themselves before entering the

apartment, but Taylor was shot at least eight times when the officers responded to a shot fired by her boyfriend, Kenneth Walker, who said the couple was in bed and he mistook the police for intruders. Walker was initially charged with attempted murder of a police officer, but the charge was dropped pending additional investigation. No drugs were found in Taylor's apartment. One officer has been fired and the other two placed on administrative leave, and the FBI is investigating the case. *See* Richard A. Oppel Jr. & Derrick Bryson Taylor, *Here's What You Need to Know About Breonna Taylor's Death*, N.Y. TIMES, June 28, 2020.

In response to these recent deaths, reform legislation was introduced in Congress in June of 2020. The Justice in Policing Act of 2020, H.R. 7120, would ban chokeholds and carotid holds, require police to use de-escalation tactics before resorting to deadly force, and permit deadly force only when necessary to prevent death or serious bodily harm. The bill would also, among other things, require body cameras, prohibit discriminatory profiling, mandate police training, require data collection on all investigatory activities, ban no-knock warrants, limit the transfer of military equipment to state and local police, prevent law enforcement officials from using the qualified immunity defense in federal civil rights suits, and create a federal registry of police misconduct complaints and disciplinary records. The House has passed the bill, but it is stalled in the Senate. *See* Nicholas Fandos, *Democrats to Propose Broad Bill to Target Police Misconduct and Racial Bias*, N.Y. TIMES, June 23, 2020; Lisa Mascaro, *Congress Split on Policing Changes*, CHI. TRIB., June 26, 2020, at C9.

Page 941: Add to the end of Note 6:

The controversy surrounding private citizens' use of force for law enforcement purposes has recently received national attention in connection with the February 2020 death of Ahmaud Arbery, a 25-year-old African-American man, in Georgia. A former police officer, Gregory McMichael, noticed Arbery running in the neighborhood and thought he looked like the person suspected of several recent break-ins in the area. McMichael and his son Travis armed themselves and chased after Arbery in a truck. Following a confrontation, the unarmed Arbery was fatally shot by Travis, who reportedly directed a racial slur at Arbery as he was dying. A third person, Roddie Bryan, who filmed a video of the incident, allegedly helped pursue and corner Arbery. All three men have been indicted for intentional murder, felony murder, aggravated assault, and attempted false imprisonment. *See* Richard Fausset, *Suspects in Ahmaud Arbery's Killing Are Indicted on Murder Charges*, N.Y. TIMES, June 26, 2020; *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES, June 29, 2020.

Under Georgia law, a citizen may make an arrest either if a crime is "committed in his presence or within his immediate knowledge" or "upon reasonable and probable grounds of suspicion" if the crime is a felony and the suspect is attempting to escape. Ga. Code Ann. § 17-4-60. For discussion of the history of the citizen's arrest doctrine and the variations in state statutes, see Ira P. Robbins, *Vilifying the Vigilante: A Narrowed Scope of Citizen's Arrest*, 25 CORNELL J.L. & PUB. POL'Y 557 (2016).

[D] NECESSITY

Page 953: Add to Note 7(a):

The number of states permitting the use of medical marijuana has increased to 33, in addition to the District of Columbia; 11 of those states, as well as D.C., also permit the recreational use of marijuana. *See Legal Medical Marijuana States and DC*, PROCON.ORG, https://medicalmarijuana.procon.org/legal-medical-marijuana-states-and-dc/.

Page 954: Add to the end of Note 7(a):

In 2018, then-Attorney General Jeff Sessions rescinded the Obama administration's 2013 policy of deferring to the states in prosecuting the use of marijuana. Noting that federal narcotics statutes "reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime," Sessions directed federal prosecutors to "follow the well-established principles that govern all federal prosecutions" in deciding when to bring charges in cases involving marijuana. *See* Memorandum for All United States Attorneys, Marijuana Enforcement (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

Sessions also asked Congress to lift the Rohrabacher-Blumenauer amendment (initially known as the Rohrabacher-Farr amendment), a budget rider in effect since 2014 that must be passed each year and that prohibits the Justice Department from using federal funds to prevent states from implementing their medical marijuana laws. *See* Chris Ingraham, *Sessions Asks to Eliminate Medical-Pot Protections*, WASH. POST, June 14, 2017, at A6. The Ninth Circuit has held that the appropriations rider bars the federal government from spending money to prosecute actions that comply with state medical marijuana laws, *see United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), and the Tenth Circuit has allowed a prisoner to file a habeas petition challenging the use of federal funds to continue incarcerating him for a conviction that predated the budget rider. *See Sandusky v. Goetz*, 944 F.3d 1240 (10th Cir. 2019).

The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act, a bill that has been introduced in Congress with bipartisan support, would go further than the budget rider and prohibit federal authorities from enforcing the federal marijuana laws in states that have legalized the drug. Attorney General William Barr has indicated that, while he "'still favor[s] one uniform federal rule against marijuana,'" he would prefer the STATES Act to the current situation. *See* Justin Wingerter, *Attorney General Gives Nod to Gardner's Pot Reform Bill*, DENVER POST, Apr. 11, 2019, at 2A.

Those opposing federal efforts to thwart the states' attempts to decriminalize the use of marijuana may find support in the Supreme Court's decision in *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). In that case, the Court ruled that a federal statute prohibiting the states from allowing sports betting violated the principle, grounded on the Tenth Amendment, that the federal government may not issue direct orders to the states. Under this "anti-commandeering" principle, the Court held, the federal government may not order the states to enforce federal laws or policies, and the federal sports gambling statute "unequivocally dictate[d] what a state legislature may and may not do." *Id.* at 1478.

CHAPTER 15

EXCUSE

[A] DURESS

Page 982: Add to Note 9(a):

In *United States v. Dixon*, 901 F.3d 1170 (10th Cir. 2018), the Tenth Circuit affirmed a trial judge's refusal to give a duress instruction in the embezzlement trial of a woman who alleged she had been subjected to years of sexual abuse by her stepfather. The court of appeals reasoned that the defendant "failed to show that she had no reasonable, legal alternative to violating the law" because she could have reported her stepfather to the police or "done any number of things … at any time during the three months in which she was embezzling," including moving out of the house or seeking help from family or friends. *Id.* at 1179-80. The court also rejected the defendant's argument that her duress defense should be evaluated in light of how a "reasonable person in the same circumstances as she confronted [would have acted] – that is, through the lens of a 'reasonable person of ordinary firmness who [has been] abused for years' and who now suffers from PTSD." *Id.* at 1180. Although the court acknowledged that the duress defense "contemplates consideration of whether the objective reasonableness of a particular defendant's conduct has been materially influenced by external, concrete factors unique to her" – for example, a defendant who is a quadriplegic could not reasonably be expected "to physically run away" from an imminent threat – the court concluded that "the touchstone is still what is objectively reasonable," "not what is reasonable only through the PTSD-distorted lens of Ms. Dixon." *Id.* at 1182-83.

Page 985: Add to Note 9(c):

As noted above in the material supplementing page 123, the Fourth Circuit held that Lee Malvo is entitled to resentencing under the Supreme Court's ruling in *Miller v. Alabama*, 567 U.S. 460 (2012), that juveniles may not automatically be sentenced to life in prison without parole even for the crime of homicide. *See Malvo v. Mathena*, 893 F.3d 265 (4th Cir. 2018). Subsequently, however, the case became moot when the Virginia legislature passed a statute making juvenile offenders eligible to seek parole after serving 20 years in prison. *See* Adam Liptak, *D.C. Sniper Seeks to Halt His Appeal*, N.Y. TIMES, Feb. 25, 2020, at A12.

The First Circuit held oral arguments in Dzhokhar Tsarnaev's case in December of 2019. Tsarnaev is arguing on appeal that his trial should have not have been held in Boston, that jurors were not properly screened for bias, and that the trial judge should have admitted evidence linking his older brother, Tamerlan, to a prior triple murder in order to bolster the defense that Dzhokhar was acting under his brother's influence at the time of the Boston Marathon bombings. *See* Milton J. Valencia, *Court on Trial in Marathon Case*, BOS. GLOBE, Dec. 8, 2019, at A1.

[C] INSANITY

[1] THE SCOPE OF THE INSANITY DEFENSE

Page 1031: Add to Note 10:

In 2018, the federal court loosened some of the conditions on John Hinckley's release from St. Elizabeths. Hinckley is now permitted to drive alone greater distances from his mother's home, he may move out of his mother's house with the approval of his therapists, and he may anonymously use the Internet to run his small antiques business and to display his art and music. *See* Del Quentin Wilber, *Hinckley Builds a New Life on the Outside*, L.A. TIMES, Apr. 1, 2019, at A6. Hinckley is now seeking an unconditional release so that he can move to California to pursue a music career. *See* Tamar Lapin, *Hinckley Calif. Dreamin'*, N.Y. POST, Sept. 11, 2019, at 8.

[2] THE CURRENT STATE OF THE LAW

Page 1049: Add to Footnote 30:

An appeal has been filed in Dylann Roof's case, arguing that Roof was "'a 22-year-old, ninth-grade dropout' who suffered from schizophrenia, autism, anxiety and depression" and should not have been allowed to represent himself. *See* Talal Ansari, *Church Shooter Appeals Sentence*, WALL STREET J., Jan. 30, 2020, at A3.

Page 1051: Add to Note 4:

William H. Reid, one of the two psychiatrists who testified for the prosecution that James Holmes did not meet Colorado's definition of insanity, has written a book about the case. Reid reviewed more than 80,000 pages of documents and spent more than 20 hours interviewing Holmes; videotapes from Reid's interviews were shown to the jury during the trial. Reid's book describes Holmes' life, from his childhood through the trial and sentencing, and concludes that we will never have a complete understanding of what led him to commit his crimes. *See* WILLIAM H. REID, A DARK NIGHT IN AURORA: INSIDE JAMES HOLMES AND THE COLORADO MASS SHOOTINGS (2018).

Page 1051: Add to Note 5:

In *Kahler v. Kansas*, 140 S. Ct. 1021 (2020), the Court, by a vote of six-to-three, upheld the Kansas statute affording mentally ill defendants a defense only if they lacked the mens rea to commit the crime. In holding that the Due Process Clause does not obligate the states to provide a defense to mentally ill defendants who cannot distinguish right from wrong, the majority, in an opinion written by Justice Kagan, reasoned that Kansas "uses *M'Naghten*'s 'cognitive capacity' prong" because a defendant who could not "comprehend what he was doing when he committed a crime … could not form the requisite intent" and therefore would be entitled to an acquittal. *Id.* at 1026. Describing the Kansas statute as the "flipside" of the statute at issue in *Clark v. Arizona*, the Court held that Kansas' failure to recognize moral incapacity as a defense "does not mean that Kansas (any more than Arizona) failed to offer any insanity defense at all." *Id.* at 1029, 1031. Noting that, "[e]ven after its articulation in *M'Naghten* (much less before), the moral-incapacity

test has never commanded the day," the majority stressed that "it is not for the courts to insist on any single criterion [for insanity] going forward." *Id.* at 1036, 1037.

The three dissenters, in an opinion written by Justice Breyer, charged that Kansas "has not simply redefined the insanity defense" but instead "has eliminated the core of [the] defense." *Id.* at 1038 (Breyer, J., dissenting). Observing that "[f]ew doctrines are as deeply rooted in our common-law heritage as the insanity defense," the dissenters concluded that a mentally ill defendant who "lacks sufficient mental capacity to be held morally responsible for his actions cannot be found guilty of a crime." *Id.* at 1039.

For criticism of the *Kahler* decision, see Joshua Dressler, Kahler v. Kansas*: Ask the Wrong Question, You Get the Wrong Answer*, 18 OHIO ST. J. CRIM. L. – (forthcoming 2020) (charging that the Court's "historical analysis is wrong or, at least, over-stated" because the majority "attach[ed] a modern understanding of 'mens rea'" to a concept that "[i]n early years … simply meant … a 'morally blameworthy state of mind'"); Laird Kirkpatrick, Kahler v. Kansas*: Narrowing the Insanity Defense*, GEO. WASH. L. REV. ON THE DOCKET, Apr. 1 2020, https://www.gwlr.org/kahler-v-kansas-narrowing-the-insanity-defense/ (arguing that the decision offers "little reassurance" the Court would invalidate a statute completely abolishing the insanity defense and predicting that it will have a greater impact in limiting the insanity defense than *Clark* because defendants who use the insanity defense "only to rebut mens rea are relatively rare").