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CHAPTER 2

PUNISHMENT

[D] SEVERITY OF PUNISHMENT

[2] SENTENCING DISCRETION

[b] SENTENCING GUIDELINES AND BEYOND

Page 109: Add after the first 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 third paragraph:

In *United States v. Haymond*, 139 S. Ct. – (2019) (plurality opinion), a plurality of the Court, in an opinion written by Justice Gorsuch, relied on the *Apprendi* line of cases in striking down a federal statute that required a judge who found by a preponderance of the evidence that a defendant had committed one of several listed crimes while on supervised release to impose a mandatory minimum sentence of at least five years "without regard to the length of the prison term authorized for the defendant's initial crime of conviction." Even though the statute did not affect 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'" and found *Alleyne* to be controlling. 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 traditional parole" 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 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 now more than 11,000. *See* Katie Benner, *They Wanted to Update the Pardon System, but Not Like This*, N.Y. TIMES, June 2, 2018, at A13.

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 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 is 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 has now agreed to consider the case. *See Mathena v. Malvo*, No. 18-217 (cert. granted, Mar. 18, 2019).

CHAPTER 3

THE ACT REQUIREMENT

[B] OMISSIONS

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 first 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. – (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 "any person..., being an alien ... 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."

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 alien 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. – (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. – (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 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 *Reihaf* 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

[C] UNINTENTIONAL HOMICIDE

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

Page 315: Add to Note 2:

Nathaniel Hendren, a St. Louis police officer, has been charged with involuntary manslaughter in the Russian-roulette-style killing of another officer, Katlyn Alix. Hendren

allegedly put one round into a revolver and spun the cylinder, and the two officers then took turns firing at each other, with Hendren going first. After he and Alix had each pulled the trigger once, Hendren did so for a second time, killing Alix. *See* Sarah Mervosh, *St. Louis Officer Charged in Fatal Russian Roulette Shooting of Another Officer, Authorities Say*, N.Y. TIMES, Jan. 27, 2019.

[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, permitting a jury to find a defendant guilty of murder in the first degree 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.

[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 29. 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*, 477 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.

Page 376: Add to the first paragraph:

In March of 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 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 that 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 404: Add to the end of the first paragraph:

See also Catherine Gross et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement* Furman*'s Narrowing Requirement*, – UCLA L. REV. – (forthcoming 2019) (analyzing 1,900 homicide convictions in California between 1978 and 2002, and concluding that six of California's 32 statutory aggravating factors "target capital eligibility based on the race or ethnicity of the defendant" such that "the statute appears to codify rather than ameliorate … harmful racial stereotypes").

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. – (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.

[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). Finding these "improper" parts of the lower court's analysis "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.

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 found 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).

Page 423: 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:

Following the Florida Supreme Court's decision in *Perry v. State*, the Florida legislature amended that state's 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 weighing whether the aggravating factors outweigh the mitigating factors. *See* Fla. Stat. § 921.141.

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 not to impose 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.

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 that 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 n.20:

In September of 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 November of 2018. Under the proposed rules, schools would be required to investigate only "formal complaints" of sexual assault that "involve conduct that occurred in the school's own program or activity" and that are made to "'an official who has the authority to institute corrective measures.'" The rules would also require colleges and universities to hold live hearings before a neutral decisionmaker in sexual assault cases. The accuser and the accused student would have the right to cross-examine each other through a third party, such as an adviser or lawyer, and both parties would be given access to all the evidence used to determine the facts of the case and the right to appeal. Although the rules would require a presumption of innocence, they would give schools the option of choosing which standard of proof – preponderance of the evidence or clear and convincing evidence – to apply. *See* Erica L. Green, *DeVos Unveils New Sex Assault Regulations Easing Colleges' Liability*, N.Y. TIMES, Nov. 17, 2018, at A18. The public notice and comment period on the proposed rules has closed, and the Department of Education is now considering more than 120,000 public comments it received. *See* Anemona Hartocollis, *Universities Contest Granting of Anonymity in Sexual Assault Suits*, N.Y. TIMES, May 30, 2019, at A11.

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 June of 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.

[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*, 2019 N.H. Lexis 126 (N.H. June 7, 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

[D] FALSE PRETENSES

Page 614: Add to the end of Note 1:

The Supreme Court granted certiorari in *Kelly v. United States*, No. 18-1059 (cert. granted, June 28, 2019), a case that grew out of the notorious "Bridgegate" scandal, where public officials allegedly 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, was convicted on charges that she engaged in wire fraud and defrauded a federally funded program, and the question before the Court is whether a public official is guilty of fraud when she offers a public policy justification for a decision that is really politically motivated. The defendant claims that this definition of fraud is inconsistent with the Court's decisions in *Skilling* and *McDonnell v. United States* (casebook page 666) because it would criminalize the same conduct that the Court held insufficient in those cases to violate the federal honest-services fraud and bribery statutes.

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). Rejecting the four 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 noted 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 Trump, was arrested by the FBI for extorting Nike. Prosecutors assert that Avenatti threatened to disclose that Nike had funneled money to NCAA men's basketball recruits in violation of league rules unless he was paid $22.5 million. Avenatti claims he was engaged in legitimate negotiations, whereas prosecutors described his behavior as a "'shakedown'": "'Avenatti used illegal and extortionate threats for the purpose of obtaining millions of dollars in payments from a public company … . Calling this anticipated payout a retainer or a settlement doesn't change what it was – a shakedown. When lawyers use their law licenses as weapons, as a guise to extort payments for themselves, they are no longer acting as attorneys.'" Marc Tracy, Kevin Draper & Rebecca R. Ruiz, *Michael Avenatti Is Accused in Nike Extortion Attempt*, N.Y. TIMES, Mar. 25, 2019.

Page 657: Add new 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. 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.

As the Second Circuit observed in *United States v. Jackson* (casebook page 652), § 875(d) of the federal extortion statute 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 intended'" – 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 Note 1:

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 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. The Florida Supreme Court is considering the question whether the amended statute applies to cases that began before 2017. *See Love v. State*, 247 So. 3d 609 (Fla. Dist. Ct. App. 2018), *review granted*, 2018 Fla. Lexis 1412 (Fla. June 26, 2018).

[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 939: Add to Note 5:

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. 2019), *cert. denied*, 2019 U.S. Lexis 3758 (U.S. June 3, 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.

New York City's Civilian Complaint Review Board initiated disciplinary proceedings against Daniel Pantaleo in connection with the death of Eric Garner. The hearing ended with the officer deciding not to testify, and a police administrative judge will now decide whether to recommend that Pantaleo be disciplined or dismissed. *See* Ashley Southall, *Police Commissioner to Make Weighty Ruling in Garner Case*, N.Y. TIMES, June 25, 2019, at A20.

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. *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.

[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 33 Legal Medical Marijuana States and DC*, PROCON.ORG, https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.

Page 954: Add to Note 7(a):

In 2018, then-Attorney General Jeff Sessions rescinded the Obama administration's 2013 policy of deferring to the states in addressing the prosecution of marijuana use. 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 Strengthening the Tenth Amendment Through Entrusting States (STATES) Act, a bill that has been introduced in Congress with bipartisan support, would 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 the federal government's efforts to restrict the states' attempts to decriminalize the use of marijuana may find support in the Supreme Court's holding 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 that 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 friends or family members. *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). The Supreme Court has agreed to consider the case. *See Mathena v. Malvo*, No. 18-217 (cert. granted, Mar. 18, 2019).

[C] INSANITY

[1] THE SCOPE OF THE INSANITY DEFENSE

Page 1031: Add to Note 10:

In November of 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.

[2] THE CURRENT STATE OF THE LAW

Page 1051: Add to Note 4:

William H. Reid, one of the two court-appointed psychiatrists who interviewed James Holmes prior to trial and testified that 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:

The Supreme Court has agreed to consider whether the Constitution permits states to abolish the insanity defense. *See Kahler v. Kansas*, No. 18-6135 (cert. granted, Mar. 18, 2019).