Criminal Law

CASES AND MATERIALS

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2023 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 in May 2020 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 mind 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).

[4] CONTROVERSIAL CRIMES

[c] GENERAL DISCUSSION

[i] MORAL AND PSYCHOLOGICAL FLUX

[A] PROSTITUTION

Page 20: Add after the first paragraph:

Joining a growing movement, the Manhattan D.A.'s office announced in April of 2021 that they would no longer prosecute sex workers and moved to dismiss thousands of prostitution cases dating back decades. In announcing the change, the D.A. explained that "'prosecuting prostitution does not make us safer, and too often, achieves the opposite result by further marginalizing vulnerable New Yorkers.'" The office will continue to charge pimps, sex traffickers, and those who pay for sex. *See* Jonah E. Bromwich, *Prostitution Will No Longer Be Prosecuted in Manhattan*, N.Y. TIMES, Apr. 22, 2021, at A23.

CHAPTER 2

PUNISHMENT

[C] METHODS OF PUNISHMENT

[1] INCARCERATION

[a] THE INVENTION OF PRISONS

Page 81: Add to Note 2:

Cf. Harness v. Watson, 47 F.4th 296 (5th Cir. 2022) (en banc) (per curiam) (upholding the constitutionality of the provision in the Mississippi constitution denying the right to vote to those convicted of certain felonies even though the 1890 constitution "eliminate[d] voter disenfranchisement for crimes thought to be 'white crimes' and … add[ed] crimes thought to be 'black crimes,'" and reasoning that "the current version" of the provision, following two "reenact[ments] according to the state's procedures for enacting constitutional amendments," was not "motivated by discriminatory intent" and therefore "any taint associated with [the 1890 provision] has been cured").

[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." *Cf. Thorpe v. Clarke*, 37 F.4th 926, 930 (4th Cir. 2022) (denying qualified immunity in suit challenging the "severe isolation" imposed at two Virginia supermax prisons without "any legitimate penological purposes").

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 Death Row Inmates Sue over Solitary Confinement*, PITTSBURGH POST-GAZETTE, Jan. 26, 2018, at A1; Samantha Melamed, *Death Row Inmates Get Rights of All Pa. Inmates*, PHILA. INQUIRER, Nov. 19, 2019, at B1.

[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 also asked to be released on the grounds that he suffered from chronic liver failure and had 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.'" Madoff died in prison at the age of 82 after serving 12 years of his sentence. *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; Diana B. Henriques, *Bernard Madoff, Architect of Largest Ponzi Scheme Ever, Is Dead at 82*, N.Y. TIMES, Apr. 15, 2021, at A1. (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 104: Add to the second paragraph:

(In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), the Court held that a crime for which a defendant had been acquitted may be considered under the Federal Sentencing Guidelines so long as the sentencing judge finds by a preponderance of the evidence that the defendant committed the crime. Although the federal courts have followed *Watts*, some state courts have found this "acquitted-conduct sentencing" unconstitutional. Court-watchers wondered whether the Supreme Court was poised to reconsider *Watts* when the Court relisted a number of cert petitions challenging acquitted-conduct sentencing for months starting in January 2023. *See* John Elwood, *Acquitted-Conduct Sentencing Returns*, SCOTUSBLOG, https://www.scotusblog.com/2023/05/acquitted-conduct-sentencing-returns-the-constitutionality-of-felon-disenfranchisement-and-good-behavior-in-capital-sentencing/ (May 24, 2022, 2:02 PM). Certiorari was ultimately denied in the cases, but four Justices signed opinions respecting the denial of cert, which said that, although the cases raised an important issue, the Court should wait for a decision from the Sentencing Commission, which is considering the question. *See McClinton v. United States*, 143 S. Ct. – (2023).)

Page 109: Add after the carryover paragraph:

In *Beckles v. United States*, 580 U.S. 256 (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 265.

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 section 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 section 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 the "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 MPC sentencing revisions, 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." *See* OFFICE OF THE ATTORNEY GENERAL, U.S. DEP'T OF JUSTICE, MEMORANDUM ON DEPARTMENT CHARGING AND SENTENCING POLICY (May 10, 2017), https://www.justice.gov/archives/opa/press-release/file/965896/download. President Biden has indicated a willingness to use the clemency power "'broadly'" to "'secure the release of individuals facing

unduly long sentences for certain nonviolent and drug crimes.'" *See* Kenneth P. Vogel & Annie Karni, *With Focus on Equity, Biden Signals Pardons May Begin at Midterm*, N.Y. TIMES, May 19, 2021, at A15. For discussion of President Biden's decision to pardon thousands of people convicted of simple marijuana possession, see the material below supplementing Page 954. The backlog of federal prisoners seeking clemency is more than 13,000. *See* OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, CLEMENCY STATISTICS, https:// www.justice.gov/pardon/clemency-statistics.

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.

In *Terry v. United States*, 141 S. Ct. 1858 (2021), the Court held that only crack offenders who received a mandatory minimum sentence may seek a sentence reduction under the First Step Act; defendants who could receive the same sentence today for their crack offenses are not eligible for relief under the statute. But in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), the Court decided that judges ruling on prisoners' First Step Act motions to reduce their sentences for crack offenses may consider any intervening changes in the facts or the law, such as evidence of rehabilitation or amendments to the Federal Sentencing Guidelines. *Cf. United States v. McCall*, 56 F.4th 1048 (6th Cir. 2022) (en banc) (interpreting *Concepcion* as limited to "what a court may consider *after* it finds a defendant meets the threshold requirement for a sentence modification" and not as retreating from the view that "nonretroactive changes in sentencing law cannot be 'extraordinary and compelling reasons' that warrant [compassionate] relief").

Congress is now considering legislation that would eliminate the sentencing disparity between crack and powder cocaine offenses and would apply retroactively to any defendants who had already been convicted or sentenced. The Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act passed the House by an overwhelming margin in 2021 and received bipartisan support in both Houses of Congress. The bill stalled in the Senate, but has been reintroduced in the 118th Congress. *See* Carl Hulse, *Bipartisan Drug Sentencing Bill Languishes Amid Midterm Politics*, N.Y. TIMES, Apr. 30, 2022, at A15.

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.

In *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), the Court held that *Miller* and *Montgomery* did not require a judge to make a finding that a juvenile convicted of homicide was permanently incorrigible before imposing a sentence of life without parole.

CHAPTER 3

THE ACT REQUIREMENT

[B] OMISSIONS

Page 139: Add to Note 2:

In *People v. Crumbley*, 2023 Mich. App. Lexis 2108 (Mich. Ct. App. Mar. 23, 2023), the court refused to dismiss involuntary manslaughter charges brought against the parents of Ethan Crumbley, the 15-year-old who shot and killed four students at Oxford High School in 2021. The court cited the parents' "decision to purchase their mentally disturbed son a handgun [and] their failure to properly secure the gun," as well as their failure, after their son "made overt threats to hurt other people," to "remove him from school," to "get him immediate medical help," or to inform school officials about his "history of mental health issues" and "access to a gun similar to … one he drew on [a] math worksheet."

Page 139: Add to Note 3:

In a federal civil rights suit filed after the 2018 shooting at the Marjory Stoneman Douglas High School in Parkland, Florida, the Eleventh Circuit held that school officials, including the school resource officer, Scot Peterson, did not violate the Constitution in failing to protect the students from Nikolas Cruz, who shot and killed 17 people and injured 17 others. The court reasoned that the students were not in the defendants' custody and did not allege that the defendants acted in an "'arbitrary' or 'conscience shocking'" way. *See L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323 (11th Cir. 2020). 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 allegedly remained outside for more than 45 minutes after 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). Criminal charges of child neglect and criminal negligence were brought against Peterson, but a jury acquitted him after 19 hours of deliberation. *See* Patricia Mazzei, *Jury Acquits Florida Deputy Who Failed to Confront Parkland Gunman*, N.Y. TIMES, June 30, 2023, at A19. The families of the victims have settled their claims that the school district and the FBI failed to prevent the shootings for, respectively, more than $26 million and more than $127 million. *See Fla. School District to Pay $26m to Victims*, BOS. GLOBE, Dec. 16, 2021, at A2.

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.

Controversy surrounding the duty to intervene has resurfaced in the wake of the death of Jordan Neely on a New York City subway train. Neely, who police said had been experiencing homelessness and "acting in 'a hostile and erratic manner,'" was placed in a chokehold by Daniel Penny, a former Marine. The chokehold continued for several minutes, even after Neely stopped moving, and the man died after becoming unconscious. Penny has been charged with manslaughter, but some have questioned whether other passengers who watched the encounter should have come to Neely's assistance. *See* Chelsia Rose Marcius, *Uneasy Questions for Chokehold Witnesses*, N.Y. TIMES, May 18, 2023, at A1.

[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, persons experiencing homelessness 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 178: Add to Note 1:

While jurors may not be able to accurately distinguish between MPC knowledge and recklessness, a study using a combination of functional magnetic resonance brain imaging and an algorithmic artificial intelligence led to "quite reliabl[e] predict[ions] – on the basis of brain activity alone – whether or not a subject was in a knowing or reckless mental state." *See* Owen D. Jones et al., *Detecting Mens Rea in the Brain*, 169 U. PA. L. REV. 1 (2020).

In *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023), SuperValu and Safeway pharmacies were alleged to have defrauded the federal Medicaid and Medicare programs by reporting and billing the government for the stores' higher official retail prices for prescription drugs and not their regularly available discounted prices. The stores were required to report their "usual and customary" charges to the government. Evidence was presented that the pharmacies knew the lower discounted prices were their "usual and customary" prices, but the defendants argued that it was reasonable to interpret the phrase to mean the higher retail prices. The Seventh Circuit granted summary judgment to the defendants, ruling that their interpretation would have to be objectively unreasonable before they could be held liable for "knowingly submitting a false claim, no matter what the defendant thought." The Supreme Court unanimously rejected the Seventh Circuit's view, holding that as long as the defendants themselves subjectively knew the prices they reported were false, they acted "knowingly" even if reasonable people could disagree about the meaning of "usual and customary."

Page 182: Add to Note 5:

See also Borden v. United States, 141 S. Ct. 1817 (2021) (eight of the nine Justices – the four joining the plurality opinion and the four in dissent – cite *Voisine* and rely not only on the MPC's definition of

recklessness, but also on the other MPC mens rea terms); *Counterman v. Colorado*, 143 S. Ct. – (2023) (citing *Voisine* and defining mental states in MPC mens rea terms).

Page 184: Add to the second paragraph of Note 8:

For a study of the 25 state criminal codes that have mens rea provisions influenced by the MPC, which reports that "only a handful have default culpability rules that faithfully implement section 2.02(3)," thus "undermining the Code's norm of requiring recklessness for each offense element," see Scott England, *Default Culpability Requirements: The Model Penal Code and Beyond*, 99 OR. L. REV. 43 (2020). *See also* Scott England, *Stated Culpability Requirements*, 74 RUTGERS U. L. REV. 1213 (2022) (attributing efforts to "circumvent" MPC § 2.02(4) in the 25 states that have mens rea provisions influenced by the MPC in part on the fact that § 2.02(4) is "deeply flawed" and "unclear about when and how it applies").

Page 184: Add to the end of 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 in *Rehaif*, 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 *Rehaif* 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.

For an empirical study reporting on the impact of *Rehaif*, which found that, in the eight months after the opinion was issued and before the COVID-19 pandemic began, *Rehaif* "significantly reduced" the number of charges brought under § 922(g) and "the likelihood that any individual charge" would lead to a conviction, but did not change the overall "conviction rate" (the likelihood that a defendant charged with violating § 922(g) would be found guilty on at least one such charge), see Matthew L. Mizel et al., *Does Mens Rea Matter?*, 2023 WIS. L. REV. 287 (2023) (estimating that the number of § 922(g) charges decreased by more than 2,350 during this time period, resulting in a decrease in prison sentences of more than 8,400 years).

Picking up on the *Rehaif* majority's observation about the mens rea required to support a felon-in-possession charge, the Court acknowledged in *Greer v. United States*, 141 S. Ct. 2090 (2021), that

Rehaif requires the prosecution to prove that defendants facing such charges knew they were felons. But the Court held that defendants who failed to challenge the prosecution's mens rea evidence at their pre-*Rehaif* trials are not entitled to relief unless they claim that "they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms."

In *Ruan v. United States*, 142 S. Ct. 2370 (2022), the Court relied on *Rehaif* in holding that the mens rea requirements in the Controlled Substances Act provision making it a federal crime, "[e]xcept as authorized," "knowingly or intentionally … to manufacture, distribute, or dispense … a controlled substance" apply to the "[e]xcept as authorized" clause. The majority reasoned that "authorization plays a 'crucial' role in separating innocent conduct … from wrongful conduct," and it rejected the Government's "grammatical positioning" argument that the fact that "the authorization clause precedes the words 'knowingly or intentionally'…, grammatically speaking,… prevents the latter *mens rea* provision from modifying the former clause." Concurring in the judgment, Justice Alito, joined by Justices Thomas and Barrett, rejected the majority's reading of the statute. "As a matter of elementary syntax," Justice Alito wrote, "the adverbs 'knowingly' and 'intentionally' are most naturally understood to modify the verbs that follow,… and not the introductory phrase 'except as authorized.'"

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).

Several Senators introduced the Mens Rea Reform Act of 2021, which was more similar to the 2015 proposed legislation and would have required a default mens rea of willfulness in federal statutes. *See* Mens Rea Reform Act of 2021, S. 739, 117th Cong. (2021). But the 117th Congress did not act on the bill.

[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."

Page 200: Add to Note 7:

A district judge refused to allow former Trump White House advisor Steve Bannon to raise an advice of counsel defense to contempt of Congress charges. The charges were based on Bannon's refusal to comply with a subpoena issued by the House Select Committee investigating the January 6 attack on the Capitol. The court relied on the D.C. Circuit's ruling in *Licavoli v. United States*, 294 F.2d 207, 209 (D.C. Cir. 1961), that "[a]dvice of counsel cannot immunize a deliberate, intentional failure" to comply with a congressional subpoena because the charge does not require an "evil motive or purpose," but only "a deliberate intention to do the act," and "[a]dvice of counsel does not immunize that simple intention." *See United States v. Bannon*, 2022 U.S. Dist. Lexis 132863 (D.D.C. Apr. 6, 2022). Bannon was convicted on two counts of contempt and sentenced to four months in prison. He is appealing the conviction. *See* Glenn Thrush & Alan Feuer, *Bannon Sentenced to 4 Months in Prison for Contempt of Congress,* N.Y. TIMES, Oct. 21, 2022.

CHAPTER 5

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

[A] "PUBLIC WELFARE" CRIMES AND VICARIOUS LIABILITY

Page 243: Add to the third paragraph of Note 6:

See also Counterman v. Colorado, 143 S. Ct. – (2023) (relying on *Elonis* in holding that the First Amendment requires a mens rea of at least recklessness in a "true-threats" prosecution – i.e., proof that the defendant "consciously disregarded a substantial risk that his communications would be viewed as threatening violence").

Page 244: Add to 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 297: Add to Note 6:

See also Commonwealth v. Ronchi, 202 N.E.3d 499, 512 (Mass. 2023) (agreeing with the Ohio Supreme Court that "the exception … to the mere words rule for sudden oral revelations of infidelity … rests upon a shaky, misogynistic foundation and has no place in our modern jurisprudence").

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).

Page 310: Add to Note 13:

For discussion of the varying standards used in jurisdictions that follow some version of the MPC's approach to voluntary manslaughter, see E. Lea Johnston et al., *Extreme Emotional Disturbance: Legal Frameworks and Considerations for Forensic Evaluation,* 40 BEHAV. SCI. & L. 733 (2022).

[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 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 reach a verdict as to the property manager, Derick Almena. Almena pleaded guilty to the involuntary manslaughter counts and was sentenced to 18 months' home detention after receiving credit for seven years of time served and good behavior. *See* James Queally, *Ghost Ship Jury Assigns No Guilt in Fire*, L.A. TIMES, Sept. 6, 2019, at A1; Sarah Ravani, *Home Confinement for Ghost Ship Defendant*, S.F. CHRON., Mar. 9, 2021, 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. In 2019, 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 was charged with conspiring to defraud the Federal Aviation Administration based on allegations that two employees withheld information about changes made to software implicated in the two crashes. In 2021, the Justice Department entered into a deferred prosecution agreement that obligated the company to pay a $244 million fine, $500 million in compensation to the victims' families, and $1.77 billion in compensation to customers who were unable to use the 737 Max. But after a federal judge ruled that the victims' families were victims of any crime committed by Boeing and should have been consulted about the agreement, charges that the company deceived the F.A.A. have been filed against Boeing. The company has pleaded not guilty. The only individual to face criminal charges in connection with the crashes, the chief technical pilot working on the 737 Max, was acquitted of federal charges that he misled the F.A.A. by failing to disclose information about the software, which led to its omission from training materials. *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; Niraj Chokshi & Michael S. Schmidt, *Boeing Reaches $2.5 Billion Settlement with U.S. over 737 Max*, N.Y. TIMES, Jan. 8, 2021, at B4; Niraj Chokshi, *Former Boeing Pilot Is Cleared of Fraud Charges in 737 Max Case*, N.Y. TIMES, Mar. 24, 2022, at B3; Madlin Mekelburg & Greg Farrell Bloomberg, *Boeing Pleads Not Guilty in Fraud Case over 737 Max Crashes*, ST. LOUIS POST-DISPATCH, Jan. 29, 2023, at C1.

Page 338: Add Note 7(h):

After an investigation that lasted almost two years, charges were filed against Rick Snyder, the former Governor of Michigan, and eight other high-ranking state officials in connection with the contaminated water crisis in Flint, Michigan. In 2014, the source of the city's drinking water was changed in a cost-saving move and lead leeched into the water supply, causing an outbreak of Legionnaires' disease that killed at least nine people. Snyder was charged with two misdemeanor counts of willful neglect of duty, but other defendants faced more serious charges, including perjury, obstruction of justice, and extortion. And two of the nine defendants, Nick Lyon, the former state health director, and Eden Wells, the former chief medical officer, were charged with nine counts of involuntary manslaughter. *See* Kathleen Gray & Julie Bosman, *Charges for 9 Officials Give Flint Some Relief, but 'Trust Is Gone'*, N.Y. TIMES, Jan. 15, 2021, at A1; Joe Guillen, *Criminal Charges in Flint Crisis May Be Telling*, DETROIT FREE PRESS, Feb. 7, 2021, at A6.

But the Michigan Supreme Court held that the charges could not be based on an indictment issued by a one-judge grand jury without a preliminary hearing. In a unanimous opinion, the court explained that state statutes allowing one-person grand juries authorize those individuals to conduct an investigation and to issue subpoenas and arrest warrants, but not to issue indictments. *See People v. Peeler*, 984 N.W.2d 80 (2022). In the wake of the court's opinion, the charges against the defendants were dismissed, but the state solicitor general planned to appeal. *See* Arpan Lobo, *Snyder's Charges in Flint Water Case Tossed*, DETROIT FREE PRESS, Dec. 10, 2022, at A1. Meanwhile, the state and the city have entered into a settlement agreement to pay $626.25 million to the victims of the Flint water crisis. *See* Paul Egan, *Flint Residents Keep Waiting for Water Compensation*, DETROIT FREE PRESS, Apr. 2, 2023, at A4.

Page 338: Add Note 7(i):

Involuntary manslaughter charges were filed against actor Alec Baldwin, after a gun with which he was rehearsing on a movie set discharged, killing the cinematographer and wounding the director. But the charges were dropped after new evidence revealed that the gun had been modified before it arrived on the set, thus weakening the government's argument that the gun could not have fired unless Baldwin pulled the trigger. The dismissal of the charges against Baldwin does not affect the involuntary manslaughter charges filed against Hannah Gutierrez-Reed, the film's armorer, who was responsible for weapons on the set and allegedly loaded the gun mistakenly with live ammunition. The first assistant director, who oversaw safety on the set and handed the gun to Baldwin, pled guilty to negligent use of a deadly weapon in exchange for a sentence of six months' probation. *See* Graham Bowley & Julia Jacobs, *Prosecutors to Dismiss Charges Against Baldwin in 'Rust' Shooting*, N.Y. TIMES, Apr. 21, 2023, at A20.

[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).

Page 347: Add to Note 5:

See also Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL'Y REV. 157, 207-08 (2022) (reporting that "statistical evidence," though "limited," suggests that Black defendants are disproportionately charged with, and convicted of, felony murder).

[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 27. 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. The Colorado legislature passed a bill abolishing the death penalty in 2020, and Virginia followed suit in 2021. *See* Saja Hindi, *Colorado Abolishes Death Penalty*, DENVER POST, Mar. 24, 2020, at A1; Gregory S. Schneider, *Virginia First Southern State to Ban Death Penalty*, BOS. GLOBE, Mar. 25, 2021, at A2.

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. Attorney General Merrick Garland similarly announced a moratorium on federal executions in 2021. *See* Katie Benner, *Merrick Garland Pauses Federal Executions a Year After His Predecessor Resumed Them*, N.Y. TIMES, July 1, 2021.

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 capital 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 382: Add to Footnote 31:

The Death Penalty Information Center webpage cited in the casebook reported that 192 death row prisoners had been exonerated as of June 2023. The 2021 documentary *The Phantom* chronicles the prosecution and execution of Carlos DeLuna.

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 390: Add to Note 3:

South Carolina likewise has authorized use of a firing squad as an alternative method of execution. *See* Richard Fausset & Rick Rojas, *South Carolina Bill to Allow Firing Squads Poised to Become Law*, N.Y. TIMES, May 7, 2021, at A20. Several states have permitted the use of nitrogen gas to execute prisoners, and Arizona has authorized the use of cyanide gas. *See* Meryl Kornfield, *Arizona Plans to Execute Prisoners with Gas Nazis Used*, BOS. GLOBE, June 3, 2021, at A6; Jimmy Jenkins, *Jewish Arizonans Fight Lethal Gas Use in Executions*, ARIZONA REPUBLIC (Phoenix), Feb. 18, 2022, at A3.

Page 392: Add to Note 4:

The prisoners in the *Glossip* case identified several alternative methods of execution, and the parties were allowed to introduce additional expert testimony on the constitutionality of Oklahoma's lethal injection protocol. After a nonjury trial in federal court, the judge upheld the Oklahoma procedures, finding "a high probability" that 500 milligrams of midazolam "will easily accomplish general anesthesia" and that the dosage had "worked as intended" in four recent Oklahoma executions. And the court rejected the prisoners' two proposed alternatives, concluding that they had not proven that death by firing squad was painless or that the state could obtain fentanyl plus pentobarbital or sodium thiopental to use in executions. *See Glossip v. Chandler*, 2022 U.S. Dist. Lexis 100412 (W.D. Okla. June 6, 2022).

But the Supreme Court granted Glossip a stay of execution after a brief filed by the state attorney general acknowledged that Glossip's conviction was "unsustainable and a new trial imperative" because prosecutors knowingly allowed the government's primary witness to present "'materially false testimony to the jury.'" *See* Adam Liptak, *Justices Stay Death Penalty for Prisoner in Oklahoma*, N.Y. TIMES, May 6, 2023, at A18.

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. *See also Barr v. Lee*, 139 S. Ct. 2590 (2020) (per curiam) (quoting some of this language in ruling against prisoners who challenged the Federal Government's decision to use a single drug – pentobarbital sodium – to execute the first federal prisoners put to death in 17 years).

Page 393: Add to the first paragraph of Note 5:

For the view that the shortages in lethal injection drugs are attributable to "many different institutions and people,… each respond[ing] to different motivations" that are "sometimes unrelated to abolitionists' categorical moral opposition to capital punishment," see Eric Berger, *Courts, Culture, and the Lethal Injection Stalemate*, 62 WM. & MARY L. REV. 1, 10 (2020).

Page 393: Add to the second paragraph of Note 5:

Romell Broom died in prison, possibly from complications of COVID-19. *See Firing Possible in Taylor Case*, CHI. DAILY HERALD, Dec. 30, 2020, at 2.

Page 393: Add to the third paragraph of 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 394: Add to Note 5:

See also Citizens for Responsibility & Ethics in Washington v. United States Department of Justice, 58 F.4th 1255 (D.C. Cir. 2023) (concluding that the Bureau of Prisons had not satisfied its burden of proving that the identity of contractors who provided pentobarbital for federal executions was exempt from disclosure under the Freedom of Information exception for trade secrets and confidential commercial information).

Page 404: Add to the carryover paragraph:

See also Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 657 (2020) (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 Black 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 4:

Five years later, the Racial Justice Act cases returned to the North Carolina Supreme Court. That court held that the state constitution's double jeopardy clause foreclosed further review of a trial judge's decision to reduce a death sentence to life in prison under the Racial Justice Act and that retroactive application of the 2012 amended statute and 2013 repeal violated state and federal constitutional provisions prohibiting ex post facto laws. The court therefore reinstated the life imprisonment sentences. *See State v. Augustine*, 847 S.E.2d 729 (N.C. 2020).

A provision in the California Racial Justice Act of 2020 allows courts to grant relief to defendants who prove by a preponderance of the evidence that they received a longer sentence than other "similarly

situated" defendants convicted of the same crime, and that longer sentences were more often imposed for that crime in cases involving defendants (or victims) who "share[d] the defendant's [or victim's] race, ethnicity, or national origin" than in cases involving defendants (or victims) "of other races, ethnicities, or national origins in the county where the sentence was imposed." *See* Cal. Penal Code § 745(a)(4).

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 a Black 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 Black prospective jurors; (2) the prosecution struck five of the six Black 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 Black 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 Black woman who was "similarly situated to white prospective jurors" who were seated on the jury. The lead prosecutor recused himself from the case, and Flowers was released on bail; the State Attorney General's office took over the case and decided to dismiss the charges. *See* Nicholas Bogel-Burroughs, *State Drops Murder Case Against Man Tried 6 Times*, N.Y. TIMES, Sept. 5, 2020, at A19.

Other provisions in the California Racial Justice Act of 2020, which went into effect for criminal cases in 2022, allow judges to reject a peremptory challenge if "there is a substantial likelihood that an objectively reasonable person would view race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or perceived membership in any of those groups, as a factor in the use of the peremptory challenge." Cal. Civ. Proc. Code § 231.7(d)(1). Peremptory challenges are

presumptively invalid if based on certain reasons, including being "distrust[ful]" of police or the criminal justice system; believing that police "engage in racial profiling or that criminal laws have been enforced in a discriminatory manner"; living in a certain neighborhood; having a "close relationship with people who have been stopped, arrested, or convicted"; and being a native speaker of a language other than English. *Id.* § 231.7(e).

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

Page 412: Add to Note 6:

In 2023, the Florida legislature passed a bill making sexual battery of a child under 12 a capital offense when committed by an adult. In signing the statute, Governor Ron DeSantis said that the Supreme Court's decision in *Kennedy* was "'wrong'" and the legislation "'sets up a procedure to be able to challenge that precedent.'" *See* Anthony Izaguirre, *DeSantis Signs Death Penalty Bill*, ORLANDO SENTINEL, May 4, 2023, at A6.

Page 414: Add to 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 imposed 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). Since the article was published, two of the 18 states have abolished the death penalty.

Page 414: Add after the third paragraph of 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." For an article detailing how few defendants have raised *Panetti* claims in federal court and how unsuccessful those claims have been, see Michael L. Perlin et al., *"The World of Illusion Is at My Door": Why* Panetti v. Quarterman *Is a Legal Mirage*, 59 CRIM. L. BULL. (forthcoming 2023).

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).

For discussion of the "procedural and substantive obstacles" erected by "recalcitrant" courts and legislators, which have "often effectively nullif[ied]" *Atkins*, see Sheri Lynn Johnson, John H. Blume, & Brendan Van Winkle, Atkins v. Virginia *at Twenty: Still Adaptive Deficits, Still in the Developmental Period*, 28 WASH. & LEE J. CIV. RTS. & SOC. JUST. 1 (2022).

Page 423: 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 ten-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); Aliza Cover, *Narrowing Death Eligibility in Idaho: An Empirical and Constitutional Analysis*, 57 IDAHO L. REV. 559 (2021) (reporting that 86-90% of murder charges filed in Idaho between 2002 and 2019 were "factually" first-degree murder cases and 93-98% of those were eligible for the death penalty).

Page 424: Add to Note 2:

In *Bosse v. Oklahoma*, 580 U.S. 1 (2016) (per curiam), the Court made clear that its decision 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 427: Add to Note 5:

In *United States v. Tsarnaev*, 142 S. Ct. 1024 (2022), the Supreme Court reversed the First Circuit and upheld the death sentence imposed on Dzhokhar Tsarnaev for his role in the 2013 Boston Marathon bombings that killed three people and injured more than 260 others. At trial, defense counsel's principal argument was that Dzhokhar, who was 19 years old at the time of the bombings, was manipulated by his 26-year-old brother Tamerlan, who masterminded the attacks and died while the two brothers were trying to avoid apprehension. The Supreme Court rejected Dzhokhar's claim that the trial judge should have admitted evidence linking Tamerlan to a prior triple murder in order to bolster the defense that Dzhokhar was acting under his older brother's influence. Justice Thomas' majority opinion for six Justices reasoned that a capital defendant's right to present mitigating evidence does not undermine the trial judge's "traditional gatekeeping function … to consider and assess specific pieces of relevant evidence in light of its probative value and the risks it poses to the jury's truth-seeking function." Calling the evidence allegedly implicating Tamerlan in the previous murders "sparse and unreliable," the Court found no abuse of the trial court's discretion because there was no "way to confirm or verify the relevant facts" and introducing the evidence "risked producing a confusing mini-trial where the only witnesses who knew the truth were dead." For further discussion of the Court's opinion, see the material below supplementing Page 985.

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 ten 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 *State v. Perry*, 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 later "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 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), *cert. denied*, 141 S. Ct. 1051 (2021). In 2023, the Florida legislature amended the death penalty statute to require only eight votes to recommend a death sentence. *See* Fla. Stat. § 921.141.

In *McKinney v. Arizona*, 140 S. Ct. 702 (2020), the Supreme Court seemingly endorsed the view taken in *Poole*. 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.

In 2023, Missouri executed the first openly transgender woman under a statute that allowed the trial judge to impose the death penalty in the wake of a deadlocked jury. Only Indiana has a similar statutory provision. *See* Katie Kull, *Missouri Executes Transgender Inmate Convicted of Murdering Ex-girlfriend in 2003*, ST. LOUIS POST-DISPATCH, Jan. 4, 2023, at A1.

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 at least five death sentences between

2010 and 2015 – found that 35% or more of the prospective jurors could have been excluded from jury service in a capital case under the *Witherspoon/Witt* standard and that almost a quarter of them said they would be reluctant to find the defendant guilty in a death penalty 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

[A] STATUTORY RAPE

Page 446: Replace the first two paragraphs of Note 8:

As explained in greater detail below in the material supplementing Page 517, the Model Penal Code provisions governing sexual offenses have been undergoing revision. Under the revisions, the crime of *sexual assault of a minor* occurs when a defendant recklessly engages in sexual penetration or oral sex with someone who is under the age of 16 and more than five years younger than the defendant. The maximum sentence ranges from three to ten years depending on the ages of the defendant and the victim. *See* Model Penal Code: Sexual Assault and Related Offenses § 213.8(1) (Tentative Draft No. 6, 2022). A defendant who is at least 18 years old commits *incestuous sexual assault of a minor*, a third-degree felony punishable by ten years in prison, by recklessly engaging in sexual penetration or oral sex with certain relatives who are younger than 18. *See id.* § 213.8(2). The crime of *exploitative sexual assault of a minor*, a fifth-degree felony punishable by three years, is defined as recklessly engaging in sexual penetration or oral sex with someone who is under the age of 18 and more than five years younger than a defendant who holds a "formal position of authority," such as a teacher, coach, employer, minister, or doctor. A defendant who proves by a preponderance of the evidence that the position of authority "did not impair the other person's ability to form an independent judgment about whether to consent" has a defense to this last offense. *Id.* § 213.8(3).

The revisions also create three additional offenses for sexual acts with a minor that do not constitute sexual penetration or oral sex. A defendant commits the crime of *fondling a minor* by knowingly committing an act of fondling and recklessly disregarding the risk that the victim is (1) under 12 and more than five years younger than the defendant or (2) under 16 and more than seven years younger than the defendant. *See id.* § 213.8(4). "Fondling" is defined as "prolonged contact with or manipulation of the genitals" for the purpose of "sexual arousal, sexual gratification, sexual humiliation, or sexual degradation" and must be more than a "transient grope or grab." *Id.* § 213.0(2)(d). The maximum penalty for this charge varies from three to five years depending on the ages of the defendant and the victim.

The last two offenses prohibit sexual contact, which is defined below in the materials supplementing Page 517. *Aggravated offensive sexual contact with a minor* is defined as knowingly committing an act of sexual contact that would be punishable as incestuous sexual assault of a minor, exploitative sexual assault of a minor, or any of the sexual assault charges described below in the material supplementing Page 517 (other than sexual assault in the absence of consent) had the defendant engaged in sexual penetration or oral sex. This offense, a fourth-degree felony punishable by five years in prison, also requires that the defendant recklessly disregards the risk that the victim is under 18 and more than five years younger than the defendant. *See id.* § 213.8(5). *Offensive sexual contact with a minor* is

defined to include knowingly committing an act of sexual contact where the defendant recklessly disregards the risk that the victim is (1) under 12 and more than five years younger than the defendant or (2) under 16 and more than seven years younger than the defendant. This crime is a misdemeanor, carrying a potential one-year sentence, but it becomes a fifth-degree felony if the defendant is at least 18 and recklessly disregards the risk that the victim is under 12. *See id.* § 213.8(6).

Page 447: Replace the last paragraph of Note 8:

The Model Penal Code's new statutory rape provisions, like the rest of the revised MPC sex offenses, are entirely gender-neutral. The revisions prohibit charging defendants younger than 12 with any sex offense other than sexual assault by aggravated physical force or restraint (described below in the material supplementing Page 517). *See* Model Penal Code: Sexual Assault and Related Offenses § 213.0(2)(g) (Tentative Draft No. 6, 2022). The revisions also provide that any defendant under 14 who is charged as a juvenile with one of the sex offenses involving minors can be found delinquent only as a misdemeanant. *See id.* § 213.8(10).

[B] FORCIBLE RAPE

[2] MENS REA

Page 473: Add to Footnote 20:

In 2017, then-Secretary of Education Betsy DeVos withdrew the Obama administration's 2011 "Dear Colleague Letter." DeVos 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 the following year and then, after considering more than 120,000 public comments, issued final regulations that went 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[ring] 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 advisor 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. Legal challenges to the new rules have been unsuccessful, but President Biden instructed DeVos' successor, Miguel A. Cardona, to

revisit the issue. *See* Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES, May 7, 2020, at A24; Katie Rogers & Erica L. Green, *Biden Will Revisit Rules on Campus Sex Assault Enacted Under Trump*, N.Y. TIMES, Mar. 9, 2021, at A13.

In June 2022, on the fiftieth anniversary of Title IX, Secretary Cardona announced new proposed rules for campus sexual misconduct. The proposed rules would, among other things ban "all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." Schools would be required to investigate all complaints, not just formal ones. The proposal would broaden the reach of the regulations to cover conduct occurring in any building "owned or controlled" by a officially recognized university student organization as well as off-campus conduct by someone who is "a representative" of the school or is "otherwise engaged in conduct under the [school's] disciplinary authority." The proposed rules would permit but not require colleges and universities to hold live hearings in sexual misconduct cases and would require a preponderance of the evidence standard of proof in most sexual assault cases. *See* DEPARTMENT OF EDUCATION, SUMMARY OF MAJOR PROVISIONS OF THE DEPARTMENT OF EDUCATION'S TITLE IX NOTICE OF PROPOSED RULEMAKING, https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf.

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).

Page 482: Replace the first full paragraph:

The revisions to the MPC sex offense provisions recognize an affirmative defense to charges of sexual assault by aggravated physical force or restraint, sexual assault by physical force or restraint, sexual assault by extortion, sexual assault in the absence of consent, aggravated offensive sexual contact, and offensive sexual contact (the elements of which are described below in the materials supplementing Page 517) if the defendant reasonably believes the victim "personally gave the [defendant] explicit prior permission" to commit any of the acts that would otherwise be prohibited. Model Penal Code: Sexual Assault and Related Offenses § 213.10(1) (Tentative Draft No. 6, 2022). Permission is considered "explicit" only if it is communicated orally or in writing and describes both "the specific forms and extent of force, restraint, or threats that are permitted" and "the specific words or gestures that will withdraw the permission." *Id.* § 213.10(2). The defense is not available in certain cases, including where the defendant recklessly disregards the risk that (1) the victim withdrew permission; (2) the victim is under the age of 18; (3) the victim "lack[s] substantial capacity to appraise or control that party's conduct" because of voluntary or involuntary intoxication; or (4) the victim gave permission under circumstances

that satisfy the elements of most of the sexual assault charges defined below in the materials supplementing Page 517 (other than sexual assault in the absence of consent). The defense is also unavailable when the defendant recklessly "causes or risks serious bodily injury" and when the victim is "unconscious, asleep, or otherwise unable to withdraw … permission." *Id.* § 213.10(3).

[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 510: Add to Note 7:

For a description of psychological studies reporting that many people believe "an individual can give consent even though she was lied to by the person seeking her consent" – for example, a doctor performing a medical procedure or a police officer entering a home – see Roseanna Sommers, *You Were Duped into Saying Yes. Is It Still Consent?*, N.Y. TIMES, Mar. 6, 2021, at A23.

Page 514: Add to Note 10:

For discussion of legislation recently passed in Florida designed to set the stage for asking the Court to overrule *Kennedy*, see the material above supplementing Page 412.

Page 517: Replace Note 13:

13. The Revisions to the Model Penal Code. Apparently agreeing with the view that the 50-year-old Model Penal Code provisions on sex offenses are "outdated," Deborah W. Denno, *Why the Model Penal Code's Sexual Assault Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 207 (2003), the American Law Institute decided in 2012 to reconsider the MPC's approach to these crimes. Like the original version of the Model Penal Code, the revisions create a number of distinct crimes, but the names and elements of those offenses differ greatly from the earlier MPC provisions. The process of revising the Model Penal Code sections governing sex offenses is almost complete as the American Law Institute voted to approve Tentative Draft No. 6 at its annual meeting in 2022, subject to amendments approved at that meeting and "the usual editorial prerogative." Publication of an official text is expected in 2024.

Tentative Draft No. 6, released in 2022, creates eight offenses linked to sexual penetration or oral sex (in addition to the three involving minors described above in the materials supplementing Page 446). "Sexual penetration" is defined as "an act involving penetration, however slight, of the anus or genitalia

by an object or a body part, except when done for legitimate medical, hygienic, or law-enforcement purposes." Model Penal Code: Sexual Assault and Related Offenses § 213.0(2)(a) (Tentative Draft No. 6, 2022). "Oral sex" is defined as "a touching of the anus or genitalia of one person by the mouth or tongue of another person." *Id.* § 213.0(2)(b).

The most serious sex offense under the revisions is *sexual assault by aggravated physical force or restraint*, defined as knowingly "us[ing] or explicitly or implicitly threaten[ing] to use aggravated physical force or restraint" to cause the victim's submission. *Id.* § 213.1(1). "Physical force or restraint" is considered "aggravated" when it is "capable of inflicting death, serious bodily injury, or extreme physical pain" or when it unlawfully "confines another for a substantial period in a place of isolation." *Id.* § 213.0(2)(f)(ii). The crime is punishable by 15 years in prison, but the maximum sentence is increased to 20 years under certain aggravating circumstances: where the defendant knowingly uses or threatens to use a deadly weapon; recklessly causes serious bodily harm; or knowingly acts with another person who either commits a "contemporaneous" act of sexual penetration or oral sex with the victim or assists the defendant's use or threat of aggravated physical force or restraint. *See id.* § 213.1(2).

Sexual assault by physical force or restraint is defined as recklessly "us[ing] or explicitly or implicitly threaten[ing] to use physical force or restraint" to cause the victim's submission. *Id.* § 213.2(1). "Force or restraint" is considered "physical" when it causes either "more than negligible physical harm" (including "a burn, black eye, or bloody nose") or "more than negligible … pain [or] discomfort" (including "a kick, punch, or slap on the face"), or when it "significantly restricts a person's ability to move freely." *Id.* § 213.0(2)(f)(i). The crime is a third-degree felony punishable by ten years in prison. *See id.* § 213.2(2).

The revisions define *sexual assault in the absence of consent* as recklessly engaging in sexual penetration or oral sex without consent, as defined in Note 10 on Page 481 of the casebook. *See id.* § 213.6(1). The crime is a fifth-degree felony, punishable by a maximum of three years in prison, but it becomes a fourth-degree felony punishable by up to five years if the defendant recklessly disregards the risk either that the victim "has, by words or actions, expressly communicated unwillingness" or that "the act is so sudden or unexpected" the victim has "no adequate opportunity to express unwillingness before the act occurs." *Id.* § 213.6(2).

Sexual assault of an incapacitated person, a third-degree felony, occurs when the defendant recklessly disregards the risk that the victim either (1) is "sleeping, unconscious, or physically unable to communicate lack of consent"; or (2) "lacks substantial capacity to appraise, control, or remember" the act because of "a substance" that the defendant "administered" (or knew another person administered) without the victim's "knowledge or consent" "for the purpose of causing that incapacity." *Id.* § 213.3(1).

The crime of *sexual assault of a vulnerable person*, a fourth-degree felony, is committed when the defendant recklessly disregards the risk that the victim (1) has "an intellectual, developmental, or mental disability, or a mental illness," such that the victim is "substantially incapable of appraising the nature of the sexual activity … or of understanding the right to give or withhold consent," and the

defendant does not have a "similarly serious disability"; (2) is "passing in and out of consciousness"; (3) "lacks substantial capacity to communicate lack of consent"; or (4) is "wholly or partly undressed … for the purpose of receiving nonsexual professional or commercial services" from the defendant and has not given the defendant "explicit prior permission" to commit the act. *Id.* § 213.3(2).

Sexual assault of a legally restricted person, a fourth-degree felony, occurs when defendants know they are in "a position of actual or apparent authority or supervision" over someone who is, for example, in custody, on probation or parole, or in a pretrial program and when the two people did not have a "consensual sexually intimate relationship" when the "state-imposed restriction on [the victim's] liberty began." *Id.* § 213.3(3).

The revisions also criminalize certain threats of nonphysical force. The crime of *sexual assault by extortion*, a fourth-degree felony, includes cases where the defendant recklessly makes an "explicit[] or implicit[] threat[]," for example, to accuse someone of a crime or noncompliance with immigration rules or to take any other action that would cause a reasonable person in the victim's situation to submit. *Id.* § 213.4.

The revisions criminalize two cases of fraud as *sexual assault by prohibited deception*, a fifth-degree felony: where the defendant knowingly misrepresents either (1) that the act has "diagnostic, curative, or preventive medical properties," or (2) that the defendant is "personally known" to the victim. *Id.* § 213.5.

The revisions also create two offenses prohibiting "sexual contact" (in addition to the two involving minors described above in the material supplementing Page 446). The term "sexual contact" includes certain acts done for the purpose of "sexual arousal, sexual gratification, sexual humiliation, or sexual degradation": "touching the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person with any body part or object"; "touching any body part of any person with the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person"; or "touching" any person with "ejaculate." *Id.* § 213.0(2)(c).

Aggravated offensive sexual contact, a fifth-degree felony, occurs when the defendant knowingly engages in sexual contact that would be punishable as sexual assault by aggravated physical force or restraint, sexual assault by physical force or restraint, sexual assault of an incapacitated or vulnerable person, or sexual assault by extortion had the defendant engaged in sexual penetration or oral sex instead of sexual contact. *See id.* § 213.7(1).

Offensive sexual contact, a petty misdemeanor punishable by up to six months in prison, criminalizes knowing sexual contact when the defendant recklessly disregards the victim's lack of consent. *See id.* § 213.7(2)(a)-(b). This charge may also be brought if the defendant's act would have been punishable as sexual assault of a legally restricted person or sexual assault by prohibited deception had the defendant engaged in sexual penetration or oral sex instead of sexual contact. *See id.* § 213.7(2)(c).

As noted above in the material supplementing Page 482, the revisions recognize an affirmative defense to charges of sexual assault by aggravated physical force or restraint, sexual assault by physical force or restraint, sexual assault by extortion, sexual assault in the absence of consent, aggravated offensive sexual contact, and offensive sexual contact if the defendant reasonably believes the victim "personally gave the [defendant] explicit prior permission" to commit any of the acts that would otherwise be prohibited. *Id.* § 213.10(1). Permission is considered "explicit" only if it is communicated orally or in writing and describes both "the specific forms and extent of force, restraint, or threats that are permitted" and "the specific words or gestures that will withdraw the permission." *Id.* § 213.10(2). The defense is not available in certain cases, including where the defendant recklessly disregards the risk that (1) the victim withdrew permission; (2) the victim is under the age of 18; (3) the victim "lack[s] substantial capacity to appraise or control that party's conduct" because of voluntary or involuntary intoxication; or (4) the victim gave permission under circumstances that satisfy the elements of most of the sexual assault charges (other than sexual assault in the absence of consent). The defense is also unavailable when the defendant recklessly "causes or risks serious bodily injury" and when the victim is "unconscious, asleep, or otherwise unable to withdraw … permission." *Id.* § 213.10(3).

The revisions eliminate the Hale instruction, the prompt-complaint requirement, and the traditional rule about uncorroborated victim testimony.

[4] MARITAL RAPE

Page 531: Replace Note 5:

The revisions to the MPC's sexual offense provisions are completely gender-neutral. *See* Model Penal Code: Sexual Assault and Related Offenses (Tentative Draft No. 6, 2022).

The American Law Institute's position on the marital rape exception has varied during the course of the revision process. Although an earlier draft of the revisions would have eliminated any form of marital exception, *see* Model Penal Code: Sexual Assault and Related Offenses (Tentative Draft No. 1, 2014), later drafts exempted spouses and intimate partners if the exception was "specifically provided" and the offense did not involve "the use or threat of physical force, physical restraint, bodily injury, or any other crime of violence … or coercion." Model Penal Code: Sexual Assault and Related Offenses § 213.9(2)(a) (Tentative Draft No. 2, 2016). The approved revisions now create an affirmative defense for spouses only if they are charged with the sex offenses involving minors, other than incestuous sexual assault and aggravated offensive sexual contact (defined above in the material supplementing Page 446). *See* Model Penal Code: Sexual Assault and Related Offenses § 213.8(9) (Tentative Draft No. 6, 2022).

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 Note 4(a):

In *Van Buren v. United States*, 141 S. Ct. 1648 (2021), the Supreme Court, in a six-to-three decision, resolved a split among the circuits concerning the reach of the Computer Fraud and Abuse Act of 1986 (CFAA). The Act makes it a crime for any person to "intentionally access[] a computer without authorization or exceed[] authorized access" to a computer. 18 U.S.C. § 1030(a)(2). As part of an FBI sting operation, a friend of Sergeant Nathan Van Buren paid the officer $5,000 to run a license-plate check on the computer in his squad car to determine whether a woman was an undercover police officer. In an opinion written by Justice Barrett, the Supreme Court reversed Van Buren's conviction for violating the CFAA. The Court ruled that "access[ing] a computer without authorization" under the statute "covers those who obtain information from particular areas in the computer – such as files, folders, or databases – to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them." In addition to relying on extensive statutory analysis, the majority outlined the problematic implications of the Government's broader construction of the statute:

> To top it all off, the Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer activity. …
>
> If the "exceeds authorized access" clause criminalizes every violation of a computer-use policy, then millions of otherwise law-abiding citizens are criminals. Take the workplace. Employers commonly state that computers and electronic devices can be used only for business purposes. So on the Government's reading of the statute, an employee who sends a personal e-mail or reads the news using her work computer has violated the CFAA.

See Orin S. Kerr, *Focusing the CFAA in* Van Buren, 2021 S. CT. REV. 155 (agreeing with the Court that "access[ing] a computer without authorization" means transgressing a technological gateway to the computer (e.g., accessing without a valid password) and not merely exceeding a stated policy limit to access particular files, but noting that the decision "leaves important details hazy" and needs further refinement by the lower courts).

Page 543: Add Note 4(g):

(g) *Identity.* In *Dubin v. United States*, 143 S. Ct. 1557 (2023), which involved the federal statute criminalizing "aggravated identity theft," 18 U.S.C. § 1028A (a)(1), the Supreme Court held that "the crux" of the crime was the "misuse of another person's means of identification." Reversing the en banc Fifth Circuit, the Court held that Dubin was not guilty of aggravated identity theft when he overbilled Medicaid for psychological testing performed by his company because the crux of the crime was the overbilling and the patient's identification was merely "an ancillary part of the Medicaid billing process."

[D] FALSE PRETENSES

Page 614: Add to 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.

In a pair of opinions issued on the same day, the Supreme Court continued to narrow the reach of the federal fraud statutes. In *Ciminelli v. United States*, 143 S. Ct. 1121 (2023), the Court disapproved of the Second Circuit's view that wire fraud charges can be based on the "right to control" theory – i.e., that the defendant deprived the victim of "'potentially valuable economic information'" "'necessary to make discretionary economic decisions.'" Noting that the federal fraud statutes "criminalize only schemes to deprive people of traditional property interests," Justice Thomas' majority opinion reasoned that this sort of important economic information is not "a traditional property interest."

In the second case, *Percoco v. United States*, 143 S. Ct. 1130 (2023), the Court reversed a conviction on charges that the defendant committed honest-services fraud while serving as campaign manager for former Governor Andrew Cuomo. The Court rejected the defendant's argument that "a person nominally outside public employment can *never* have the necessary fiduciary duty to the public" to be guilty of honest-services fraud, noting that "individuals not formally employed by a government entity may enter into agreements that make them actual agents of the government." But the Court thought that the jury instructions given in Percoco's case – that he owed a sufficient duty to the public if he "'dominated and controlled any governmental business'" and "'people working in the government actually relied on him because of a special relationship he had with the government'" – were "too vague"

because they suggested that a fiduciary duty to the public arose whenever a private person's "clout exceeds some ill-defined threshold."

See also United States v. Abdelaziz, 68 F.4th 1 (1st Cir. 2023) (reversing wire and mail fraud convictions of two parents who were charged as part of the "Varsity Blues" admissions scandal with making payments to ensure their children's admission into college on the grounds that the government's theory that the defendants "depriv[ed] the universities of property in the form of 'admissions slots'" was inconsistent with Supreme Court precedent because admissions slots are not property). For an update on the college admissions scandal, see the material below supplementing Page 681.

Page 618: Add to Note 8:

Moshe Porat, the former Dean of Temple University's Fox Business School, became the first university administrator to be convicted of misrepresenting data used in calculating college rankings. Porat was found guilty on federal conspiracy and wire fraud charges that alleged he intentionally reported false data to U.S. News and World Report, thereby deceiving the school's applicants, students, and donors. He was sentenced to 14 months in jail but has appealed his conviction. *See* Jeremy Roebuck & Susan Snyder, *14 Mo. Detention for Ex-Temple Dean*, PHILA. DAILY NEWS, Mar. 13, 2022, at 9.

CHAPTER 9

AGGRAVATED PROPERTY CRIMES

[A] ROBBERY

Page 632: 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 Note 5:

Michael Avenatti, the celebrity lawyer best known for representing adult film star Stormy Daniels in lawsuits against former 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 was sentenced to two and a half years in prison, but he has appealed the conviction. *See* Kevin Draper, *Avenatti Sentenced to Prison in Nike Extortion Case*, N.Y. TIMES, July 9, 2021, at B11.

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 exposé of his extramarital affair was not "'politically motivated or influenced by political forces.'" A federal investigation of Bezos' allegations was dropped, and some journalists have questioned the accuracy of

his charges. *See* Peter J. Henning, *Proving Jeff Bezos' Claims of Blackmail and Extortion Could Be Tricky*, N.Y. TIMES, Feb. 25, 2019; Holman W. Jenkins, Jr., *Jeff Bezos Wags the Dog, Part II*, WALL STREET J., May 12, 2021, at A17.

As the Second Circuit observed in *United States v. Jackson* (Page 652 of the casebook), 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." Would a statement from Bezos exonerating the tabloid's motives constitute a "thing of value"? Was The National Enquirer's alleged threat to disclose intimate nude pictures classic blackmail or simply a newspaper exercising its First Amendment right to solicit quotations?

[C] BRIBERY

Page 681: Add to Note 6:

The well-publicized "Varsity Blues" cases, another scandal implicating parents seeking to advance their children's careers, involved bribes intended to facilitate admission to elite colleges. Dozens of people have been charged by federal prosecutors, who allege that parents bribed college coaches to recruit their children based on fabricated athletic credentials and bribed SAT and ACT exam administrators to falsify their children's exam scores. For a summary of the allegations made against the defendants who have already been sentenced in these cases, see Kelly McLaughlin et al., *The Full List of Everyone Who's Been Sentenced in the College Admissions Scandal So Far*, INSIDER (May 12, 2023), https://www.insider.com/college-admissions-scandalfull-list-people-sentenced-2019-9.

[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 745: Add to the first paragraph of Note 1:

See also United States v. Taylor, 142 S. Ct. 2015 (2022) (likewise relying on the MPC's "substantial step" test in defining the elements of attempt required by a federal statute, though declining to discuss "[w]hat exactly constitutes a substantial step").

Page 749: Add to Note 6:

In *State v. Sawyer*, 187 A.3d 377 (Vt. 2018), an opinion applying the common law's physical proximity test, the Vermont Supreme Court found insufficient evidence that Jack Sawyer, who confessed to planning 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(a). 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 ten 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.

B. SOLICITATION

Page 780: Add to the second paragraph of Note 10:

See also United States v. Hansen, 143 S. Ct. – (2023) (rejecting a First Amendment challenge to a federal statute that prohibits "encourag[ing] or induc[ing]" illegal immigration on the grounds that the statute "used encourage and induce as terms of art referring to criminal solicitation and facilitation" and therefore was not unconstitutionally overbroad).

CHAPTER 12

ACCOMPLICE LIABILITY

[C] MENS REA: THE STATE OF MIND NECESSARY

Page 810: Add to Note 2:

In *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (2023), the Court considered the meaning of the concept of aiding and abetting in a civil suit brought under the Justice Against Sponsors of Terrorism Act, which creates a federal cause of action against anyone "who aids and abets, by knowingly providing substantial assistance," "an act of international terrorism." The plaintiffs, who alleged that they were injured by an ISIS attack on a Turkish nightclub in 2017, sued Facebook, Twitter, and Google (which owns YouTube) for aiding and abetting ISIS by allowing ISIS to "use[] defendants' social-media platforms to recruit new terrorists and to raise funds for terrorism."

Without "resolving the extent of th[e] differences" between accomplice liability under criminal and civil law, the Court cited *Rosemond* and *Peoni* in concluding that the social-media companies did not knowingly provide substantial assistance to ISIS. The Court reasoned that the companies simply enabled ISIS "to upload content to the platforms and connect with third parties, just like everyone else." In addition, the Court found that the fact that "defendants' recommendation algorithms matched ISIS-related content to users most likely to be interested in that content – again, just like any other content" – did not "convert defendants' passive assistance into active abetting."

[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 prohibiting 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."

In *Pugin v. Garland*, 143 S. Ct. – (2023), the Court ruled that noncitizens are subject to removal under the federal immigration statutes for committing "offenses 'relating to obstruction of justice' … even if the offense does not require that an investigation or proceeding be pending." The Court reasoned that dictionary definitions of the term "obstruction of justice" "generally do[] not require a pending investigation or proceeding," that many federal and state obstruction statutes (as well as the MPC) impose no such requirement, and that "common sense" dictates that "[i]ndividuals can obstruct the process of justice even when an investigation or proceeding is not pending" by, for example, "threaten[ing] to kill a witness if the witness reports information to the police."

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* https://www.cnn.com/2019/04/18/politics/full-mueller-report-pdf/index.html.

With respect to allegations that then-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 the former president:

> **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, the Attorney General at the time, William Barr, took the view that then-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 1, 2023) (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 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 first impeachment investigation of former President Trump. 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 was whether a congressional impeachment trial is a "judicial proceeding" within the meaning of the rule. Oral argument was scheduled for December 2020, but, in the wake of the November election, the Court granted the House Judiciary Committee's motion to postpone the argument so that the Judiciary Committee for the 117th Congress could decide whether to proceed with the request for the grand jury materials. *See Department of Justice v. House Committee on the Judiciary*, 141 S. Ct. 870 (2020). With the agreement of the parties, the Court then vacated the decision below and dismissed the case as moot because there was no ongoing impeachment investigation of the former president. *See Department of Justice v. House Committee on the Judiciary*, 142 S. Ct. 46 (2021).

In two cases challenging subpoenas issued for then-President Trump's financial records, the Supreme Court held, first, that House Committees could not subpoena the 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 former president's position that congressional subpoenas seeking unprivileged private financial records have to meet the strict standards for subpoenas seeking communications between a president and close advisors 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. 2019 (2020).

But the Court held in the other case 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 allowed the Manhattan District Attorney to subpoena then-President Trump's personal accountant for his financial and tax records, although the Court noted that the then-president could still challenge the subpoena on the grounds that it was "overly broad or unreasonably burdensome" or would interfere with his official duties. *Trump v. Vance*, 140 S. Ct. 2412 (2020).

In the wake of the Court's decision in *Trump v. Vance*, the former president's tax and financial records were turned over to the Manhattan D.A.'s office, and that office joined forces with the New York Attorney General's Office in conducting a fraud investigation of the Trump Organization. In 2021, a grand jury issued an indictment charging the company and its long-time Chief Financial Officer, Allen Weisselberg, with tax fraud. The charges centered around a conspiracy to help executives like Weisselberg evade taxes on off-the-books benefits while simultaneously decreasing the company's tax liabilities. Weisselberg pled guilty in exchange for a five-month prison sentence and testified for the prosecution at the Trump Organization's trial. The organization was convicted on 17 felony counts and received the maximum sentence, a $1.6 million fine. The organization announced that it will appeal the

conviction. The wider fraud investigation of the former president and his organization is ongoing, with prosecutors focusing on whether Trump falsely inflated the value of his assets in financial statements. *See* Jonah E. Bromwich et al., *Trump Family Company Must Pay $1.6 Million for Tax Fraud and More*, N.Y. TIMES, Jan. 14, 2023, at A9.

Former President Trump has now been charged with an additional 34 felony counts of falsifying business records in connection with hush money he allegedly arranged to have paid to adult film star Stormy Daniels towards the end of the 2016 presidential campaign. Prosecutors claim that Trump "'falsified … business records in order to conceal an illegal conspiracy to undermine the integrity of the 2016 presidential election.'" *See* Ben Protess & Jonah E. Bromwich, *A Look at the Charges Against Trump*, N.Y. TIMES, Apr. 5, 2023, at A14.

In 2022, the state attorney general's office filed a civil fraud suit against Trump, three of his children, and the Trump Organization. The lawsuit, which seeks $250 million in damages, alleges that the defendants committed a "'staggering'" amount of fraud in annual financial statements, "inflat[ing] the worth of nearly all of [Trump's] best-known properties" by billions of dollars in order to "secure better terms from … lenders and insurers." *See* Ben Protess et al., *Trump Is Questioned in New York Fraud Case*, N.Y. TIMES, Apr. 14, 2023, at A17. *See also People v. Trump*, 2023 N.Y. Misc. Lexis 61 (N.Y. Sup. Ct. Jan. 6, 2023) (denying a motion to dismiss the civil fraud suit and calling some of the defendants' arguments "frivolous"); *Trump v. James*, 2022 U.S. Dist. Lexis 95250 (N.D.N.Y. May 27, 2022) (dismissing a civil rights suit filed by the former president and the Trump Organization alleging that the state attorney general violated their constitutional rights by conducting an investigation without any justifiable legal basis).

In 2023, after a seven-month investigation by Special Counsel Jack Smith, former President Trump was indicted on 38 counts, including conspiring with one of his personal aides, Waltine Nauta, to obstruct justice. The federal charges are based on allegations that Trump kept government documents, including classified national security information, when he left office and then attempted to conceal the documents and obstruct the FBI's efforts to secure their return. *See* Alan Feuer & Maggie Haberman, *Evidence a President's Actions Were More Overt Than Known*, N.Y. TIMES, June 10, 2023, at A1.

For additional 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 would "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 prohibit[ed] or limit[ed] 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 United States v. Abdelaziz, 68 F.4th 1 (1st Cir. 2023) (finding insufficient evidence that two parents who were convicted in connection with the "Varsity Blues" college admissions scandal had entered into a conspiracy with other parents working with the same admissions consultant to offer bribes in return for their children's admission into college; explaining that it was not "reasonable to infer that *any* parents who sought the assistance of [the consultant] shared a goal of getting children *other* than their own into any university," and, in fact, given the "highly competitive" nature of college admissions, it was more likely that the defendants "were indifferent or even adverse to whether other parents' children were admitted to the schools to which they sought admission, and had no interest in what happened to parents seeking admission at other universities"). For an update on the college admissions scandal, see the material above supplementing Page 681.

[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).

[2] THE RICO STATUTE

Page 881: Add to Note 7:

In *Yegiazaryan v. Smagin*, 143 S. Ct. – (2023), the Court held that the "residence" of a private civil RICO plaintiff is not "determinative" in ascertaining whether the plaintiff sufficiently alleged "a domestic injury" under *RJR Nabisco*. Rather, the Court adopted "a contextual approach" that asks whether "the circumstances surrounding the injury indicate it arose in the United States." In making this judgment, the Court instructed, judges should engage in "a case-specific inquiry that considers the particular facts surrounding the alleged injury."

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 and 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. Pistorius was recently denied parole because he has not yet served half his sentence, but his parole request is eligible to be reconsidered in August 2024. *See* John Eligon, *Olympian Jailed for Murder Is Denied Parole from Prison*, N.Y. TIMES, Apr. 1, 2023, at A8.

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 916: Add to Note 8:

The definition of an initial aggressor was at issue in the trial that ended in the acquittal of Kyle Rittenhouse, a teenager who shot three people, killing two of them, in Kenosha, Wisconsin. Rittenhouse claimed that he was openly carrying an assault rifle in order to protect people and property endangered by protests following the shooting of a Black man by Kenosha police, whereas the prosecution argued that he was the initial aggressor because he pointed his gun at a bystander. *See* Julie Bosman et al., *Rittenhouse Case in the Jury's Hands as Closing Arguments Wrap Up*, N.Y. TIMES, Nov. 16, 2021, at A13; Shaila Dewan & Mitch Smith, *Self-Defense Is Difficult to Disprove, Experts Say*, N.Y. TIMES, Nov. 20, 2021, at A1. Wisconsin's self-defense laws deny the right to use deadly force in self-defense if one "engages in unlawful conduct of a type likely to provoke others to attack him or her," unless the individual "reasonably believes he or she has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm." Wis. Stat. § 939.48(2).

For discussion of the killing of Ahmaud Arbery, which led to trials in which jurors rejected self-defense claims similar to that made by Rittenhouse – that he reasonably feared unarmed individuals because he thought they might disarm him – see the material below supplementing Page 941. For an article describing the "patchwork" of initial aggressor rules in effect throughout the country and proposing that judges be required to give initial aggressor jury instructions when a defendant claiming self-defense brought "a firearm outside of the home and display[ed] it in a threatening manner," see

Cynthia Lee, *Firearms and Initial Aggressors*, 101 N.C. L. REV. 1 (2023) (also suggesting that an initial aggressor be defined as one whose "words or acts created a reasonable apprehension of imminent death or serious physical harm").

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 a 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.

For an article arguing that the immunity granted to defensive force in Florida and a quarter of the states is a "concept … foreign to the Anglo-American legal tradition" and has had the result of "increasing violence, diminishing the institution of the jury, delegitimizing criminal law outcomes, and undermining judicial economy," see Eric Ruben, *Self-Defense Exceptionalism and the Immunization of Private Violence*, 96 SO. CAL. L. REV. 509 (2023).

Page 921: Add to Note 2:

Amber Guyger, an off-duty white police officer in Dallas, was charged with murder when she entered the apartment one floor above her own and shot the resident of that apartment, Botham Jean, a Black accountant who was sitting on his living room sofa watching television and eating a bowl of ice cream. Guyger testified that she thought she was in her own home and Jean was an intruder. Even though she was in the wrong apartment and claimed she didn't notice Jean's red doormat or the illuminated apartment number on the door, 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 ten 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; Marina Trahan Martinez et al., *Former Officer Who Shot Her Neighbor Is Sentenced to 10 Years in Prison*, N.Y. TIMES, Oct. 3, 2019, at A17. The court of appeals affirmed Guyger's conviction, rejecting her argument that she was guilty at most of criminally negligent homicide, and both the Texas Court of Criminal Appeals and the U.S. Supreme Court declined to consider the case. *See Guyger v. State*, 2021 Tex. App. Lexis 9341 (Tex. App. Nov. 17, 2021), *review denied*, 663 S.W.3d 123 (Tex. Crim. App.), *cert. denied*, 143 S. Ct. 407 (2022).

[C] OTHER USES OF DEFENSIVE FORCE

[2] LAW ENFORCEMENT

Page 936: Add to Note 1:

But cf. Lombardo v. City of St. Louis, 141 S. Ct. 2239 (2021) (per curiam) (reversing grant of summary judgment to police officers in fatal excessive force case, without reaching either the merits of the excessive force claim or the defendants' entitlement to qualified immunity, on the grounds that the lower court may have considered "the use of a prone restraint … *per se* constitutional so long as an individual appears to resist officers' efforts to subdue him" – without considering other relevant circumstances, such as the fact that the individual was already in handcuffs and leg shackles when he was moved to the prone position and was kept in that position for 15 minutes – and reasoning that "[s]uch a *per se* rule would contravene the careful, context-specific analysis required by this Court's excessive force precedent").

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 may be used, see Melissa Hamilton, *Excessive Lethal Force*, 111 NW. U. L. REV. 1167 (2017).

Page 937: Add to Note 2:

In 2022, the Justice Department revised its policy on law enforcement use of force for the first time in 18 years. Under the new policy, deadly force may be used only if an officer reasonably believes that someone "poses an imminent danger of death or serious physical injury" to the officer or to a third person. The policy prohibits using deadly force to prevent the escape of a fleeing felon; firing a weapon to "disable moving vehicles"; and firing a warning shot "outside of the prison context." The policy also requires training in de-escalation techniques, in "the affirmative duty to intervene to prevent or stop" another officer from using excessive force, and in "the affirmative duty" to provide "medical aid, as appropriate, where needed." *See* Memorandum, Department's Updated Use-of-Force Policy (May 20, 2022), https://www.justice.gov/d9/pages/attachments/2022/05/23/departments_updated_use-of-force_policy.pdf.

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 California Act to Save Lives 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 Black 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.

In the wake of George Floyd's death, the Maryland legislature also limited law enforcement use of force, overriding the Governor's veto. The legislation allows the use of force only "to prevent 'an imminent threat of physical injury' to a person or to 'effectuate a legitimate law enforcement objective,'" and any force used must be "'necessary and proportional.'" Excessive force that causes serious injury or death can lead to criminal charges and a maximum ten-year prison sentence. In addition, the law requires creation of "a system to identify police officers who are considered likely to use excessive force and to retrain, counsel or, if needed, reassign them." *See* Michael Levenson & Bryan Pietsch, *Overriding Governor's Vetoes, Maryland Lawmakers Enact Police Reform*, N.Y. TIMES, Apr. 11, 2021, at A23.

Page 938: Add to Note 5:

For an empirical study finding that about one of every 1,000 Black 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 NAT'L ACAD. SCI. 16,793 (2019). *See also United States v. Knights*, 989 F.3d 1281, 1296 & n.6 (11th Cir. 2021) (Rosenbaum, J., concurring) (citing statistics reporting that overall Black individuals are 2.5 times more likely to be fatally shot by police officers than whites, and that the racial disparity increases to five times for unarmed individuals and to 21 times for young Black men between the ages of 15 and 19), *cert. denied*, 142 S. Ct. 709 (2021); 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 in every year since 2013 and concluding, based on a study of the almost 4000 such killings that occurred from 2015 through 2018, that Black persons 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. A new prosecutor in Ferguson, who is Black, reopened the investigation into Brown's death, but ultimately decided not to press charges on the grounds that Darren Wilson could not be proven guilty of murder or manslaughter beyond a reasonable doubt. *See* John Eligon, *Officer Won't Be Charged in 2014 Brown Killing*, N.Y. TIMES, July 31, 2020, at A18.

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 and Van Dyke withdrew his appeal of the conviction. Van Dyke's 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 challenged that decision, and, to date, judges have upheld three of the terminations. *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; Megan Crepeau, *Van Dyke Withdraws Appeal of Conviction in McDonald Slaying*, CHI. TRIB., Oct. 11, 2020, at C14; Jeremy Gorner, *Judge Upholds Firing of Officer Dismissed in the Wake of Laquan McDonald Case*, CHI. TRIB. ONLINE, Dec. 10, 2020.

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 had committed reckless assault and violated police department policy banning chokeholds. *See* Ashley Southall, *Officer in Garner's Death Was 'Untruthful' to Investigators, Judge Says*, N.Y. TIMES, Aug. 19, 2019, at A21. The police commissioner subsequently fired Pantaleo and denied him retirement benefits. Pantaleo's challenge to the commissioner's decision was rejected on appeal. *See Matter of Pantaleo v. O'Neill*, 146 N.Y.S.3d 38 (N.Y. App. Div.), *leave to appeal denied*, 174 N.E.3d 710 (N.Y. 2021).

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 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 was 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. After about ten hours of deliberation, a jury convicted him on all three counts, and he was sentenced to 22½ years in prison. Chauvin is appealing, arguing that the jurors were influenced by the protests and publicity surrounding the case. The other three officers were charged as accomplices to felony murder and to involuntary manslaughter, but their trials were delayed while the Justice Department pursued federal charges that the four officers violated Floyd's civil rights. Chauvin pled guilty to the federal charges in exchange for a sentence of 21½ years that runs concurrently with his state sentence. The other three officers were also convicted of the federal charges. Two of them pled guilty to involuntary manslaughter in the state case and are serving concurrent

sentences on the state and federal charges ranging from 3 to 3½ years. The final officer was sentenced to 3½ years on the federal charge and was recently convicted of manslaughter in state court. The city of Minneapolis agreed to pay Floyd's family $27 million to settle their civil claims. George Floyd's death led to protests around the world and calls for police department reforms. Following an investigation spurred by Floyd's death, the U.S. Department of Justice issued a report finding a pattern of excessive force on the part of Minneapolis police officers, who "routinely discriminated against Black people and Native Americans,… patrolling 'differently based on the racial composition of the neighborhood, without a legitimate, related safety rationale.'" The city is expected to enter into a consent decree with the Justice Department that will require reform. *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; Tim Arango, *Chauvin Given 22½-Year Term in Floyd Killing*, N.Y. TIMES, June 26, 2021, at A1; Jay Senter & Shaila Dewan, *Chauvin Is Sentenced to 21 Years in a Case of Civil Rights Violations*, N.Y. TIMES, July 8, 2022, at A12; Amanda Holpuch, *Last Officer in Floyd Case Is Convicted for Abetting*, N.Y. TIMES, May 4, 2023, at A15; Ernesto Londoño et al., *Police in Minneapolis Blatantly Disregarded Civil Rights, U.S. Says*, N.Y. TIMES, June 17, 2023, at A1.

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 Taylor's ex-boyfriend, a suspected drug dealer who had already been located by police elsewhere in the city, had used Taylor's apartment to receive mail and to store drugs and drug money. There is a dispute whether the police did identify themselves before entering the apartment, but Taylor was shot six 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. No drugs were found in Taylor's apartment. A grand jury indicted Brett Hankinson, who shot into a neighbor's apartment, but declined to charge any of the other officers in connection with Taylor's death. Hankinson was acquitted of reckless endangerment charges. Hankinson and Myles Cosgrove, who fired the shots that killed Taylor, were fired by the police department, as was Joshua Jaynes, for falsely claiming in the search warrant application that he had verified with postal employees that the suspected dealer had received mail at Taylor's apartment. The Police Merit Board upheld the terminations of Cosgrove and Jaynes and is considering Hankinson's appeal; Jaynes has sued to challenge the Board's decision. Federal charges have now been filed against four officers involved in the Taylor case. Hankinson has been charged with depriving Taylor, Walker, and three neighbors of their civil rights by firing blindly into the apartment building. The other three officers – Jaynes, Kyle Meaney, and Kelly Goodlett – have been charged with knowingly including false information in the search warrant affidavit and covering up their lies. Meaney was fired by the Louisville police department. Goodlett, who may cooperate with federal prosecutors in the case against the other three defendants, resigned from the police force and pled guilty to one count of conspiring to falsify the warrant application. In the wake of Taylor's death, the city banned no-knock warrants and settled a civil suit with her mother and boyfriend for $12 million and $2 million respectively. The judge who signed the no-knock warrant lost her bid for re-election in November 2022. *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; Malachy Browne et al., *How the Police Killed Breonna Taylor*, N.Y. TIMES,

Dec. 31, 2020, at A11; Tessa Duvall, *Cops: Retired, Fired, Acquitted*, COURIER-JOURNAL (Louisville), Mar. 14, 2022, at A3; Nicholas Bogel-Burroughs, *4 Officers Face Federal Charges in Taylor Killing*, N.Y. TIMES, Aug. 5, 2022, at A1; Nicholas Bogel-Burroughs, *Ex-Detective Admits Conspiracy to Mislead Judge on Taylor Raid*, N.Y. TIMES, Aug. 24, 2022, at A14; Andrew Wolfson, *Shaw Ousted from Bench*, COURIER-JOURNAL (Louisville), Nov. 10, 2022, at A3.

In response to these recent deaths, reform legislation was introduced in Congress in June of 2020 and then again in the next Congress. The George Floyd Justice in Policing Act 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 passed the bill in 2020 and 2021, but it did not have sufficient support in the Senate.

On the second anniversary of George Floyd's death, President Biden signed an executive order addressing some of the issues covered in the bill. The order, which Biden acknowledged is "no substitute for more far-reaching reforms that only Congress can enact," instructs federal agencies to revise their use-of-force policies to align with the Department of Justice policy described above in the material supplementing Page 937; establishes a national registry of police officers who have been terminated because of misconduct; and provides federal funds to encourage police departments to limit chokeholds and no-knock warrants. *See* Eli Stokols, *Biden Signs Executive Order for Federal Reform of Policing*, L.A. TIMES, May 26, 2022, at A1. At least 17 states have already enacted legislation, almost all in the year following George Floyd's death, to ban or restrict the use of chokeholds. *See* Farnoush Amiri et al., *Floyd Killing Prompts Some States to Limit or Ban Chokeholds*, AP NEWS (May 23, 2021), https://apnews.com/article/george-floyd-business-police-reform-death-of-george-floyd-government-and-politics-d706e72d068ee4898878415565b4e49a. *See also* Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 111 (2022) (surveying the variety of federal, state, and municipal regulations on police chokeholds).

Calls for Congress to enact reform legislation have intensified in the wake of the fatal beating of Tyre Nichols after a traffic stop in Memphis. The five officers who punched and kicked Nichols have been fired and charged with second-degree murder. Two other officers have been suspended, and two EMTs who failed to provide care to Nichols have also been fired. *See* Erin B. Logan & Libor Jany, *At Funeral, Harris Calls for Action*, L.A. TIMES, Feb. 2, 2023, at A1.

Page 941: Add to Note 6:

The controversy surrounding private citizens' use of force for law enforcement purposes received national attention in connection with the February 2020 death of Ahmaud Arbery, a 25-year-old Black

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 shot three times at close range by Travis, who reportedly directed a racial slur at Arbery as he lay dying. A third man, Roddie Bryan, who filmed a video of the incident, helped the McMichaels pursue and corner Arbery. Travis was convicted on all nine charges filed by state prosecutors, including intentional murder, felony murder, and false imprisonment. His father was convicted on all the charges except intentional murder, and Bryan was convicted on six of the nine counts, including felony murder and false imprisonment. The three men were sentenced to life in prison (without the possibility of parole for the McMichaels). They were also convicted on federal hate crime charges: in that case, the McMichaels were sentenced to life sentences to run concurrently with their state sentences (plus an additional consecutive sentence of ten years for Travis and seven years for Gregory), and Bryan received a concurrent 35-year sentence. The three men have appealed both the federal and state convictions. *See What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES, June 29, 2020; Richard Fausset et al., *Three in Georgia Are Found Guilty in Arbery Murder*, N.Y. TIMES, Nov. 25, 2021, at A1; Richard Fausset, *Georgia Judge Sentences Three Men to Life in Prison in Arbery Killing*, N.Y. TIMES, Jan. 8, 2022, at A12; Tariro Mzezewa et al., *Federal Jury Finds that Arbery Killing Was Motivated by Racism*, N.Y. TIMES, Feb. 23, 2022, at A1. For a moving interview with Marcus Ransom, the jury foreperson and the only Black male juror in the federal trial, see Richard Fausset & Tariro Mzezewa, *'So Much Hatred'*, N.Y. TIMES, Mar. 2, 2022, at A14.

Under Georgia law at the time Arbery was killed, a citizen could make an arrest either if a crime was "committed in his presence or within his immediate knowledge" or "upon reasonable and probable grounds of suspicion" if the crime was a felony and the suspect was attempting to escape. Ga. Code Ann. § 17-4-60. Following Arbery's death, the Georgia legislature repealed the statute allowing ordinary citizens to make arrests and also enacted hate crime legislation. *See* Richard Fausset, *Lawmakers in Georgia Curb Civil War-Era Law Allowing Citizen's Arrests*, N.Y. TIMES, Apr. 1, 2021, at A18. For discussion of the history of citizen's arrest provisions 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 38, in addition to the District of Columbia; 22 of those states, as well as D.C., also permit the recreational use of marijuana. *See Legal Medical and Recreational Marijuana States*, 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, e.g.*, *United States v. Pisarski*, 965 F.3d 738 (9th Cir. 2020). *Cf. United States v. Bilodeau*, 24 F. 4th 705 (1st Cir. 2022) (agreeing with the Ninth Circuit, but allowing prosecution to proceed where licensed medical marijuana distributors were running "facades for selling marijuana to unauthorized users"). The Tenth Circuit 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), but the case was dismissed as moot when the inmate was released from prison. *See Sandusky v. Herrera*, 2020 U.S. Dist. Lexis 78714 (D. Colo. May 5, 2020).

The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act, a bill first introduced in Congress with bipartisan support in 2018, would have gone further than the budget rider and prohibited federal authorities from enforcing the federal marijuana laws in states that have legalized the drug. *See* Kimberly Veklerov, *Move to Ease U.S. Limits on Cannabis*, S.F. CHRON., June 9, 2018, at A1. But the House twice passed a bill that would decriminalize marijuana entirely and expunge any marijuana-related conviction for a nonviolent crime. Although the legislation was not passed by the Senate, its supporters cited statistics reporting that 40% of drug arrests in 2018 involved marijuana, 90% of which were possession charges, and that Blacks are more than three times as likely to be arrested for possessing marijuana than whites although their usage rates are similar. *See* Catie Edmondson, *Measure Decriminalizing Marijuana Clears House*, N.Y. TIMES, Dec. 5, 2020, at A17; *U.S. News: U.S. Watch*, WALL STREET J., Apr. 2, 2022, at A2.

In October 2022, President Biden pardoned everyone who had been convicted of simple marijuana possession in D.C. or federal court since the drug became illegal in the 1970s. Although no federal prisoners are currently serving time for simple marijuana possession, the pardons will eliminate the collateral consequences of a marijuana conviction affecting thousands of people, for example, in applying for jobs, housing, college admission, or federal benefits. The President also instructed the Attorney General to consider whether marijuana should continue to be classified as a Schedule 1 controlled

substance like heroin and LSD. *See* Michael D. Shear & Zolan Kanno-Youngs, *President Issues Federal Pardons over Marijuana,* N.Y. TIMES, Oct. 7, 2022, at A1.

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. *But see United States v. Dingwall*, 6 F.4th 744, 755 (7th Cir. 2021) (disagreeing with *Dixon* on the ground that "the factual existence of a mental condition is an 'external, concrete factor' … that can assist in the reasonable person inquiry" by "help[ing] the factfinder consider how a reasonable person with that condition may have responded to the situation") (quoting *Dixon*, 901 F.3d at 1183). For discussion of the circuit split on this issue, see Addison May, Comment, *Janie's Got a Gun (And No Other Option): The Harsh Reality for Battered Women Claiming Duress in Federal Court*, 55 TEX. TECH L. REV. 249 (2023).

Page 985: Add to Note 9(c):

As noted above in the material supplementing Page 123, the Fourth Circuit held that Lee Malvo was 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 reversed Dzhokhar Tsarnaev's death sentence on the grounds that prospective jurors were not properly screened for bias and that the trial judge should have admitted evidence linking Tamerlan Tsarnaev to a prior triple murder in order to bolster Dzhokhar's defense that he was acting under his older brother's influence at the time of the Boston Marathon bombings. *See United States v. Tsarnaev*, 968 F.3d 24 (1st Cir. 2020). But the Supreme Court disagreed, holding that the trial court did not abuse its discretion either in refusing to ask prospective jurors to list the facts they had learned about the case prior to trial or, as discussed further in the material above supplementing Page 427, in excluding the evidence allegedly implicating Tamerlan in the previous murders. *See United States v. Tsarnaev*, 142 S. Ct. 1024 (2022).

[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 was permitted to drive greater distances from his mother's home by himself, to move out of his mother's house with the approval of his therapists, and to anonymously use the Internet to run his antiques business and 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 was subsequently allowed to speak to the media and to use his name on Internet postings of his art, music, and writings, and he began living on his own when his mother died in July of 2021. *See* Ben Finley, *No Opposition to Restrictions on Would-Be Reagan Assassin*, CHI. TRIB., May 22, 2022, at C2. Two months later, the court ordered that Hinckley be unconditionally released on June 15, 2022, assuming that he was still mentally stable and complying with the conditions of his release. *See United States v. Hinckley*, 2021 U.S. Dist. Lexis 257289 (D.D.C. Sept. 30, 2021). The government had no objection to his release, and Hinckley was unconditionally released on June 15, 2022, after more than 40 years of confinement. Hinckley posts his music videos on his YouTube channel and plans to start a record label. *See* Aishvarya Kavi, *Hinckley, Who Tried to Assassinate Reagan, Will Gain Full Freedom*, N.Y. TIMES, June 2, 2022, at A14.

Page 1034: Add to Note 12:

The Supreme Court has agreed to consider whether the Double Jeopardy Clause permits retrying a defendant who was acquitted by reason of insanity on one count and found guilty but mentally ill on another count when both the insanity acquittal and the GBMI conviction were reversed on the grounds that "it is not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode against a single victim." *McElrath v. State*, 880 S.E.2d 518 (Ga. 2022), *cert. granted*, 143 S. Ct. – (2023).

[2] THE CURRENT STATE OF THE LAW

Page 1049: Add to Footnote 30:

The Fourth Circuit affirmed Dylann Roof's conviction and death sentence, holding that the trial judge did not err in finding Roof competent both to stand trial and to represent himself. The appellate court relied on a psychiatrist's testimony that Roof's schizophrenia was "'in remission'" and that his "beliefs" were "'extreme racial views'" rather than "'delusions.'" *See United States v. Roof*, 10 F.4th 314 (4th Cir. 2021) (quoting expert testimony), *cert. denied*, 143 S. Ct. 303 (2022).

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).

Lynne Fenton, a psychiatrist who saw Holmes six times in the four months leading up to the shootings, has also written a book. The book reveals that Holmes told Fenton he was having thoughts about killing people, and she made calls to his mother and campus police. But she did not try to put a mental health hold on Holmes because he had no criminal record and did not tell her about any specific targets or plans to kill. *See* LYNNE FENTON & KERRIE DROBAN, AURORA (2022).

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 a defense to defendants experiencing mental illness 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 those 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 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. 409 (2020) (maintaining 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. 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").

Page 1056: Add to Note 6(c):

For a moving account of a woman's experience with postpartum psychosis, see CATHERINE CHO, INFERNO: A MEMOIR OF MOTHERHOOD AND MADNESS (2020).