CRIMINAL LAW: CASES AND MATERIALS

Third Edition

2016 Supplement

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Chapter 1

THE NATURE AND STRUCTURE OF CRIMINAL LAW

A. THE CORE AND PERIPHERY OF CRIMINAL LAW

[3] THE CAPACITY TO OBEY

Page 10: Add to Note 5:

In 1838, a half century before the *Dudley & Stephens* case, Edgar Allan Poe published his only complete novel, a story about a marooned whaling boat that coincidentally featured a character named Richard Parker. In the book, *The Narrative of Arthur Gordon Pym of Nantucket*, Parker drew the "short straw" and was promptly cannibalized. Less coincidental, the tiger stranded on a lifeboat with the title character in *Life of Pi*, the 2002 novel that became an award-winning film in 2012, was also called Richard Parker.

[5] SUMMARY

Page 17: Add to the end of the Summary:

Many of the dilemmas that appear at the periphery of criminal law involve the effects of technological progress on social conditions. (For recent decisions in which the U.S. Supreme Court has addressed technological change, see *Riley v. California*, 134 S. Ct. 2473 (2014) (refusing to allow warrantless searches incident to arrest of the data stored on cellphones because "they hold for many Americans the privacies of life"); *Maryland v. King*, 133 S. Ct. 1958 (2013) (upholding the constitutionality of a statute requiring that DNA samples be taken from all persons arrested for serious crimes), and *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that the installation and use of a GPS tracking device on a car constitutes a Fourth Amendment "search").) In criminal law, as in many other areas of law, legislators and theorists are constantly playing catch-up in dealing with changes that have no precedent and no obvious guidelines. As new technologies reshape how we share information and communicate, law must address what ways of transmitting data (music, movies, books, inventions, ideas) are permissible given the evolving notions of intellectual property and what ways demand limitations, protection, and sanctions. As medical technology affects our ability to heal and change our bodies and minds and even affects how we conceive our nature as physical and mental beings, law must confront and redefine our rights to draw benefits from medical progress and to control our destiny. As we draw upon technology to form new communities that do not depend on geography or genealogy, we need law to set the rules by which we may assume roles in each other's lives. In these areas, certain kinds of conduct will be allowed and perhaps even seen as desirable, and other kinds will be seen as harmful and subject to prohibition.

B. THE FUNCTIONAL AND PROCEDURAL BASES OF CRIMINAL LAW

[2] PROCEDURAL ASPECTS OF CRIMINAL LAW

[a] THE STATE AS PLAINTIFF: CIVIL VERSUS CRIMINAL LIABILITY

Page 20: Add to Note 1:

The question of what qualifies as a criminal case arose in *Robertson v. United States ex rel. Watson*, 560 U.S. 272 (2010). Robertson committed a violent assault on his then-girlfriend Watson, and criminal charges were brought against him. In addition, Watson obtained a civil protective order against Robertson, which he violated by again violently assaulting her. Robertson pled guilty to attempted aggravated assault in connection with the first attack, and the government agreed to dismiss all other charges arising from that assault and not to prosecute the second assault. Watson thereafter initiated criminal contempt proceedings against Robertson for violating the protective order. After a judge found him guilty of three counts of criminal contempt, Robertson was sentenced to about a year in prison and ordered to pay $10,000 in restitution. Robertson complained on appeal to the D.C. Court of Appeals that the criminal contempt prosecution was barred by the plea agreement, but the court held that the criminal contempt proceedings were brought in the name of and interest of Watson rather than the government.

The Supreme Court granted certiorari but ultimately dismissed the writ as improvidently granted. Chief Justice Roberts, joined by Justices Scalia, Kennedy, and Sotomayor, filed a dissent, arguing that the case was plainly controlled by *United States v. Dixon*, 509 U.S. 688 (1993), which held that a private party's prosecution for criminal contempt barred a subsequent prosecution by the government for the same offense. The Chief Justice cited a long history establishing that crimes may only be prosecuted on behalf of the government and observed as follows:

> That we treated the criminal contempt prosecution in *Dixon* as an exercise of government power should not be surprising. More than two centuries ago, Blackstone wrote that the king is "the proper person to prosecute for all public offenses and breaches of the peace, being the person injured in the eyes of the law."…
>
> Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another. The ruling below is a startling repudiation of that basic understanding….
>
> Watson's arguments based on American precedent fail largely for the same reason: To say that private parties could (and still can, in some places) exercise some control over criminal prosecutions says nothing to rebut the widely accepted principle that those private parties necessarily acted (and now act) on behalf of the sovereign.

Robertson, 560 U.S. at 275-76, 278-79 (Roberts, C.J., dissenting).

[b] CONSTITUTIONAL SAFEGUARDS

Page 26: Add Note 5:

5. *Rightsholders.* It had long been assumed that all persons tried under the American system of criminal justice could avail themselves of the procedural rights listed in the Constitution. Laws passed in the wake of the 9/11 terrorist acts have cast substantial doubt on this assumption. See the next Note, below, on the status of so-called "unlawful enemy combatants" and the putative use of military tribunals.

[e] DUE PROCESS AND FAIR WARNING

Page 41: Add Notes 10 & 11:

10. *The Armed Career Criminal Act.* Courts often work hard to interpret statutes that are vague and ambiguous in order to provide judicial glosses that provide fair warning and some guarantee of consistency in implementation, but sometimes their best efforts are to no avail. A good example is *Johnson v. United States*, 135 S. Ct. 2551 (2015), which struck down a portion of the federal Armed Career Criminal Act (ACCA) as unconstitutionally vague. The Act provides that violations of federal law prohibiting certain classes of people from shipping, possessing, or receiving firearms are generally punishable by up to ten years in prison, but the punishment increases to a minimum of fifteen years and a maximum of life if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e). The Act defines "violent felony" as follows:

> [A]ny crime punishable by imprisonment for a term exceeding one year … that … (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*.

Id. § 924(e)(2)(B) (emphasis added).

In four prior cases, the Court had strained to interpret the italicized language — ACCA's so-called "residual clause" — to uphold its constitutionality. But in ultimately finding the clause impermissibly vague, Justice Scalia's opinion for the Court in *Johnson* reasoned as follows:

> Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"…

> At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes — burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses."

Johnson, 135 S. Ct. at 2557-58. For discussion of Supreme Court opinions interpreting other provisions of the ACCA, see the material below supplementing Page 617.

11. *Vagueness and Jurisdiction.* In the wake of the terrorist acts of 9/11, the courts have had to face a new kind of vagueness question. As we have seen, vagueness is typically raised as a defense and involves claims about the definition of crime and criminal activity; it takes the form of an argument that the definition lacks sufficient specificity to afford fair warning to actors and to circumscribe the actions of those who enforce the law. The new kind of question is one of jurisdiction and standing. It concerns the question who is entitled to be tried in civilian criminal courts and to take advantage of the procedural guarantees of the Constitution.

Just one week after 9/11, Congress passed the Authorization for Use of Military Force Against Terrorists, which drew upon Congress' preexisting War Powers Resolution. On November 13, 2001, President Bush issued a presidential military order under these powers to authorize the indefinite detention at Guantanamo of "enemy combatants," defined as members or supporters of the Taliban or al-Qaida forces engaged in hostilities against the United States. The Military Commissions Act of 2006, passed by Congress in response to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), distinguished between lawful and unlawful enemy combatants. The latter, according to the Act, were in a legal limbo, entitled to access neither the U.S. civil justice system nor the procedures granted to prisoners of war by the Geneva Conventions. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that Congress was not empowered to deny such individuals the right to use the U.S. federal courts system. Thus, habeas corpus petitions of these individuals were reinstated.

The Obama administration has followed the Bush administration's policy and sought to bar "unlawful" enemy combatants from the civil courts. The Obama Department of Justice has, however, phased out the term "enemy combatant," referring instead to "person[s] engaged in hostilities against the United States or its coalition partners during an armed conflict." (Department of Defense Dictionary.)

The indefiniteness of a term such as "unlawful enemy combatant" in its current use lies in the fact that it was invented for political reasons to circumscribe a category that had not existed previously, individuals who were detained under the American criminal justice system but could not avail themselves of the rights associated with such detention; at the same time, these individuals were not prisoners of war and therefore not protected by international rules of war. The term was invented not simply as a description of an independently identifiable category of

actors but as embodying the conclusion that certain actors lacked particular legal rights. The term embodied the postulate that unlawful enemy combatants could not avail themselves of these procedural rights; it did not leave it an open question. The courts, on the other hand, persist in regarding the question as open and determinable. Thus, the term is fatally ambiguous.

Chapter 3

PUNISHMENT

B. GENERAL JUSTIFICATIONS OF PUNISHMENT

[1] RETRIBUTION

Page 94: Add to Note 4:

See also *Graham v. Florida*, 560 U.S. 48 (2010), and *Alabama v. Miller*, 132 S. Ct. 2455 (2012), which are described below in the material supplementing Page 140.

C. METHODS OF PUNISHMENT

[1] INCARCERATION

[c] The Critique of Prisons

Page 105: Add Note 4:

4. *An Inside Account.* For a revealing first-hand account of life inside a prison and the work of a prison guard, see Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (July-Aug. 2016), http://m.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer.

[3] CAPITAL PUNISHMENT

Page 116: Add to Note 1:

A recently published study conducted over six years by Columbia Law Professor James Liebman and a group of students discovered evidence that in 1989 Carlos DeLuna was wrongfully executed in Texas for a murder actually committed by another man, Carlos Hernandez, who not only shared DeLuna's name but also resembled him in appearance. *See* James S. Liebman et al., *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012).

The 2012 documentary *West of Memphis* chronicled the story of the so-called "West Memphis Three," three teenagers who were convicted of murdering three boys in West Memphis, Arkansas, in 1993. One of the three defendants, Damien Echols, was sentenced to die, while the other two, Jason Baldwin and Jessie Misskelley, were sentenced to life in prison. Later DNA evidence showed the defendants were not at the scene of the crime, and the case attracted the attention of celebrities such as Peter Jackson, Eddie Vetter, and Johnny Depp. Under a compromise agreement, the State released the three defendants in 2011 after they entered *Alford*

pleas, pleading guilty while still maintaining their innocence. *See* Stephen Holden, *A Happy Ending, Sort of, Comes with No Closure*, N.Y. TIMES, Dec. 25, 2012, at C6.

In March of 2015, the State Bar of Texas filed formal disciplinary charges against John H. Jackson, the prosecutor in the case against Cameron Todd Willingham, who was executed in 2004 for murdering his three daughters. The disciplinary charges — obstructing justice, making false statements, and concealing exculpatory evidence — involve the former prosecutor's relationship with a jailhouse informant, who has now recanted his testimony that Willingham admitted he started the fire that led to the girls' death. *See* Maurice Possley, *Prosecutor Accused of Misconduct in Death Penalty Case*, WASH. POST, Mar. 19, 2015, at A3. For an extensive discussion of the Willingham case, including an indictment of the scientific validity of the prosecution's expert testimony that the fatal fire was the result of arson and could not have started accidentally, as Willingham claimed, see David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, at 42.

D. SEVERITY OF PUNISHMENT

[1] ON SENTENCING

Page 122: Add to Note 1:

As described below in the material supplementing Page 558, the conviction of former Enron CEO Jeffrey Skilling was placed in doubt following the Supreme Court's ruling in *Skilling v. United States*, 561 U.S. 358 (2010). Although the conviction was subsequently reaffirmed by the Fifth Circuit on remand, Skilling's sentence was reduced by ten years. *See United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011).

For an interesting interview with the federal judge who in 2009 sentenced investment advisor Bernie Madoff to the maximum sentence of 150 years after Madoff pled guilty to eleven counts of fraud, money laundering, perjury, and theft in connection with a $65 billion Ponzi scheme that defrauded thousands of investors, see Benjamin Weiser, *Madoff Judge Recalls Rationale for Imposing 150-Year Sentence*, N.Y. TIMES, June 29, 2011, at A1.

[2] SENTENCING DISCRETION

[b] GUIDELINES AND BEYOND

Page 127: Add to the end of the last full paragraph on the page:

See also United States v. O'Brien, 560 U.S. 218 (2010) (the determination whether a weapon is a machine gun for purposes of the federal statute imposing a mandatory minimum sentence on defendants who use a machine gun in committing a crime of violence is an element of the crime that must be proved to the jury beyond a reasonable doubt, and not a sentencing factor to be determined by the judge at sentencing); *Oregon v. Ice*, 555 U.S. 160 (2009) (the decision

whether to impose a consecutive or concurrent prison sentence may be based on facts found by the judge because juries traditionally had no role in such determinations).

In *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), the Supreme Court ruled by a vote of 6-3 that *Apprendi* applies to the imposition of criminal fines, finding no reason to treat fines any differently from prison sentences.

The Court has now overruled its decision in *Harris v. United States*, 536 U.S. 545 (2002), rejecting *Harris*' distinction between mandatory minimum sentences and statutory maximums. *See Alleyne v. United States*, 133 S. Ct. 2151 (2013). "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt," the Court reasoned, and "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." In that case, therefore, the factual question whether Alleyne had "brandished" his firearm during a robbery, thus increasing his mandatory minimum sentence under federal law from five to seven years, should have been submitted to the jury, and his case was remanded for resentencing.

In some cases, it is not easy to determine precisely what the elements of an offense are and what issues remain for the jury to decide. One example is *Taylor v. United States*, 136 S. Ct. — (2016). Taylor was indicted under the Hobbs Act on two counts of affecting commerce or attempting to do so through robbery as a result of his participation in two home invasions in which he and other gang members attempted to rob drug dealers. Taylor's first trial ended in a hung jury, and before the second trial the judge granted the prosecution's motion to preclude Taylor from offering evidence that the targeted marijuana dealers dealt only in locally grown marijuana. In agreeing with the trial judge's ruling, Justice Alito's opinion for the Court reasoned as follows:

> We held in *Gonzales v. Raich*, 545 U.S. 1 (2005), that the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance. Because Congress may regulate these intrastate activities based on their aggregate effect on interstate commerce, it follows that Congress may also regulate intrastate drug theft. And since the Hobbs Act criminalizes robberies and attempted robberies that affect any commerce "over which the United States has jurisdiction," [18 U.S.C.] § 1951(b)(3), the prosecution in a Hobbs Act robbery case satisfies the Act's commerce element if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds.

The sole dissenter, Justice Thomas, argued that Congress did not intend the statute to reach local drug dealing and would have overturned the conviction because "[t]he Government did not prove that Taylor affected any channel of interstate commerce, instrumentality of commerce, or person or thing in interstate commerce." At the end of his opinion, Justice Thomas focused on the prosecution's burden to prove each element of an offense beyond a reasonable doubt and argued that "[t]oday's decision fails to hold the Government to its burden to prove, beyond a reasonable doubt, that the defendant's robbery itself affected commerce." Thus, the majority's interpretation of the Hobbs Act essentially resulted in the jury's being instructed that the interstate commerce element was proven if the attempted robberies involved marijuana. Justice Thomas' interpretation

would have left the jury with the question whether local drug dealing did in fact affect interstate commerce.

Page 129: Add to the end of the first paragraph:

The California legislature responded to the Supreme Court's decision in *Cunningham v. California* by amending Cal. Penal Code § 1170(b) to provide that when a criminal statute "specifies three possible [prison] terms, the choice of the appropriate term shall rest within the sound discretion of the court," which is to "select the term which, in the court's discretion, best serves the interests of justice."

Page 131: Add to the end of Part [2][b]:

In *Pepper v. United States*, 562 U.S. 476 (2011), the Supreme Court held that a defendant whose sentence has been set aside on appeal may offer evidence of post-sentencing rehabilitation to support a downward variance from the Federal Sentencing Guidelines. But in *Tapia v. United States*, 564 U.S. 319 (2011), the Court concluded that the provision in the Sentencing Reform Act of 1984 cautioning that "imprisonment is not an appropriate means of promoting correction and rehabilitation," 18 U.S.C. § 3582(a), prohibits the federal courts from imposing or increasing a prison sentence for purposes of rehabilitation. The Court therefore held that the trial judge could not sentence Tapia to a longer prison term so that she would be eligible for a prison drug abuse program.

In *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), the Supreme Court decided that Fed. R. Crim. P. 52(b)'s requirement that only "[a] plain error that affects substantial rights" can support a reversal based on an objection that was not raised at trial is presumptively satisfied by proof that the trial judge used the wrong Federal Sentencing Guidelines range, even if the defendant could have received the same sentence under the correct range.

Page 131: Add new Part [2][c]:

[c] MODEL PENAL CODE SENTENCING REVISIONS

The Model Penal Code's provisions on sentencing are currently in the process of being revised, and the American Law Institute has already voted to approve some changes. Under the new provisions, the following considerations are relevant in choosing a sentence in a particular case: to make sentences "proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders"; "when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community"; to impose sentences "no more severe than necessary" to achieve these purposes of punishment; and to "avoid the use of sanctions that increase the likelihood offenders will engage in future criminal conduct." *See* MODEL PENAL CODE: SENTENCING § 1.02(2)(a) (Tentative Draft No. 4, 2016) (approved May 2016). The overall purposes of "the sentencing system" include

"preserv[ing] judicial discretion to individualize sentences"; making sentences uniform; and "eliminat[ing] inequities in sentencing across population groups." *See id.* § 1.02(2)(b).

The new provisions no longer include the minimum sentencing terms set out in sections 6.06-6.09, and they create five instead of three degrees of felonies, with the following maximum prison terms: life in prison for a first-degree felony; twenty years for a second-degree felony; ten years for a third-degree felony; five years for a fourth-degree felony; and three years for a fifth-degree felony. The maximum sentence for a misdemeanor remains at one year and for a petty misdemeanor is increased to six months. *See* MODEL PENAL CODE: SENTENCING § 6.06 (Tentative Draft No. 2, 2011) (approved May 2011).

The revisions allow a sentence of probation for any felony or misdemeanor conviction, for a maximum period of one year for a misdemeanor and three years for a felony, with the proviso that "ordinarily" a felon will be discharged from probation "after successful completion of a minimum term" of not more than one year. *See* MODEL PENAL CODE: SENTENCING § 6.03 (Tentative Draft No. 3, 2014) (approved May 2014).

The revisions also set the maximum fine that may be assessed for each grade of criminal offense, ranging from $200,000 for a first-degree felony to $1,000 for a petty misdemeanor. In addition, this provision limits fines to five times "the pecuniary gain" realized by the defendant or five times "the loss or damage" incurred by the victim. *See id.* § 6.04B(1). Fines in excess of these maxima may be imposed if the state opts to create a "means-based fine plan" that varies fines based on defendants' "wealth and/or income … so that the punitive force of financial penalties will be comparable for offenders of varying economic means." *See id.* §§ 6.04B(3), 6.04B(5).

The revisions also authorize judges to use "restorative justice practices" — defined as "formalized opportunities that provide for guided exchange between defendants and victims" — either instead of, or in addition to, traditional sentencing procedures if the defendant and participating victims agree. *See* MODEL PENAL CODE: SENTENCING § 6.14 (Tentative Draft No. 4, 2016) (approved May 2016). Other sections of the revisions address restitution to victims, *see id.* § 6.04(A), economic sanctions, asset forfeiture, and post-release supervision. *See* MODEL PENAL CODE: SENTENCING §§ 6.04, 6.04C, 6.09 (Tentative Draft No. 3, 2014) (approved May 2014).

In a separate provision for sentencing those who were under the age of eighteen at the time of their crime, the revisions caution that sentencing in such cases is to focus on rehabilitation and reintegration into the community unless the defendant committed "a serious violent offense" and "presents a high risk of serious violent offending in the future." This section adds a provision prohibiting sentences longer than twenty-five years "for any offense or combination of offenses," and that maximum is reduced to twenty years for defendants under the age of sixteen and to ten years for those under fourteen. *See* MODEL PENAL CODE: SENTENCING § 6.11A (Tentative Draft No. 2, 2011) (approved May 2011).

In place of the sentencing criteria set out in sections 7.01-7.04, the new sentencing provisions envision the creation of state sentencing commissions that would be charged with

submitting proposed sentencing guidelines to the legislature and then conducting "an omnibus review of the sentencing system" every ten years. *See* MODEL PENAL CODE: SENTENCING §§ 6A.01, 6A.09(1) (Tentative Draft No. 1, 2007) (approved Apr. 2007). In addition to fixing presumptive sentences, the sentencing guidelines would include "nonexclusive lists of aggravating and mitigating factors that may be used as grounds for departure from presumptive sentences" but, unlike the Federal Sentencing Guidelines, would not "quantify the effect given to specific aggravating or mitigating factors." *See id.* §§ 6B.02(1), 6B.04(4).

The new provisions authorize judges to rely on the enumerated aggravating and mitigating factors, or other factors, to depart from the presumptive sentence "when substantial circumstances establish that the presumptive sentence … will not best effectuate the purposes" of punishment outlined in section 1.02(2)(a). *See id.* § 7.XX(2). These aggravating or mitigating factors, however, must "take the case outside the realm of an ordinary case within the class of cases defined in the guidelines," and a departure may not be based on the judge's "mere disagreement with a presumptive sentence as applied to an ordinary case." *See id.* The Code creates "a heavy presumption" against any upward departure greater than twice the presumptive sentence; any such departure is considered an "extraordinary departure," which may be imposed only if "extraordinary and compelling circumstances demonstrate" that the presumptive sentence is "unreasonable" in light of the purposes of punishment. *See id.* § 7.XX(3).

Unlike the Federal Sentencing Guidelines, the Model Penal Code would not necessarily consider a defendant's criminal history, but instead leaves to the discretion of each individual sentencing commission whether to take the defendant's prior record into account either in determining the presumptive sentence or in deviating from that presumptive sentence. *See* MODEL PENAL CODE: SENTENCING § 6B.07(1) (Tentative Draft No. 4, 2016) (approved May 2016). The drafters require sentencing commissions to "explain and justify any use of criminal history" in light of the purposes of punishment articulated in section 1.02(2), and also instruct the commissions to consider that "offenders have already been punished for their prior convictions," a defendant's criminal history "may over-predict" the "risk of reoffending," and the use of criminal history to increase sentences "may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups." *See id.* But the revisions would not allow consideration of prior convictions more than ten years old, *see id.* § 6B.07(3), or of any "alleged criminal conduct" other than an actual conviction or "criminal conduct admitted by the offender at sentencing." *See* MODEL PENAL CODE: SENTENCING § 6B.06(2)(b) (Tentative Draft No. 1, 2007) (approved Apr. 2007).

The Model Penal Code's sentencing modifications also address for the first time the collateral consequences of conviction. The revisions bar denial of the right to vote, except to felons while they are incarcerated, and allow disqualification from jury service only while defendants are serving their sentences, "including any period of community supervision." *See* MODEL PENAL CODE: SENTENCING § 6x.03 (Tentative Draft No. 3, 2014) (approved May 2014).

Finally, the recent revisions add a provision that allows prisoners to move to modify their sentences after serving fifteen years and then at least every ten years thereafter. These sentence-modification proceedings are "analogous to a resentencing in light of present circumstances," and

a prisoner's sentence may be reduced if the purposes of punishment "would better be served" by a lesser sentence. *See* MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2011) (approved May 2011). In addition, a prisoner may seek a sentence modification based on "advanced age, physical or mental infirmity, exigent family circumstances, or other compelling reasons," and a court may reduce the prisoner's sentence based on a finding that one or more of those factors "justify a modified sentence" in light of the purposes of punishment. *See id.* § 305.7.

In addition to these approved changes, other modifications of the Model Penal Code's sentencing provisions are currently under review. The issues remaining to be resolved include sentencing for multiple offenses, sentencing hearing procedures, and sentencing appeals.

[3] PROPORTIONALITY

Page 139: Add to Note 4:

In the November 2012 elections, 69% of the California electorate voted in favor of Proposition 36, which narrowed the state's three-strikes law to require that the defendant's third crime, like the first two, must be a serious or violent felony. As a result, about 3,000 prisoners, approximately one-third of those serving sentences under California's three-strikes law, became eligible to seek a reduction in their sentence. By the end of February 2015, California judges had released more than 2,000 prisoners under the new law, refusing to reduce the sentences of only 132 eligible prisoners on the ground that they presented an "unreasonable risk of danger to public safety." The prisoners released as a result of Proposition 36 have had a relatively low recidivism rate of 4.7%. *See* Erik Eckholm, *Out of Prison, and Staying Out, After 3rd Strike in California*, N.Y. TIMES, Feb. 27, 2015, at A1.

Page 140: Add to Note 5:

In *Dillon v. United States*, 560 U.S. 817 (2010), the Court held that *Booker*'s decision to make the Federal Sentencing Guidelines advisory does not apply to the sentence-modification proceedings occasioned by the Sentencing Commission's reduction of the offense level for crack cocaine offenses. Sentence-adjustment proceedings have a "limited scope and purpose" and "are not constitutionally compelled," the Court explained. Instead, they "represent[] a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments" to the guidelines, and therefore they "do not implicate the interests identified in *Booker*."

In 2010, Congress passed the Fair Sentencing Act, increasing the amount of crack that triggers a mandatory five-year minimum sentence from five to twenty-eight grams (about one ounce), thus reducing the sentencing disparity between crack and powder cocaine to about 18-to-1. *See* Erik Eckholm, *Congress Moves to Narrow Cocaine Sentencing Disparities*, N.Y. TIMES, July 29, 2010, at A16.

In *Dorsey v. United States*, 132 S. Ct. 2321 (2012), the Court concluded that Congress intended the 2010 statute's more lenient penalties to apply to those defendants who committed their crimes before, but were sentenced after, the act went into effect. *But cf. Peugh v. United*

States, 133 S. Ct. 2072 (2013) (holding that the Ex Post Facto Clause prohibits imposing a higher sentence based on a version of the Federal Sentencing Guidelines that went into effect after the defendant committed the crime).

Dorsey and the Fair Sentencing Act do not help the thousands of federal prisoners sentenced before the 2010 statute took effect, although the Smarter Sentencing Act currently pending before Congress would allow those prisoners to seek reductions in their sentences. *See* Linda Greenhouse, *Crack Cocaine Limbo*, N.Y. TIMES, Jan. 6, 2014, at A19.

In an additional effort to decrease the prison population, former Attorney General Eric Holder expressed support for the elimination of mandatory minimum sentences for nonviolent drug offenders. In 2014, the Justice Department also announced an initiative encouraging such offenders currently serving lengthy prison sentences to apply for clemency. Justice Department guidelines limit clemency to those who have already served at least ten years, who have no significant criminal history and no link to gangs or organized crime, and who likely would have been given a "substantially lower sentence" today. Although President Obama has commuted 248 sentences, the process for reviewing clemency applications has been slow and somewhat cumbersome, and more than 10,000 applications still await resolution. *See The Clemency Backlog Continues*, N.Y. TIMES, Mar. 31, 2016, at A24; Sari Horwitz, *Bureaucracy Slows Clemency Efforts*, WASH. POST, Mar. 1, 2015, at A3; Matt Apuzzo, *Holder Backs Proposal to Reduce Drug Sentences*, N.Y. TIMES, Mar. 14, 2014, at A18.

Page 140: Add Note 6:

6. *Proportionality and Crimes Committed by Minors.* In *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court held that the Eighth Amendment's prohibition on cruel and unusual punishment precludes sentencing defendants to life in prison without parole for nonhomicide crimes committed before they turned eighteen. Although these sentences were in theory permitted by 37 States, as well as the Federal Government and the District of Columbia, the Court found only 123 prisoners actually serving such sentences (77 of whom were in Florida). The Court therefore concluded that in practice only eleven states imposed life without parole sentences on juvenile defendants for nonhomicide crimes and that the United States was the only country to do so. The Court made clear that its decision was categorical and was not the result of measuring the duration of the sentence against the severity of the crime. Justice Kennedy's opinion for the majority expressed skepticism about judges' ability to identify "the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence."

In *Alabama v. Miller*, 132 S. Ct. 2455 (2012), the Court extended *Graham* in finding that the Eighth Amendment likewise prohibits sentencing schemes that *mandate* life imprisonment without the possibility of parole for homicide crimes committed by juveniles. "[N]one of what [*Graham*] said about children — about their distinctive (and transitory) mental traits and environmental vulnerabilities — is crime-specific," Justice Kagan's majority opinion reasoned. Thus, the Court concluded that precluding sentencers from considering a homicide defendant's youth "contravenes *Graham*'s … foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." The Court was

not persuaded by the dissenters' argument that 28 states and the Federal Government mandate life in prison without parole for some juvenile homicide defendants, concluding that it was "breaking no new ground" given the holding in *Graham*. *See also Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (holding that *Miller* announced a new substantive rule of constitutional law that applies retroactively to cases on collateral review).

Many of the defendants who have been resentenced in the wake of these recent Supreme Court decisions have received lengthy prison terms of fifty years or more. *See* Erik Eckholm, *Juveniles Facing Lifelong Terms Despite Rulings*, N.Y. TIMES, Jan. 20, 2014, at A1. The Court has thus far refused to resolve a conflict that has arisen in the lower courts as to whether sentencing a juvenile to "consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy" is barred by the Eighth Amendment because it is "a de facto life without parole sentence and therefore violates the spirit, if not the letter, of *Graham*." *Bunch v. Smith*, 685 F.3d 546, 552 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013).

Chapter 5

MENS REA

B. LEVELS OF CULPABILITY

[1] THE COMMON LAW: GENERAL VERSUS SPECIFIC INTENT

Page 179: Add to Note 1:

A 29-year-old Northern Virginia man, Erick Williamson, found himself in Peery's shoes in October of 2009. Williamson was home alone one morning after his roommates left for work. He was making coffee in the nude when a neighbor who was walking her seven-year-old son to school saw Williamson in the house. According to Williamson, he did not realize the woman and her son were there until police appeared at his door later that morning and arrested him at gunpoint on indecent exposure charges. But the woman (a police officer's wife) said that Williamson had exposed himself to her at two different windows in the house, and police thought he was trying to attract attention to himself. The Virginia statutes define indecent exposure as "intentionally mak[ing] an obscene display or exposure of [one's] person, or the private parts thereof, in any public place, or in any place where others are present." Va. Code Ann. § 18.2-387.

When a second witness testified that she too had seen Williamson standing naked in his home several hours earlier on the same day, a judge convicted him, concluding that "the fact that it went on for so long indicates an obscene display." Williamson challenged the judge's decision in a *de novo* appeal, however, and was tried by a jury. The jury voted to acquit him after deliberating for twenty minutes. *See* Tom Jackman, *Jury Finds 'Naked Guy' Was Clearly Innocent*, WASH. POST, Apr. 8, 2010, at B4.

Page 181: Add at the end of Note 3:

The California Supreme Court has now twice declared that an offense must be classified as a specific or general intent crime "only when the court must determine whether a defense of voluntary intoxication or mental disease, defect or disorder is available." *See People v. Rathert*, 6 P.3d 700 (Cal. 2000).

[2] THE MODEL PENAL CODE

Page 189: Add to Note 1:

In concluding that the federal statute prohibiting anyone convicted of a "misdemeanor crime of domestic violence" from possessing a firearm, 18 U.S.C. § 922(g)(9), "applies to reckless assaults, as it does to knowing and intentional ones," the Supreme Court expressly adopted the Model Penal Code's definition of recklessness. *Voisine v. United States*, 136 S. Ct. — (June 27,

2016). Characterizing the Model Penal Code mens rea definitions as the "dominant formulation" and describing the common law as "us[ing] a variety of overlapping and, frankly, confusing phrases to describe culpable mental states," the Court concluded that when Congress defined a misdemeanor crime of domestic violence to include offenses that have, "as an element, the use or attempted use of physical force," 18 U.S.C. § 921(a)(33)(A), it meant to extend the firearm prohibition to domestic abusers whose "acts of force [were] undertaken recklessly — i.e., with conscious disregard of a substantial risk of harm." The Court distinguished "true accident[s]" from "reckless behavior" on the grounds that "[t]he harm [reckless] conduct causes is the result of a deliberate decision to endanger another." For the observation that the Court "has certainly invoked the MPC in the past" but that adopting its mens rea terms "so bluntly" and "without debate" in *Voisine* is "quite a significant step," see Rory Little, *Opinion Analysis: Federal "Use of Force" Encompasses Reckless Domestic Violence Misdemeanor Offenses*, SCOTUSBLOG (June 27, 2016, 9:08 PM), http://www.scotusblog.com/2016/06/opinion-analysis-federal-use-of-force-encompasses-reckless-domestic-violence-misdemeanor-offenses/.

For empirical research suggesting, however, that jurors may have difficulty identifying and distinguishing between the Model Penal Code's concepts of knowledge and recklessness, see Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327 (2014); Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306 (2011).

C. DEFENSES BASED ON MENS REA

[2] MISTAKE OF LAW

Page 200: Add to Note 1:

The venerable mistake of law doctrine has recently come under attack from some academics. *See, e.g.*, Stephen P. Garvey, *When Should Mistake of Fact Excuse?*, 42 TEX. TECH. L. REV. 359, 366 (2009) (supporting a defense for even unreasonable mistakes of law so long as they do not reflect the defendant's "defiance of the law's demands"); Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. L. 487, 523 (2012) (advocating a defense at least for reasonable mistakes of law).

Note that the Supreme Court recently refused to apply the maxim in a Fourth Amendment case, finding that the "reasonable suspicion" required to conduct a traffic stop can be based on a police officer's reasonable mistake of state law. *See Heien v. North Carolina*, 135 S. Ct. 530 (2014) (upholding a traffic stop where an officer reasonably, but incorrectly, believed that state law required vehicles to have two functioning brake lights). *But see id.* at 543 (Sotomayor, J., dissenting) (arguing that "'the notion that the law is definite and knowable' sits at the foundation of our legal system," and criticizing the Court for "significantly expand[ing] [police] authority" to subject innocent persons to intrusive and pretextual traffic stops).

Page 202: Replace the first full paragraph on the page with the following:

In one prominent case, Wesley Snipes, the star of the *Blade* movie trilogy, was acquitted of the most serious charges brought in connection with his failure to pay federal income taxes (and his request for a seven million dollar refund for taxes he did pay one year). Snipes claimed that, based on advice he received, he believed the federal tax laws applied only to federal officials, residents of Washington, D.C., and those involved in a business or trade. Although Snipes' attorneys conceded his tax theories were "kooky" and "crazy," they argued that he sincerely believed them and therefore lacked criminal intent. The jury acquitted Snipes of fraud and conspiracy charges, but he was convicted on three misdemeanor counts of willfully failing to file a tax return and was sentenced to one year in prison on each count. His conviction was affirmed on appeal, and the Supreme Court denied certiorari. *See United States v. Snipes*, 611 F.3d 855 (11th Cir. 2010), *cert. denied*, 563 U.S. 1032 (2011). Snipes began serving his prison term in December of 2010 and was released in July of 2013.

Chapter 6

STRICT LIABILITY AND PUBLIC WELFARE OFFENSES; VICARIOUS AND CORPORATE LIABILITY

A. PUBLIC WELFARE CRIMES AND VICARIOUS LIABILITY

Page 246: Add to Note 6:

In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court was asked to interpret the federal aggravated identity theft statute, which imposed a mandatory two-year prison term on a defendant who, in committing certain other crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1). The defendant in that case, a Mexican citizen, provided his employer with a counterfeit Social Security card, but the Court held that he could not be convicted under the statute absent proof that he knew the social security number listed on the card actually belonged to another person. Finding the statutory history "(outside of the statute's language) … inconclusive," Justice Breyer's opinion for the Court noted that "[a]s a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Flores-Figueroa*, 556 U.S. at 655, 650. Continuing with the grammar lesson, Justice Breyer observed, "[i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." *Id.* at 650. In response to the Government's argument that such an interpretation would place an onerous burden on prosecutors, the Court thought that "concerns about practical enforceability are insufficient to outweigh the clarity of the text." *Id.* at 656. Writing separately, Justice Alito agreed that the statute was clear, but cautioned that courts should not necessarily generalize the majority's "overstated" proposition to all criminal statutes. *Id.* at 659 (Alito, J., concurring in part and concurring in the judgment).

The Court reached a different conclusion, however, in *Dean v. United States*, 556 U.S. 568 (2009), an opinion issued the week before *Flores-Figueroa*. The federal statute at issue in that case imposed a mandatory ten-year prison sentence on a defendant who used or carried a weapon in committing any violent or drug trafficking crime "if the firearm is discharged." 18 U.S.C. § 924(c)(1)(A)(iii). In deciding that the mandatory prison term applied even in cases of accidental discharge, Chief Justice Roberts' opinion for the Court explained that the statute did not "require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation." *Dean*, 556 U.S. at 572. Demonstrating that he too is familiar with the rules of grammar, the Chief Justice continued: "Congress's use of the passive voice further indicates that subsection (iii) does not require proof of intent. The passive voice focuses on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Id.*

In *Elonis v. United States*, 135 S. Ct. 2001 (2015), by contrast, the Court declined to interpret 18 U.S.C. § 875(c), the federal statute making it a crime to "transmit[] in interstate or

foreign commerce any communication containing any threat to kidnap … or … injure" another person, as a strict liability crime. The case arose when the defendant posted rap lyrics on a Facebook page that the Government claimed threatened the lives of a number of people, including the defendant's estranged wife and an FBI agent. The lower courts held that the statute's mens rea requirement was satisfied so long as a reasonable person would view the postings as threatening. The Supreme Court found no "indication of a particular mental state requirement in the text" of the statute, rejecting the defendant's argument that the word "threat" implies an intent to threaten, but then went on to note that as a "'general rule,'" "a guilty mind is 'a necessary element … of every crime.'" *Id.* at 2008-09 (quoting *United States v. Balint*, 258 U.S. 250, 251 (1922)). Given the presumption that mens rea should be required for "'*each* of the statutory elements that criminalize otherwise innocent conduct,'" Chief Justice Roberts' opinion for the majority held that one such element here was "the fact that the communication contains a threat." *Id.* at 2011 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (emphasis added)). Although the negligence standard adopted by the lower courts is "a familiar feature of civil liability in tort law," the majority thought it "inconsistent" with the "'*awareness* of some wrongdoing'" generally required for a criminal conviction. *Id.* (quoting *Staples v. United States*, 511 U.S. 600, 607 (1994) (emphasis added)). The Court therefore concluded that the defendant could be convicted of violating § 875(c) if he acted either "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 2012. But the Court refused to decide whether recklessness would suffice because that issue had not been briefed or argued by the parties. Writing separately, Justice Alito criticized the Court for creating confusion by leaving this question open. He thought that a § 875(c) conviction could be based on proof of recklessness — i.e., if a defendant "consciously disregards the risk that the communication … will be interpreted as a true threat." *Id.* at 2016 (Alito, J., concurring in part and dissenting in part). Justice Thomas read the statute to require only proof of "general intent" and therefore would have affirmed the lower courts' interpretation. *Id.* at 2018 (Thomas, J., dissenting).

In *McFadden v. United States*, 135 S. Ct. 2298 (2015), the Supreme Court defined the mens rea required for a conviction under the federal Controlled Substances Analogue Enforcement Act of 1986, 21 U.S.C. § 813, which provides that a controlled substance analogue is treated as a controlled substance if it is "intended for human consumption." The defendant was convicted of "knowingly or intentionally" distributing a controlled substance analogue (in this case, bath salts). In an opinion written by Justice Thomas, the Court first observed that the mens rea needed to convict a defendant charged with knowingly distributing a controlled substance can be established in one of two ways: either if the defendant "knew he possessed a substance listed on the schedules [of controlled substances], even if he did not know … precisely what substance it is"; or if the defendant "knew the identity of the substance he possessed." In the latter case, the Court continued, the defendant need not realize that the substance is listed as a controlled substance "[b]ecause ignorance of the law is typically no defense." Applying that analysis to the knowing sale of a controlled substance analogue, the Court held that the necessary mens rea for that crime can likewise be demonstrated in two ways:

> First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance — that is, one actually listed on the federal drug schedules or treated as such by operation of the Analogue

> Act — regardless of whether he knew the particular identity of the substance. Second, it can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. The Analogue Act defines a controlled substance analogue by its features, as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance" … [and which either] "has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to" ... the effect of a controlled substance … or which is represented or intended to have that effect …. A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal. A defendant need not know of the existence of the Analogue Act to know that he was dealing with "a controlled substance."

Concurring in part and concurring in the judgment, Chief Justice Roberts argued that the federal drug laws require proof that a defendant "know that the substance is controlled," which cannot be satisfied simply by "knowledge of the substance's identity." The Chief Justice acknowledged that ignorance of the law is "'typically'" no defense, but noted that an absence of knowledge about a "'legal element [in a crime] can be a defense'" and here the requirement that the substance be "controlled" is "arguably a legal element." Therefore, the Chief Justice concluded, "it is no defense that a defendant did not know it was illegal to possess a controlled substance, but it is a defense that he did not know the substance was controlled."

Page 253: Add to Note 5:

After the massive financial fraud and collapse of the Enron corporation in 2001, Congress enacted the Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745. The Act mandated a number of strict reforms designed to protect investors from fraudulent accounting activities by publicly traded corporations.

Page 255: Add Note 7:

7. *Department of Justice Policy Regarding Individual Accountability for Corporate Wrongdoing:* In 2015, Deputy Attorney General Sally Q. Yates issued a memo outlining a policy stressing that individuals, as well as corporations, should be held responsible for corporate wrongdoing. The "Yates Memo," which can be accessed at https://www.justice.gov/dag/file/769036/download, presented six principles: "(1) in order to qualify for any cooperation credit, corporations must provide to the Department [of Justice] all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) federal attorneys should not resolve corporate investigations without a clear plan to resolve related individual cases, and should memorialize any declinations as to

individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay."

Chapter 7

HOMICIDE

B. INTENTIONAL HOMICIDE

[2] VOLUNTARY MANSLAUGHTER: HEAT OF PASSION

Page 289: Add to Note 3:

In *People v. Mills*, 226 P.2d 276 (Cal. 2010), the California Supreme Court permitted the prosecution to introduce evidence describing a murder defendant's activities in the days following the killing, including a sightseeing excursion with friends to San Francisco and a snowboarding trip to the mountains. Even though some of these events occurred more than sixty hours after the crime, the court reasoned that the fact that the defendant "was behaving normally, engaging in leisure activity, after forcibly raping and brutally slashing the throat of a woman just days before," was relevant to prove that he did not kill in the heat of passion, but rather "intended to kill the victim in cold blood." *Id.* at 307-08. The court thought that a jury could conclude that "a person who had acted under the influence of a passionate impulse would not have behaved in so cavalier a fashion so recently after committing such a violent and transgressive act." *Id.* at 308. For discussion of the use of similar evidence in first-degree murder cases to prove premeditation, see Note 4 on Page 278 of the casebook.

C. UNINTENTIONAL HOMICIDE

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

Page 312: Add to Note 1:

On remand, a different trial judge refused Knoller's request for a new trial and reinstated the second-degree murder conviction. Rejecting the argument that she was bound by the original trial judge's conclusion, Judge Charlotte Woolard concluded that the prosecution's evidence showed that Knoller "'knew her conduct endangered life'" and knew that "both dogs 'singularly or together were capable of killing a person and, if not properly restrained, would kill a person.'" *See* Bob Egelko, *Murder Conviction Reinstated in '01 Dog Mauling*, S.F. CHRON., Aug. 23, 2008, at B1. Citing the fact that Knoller made "only 'minimal efforts' at intervention and 'left Ms. Whipple in the hallway to die alone,'" and then "'blamed the victim'" in her interview on *Good Morning America*, the judge sentenced Knoller to a prison term of fifteen years to life. *See* Bob Egelko, *Knoller Gets 15 to Life in Mauling Death*, S.F. CHRON., Sept. 23, 2008, at B1. (Excerpts from the defendants' appearance on *Good Morning America* can be viewed at https://www.youtube.com/watch?v=uOFRsFS2lCE.)

A unanimous California Court of Appeal rejected Knoller's appeal in an unpublished opinion. The court explained:

> Defendant's deliberate act of leaving her apartment with an unmuzzled Bane knowing that she could not control him, as well as the evidence that she knew he was dangerous to human life provided substantial support for the jury's finding that she acted with conscious disregard for human life. The question was not whether Bane would *probably* kill someone but whether defendant was aware that her act of taking him into the hallway without a muzzle created a substantial risk that someone would be killed.

People v. Knoller, 2010 Cal. App. Unpub. Lexis 6668, at *124 (Aug. 20, 2010). The California Supreme Court denied review, s*ee People v. Knoller*, 2010 Cal. Lexis 12088 (Dec. 1, 2010), and the federal courts rejected her habeas petition. *See Knoller v. Miller*, 633 F. App'x 418 (9th Cir. 2016).

[2] INVOLUNTARY MANSLAUGHTER: CRIMINAL NEGLIGENCE/ RECKLESSNESS

Page 317: Add to Notes and Questions:

Civil suits were filed in the wake of the fire at the Station nightclub by more than three hundred survivors and family members. They sued dozens of defendants, including the manufacturers of the flammable foam, brewer Anheuser Busch, the town of West Warwick, and the state of Rhode Island. Eventually all of the defendants agreed to settlements totaling $176 million. *See* Eric Tucker, *Funds Set for R.I. Club Fire Victims' Children*, BOS. GLOBE, Nov. 25, 2009, at 2.

Page 328: Add Note 7(g):

In November 2011, a jury convicted Conrad Murray, Michael Jackson's personal physician, of involuntary manslaughter in connection with the fifty-year-old singer's 2009 death. In a police interview, the cardiologist admitted giving Jackson propofol, an anesthetic usually used during surgery, as a sleeping aid shortly before he stopped breathing. At trial, however, Murray's defense was that Jackson took a sedative and injected himself with propofol. In addition to challenging this version of the facts, the prosecution also introduced evidence that Murray delayed calling for help after Jackson went into cardiac arrest, instead texting and talking on his cellphone. The coroner's report concluded that Jackson died of "acute propofol intoxication," and the autopsy revealed that he had received an amount of propofol equivalent to that administered during major surgery. *See* Randal C. Archibold, *Doctor Is Charged in Death of Jackson*, N.Y. TIMES, Feb. 9, 2010, at A12; Harriet Ryan & Victoria Kim, *Jury Convicts Murray in Jackson Death*, L.A. TIMES, Nov. 8, 2011, at A1.

Citing the doctor's complete lack of remorse and accusing him of practicing "'horrible medicine'" and being "more concerned with collecting his $150,000-a-month salary than following the Hippocratic oath," the trial judge sentenced Murray to the maximum term of four years in prison. *See* Harriet Ryan, *Murray Gets the Maximum*, L.A. TIMES, Nov. 30, 2011, at A1. The California Court of Appeal rejected his appeal, concluding, inter alia, that sufficient evidence

supported his conviction and sentence and that the trial judge did not err in refusing to sequester the jury and exclude cameras from the trial. *See People v. Murray*, 2014 Cal. App. Unpub. Lexis 281 (Jan. 15, 2014). The California Supreme Court refused to consider the case. *See People v. Murray*, 2014 Cal. Lexis 3018 (Apr. 23, 2014). Murray was released from prison in October of 2013. *See* Jill Cowan, *Murray Quietly Released from Jail in Jackson Case*, L.A. TIMES, Oct. 29, 2013, at AA3.

Jackson's mother brought a billion-dollar civil negligence suit against AEG Live, the company that was promoting the concert for which Jackson was rehearsing at the time of his death. The jury ruled in favor of AEG Live, finding that while the company was responsible for hiring Murray, the doctor was not unfit or incompetent and therefore AEG Live was not responsible for the singer's death. *See* Kate Mather, *Jackson Lawyers Say Jury Puzzled by Form*, L.A. TIMES, Jan. 4, 2014, at AA3. The jury's verdict was upheld on appeal, and the California Supreme Court declined to review the case. *See Jackson v. AEG Live, LLC*, 183 Cal. Rptr. 3d 394 (Ct. App. 2015), *review denied*, 2015 Cal. Lexis 3483 (May 13, 2015).

D. FELONY MURDER

[1] THE POLICY ISSUES SURROUNDING THE FELONY MURDER RULE

Page 333: Add to Note 1:

For a more recent case involving a "polite robber," who was sentenced to twelve years in prison for robbing a gas station in Seattle, see Erica Goode, *Miss Manners Would Approve; A Judge Didn't*, N.Y. TIMES, Apr. 2, 2011, at A11.

[2] LIMITATIONS ON THE FELONY MURDER DOCTRINE

[b] THE MERGER DOCTRINE

Page 345: Replace *People v. Robertson* with the following:

PEOPLE v. CHUN
203 P.3d 425 (Cal. 2009)

CHIN, JUSTICE.

In this murder case, the trial court instructed the jury on second degree felony murder with shooting at an occupied vehicle under Penal Code section 246, the underlying felony. We granted review to consider various issues concerning the validity and scope of the second degree felony-murder rule....

I. Facts and Procedural History

... Judy Onesavanh and Sophal Ouch were planning a party for their son's birthday. Around 9:00 p.m. on September 13, 2003, they and a friend, Bounthavy Onethavong, were driving to the store in Stockton in a blue Mitsubishi that Onesavanh's father owned. Onesavanh's brother, George, also drives the car. The police consider George to be highly ranked in the Asian Boys street gang (Asian Boys).

That evening Ouch was driving, with Onesavanh in the front passenger seat and Onethavong behind Ouch. While they were stopped in the left turn lane at a traffic light, a blue Honda with tinted windows pulled up beside them. When the light changed, gunfire erupted from the Honda, hitting all three occupants of the Mitsubishi. Onethavong was killed, having received two bullet wounds in the head. Onesavanh was hit in the back and seriously wounded. Ouch was shot in the cheek and suffered a fractured jaw.

Ouch and Onesavanh identified the Honda's driver as "T-Bird," known to the police to be Rathana Chan, a member of the Tiny Rascals Gangsters (Tiny Rascals), a criminal street gang. The Tiny Rascals do not get along with the Asian Boys. Chan was never found. The forensic evidence showed that three different guns were used in the shooting, a .22, a .38, and a .44, and at least six bullets were fired. Both the .38 and the .44 struck Onethavong; both shots were lethal. Only the .44 was recovered. It was found at the residence of Sokha and Mao Bun, brothers believed to be members of a gang.

Two months after the shooting, the police stopped a van while investigating another suspected gang shooting. Defendant was a passenger in the van. He was arrested and subsequently made two statements regarding the shooting in this case. He admitted he was in the backseat of the Honda at the time; T-Bird was the driver and there were two other passengers. Later, he also admitted he fired a .38-caliber firearm. He said he did not point the gun at anyone; he just wanted to scare them.

Defendant, who was 16 years old at the time of the shooting, was tried as an adult for his role in the shooting.... The prosecution sought a first degree murder conviction. The court also instructed the jury on second degree felony murder based on shooting at an occupied motor vehicle (§ 246) either directly or as an aider and abettor. The jury found defendant guilty of second degree murder....

II. Discussion

A. The Constitutionality of the Second Degree Felony-Murder Rule

....

Section 187, subdivision (a), defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." ... Critical for our purposes is that the crime of murder ... includes, as an element, malice. Section 188 defines malice. It may be either express or implied.

It is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." It is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." This definition of implied malice is quite vague.... Accordingly, the statutory definition permits, even requires, judicial interpretation. We have interpreted implied malice as having "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and ... acts with a conscious disregard for life.'"[2]

... The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state. The rule has two applications: first degree felony murder and second degree felony murder. We have said that first degree felony murder is a "creation of statute" (i.e., § 189) but, because no statute specifically describes it, that second degree felony murder is a "common law doctrine." ... Second degree felony murder is "an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189 ...."

... "The second degree felony-murder rule eliminates the need for the prosecution to establish the mental component [of conscious-disregard-for-life malice]. The justification therefor is that, when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved. The physical requirement, however, remains the same; by committing a felony inherently dangerous to life, the defendant has committed 'an act, the natural consequences of which are dangerous to life,' thus satisfying the physical component of implied malice."

The second degree felony-murder rule is venerable. It "has been a part of California's criminal law for many decades...." But some former and current members of this court have questioned the rule's validity because no statute specifically addresses it....

In line with these concerns, defendant argues that the second degree felony-murder rule is invalid on separation of powers grounds. As he points out, we have repeatedly said that "'the power to define crimes and fix penalties is vested exclusively in the legislative branch.'" ...

... We agree ... that there are no nonstatutory crimes in this state. Some statutory or regulatory provision must describe conduct as criminal in order for the courts to treat that conduct as criminal. But, as we explain, the second degree felony-murder rule, although derived from the common law, is based on statute; it is simply another interpretation of section 188's "abandoned and malignant heart" language.

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[2] For ease of discussion, we will sometimes refer to this form of malice by the shorthand term, "conscious-disregard-for-life malice."… [This concept of implied malice was applied in *People v. Knoller*, 158 P.3d 731 (Cal. 2007), which is excerpted in Chapter 7, Section C.1 of the textbook.]

Many provisions of the Penal Code were enacted using common law terms that must be interpreted in light of the common law.... "It will be presumed ... that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form."

Even conscious-disregard-for-life malice is nonstatutory in the limited sense that no California statute specifically uses those words. But that form of implied malice is firmly based on statute; it is an interpretation of section 188's "abandoned and malignant heart" language. Similarly, the second degree felony-murder rule is nonstatutory in the sense that no statute specifically spells it out, but it is also statutory as another interpretation of the same "abandoned and malignant heart" language.... [T]he felony-murder rule "acts as a substitute" for conscious-disregard-for-life malice. It simply describes a different form of malice under section 188. "The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life." ... The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.[4]

B. The Merger Doctrine and Second Degree Felony Murder

Although today we reaffirm the constitutional validity of the long-standing second degree felony-murder rule, we also recognize that the rule has often been criticized and, indeed, described as disfavored. We have repeatedly stated, as recently as 2005, that the rule "'"deserves no extension beyond its required application."'" *(People v. Howard*.)...

... Section 246 makes it a felony to "maliciously and willfully discharge a firearm at an … occupied motor vehicle ...."[5] ...

... The merger doctrine developed due to the understanding that the underlying felony must be an independent crime and not merely the killing itself. Thus, certain underlying felonies "merge" with the homicide and cannot be used for purposes of felony murder....

1. Historical Review

The merger doctrine arose in the seminal case of [*People v.*] *Ireland*, [(1969) 450 P.2d 580], and hence sometimes is called the "*Ireland* merger doctrine." In *Ireland*, the defendant shot

[4] For policy reasons, Justice Moreno would abolish the second degree felony-murder doctrine entirely. As we have explained, this court has long refused to abolish it because it is so firmly established in our law. We continue to abide by this long-established doctrine, especially now that we have shown that it is based on statute, while at the same time attempting to make it more workable.

[5] In its entirety, section 246 provides: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar,… or inhabited camper … is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year. As used in this section, 'inhabited' means currently being used for dwelling purposes, whether occupied or not."

and killed his wife, and was convicted of second degree murder. The trial court instructed the jury on second degree felony murder with assault with a deadly weapon the underlying felony. We held the instruction improper, adopting the "so-called 'merger' doctrine" that had previously been developed in other jurisdictions. We explained our reasons: "...To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence … shows to be an offense included *in fact* within the offense charged."

We next confronted the merger doctrine in a second degree felony-murder case in [*People v.*] *Mattison*, [(1971) 481 P.2d 193]. As we later described *Mattison*'s facts, "...The defendant supplied the victim with methyl alcohol, resulting in the victim's death by methyl alcohol poisoning. At trial, the court instructed on felony murder based upon the felony of mixing poison with a beverage, an offense proscribed by the then current version of section 347 ('"Every person who wilfully mingles any poison with any food, drink or medicine, with intent that the same shall be taken by any human being to his injury, is guilty of a felony."')...."

The *Mattison* defendant argued "that the offense of administering poison with the intent to injure is an 'integral part of' and 'included in fact within the offense' of murder by poison" within the meaning of *Ireland*. We disagreed. "...The facts before us are very similar to *People v. Taylor* (1970) 89 Cal. Rptr. 697, in which the victim died as a result of an overdose of heroin which had been furnished to her by the defendant.... [In *Taylor*, the California Court of Appeal] concluded that application of the felony-murder rule was proper because the underlying felony was committed with a 'collateral and independent felonious design.' In other words the felony was not done with the intent to commit injury which would cause death. Giving a felony-murder instruction in such a situation serves rather than subverts the purpose of the rule. 'While the felony-murder rule can hardly be much of a deterrent to a defendant who has decided to assault his victim with a deadly weapon, it seems obvious that … in the case at bar, it does serve a rational purpose: knowledge that the death of a person to whom heroin is furnished may result in a conviction for murder should have some effect on the defendant's readiness to do the furnishing.' (*People v. Taylor*, *supra*.) The instant case is virtually indistinguishable from *Taylor*, and we hold that it was proper to instruct the jury on second degree felony murder." (*Mattison*, *supra*.)

In *People v. Smith* (1984) 678 P.2d 886, the defendant was convicted of the second degree murder of her two-year-old daughter. We had to decide whether the trial court correctly instructed the jury on second degree felony murder with felony child abuse (now § 273a, subd. (a)) the underlying felony.... We explained that the crime at issue was "child abuse of the assaultive variety" for which we could "conceive of no independent purpose." Accordingly, we concluded that the offense merged with the resulting homicide, and that the trial court erred in instructing on felony murder.

Our merger jurisprudence took a different turn in [*People v.*] *Hansen*, [(1994) 885 P.2d 1022]. In that case, the defendant was convicted of second degree murder for shooting at a house,

killing one person. The trial court instructed the jury on second degree felony murder, with discharging a firearm at an inhabited dwelling house (§ 246) the underlying felony. The majority concluded that the crime of discharging a firearm at an inhabited dwelling house "does not 'merge' with a resulting homicide so as to preclude application of the felony-murder doctrine." We noted that this court "has not extended the *Ireland* doctrine beyond the context of assault, even under circumstances in which the underlying felony plausibly could be characterized as 'an integral part of' and 'included in fact within' the resulting homicide."

[Our opinion in *Hansen*] discussed in detail *Mattison* and *People v. Taylor*, the case *Mattison* relied on. We agreed with *Taylor*'s "rejection of the premise that *Ireland*'s 'integral part of the homicide' language constitutes the crucial test in determining the existence of merger. Such a test would be inconsistent with the underlying rule that only felonies 'inherently dangerous to human life' are sufficiently indicative of a defendant's culpable mens rea to warrant application of the felony-murder rule. The more dangerous the felony, the more likely it is that a death may result directly from the commission of the felony, but resort to the 'integral part of the homicide' language would preclude application of the felony-murder rule for those felonies that are most likely to result in death and that are, consequently, the felonies as to which the felony-murder doctrine is most likely to act as a deterrent (because the perpetrator could foresee the great likelihood that death may result, negligently or accidentally)."

But the *Hansen* majority also disagreed with *People v. Taylor* in an important respect. We declined "to adopt as the critical test determinative of merger in all cases" language in *Taylor* indicating "that the rationale for the merger doctrine does not encompass a felony '"committed with a collateral and independent felonious design."' Under such a test, a felon who acts with a purpose other than specifically to inflict injury upon someone — for example, with the intent to sell narcotics for financial gain, or to discharge a firearm at a building solely to intimidate the occupants — is subject to greater criminal liability for an act resulting in death than a person who actually intends to injure the person of the victim. Rather than rely upon a somewhat artificial test that may lead to an anomalous result, we focus upon the principles and rationale underlying the foregoing language in *Taylor*, namely, that with respect to certain inherently dangerous felonies, their use as the predicate felony supporting application of the felony-murder rule will not elevate all felonious assaults to murder or otherwise subvert the legislative intent."

Hansen went on to explain that "application of the second degree felony-murder rule would not result in the subversion of legislative intent. Most homicides do not result from violations of section 246, and thus, unlike the situation in *People v. Ireland*, application of the felony-murder doctrine in the present context will not have the effect of 'preclud[ing] the jury from considering the issue of malice aforethought ... [in] the great majority of all homicides.'... Indeed, ... application of the felony-murder rule, when a violation of section 246 results in the death of a person, clearly is consistent with the traditionally recognized purpose of the second degree felony-murder doctrine — namely the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies." ...

In [*People v.*] *Robertson*, [(2004) 95 P.3d 872], the issue was whether the trial court properly instructed the jury on felony murder based on discharging a firearm in a grossly negligent

manner. (§ 246.3.) As we later summarized, "[t]he defendant in *Robertson* claimed he fired into the air, in order to frighten away several men who were burglarizing his car." *Robertson* concluded that the merger doctrine did not bar a felony-murder instruction. Its reasons, however, were quite different than *Hansen*'s reasons.

The *Robertson* majority reviewed some of the cases discussed above, then focused on *Mattison*.... We noted that *Mattison* focused on the fact that the underlying felony's purpose "was independent of or collateral to an intent to cause injury that would result in death." Then we explained, "Although the collateral purpose rationale may have its drawbacks in some situations (*Hansen*, *supra*), we believe it provides the most appropriate framework to determine whether, under the facts of the present case, the trial court properly instructed the jury. The defendant's asserted underlying purpose was to frighten away the young men who were burglarizing his automobile. According to defendant's own statements, the discharge of the firearm was undertaken with a purpose collateral to the resulting homicide, rendering the challenged instruction permissible. As Justice Werdegar pointed out in her concurring opinion in *Hansen*, a defendant who discharges a firearm at an inhabited dwelling house, for example, has a purpose independent from the commission of a resulting homicide if the defendant claims he or she shot to intimidate, rather than to injure or kill the occupants." ...

Thus, the *Robertson* majority abandoned the rationale of *Hansen* and resurrected the collateral purpose rationale of *Mattison*, at least when the underlying felony is a violation of section 246.3....

In ... dissent, Justice Kennard disagreed that "[Robertson's] claimed objective to scare the victim" was "a felonious purpose that was independent of the killing." ... "An intent to scare a person by shooting at the person is not independent of the homicide because it is, in essence, nothing more than the intent required for an assault, which is not considered an independent felonious purpose.... [W]hen, as here, a defendant fires a gun to scare the victim, the intended harm — that of scaring the victim — is not independent of the greater harm that occurs when a shot fired with the intent to scare instead results in the victim's death." "In sum, it makes no sense legally to treat defendant's alleged intent to scare as 'felonious' when such an intent is legally irrelevant [to guilt of the underlying felony] and when the jury never decided whether he had that intent." ...

In [*People v.*] *Randle*, [(2005) 111 P.3d 987], the trial court, as in *Robertson*, instructed the jury on second degree felony murder, with discharging a firearm in a grossly negligent manner the underlying felony. [(§ 246.3.)] We found the instruction erroneous under the facts. "Here, unlike *Robertson*, defendant admitted, in his pretrial statements to the police and to a deputy district attorney, he shot at Robinson [the homicide victim].... The fact that defendant admitted shooting at Robinson distinguishes *Robertson* and supports application of the merger rule here. Defendant's claim that he shot Robinson in order to rescue [another person] simply provided a motive for the shooting; it was not a purpose independent of the shooting." ...

2. Analysis

The current state of the law regarding the *Ireland* merger doctrine is problematic .... In light of these problems, we conclude we need to reconsider our merger doctrine jurisprudence. As Justice Werdegar observed in her dissenting opinion in *Robertson*, "sometimes consistency must yield to a better understanding of the developing law." In considering this question, we must also keep in mind the purposes of the second degree felony-murder rule. We have identified two. The purpose we have most often identified "is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." Another purpose is to deter commission of the inherently dangerous felony itself. (*Robertson*, *supra* ["the second degree felony-murder rule is intended to deter both carelessness in the commission of a crime and the commission of the inherently dangerous crime itself"]; *Hansen*, *supra*.)

We first consider whether *Hansen* has any continuing vitality after *Robertson* and *Randle*.... [W]e see no basis today to resurrect the *Hansen* approach for [cases like *Robertson* and *Randle* that involve] a violation of section 246.3. Indeed, doing so would arguably be inconsistent with *Hansen*'s reasoning. *Hansen* explained that most homicides do not involve violations of section 246, and thus holding that such homicides do not merge would not "subvert the legislative intent." But most fatal shootings, and certainly those charged as murder, do involve discharging a firearm in at least a grossly negligent manner. Fatal shootings, in turn, are a high percentage of all homicides. Thus, holding that a violation of section 246.3 never merges would greatly expand the range of homicides subject to the second degree felony-murder rule....

But if, as we conclude, the *Hansen* test does not apply to a violation of section 246.3, we must decide whether it still applies to any underlying felonies.... The *Robertson* and *Randle* test and the *Hansen* test cannot coexist. Our analyses in *Robertson* and *Randle* implicitly overruled the *Hansen* test. We now expressly overrule *People v. Hansen* to the extent it stated a test different than the one of *Robertson* and *Randle*....

But the test of *Robertson* and *Randle* has its own problems that were avoided in *Hansen* .... On reflection, we do not believe that a person who claims he merely wanted to frighten the victim should be subject to the felony-murder rule (*Robertson*), but a person who says he intended to shoot at the victim is not subject to that rule (*Randle*). Additionally, *Robertson* said that the intent to frighten is a collateral purpose, but *Randle* said the intent to rescue another person is not an independent purpose but merely a motive. It is not clear how a future court should decide whether a given intent is a purpose or merely a motive.

The *Robertson* and *Randle* test presents yet another problem. In the past, we have treated the merger doctrine as a legal question with little or no factual content. Generally, we have held that an underlying felony either never or always merges, not that the question turns on the specific facts. Viewed as a legal question, the trial court properly decides whether to instruct the jury on the felony-murder rule, but if it does so instruct, it does not also instruct the jury on the merger doctrine. The *Robertson* and *Randle* test, however, turns on potentially disputed facts specific to the case.... Whether a defendant shot at someone intending to injure, or merely tried to frighten that someone, may often be a disputed factual question....

To avoid the anomaly of putting a person who merely intends to frighten the victim in a worse legal position than the person who actually intended to shoot at the victim, and the difficult question of whether and how the jury should decide questions of merger, we need to reconsider our holdings in *Robertson* and *Randle*. When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An "assaultive" felony is one that involves a threat of immediate violent injury. In determining whether a crime merges, the court looks to its elements and not the facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive. For example, in *People v. Smith*, *supra*, the court noted that child abuse under section 273a "includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect." Looking to the facts before it, the court decided the offense was "of the assaultive variety," and therefore merged. It reserved the question whether the nonassaultive variety would merge. Under the approach we now adopt, both varieties would merge. This approach both avoids the necessity of consulting facts that might be disputed and extends the protection of the merger doctrine to the potentially less culpable defendant whose conduct is not assaultive.

This conclusion is also consistent with our repeatedly stated view that the felony-murder rule should not be extended beyond its required application. We do not have to decide at this point exactly what felonies are assaultive in nature, and hence may not form the basis of a felony-murder instruction, and which are inherently collateral to the resulting homicide and do not merge. But shooting at an occupied vehicle under section 246 is assaultive in nature and hence cannot serve as the underlying felony for purposes of the felony-murder rule.[7]...

C. Prejudice

....

For felony murder, the court's instructions required the jury to find that defendant had the specific intent to commit the underlying felony of shooting at an occupied vehicle.... Thus any juror who relied on the felony-murder rule necessarily found that defendant willfully shot at an occupied vehicle.... No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life — which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice....

[7] Justice Baxter makes some provocative arguments in favor of abolishing the *Ireland* merger doctrine entirely. However, just as we have refused to abolish the second degree felony-murder doctrine because it is firmly established, so too we think it a bit late to abolish the four-decades-old merger doctrine. Instead, we think it best to attempt to make it and the second degree felony-murder doctrine more workable.

Although we agree with the Court of Appeal that the trial court erred in instructing the jury on second degree felony murder, we also conclude that the error, alone, was harmless….*

BAXTER, JUSTICE, concurring and dissenting.

I concur in the majority's decision to reaffirm the constitutional validity of the long-standing second degree felony-murder rule. Ever since the Penal Code was enacted in 1872, and going back even before that, to California's first penal law, the Crimes and Punishments Act of 1850, the second degree felony-murder rule has been recognized as a rule for imputing malice under the statutory definition of implied malice (§ 188) where the charge is second degree murder....

Although the majority reaffirms the constitutional validity of the second degree felony-murder rule, it goes on to render the rule useless in this and future cases out of strict adherence to the so-called "merger doctrine" announced in *People v. Ireland*....

I signed the majority opinion in *Hansen*, and continue to find that decision well reasoned and most directly on point in the matter now before us. I would follow *Hansen* and conclude the jury below was properly instructed on second degree felony murder based on defendant's commission of the inherently dangerous felony of shooting at an occupied vehicle in violation of section 246 and the inference of malice that follows therefrom. The majority, in contrast, rejects the analysis and holding in *Hansen* and expressly overrules it....

I signed the majority opinion in *Robertson* as well, but I have since come to appreciate that the collateral purpose rule on which it relied is unduly deferential to *Ireland*'s flawed merger doctrine. The majority itself points to several serious concerns raised in the wake of *Robertson*'s reliance on the collateral purpose rule in its effort to mitigate the harsh effects of *Ireland*'s all-or-nothing merger doctrine. Nonetheless, it can fairly be observed that the decision in *Robertson*, right or wrong, did represent a compromise ....

The majority, in contrast, rejects the analysis and holding of *Robertson* and expressly overrules it along with our earlier decision in *Hansen*.... In short, this court's various attempts over the course of several decades to salvage the second degree felony-murder rule in the wake of *Ireland*'s merger doctrine, and to ameliorate the harsh effects of that all-or-nothing rule, have been wiped clean from the slate....

In the end, this case presented us with a clear opportunity to finally get this complex and difficult issue right.... Once it is understood and accepted that the second degree felony-murder rule is simply a rule for imputing malice from the circumstances attending the commission of an inherently dangerous felony during which a homicide occurs, no grounds remain to support the sole rationale offered by the *Ireland* court for the merger doctrine — that use of an assaultive-type felony as the basis for a second degree felony-murder instruction "effectively preclude[s] the jury

* The Ninth Circuit disagreed with the California Supreme Court's ruling that the error was harmless and granted Chun's habeas petition. *See Chun v. Lopez*, 2016 U.S. App. Lexis 10457 (9th Cir. Oct. 20, 2015).

from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault." The majority's holding in part II.A. of its opinion makes clear it understands and accepts that the second degree felony-murder rule is but a means by which juries impute malice under the Legislature's statutory definition of second degree implied malice murder. The majority's holding in part II.B. of its opinion nonetheless fails to follow through and reach the logical conclusions to be drawn from the first premise, and instead simply rubberstamps the *Ireland* court's misguided belief that the second degree felony-murder rule improperly removes consideration of malice from the jury's purview....

MORENO, JUSTICE, concurring and dissenting.

The second degree felony-murder rule is deeply flawed. The majority attempts once more to patch this judicially created rule and improves the state of the law considerably, but several years ago I expressed my willingness to "reassess[] the rule in an appropriate case." (*People v. Robertson* (2004) 95 P.3d 872 (conc. opn. of Moreno, J.).) This is that case. The time has come to abandon the second degree felony-murder rule.

"The felony-murder rule has been roundly criticized both by commentators and this court. As one commentator put it, '[t]he felony murder rule has an extensive history of thoughtful condemnation.'" ... Regardless of this court's view of the wisdom of doing so, it is within the Legislature's prerogative to remove the necessity to prove malice when a death results from the commission of certain felonies, and the Legislature has done so by codifying the first degree felony-murder rule in Penal Code section 189.... We do, however, possess the authority to abrogate the second degree felony-murder doctrine because "'the second degree felony-murder rule remains, as it has been since 1872, a judge-made doctrine without any express basis in the Penal Code.'"

My concerns about the felony-murder rule are neither new nor original. Nearly 45 years ago, this court acknowledged that "[t]he felony-murder rule has been criticized on the grounds that in almost all cases in which it is applied it is unnecessary and that it erodes the relation between criminal liability and moral culpability...." We have described the felony-murder rule as "'a "highly artificial concept"'" that this court long has held "in disfavor" "because it relieves the prosecution of the burden of proving one element of murder, malice aforethought." "The felony-murder doctrine has been censured not only because it artificially imposes malice as to one crime because of defendant's commission of another but because it anachronistically resurrects from a bygone age a 'barbaric' concept that has been discarded in the place of its origin."

The second degree felony-murder doctrine suffers from all the same infirmities as its first degree counterpart, and more.... The majority's reformulation of the merger doctrine is an improvement, but it does not correct the basic flaw in the felony-murder rule; that it is largely unnecessary and, in those unusual instances in which it would produce a different result, may be unfair....

The lack of necessity for the second degree felony-murder rule is demonstrated by the majority's conclusion that the error in instructing the jury on second degree felony murder in this

case was harmless because no reasonable juror could have found that defendant participated in this shooting without also concluding that he harbored at least implied malice. I agree. This will be the rule, rather than the exception. In most instances, a juror who finds that the defendant killed the victim while committing a felony that is inherently dangerous to human life necessarily also will conclude that the defendant harbored either express or implied malice and thus committed second degree murder without relying upon the second degree felony-murder rule. Only in those rare cases in which it is not clear that the defendant acted in conscious disregard of life will the second degree felony-murder rule make a difference, but those are precisely the rare cases in which the rule might result in injustice. I would eliminate the second degree felony-murder rule and rely instead upon the wisdom of juries to recognize those situations in which a defendant commits second degree murder by killing the victim during the commission of a felony that is inherently dangerous to life.

Page 354: Add to Note 5:

Relying in part on the reasoning in *Miller* and in part on the fact that the California legislature listed burglary as one of the felonies that can lead to a first-degree felony murder conviction, the California Supreme Court overturned its holding in *Wilson*. *See People v. Farley*, 210 P.3d 361 (Cal. 2009). In so doing, the court disputed *Wilson*'s conclusion that felony murder charges "serve[] no purpose" in these circumstances: "a person who enters a building with the intent to assault, rather than to kill (in which case the felony-murder rule would be unnecessary), may be deterred by the circumstance that if the victim of the assault dies, the burglar 'will be deemed guilty of first degree murder.'" *Id.* at 410. Does that argument apply equally to felony murder cases where assault is the underlying felony?

E. THE DEATH PENALTY

[1] THE HISTORY AND CONSTITUTIONALITY OF THE DEATH PENALTY

Page 366: Add to Note 2:

Five other states have followed New Jersey's lead and abolished the death penalty in recent years. In 2009, the New Mexico legislature repealed the death penalty in that state, followed by the Illinois and Connecticut legislatures in 2011 and 2012. The Maryland legislature rejected a proposal to abolish capital punishment in 2009, but passed a compromise bill that limited the death penalty to cases with "biological or DNA evidence, a videotaped confession or a videotape linking the defendant to a homicide." *See* John Wagner, *Maryland Likely to Pass Death Penalty Bill*, WASH. POST, Mar. 26, 2009, at B1. No defendant was sentenced to death under that legislation, and in 2013 Maryland's Governor signed a bill repealing the death penalty. In May of 2015, the Nebraska legislature overrode Governor Pete Ricketts' veto of a bill abolishing the death penalty in that state, making Nebraska the first conservative state to ban the death penalty in more than forty years and bringing the number of states without capital punishment up to nineteen. *See* Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, N.Y. TIMES, May 28, 2015, at A1. But a referendum funded largely by Ricketts that would overturn the legislature's ban will appear on the Nebraska ballot in the November 2016 elections. *See* Julie Bosman, *Petition Drive in Nebraska*

Forces Vote on Abolishing Death Penalty, N.Y. TIMES, Oct. 17, 2015, at A12. A proposition that would have abolished the death penalty in California was defeated by the voters in the November 2012 elections by a margin of 53% to 47%. *See* Jack Leonard & Maura Dolan, *Priming Cases for 3-Strikes Review*, L.A. TIMES, Nov. 8, 2012, at AA1.

In addition to these legislative developments, the then-Governor of Oregon, a former emergency room doctor, announced in 2011 that he would block all executions in that state during his time in office, and the Governors of Colorado, Washington, and Pennsylvania followed suit in 2013, 2014, and 2015. *See* Ian Lovett, *Executions Are Suspended by Governor in Washington*, N.Y. TIMES, Feb. 12, 2014, at A12; Hannah Hoffman, *Brown Looks for Her Successor*, STATESMAN JOURNAL (Salem, Or.), Feb. 21, 2015, at A1; Joseph A. Slobodzian & Angela Couloumbis, *Wolf Halts Death Penalty in Pennsylvania*, PHILA. INQUIRER, Feb. 14, 2015, at A1.

In October of 2009, the American Law Institute voted to withdraw § 210.6 of the Model Penal Code. Although the Institute decided not to express disapproval of capital punishment, it chose to withdraw the provision "'in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.'" *See* Adam Liptak, *Shapers of Death Penalty Give up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11. *See also* Report of the Council to the Membership of the American Law Institute on the Matter of the Death Penalty (Apr. 15, 2009), *available at* http://www.deathpenaltyinfo.org/documents/alicoun.pdf.

The "Timely Justice Act," enacted in Florida in 2013, requires the Governor to sign a death warrant thirty days after the state supreme court certifies that all legal appeals have been exhausted in a capital case. Under the terms of the statute, the prisoner must then be executed within six months. The law gives the Governor some discretion in that the death warrant cannot be signed until after clemency review is completed and the Governor has the sole authority to order a clemency investigation. But the state's parole commission typically completes clemency investigations in less than a year. *See* Mary Ellen Klas, *Scott Speeds Executions*, TAMPA BAY TIMES, June 15, 2013, at 1A. The Florida Supreme Court upheld the constitutionality of the statute in *Abdool v. Bondi*, 141 So. 2d 529 (Fla. 2014), and the number of executions has recently increased in Florida, though the Governor has not signed death warrants for every death row prisoner whose appeals have been exhausted. *See* Steve Bousquet, *Vigils to Protest Death Penalty*, TAMPA BAY TIMES, Jan. 12, 2015, at 1A.

By contrast, a federal court in California cited the "inordinate and unpredictable period of delay preceding … execution" in striking down the state's death penalty statute as violative of the Eighth Amendment. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014). But the decision was reversed by the Ninth Circuit on procedural grounds. *See Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

Page 367: Add to Footnote *:

Justice Stevens, who retired from the Supreme Court in June 2010, also came to believe late in his tenure that the death penalty was unconstitutional. In *Baze v. Rees*, 553 U.S. 35 (2008),

he expressed concern that "current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty … are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty." *Id.* at 78 (Stevens, J., concurring in the judgment). After assessing those costs and benefits, Justice Stevens concluded that "the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes'" and therefore is "'patently excessive and cruel and unusual punishment.'" *Id.* at 86 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)). For further discussion of *Baze v. Rees*, see the material below supplementing Page 372. (Following his retirement from the Court, Justice Stevens published a book review of David Garland's book, *Peculiar Institution: America's Death Penalty in an Age of Abolition*, in which the Justice was critical of some of the Supreme Court's recent death penalty jurisprudence. *See* John Paul Stevens, *On the Death Sentence*, N.Y. REV. OF BOOKS, Dec. 23, 2010, at 8.)

In *Glossip v. Gross*, 135 S. Ct. 2726 (2015), which is also discussed below in the material supplementing Page 372, Justice Breyer, joined by Justice Ginsburg, described "changes that have occurred during the past four decades" that led them "to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishmen[t].'" *Id.* at 2756 (Breyer, J., dissenting). Specifically, the two Justices cited "convincing evidence that … innocent people have been executed," "striking" evidence from recent exonerations that death sentences have been "wrongly imposed," indications that improper considerations such as race, gender, and geography affect capital sentencing, delays in execution that "aggravate the cruelty of the death penalty and undermine its jurisprudential rationale," and the "significant decline in the use of the death penalty." *Id.* at 2756, 2770, 2772. On the last point, the Justices observed:

> [I]f we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, i.e., three States, account for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty.

Id. at 2774. The two Justices urged the Court, "[a]t the very least," to "call for full briefing" on the constitutionality of the death penalty. *Id.* at 2777. Since *Glossip* was decided, Justices Breyer and Ginsburg have written dissents from the denial of certiorari in cases questioning the constitutionality of the death penalty. *See, e.g.*, *Tucker v. Louisiana*, 136 S. Ct. – (May 31, 2016).

Page 369: Add to Note 6:

In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Supreme Court reversed the Louisiana Supreme Court, concluding that sentencing Kennedy to death for raping his eight-year-old stepdaughter was cruel and unusual punishment violative of the Eighth Amendment. Writing for the five Justices in the majority, Justice Kennedy noted that only five other states had followed the 1995 Louisiana statute in authorizing the death penalty for child rape. Thus, the majority concluded, "[t]he evidence of a national consensus with respect to the death penalty for child

rapists ... shows divided opinion but, on balance, an opinion against it." "[I]t is of significance," the majority thought, that "in 45 jurisdictions, petitioner could not be executed for child rape of any kind." *Id.* at 426.

Responding to the State's argument that "the six States where child rape is a capital offense, along with the [five] States that have proposed but not yet enacted [similar] legislation, reflect a consistent direction of change in support of the death penalty for child rape," the Court acknowledged that "[c]onsistent change might counterbalance an otherwise weak demonstration of consensus." But the Court thought that "no showing of consistent change has been made in this case." "It is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted," the Court observed, noting that the bills had been rejected in at least two of the five states. *Id.* at 431.

Turning to execution statistics, the majority found support for its "determination ... that there is a social consensus against the death penalty for the crime of child rape." Although nine states had at some point allowed capital punishment for adult or child rape since *Furman* was decided in 1972, the Court pointed out that "no individual has been executed for the rape of an adult or child since 1964, ... no execution for any other nonhomicide offense has been conducted since 1963," and in fact Kennedy and one other prisoner in Louisiana were "the only two individuals now on death row in the United States for a nonhomicide offense." *Id.* at 433-34.

Exercising its own independent judgment "informed by our precedents and our own understanding of the Constitution and the rights it secures," the majority determined that "there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." *Id.* at 434, 438. Quoting from its decision in *Coker*, the Court noted that "[t]he latter crimes may be devastating in their harm, as here, but 'in terms of moral depravity and of the injury to the person and to the public,' they cannot be compared to murder in their 'severity and irrevocability.'" *Id.* at 438. The Court warned, however, that its decision was "limited to crimes against individual persons" and did not reach crimes like "treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." *Id.* at 437.

Finally, the majority made the following points:

> It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. Capital cases require a long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings.... Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice.... There are, moreover, serious systemic concerns in prosecuting the crime of child rape that are relevant to the constitutionality of making it a capital offense. The problem of unreliable, induced, and even imagined child testimony means there is a "special risk of wrongful execution" in some child rape cases.

Id. at 442-43.

Writing for the four dissenters, Justice Alito disputed the majority's national consensus argument, noting that "dicta in [*Coker*] has stunted legislative consideration of the question whether the death penalty for ... raping a young child is consistent with prevailing standards of decency." *Id.* at 448 (Alito, J., dissenting). Moreover, the dissent argued, "[i]f anything can be inferred from state legislative developments, the message is very different from the one that the Court perceives. In just the past few years, despite the shadow cast by the *Coker* dicta, five States have enacted targeted capital child-rape laws. If, as the Court seems to think, our society is '[e]volving' toward ever higher 'standards of decency,' these enactments might represent the beginning of a new evolutionary line." *Id.* at 455.

Turning to the majority's independent understanding of the constitutional issue, the dissent thought that these "policy arguments concern matters that legislators should — and presumably do — take into account," but are "irrelevant to the [Eighth Amendment] question that is before us in this case." *Id.* at 462. The dissent also questioned whether "[w]ith respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist?" *Id.* at 466. Finally, on the question of harm, the dissent admitted that "it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence." *Id.* at 467.

Following the Supreme Court's decision, the State moved for rehearing, pointing out that a 2006 federal statute (which had not been mentioned by any of the Justices or cited in any of the briefs filed in the case) made child rape a capital offense under the Uniform Code of Military Justice. The Court denied the motion for rehearing, reasoning that "military law has included the death penalty for rape of a child or adult victim since at least 1863," well before *Furman* and *Coker*, and that "authorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context." *Kennedy v. Louisiana*, 554 U.S. 945, 946-47 (2008).

Page 372: Add to Note 8:

In *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion), the Supreme Court upheld the constitutionality of the three-drug protocol used until recently in most jurisdictions that conduct executions by means of lethal injection. The protocol, adopted first in 1977 by the Oklahoma legislature "after consulting with the head of the anesthesiology department at the University of Oklahoma College of Medicine," and then adopted by other states "without significant independent review," was described by the plurality as follows:

> The first drug, sodium thiopental (also known as Pentathol), is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness …. The second drug, pancuronium bromide (also known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops

> respiration. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.

Id. at 42 & n.1, 44.

Chief Justice Roberts' plurality opinion, joined by Justices Kennedy and Alito, took the position that the Eighth Amendment prohibits a particular method of execution if it creates a "substantial risk of serious harm" or an "objectively intolerable risk of harm," and that a state's rejection of alternative methods of execution is unconstitutional only if the alternatives are "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Id.* at 50, 52. Applying those standards to the facts of the case, which arose in Kentucky, the plurality observed that "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated" and that the prisoners had conceded that, "if administered as intended," the state's execution procedures "will result in a painless death." *Id.* at 53, 62. The plurality then concluded that the prisoners had not satisfied their burden of proving that "the risk of an inadequate dose of the first drug is substantial": "[t]he risks of maladministration they have suggested — such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel — cannot remotely be characterized as 'objectively intolerable.'" *Id.* at 54, 62.

Although Justices Thomas and Scalia agreed that Kentucky's lethal injection procedures comported with the Eighth Amendment, they endorsed a stricter standard that would invalidate a method of execution "only if it is deliberately designed to inflict pain." *Id.* at 94 (Thomas, J., concurring in the judgment).

Justice Ginsburg, joined by Justice Souter, dissented. Given that the second and third drugs in the protocol would unquestionably "cause a conscious inmate to suffer excruciating pain," the dissenters thought the case "turn[ed] on whether inmates [were] adequately anesthetized by the first drug." Because "Kentucky's protocol lack[ed] basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs," the dissenters would have remanded for the lower courts to "consider whether Kentucky's omission of those safeguards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain." *Id.* at 113-14 (Ginsburg, J., dissenting).

Justice Breyer agreed with the "untoward, readily avoidable risk" standard articulated by the dissenters, but considered a remand unnecessary because he could not "find, either in the record or in the readily available literature..., sufficient grounds to believe that Kentucky's method of lethal injection creates a significant risk of unnecessary suffering." *Id.* at 113 (Breyer, J., concurring in the judgment).

Justice Stevens thought it "unseemly — to say the least — that Kentucky may well kill petitioners using a drug [pancuronium bromide] that it would not permit to be used on their pets" because of the risk of "excruciating pain," and he found it "particularly disturbing" because the drug "serves 'no therapeutic purpose.'" *Id.* at 72-73 (Stevens, J., concurring in the judgment). Nevertheless, under the Court's precedents, he concluded that the prisoners' evidence did not establish a constitutional violation. But he warned that "States wishing to decrease the risk that

future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide." *Id.* at 77.

Despite the Court's approval of the three-drug protocol in *Baze v. Rees*, states have made changes in their lethal injection procedures as the supply of drugs has dwindled. In 2011, the sole American manufacturer of sodium thiopental announced that it would no longer produce the drug, and Britain and other European countries have banned the exportation of drugs to be used for executions in the United States. *See* John Schwartz, *Legal Questions Are Raised as States Seek Death Penalty Drug*, N.Y. TIMES, Apr. 14, 2011, at A14. In addition, the D.C. Circuit blocked the FDA from allowing prisons to import sodium thiopental on the grounds that the agency had not approved or reviewed the drug for safety and effectiveness. *See Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013).

In response, Oklahoma attempted for the first time to substitute midazolam as the first drug in the three-drug cocktail in April 2014. The execution was halted, however, when it became apparent that the prisoner, Clayton Lockett, was not unconscious. Lockett ultimately died of a heart attack in the execution chamber, and the State imposed a six-month moratorium on the death penalty. The State's investigation attributed the botched execution to the placement of the IV, as a result of which some of the drugs were injected into Lockett's tissue instead of his bloodstream. The moratorium ended after the State decided to increase the dosage of midazolam in its lethal injections, to require better training and monitoring, and to spend $100,000 on a new execution chamber featuring a surgical table, more monitoring devices, and video equipment that can zoom in on the prisoner's face. *See* Erik Eckholm, *After Botched Execution, Oklahoma to Resume Lethal Injections*, N.Y. TIMES, Dec. 23, 2014, at A14; Helen Lock & James Rush, *Oklahoma Unveils $71,000 Renovated Death Chamber*, THE INDEPENDENT (London), Oct. 12, 2014, at 1. A federal district court upheld the constitutionality of the State's new restrictions on the media's ability to witness executions, rejecting the claim that the chosen "media representatives" have the right "to view and hear the entire execution process from beginning to end." *The Oklahoma Observer v. Patton*, 73 F. Supp. 3d 1318, 1320 (W.D. Okla. 2014).

In January of 2015, the Supreme Court agreed to review a cert petition filed by four Oklahoma death row prisoners challenging the State's use of midazolam. But the Court's decision came too late for one of the four, Charles Warner, who had been put to death the prior week after the Court, by a vote of five to four, refused to stay his execution. *See Warner v. Gross*, 135 S. Ct. 824 (2015) (Sotomayor, J., dissenting). The Court subsequently stayed the executions of the other three inmates at the request of the State. *See* Adam Liptak, *Justices Stay Executions of 3 in Oklahoma, Pending Decision on Lethal Drug Protocol*, N.Y. TIMES, Jan. 29, 2015, at A14.

By a five-to-four vote, the Supreme Court cited "two independent reasons" for affirming the lower courts' decision to deny the prisoners a preliminary injunction. *See Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015). First, the prisoners had "failed to identify a known and available alternative method of execution that entails a lesser risk of pain," which Justice Alito's majority opinion called "a requirement of all Eighth Amendment method-of-execution claims." *Id.* Second, the Court found no "clear error" in the trial court's conclusion that "the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam … entails a substantial risk of

severe pain." *Id.* Specifically, the majority noted that the State now administers 500 instead of 100 milligrams of midazolam, mandates a "pause between injection of the first and second drugs," and requires the execution team to "secure both a primary and backup IV access site,… confirm the viability of the IV sites, and … continuously monitor the offender's level of consciousness." *Id.* at 2742. In addition, Justice Alito observed that midazolam was used in eleven Florida executions, which "appear[ed] to have been conducted without any significant problems." *Id.* at 2746.

As they had in *Baze v. Rees*, Justices Thomas and Scalia would have applied a stricter standard on the ground that the Eighth Amendment "prohibits only those 'method[s] of execution' that are 'deliberately designed to inflict pain.'" *Id.* at 2750 (Thomas, J., concurring).

Writing for the four dissenters, Justice Sotomayor thought that the prisoners had produced "ample evidence showing that the State's planned use of [midazolam] poses substantial, constitutionally intolerable risks." *Id.* at 2781 (Sotomayor, J., dissenting). Responding to the majority's first rationale, the dissent charged that the Court had created a "wholly novel requirement" that prisoners must "prov[e] the availability of an alternative means for their own executions." *Id.* On the majority's second point, Justice Sotomayor criticized the Court for "deferring to the District Court's decision to credit the scientifically unsupported and implausible testimony of a single expert witness." *Id.* Specifically, the dissent noted that all three experts who testified before the trial court agreed that midazolam was not approved by the FDA "for use as, and is not in fact used as, a 'sole drug to produce and maintain anesthesia in surgical proceedings'" and that the drug is "subject to a ceiling effect,… a point at which increasing the dose of the drug does not result in any greater effect," although the experts differed "on the crucial questions of how this ceiling effect operates, and whether it will prevent midazolam from keeping a condemned inmate unconscious when the second and third lethal injection drugs are administered." *Id.* at 2783.

Two hours before Glossip was scheduled to be executed, prison officials discovered that the drugs they had been sent were not the ones required by the state's death penalty protocol. Glossip's execution was postponed as a result, and the Governor subsequently declared another moratorium pending an investigation. *See* Manny Fernandez, *States Delay and Improvise in a Scramble for Execution Drugs*, N.Y. TIMES, Oct. 9, 2015, at A1. A grand jury recently refused to issue any indictments, but concluded that the same drug intended for Glossip's execution was actually used to execute Charles Warner due to "a faulty protocol, inexcusable failures by corrections officials and a pharmacist's negligence." *See* Nolan Clay, *Corrections Officials Failed in Drug Mix-up, Grand Jury Reports*, THE DAILY OKLAHOMAN, May 20, 2016, at 1.

States other than Oklahoma have likewise made changes in their lethal injection protocol in response to shortages in the supply of drugs. In 2009, perhaps heeding Justice Stevens' advice in *Baze v. Rees*, Ohio became the first state to abandon the three-drug cocktail and instead use a massive dose of a single anesthetic in its lethal injections. The move came after an unsuccessful attempt to execute Romell Broom, who "sobbed with pain as prison officials repeatedly stuck him with a needle for nearly two hours in a failed effort to find a usable vein." *See* Ian Urbina, *Ohio Is First to Change to One Drug in Executions*, N.Y. TIMES, Nov. 14, 2009, at A10. The Ohio

Supreme Court recently ruled that the Eighth Amendment does not bar a second attempt to execute Broom, the only prisoner in almost seventy years to survive a failed execution. *See State v. Broom*, 2016 Ohio Lexis 730 (Ohio Mar. 16, 2016); Michael Muskal, *Court to Rule on Execution Do-Over*, L.A. TIMES, June 4, 2014, at AA2.

Lethal injections in a number of other death penalty states now consist of a single drug, including pentobarbital and midazolam. *See State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state-lethal-injection. But Pfizer's recent announcement that it would no longer allow any of its products to be used in lethal injections "closes off the last remaining open-market source of drugs used in executions," as every FDA-approved drug company now bans the sale of drugs for such purposes. *See* Erik Eckholm, *Pfizer Prohibits Use of Its Drugs for Executions*, N.Y. TIMES, May 14, 2016, at A1.

As a result, a number of states are turning to compounding pharmacies, which are not regulated by the FDA, to obtain their lethal injection drugs. *See State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state-lethal-injection. In the wake of numerous challenges to lethal injection protocols, some states have refused to disclose the source of the drugs used in executions. Constitutional challenges to this lack of transparency have largely been rejected, and a Ninth Circuit opinion that stayed an execution until the State of Arizona disclosed "the name and provenance" of the drugs and the qualifications (but not the names) of the executioners was summarily vacated by the Supreme Court. *See Wood v. Ryan*, 759 F.3d 1076, 1088 (9th Cir.), *vacated*, 135 S. Ct. 21 (2014). For an article arguing that "states can — and do — modify virtually any aspect of their lethal injection procedures with a frequency that is unprecedented among execution methods in this country's history," and challenging both the secrecy surrounding lethal injection protocols and the reliance on compounding pharmacies that are unregulated by the FDA and "regulated relatively permissively by the states," see Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1335-36 (2014).

The controversies surrounding lethal injection and the scarcity of drugs have led several states in recent years to authorize alternative methods of execution if the drugs become unavailable, including Tennessee (electric chair), Utah (firing squad), and Oklahoma (nitrogen gas). *See Methods of Execution: Authorized Methods*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/methods-execution.

Page 382: Add to Note 4:

In 2009, the North Carolina legislature passed the Racial Justice Act, which barred use of the death penalty if defendants could prove that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed" in their case. N.C. Gen. Stat. § 15A-2012(a)(3). In making such claims, the statute authorized defendants to introduce statistical evidence as well as "sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system" showing either that "[d]eath sentences were sought or imposed significantly more frequently upon persons of one race" or "as punishment for

capital offenses against persons of one race," or that "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection." *Id.* § 15A-2011(b).

Almost all of the more than 150 prisoners on death row in North Carolina sought relief under the statute, citing a study which found that capital defendants in the state were 2.6 times more likely to be sentenced to die in cases where at least one of the victims was white. For additional discussion of racial disparities in North Carolina's use of the death penalty, see Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031 (2010).

In the first of the Racial Justice Act challenges to be decided on the merits, a North Carolina judge reduced a death sentence to life in prison without parole, relying on both statistical and non-statistical evidence in finding that race was a "significant factor" in the prosecution's use of peremptory challenges in the state from 1990 to 2010. *See State v. Robinson*, No. 91-CRS-23143 (N.C. Super. Ct. Apr. 20, 2012), *available at* http://www.deathpenaltyinfo.org/north-carolina-racial-justice-act-ruling-summary.

Meanwhile, the North Carolina legislature took steps to limit the reach of the Racial Justice Act. Although the Governor vetoed a bill to repeal the statute, the legislature was able to override her veto of another bill that restricted the act in a number of ways: no longer allowing relief based on proof of racial disparities tied to the race of the victim; requiring that any statistical evidence relate to the particular county or prosecutorial district where the defendant was tried; and providing that statistical evidence was insufficient by itself to make the required showing. Three additional death sentences were invalidated under this amended version of the act in December 2012, but the legislature voted to repeal it and the new Governor signed the bill in 2013. *See* Campbell Robertson, *Judge in North Carolina Voids 3 Death Sentences*, N.Y. TIMES, Dec. 14, 2012, at A25; Paul Woolverton, *A Defense Lawyer Predicts the Repeal of the Racial Justice Act Will Flood Courts with Constitutional Challenges*, FAYETTEVILLE OBSERVER, June 21, 2013.

The North Carolina Supreme Court agreed to review the cases involving the four prisoners whose sentences were reduced while the Racial Justice Act was still in effect. Twenty months after oral argument, the court reversed the lower courts' rulings on procedural grounds and remanded the cases for reconsideration without expressing any views on the merits. *See State v. Robinson*, 780 S.E.2d 151 (N.C. 2015); *State v. Augustine*, 780 S.E.2d 552 (N.C. 2015).

Page 382: Add Note 5:

5. *Subsequent Developments on Race and the Death Penalty in the Supreme Court.* In *Foster v. Chatman*, 136 S. Ct. – (May 23, 2016), the Supreme Court reversed a capital conviction based on the constitutional principle first recognized in *Batson v. Kentucky*, 476 U.S. 79 (1986), that prohibits striking prospective jurors (in any type of case) because of their race. Based on notes discovered from the prosecution nineteen years after trial, the Supreme Court concluded by a seven-to-one vote that the prosecution's decision to strike all eligible African-American jurors had been "motivated in substantial part by race" and that its proffered race-neutral reasons were "pretextual." In support of its finding that prosecutors made "a concerted effort to keep black

prospective jurors off the jury," Chief Justice Roberts' majority opinion cited evidence that the prosecution's files identified and highlighted the race of the African-Americans in the jury pool, that "no" was written next to the names of prospective African-American jurors, and that the reasons offered for excusing several African-Americans from the jury applied equally to white members of the pool who were allowed to sit on the jury. In addition, handwritten notes in the prosecutors' files said, "NO Black church" members, and "if we had to pick a black juror, I recommend ….."

The Supreme Court has agreed to review a capital case in which the defendant is challenging his sentence on the grounds that his trial attorney provided ineffective assistance when he chose to introduce the testimony of an expert psychologist who the lawyer knew would testify (and who did testify) that the defendant was more likely to pose a future danger to society because he is African-American. *See Buck v. Stephens*, No. 15-8049 (cert. granted, June 6, 2016).

[2] DEATH PENALTY PROCEDURES

Page 383: Add to Note 2:

When *Panetti v. Quarterman* returned to the district court on remand, the judge found that although Panetti "is seriously mentally ill" and "was under the influence of this severe mental illness" at the time of the murders, he had "both a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two." *Panetti v. Quarterman*, 2008 U.S. Dist. Lexis 107438, at *100, 102 (W.D. Tex. Mar. 26, 2008). As a result, the court concluded, "if any mentally ill person is competent to be executed for his crimes, this record establishes it is Scott Panetti." *Id.* at *102. The Fifth Circuit affirmed, and the Supreme Court denied certiorari. *See Panetti v. Stephens*, 727 F.3d 398 (5th Cir. 2013), *cert. denied*, 135 S. Ct. 47 (2014). But in December of 2014, the Fifth Circuit granted a stay of execution while it considers Panetti's claim that the Due Process Clause constitutionally obligates the State to provide him with a lawyer and expert to evaluate his mental condition. *See Panetti v. Stephens*, 586 F. App'x 163 (5th Cir. 2014); *Panetti Case Highlights Cracks in Execution Law*, TEX. TRIB., Oct. 20, 2015.

Page 385: Add to Note 3:

One of the issues left open in *Atkins* — the proper definition of intellectual disability — returned to the Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014), where the majority overturned a Florida statute that required a death row prisoner to have an IQ no higher than 70 in order to present evidence of intellectual disability. Writing for the five Justices in the majority, Justice Kennedy observed that "the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period." *Id.* at 1994. The majority went on to find that the Florida statute "disregards established medical practice in two interrelated ways": by "tak[ing] an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence"; and by failing to recognize that an IQ score is "imprecise" and,

because of the "standard error of measurement" (SEM), is "best understood as a range of scores on either side of the recorded score" rather than "a single fixed number." *Id.* at 1995. Accordingly, the Court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error [typically five points], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001.

The four dissenters, in an opinion written by Justice Alito, accused the majority of overturning *Atkins*' holding that the Eighth Amendment "does not mandate the use of a single method for identifying" intellectually disabled death row prisoners. *Id.* at 2002 (Alito, J., dissenting). The dissent also criticized the Court for ignoring that the Eighth Amendment concept of "evolving standards of decency" refers to "the standards of *American society as a whole*," not the "standards of *professional societies*," which "at best represent the views of a small professional elite." *Id.* at 2002, 2005. The dissent defended the Florida statute as "a sensible standard that comports with the longstanding belief that IQ tests are the best measure of intellectual functioning" and noted that it "takes into account the inevitable risk of testing error by permitting defendants to introduce multiple scores." *Id.* at 2007. By contrast, the dissent thought the majority's approach "conflates what have long been understood to be two *independent* requirements for proving intellectual disability: (1) significantly subaverage intellectual functioning and (2) deficits in adaptive behavior." *Id.*

In another post-*Atkins* case, *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), the Supreme Court determined that the Louisiana courts had made unreasonable factual findings in denying a death row inmate an evidentiary hearing on his *Atkins* claim. Specifically, Justice Sotomayor's opinion for the five Justices in the majority reasoned that, "[a]ccounting for th[e] margin of error," an IQ test score of 75 was "squarely in the range of potential intellectual disability" and impairment of adaptive functioning was shown by evidence that Brumfield "was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level." In addition to challenging the majority's interpretation of the record, Justice Thomas' dissent described at length the facts supporting Brumfield's conviction for murdering a police officer, the impact of the victim's death on her six children, and the accomplishments on and off the football field of her eldest child, Warrick Dunn. The Chief Justice and Justice Alito did not join this last part of the dissent because, as Justice Alito explained, Dunn's "story … is inspiring…, but I do not want to suggest that it is essential to the legal analysis in this case."

The Supreme Court has agreed to consider another case concerning the proper definition of intellectual disability under *Atkins*. The defendant in that case is challenging the Texas courts' use of a standard based on a 1992 definition that the American Association on Intellectual and Developmental Disabilities has since abandoned. *See Moore v. Texas*, No. 15-797 (cert. granted, June 6, 2016).

Page 386: Add to Note 4:

For a discussion of subsequent Supreme Court opinions that applied *Roper v. Simmons* to cases where juveniles were sentenced to life in prison without parole, see the material above supplementing Page 140.

Page 399: Add to Note 5:

In *Kansas v. Carr*, 136 S. Ct. 633 (2016), the Supreme Court held that trial judges in capital cases are not required to explicitly instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. The Court reasoned that the jurors were told that aggravating circumstances must be established beyond a reasonable doubt whereas mitigating circumstances "must merely 'be found to exist'" and that the jury was "repeatedly" instructed "to consider *any* mitigating factor." *Id.* at 643. The Court also ruled that the Eighth Amendment did not mandate separate capital sentencing hearings for two brothers who were tried jointly.

Page 401: Add to Note 6:

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Supreme Court relied on *Ring v. Arizona* in striking down Florida procedures pursuant to which the jury in capital cases made a nonbinding sentencing recommendation based on a majority vote, but the trial judge then made the ultimate determination after independently evaluating the aggravating and mitigating circumstances. Noting that the Sixth Amendment "requires a jury, not a judge, to find each fact necessary to impose a sentence of death," the Court refused to distinguish *Ring* on the grounds that Florida, unlike Arizona, "incorporated an advisory jury verdict." *Id.* at 619, 622. Under the Florida scheme, the Court reasoned, the jury did not "'make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation [was] not binding on the trial judge.'" *Id.* at 622 (quoting *Walton v. Arizona*, 497 U.S. 639, 648 (1990)). The *Hurst* Court therefore overturned *Spaziano v. Florida* "to the extent that [it] allow[ed] a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Id.* at 624.

Page 402: Add to the end of Note 7:

See also White v. Wheeler, 136 S. Ct. 456, 461 (2015) (per curiam) (finding that state court did not violate clearly established law in rejecting capital defendant's challenge to the trial judge's decision to exclude a juror whose "answers … were at least ambiguous as to whether he would be able to give appropriate consideration to imposing the death penalty"). *But cf. Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring in the judgment) (arguing that "the process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction" and therefore "deprive[s] the defendant of a trial by jurors representing a fair cross section of the community").

Chapter 8

RAPE

A. STATUTORY RAPE

Page 415: Add to Note 7:

As explained in greater detail below in the material supplementing Page 468, the Model Penal Code provisions governing sexual offenses are currently undergoing revision. Under the most recent proposal, rape of a child, a second-degree felony, is defined as sexual penetration where the defendant knows or recklessly disregards the risk that the victim is under twelve years old and more than two years younger than the defendant. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.5(1) (Tentative Draft No. 2, 2016). Sexual penetration of a minor, a third-degree felony, would include cases of sexual penetration where the defendant knows or recklessly disregards the risk that the victim is not the defendant's spouse and is under sixteen and more than four years younger than the defendant. *See id.* § 213.5(3). A defendant who knows or recklessly disregards the risk that the victim is under eighteen years old and that the defendant is the victim's parent, foster parent, guardian, grandparent, aunt, or uncle would be guilty of incest, a second-degree felony, for an act of sexual penetration and of incestuous sexual contact with a child, a third-degree felony, for an act of sexual contact, *see id.* §§ 213.5(2), 213.7(2).

The proposed revisions would also create two additional offenses for sexual contact with a child, which, as described below, includes sexual touching. Aggravated sexual contact with a child, a third-degree felony, applies to cases where the defendant knows or recklessly disregards the risk that the victim is under twelve years old and more than four years younger than the defendant, or where a person under the age of sixteen is the victim of the crimes of aggravated criminal sexual contact or offensive criminal sexual contact (which are described below). *See id.* § 213.7(1) (citing *id.* §§ 213.6(1)-(2)). Inappropriate sexual contact with a minor, a misdemeanor, is defined as sexual contact with someone other than a spouse where the defendant knows or recklessly disregards the risk that the victim is under sixteen and more than ten years younger than the defendant. *See id.* § 213.7(3).

The proposed statutory rape provisions, like the rest of the Model Penal Code's sex offenses, would be entirely gender-neutral. In addition, the proposed revisions foreclose convicting someone under the age of twelve except for the crimes of aggravated forcible rape and aggravated criminal sexual contact (which are described below). *See id.* § 213.0(9) (citing *id.* §§ 213.1(1), 213.6(1)(a)).

B. FORCIBLE RAPE

[1] PERSPECTIVES

Page 424: Add to Footnote *:

Although the Prison Rape Elimination Act received unanimous approval from Congress in 2003, the Justice Department did not issue the final standards required by the statute until 2012 and the incidence of prison rape remains high. In May 2013, the Justice Department's Bureau of Justice Statistics issued a report summarizing the results of a survey of more than 90,000 inmates conducted pursuant to the statute:

> In 2011-12, an estimated 4.0% of state and federal prison inmates and 3.2% of jail inmates reported experiencing one or more incidents of sexual victimization by another inmate or facility staff in the past 12 months …. Among non-heterosexual inmates, 12.2% of prisoners and 8.5% of jail inmates reported being sexually victimized by another inmate; 5.4% of prisoners and 4.3% of jail inmates reported being victimized by staff.

ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, at 6-7 (2013), *available at* http://bjs.gov/content/pub/pdf/svpjri1112.pdf.

The first annual deadline for states to certify that their prisons were making progress in complying with the federal standards was May 15, 2014. All but eight Governors met the deadline, with six deliberately choosing to opt out and thereby forfeit five percent of federal funds related to prisons. Texas, which houses the largest number of prisoners in the country and has "by far the most reports of sexual assault and abuse," was one of those states. Then-Governor Rick Perry explained that Texas had a "'safe prisons program'" and therefore "did not need the 'unnecessarily cumbersome and costly' intrusion of another federal mandate." *See* Deborah Sontag, *Push to End Prison Rapes Loses Momentum*, N.Y. TIMES, May 13, 2015, at A1. When the second annual deadline expired on May 15, 2015, eleven states reported being in complete compliance with the federal standards. Perry's successor, Greg Abbott, assured the Attorney General that Texas intended to comply with the federal standards, but the Justice Department concluded that the Governor had not made all the representations necessary to comply with the reporting requirement. *See* Deborah Sontag, *U.S. Spars with Texas on Ending Prison Rapes*, N.Y. TIMES, May 23, 2015, at A14.

[2] MENS REA

Page 440: Add to Note 8:

In a recent case reminiscent of Glen Ridge, two high school football players in Steubenville, Ohio, Trent Mays and Ma'Lik Richmond, were found guilty in juvenile court of raping a sixteen-year-old girl after a party. Although the victim was intoxicated and could not remember the incident, text messages and cellphone photos taken at the party documented that the

defendants had digitally penetrated her. Mays, who described the victim in a text message as "'like a dead body,'" acknowledged in another message that he had taken a widely circulated picture showing her lying naked with what he said was his semen on her body. The case generated controversy in the community and nationwide, with some claiming a cover-up to protect the football program and supporters of the defendants arguing that the charges would ruin their lives. *See* Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES, Mar. 18, 2013, at A10. Richmond and Mays received sentences of, respectively, one and two years in a juvenile detention facility and have now been released. Several school officials, including the superintendent, were also charged in connection with the cover-up of the crime. The superintendent, who allegedly erased emails and created phony records, agreed to resign in return for dismissal of the charges against him. The IT Director pled guilty to misdemeanor charges and received a ninety-day sentence. *See* Molly Born, *Steubenville Schools Chief Quits in Deal to Drop Case Tied to Rape*, PITTSBURGH POST-GAZETTE, Jan. 13, 2015, at A7.

Page 440: Add Note 10:

10. *Mens Rea and Intoxication.* In a case that received international attention, Brock Turner, a nineteen-year-old Stanford University freshman and varsity swimmer, was convicted on three felony charges: assault with the intent to commit rape; sexual penetration with a foreign object of an intoxicated person; and sexual penetration with a foreign object of an unconscious person. Shortly after Turner met the twenty-two-year-old victim at a fraternity party, two Swedish graduate students came upon him outside behind a dumpster on top of her. The graduate students, who said the victim "appeared motionless" with "her eyes closed and her head tilted to the side," stopped and yelled, and then pursued and tackled Turner when he attempted to run away. Police reports indicated that both Turner and the victim were heavily intoxicated, and the victim did not regain consciousness until three hours later.

At his sentencing hearing, Turner claimed that the victim, who could not remember the incident, had consented, and he "described his actions as the product of a culture of drinking, peer pressure and 'sexual promiscuity.'" The prosecution's sentencing memorandum, by contrast, relied on Turner's photos and text messages to argue that on other occasions he had "'engag[ed] in excessive drinking and using drugs'" and "aggressively flirted with women." The victim read a twelve-page letter at the sentencing hearing, in which she responded to the defendant's claim that alcohol and peer pressure explained his conduct. "[Y]ou were not wrong for drinking," she told Turner. "You were wrong for doing what nobody else was doing": "[e]veryone around you was not sexually assaulting me." In addition, the victim's letter detailed her experience and its lasting impact:

> [Turner] admitted to kissing other girls at th[e] party, one of whom was my own sister who pushed him away. He admitted to wanting to hook up with someone. I was the wounded antelope of the herd, completely alone and vulnerable, physically unable to fend for myself, and he chose me. Sometimes I think, if I hadn't gone, then this never would've happened. But then I realized, it would have happened, just to somebody else. …

> [At the trial,] I was pummeled with narrowed, pointed questions that dissected my personal life, love life, past life, family life,… accumulating trivial details to try and find an excuse for this guy who didn't even take the time to ask me for my name, who had me naked a handful of minutes after seeing me.…
>
> According to him, the only reason we were on the ground was because I fell down. Note[:] if a girl falls help her get back up. If she is too drunk to even walk and falls, do not mount her, hump her, take off her underwear, and insert your hand inside her vagina.…
>
> I can't sleep alone at night without having a light on, like a five year old, because I have nightmares of being touched where I cannot wake up[.] I did this thing where I waited until the sun came up and I felt safe enough to sleep. For three months, I went to bed at six o'clock in the morning.
>
> I used to pride myself on my independence, now I am afraid to go on walks in the evening, to attend social events with drinking among friends where I should be comfortable …. It is embarrassing how feeble I feel, how timidly I move through life, always guarded, ready to defend myself, ready to be angry.
>
> … It took me eight months to even talk about what happened. I could no longer connect with friends, with everyone around me…. Every time a new article c[a]me out, I lived with the paranoia that my entire hometown would find out and know me as the girl who got assaulted. I didn't want anyone's pity and am still learning to accept victim as part of my identity.…
>
> [In recommending a sentence of no more than a year in jail,] [t]he probation officer weighed the fact that [Turner] has surrendered a hard earned swimming scholarship. If I had been sexually assaulted by an un-athletic guy from a community college, what would his sentence be? If a first time offender from an underprivileged background was accused of three felonies and displayed no accountability for his actions other than drinking, what would his sentence be?

See Lindsey Bever, *'You Took Away My Worth': A Sexual Assault Victim's Powerful Message to Her Stanford Attacker*, WASH. POST (June 4, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/06/04/you-took-away-my-worth-a-rape-victim-delivers-powerful-message-to-a-former-stanford-swimmer/ (reprinting the victim's letter).

Turner faced a maximum fourteen-year prison term, but the trial judge, commenting that the case involved "less moral culpability" because Turner had been intoxicated, sentenced him to six months in jail and three years' probation. In addition, Turner lost his athletic scholarship and agreed to withdraw from Stanford shortly after his arrest, and he must register as a sex offender for the rest of his life. According to Turner's father, his son's life has been ruined for "20 minutes of action." *See* Thomas Fuller, *Court Records Fill in Details of Stanford Sexual Assault*, N.Y. TIMES, June 13, 2016, at A8; Liam Stack, *In Stanford Rape Case, Brock Turner Blamed Drinking*

and Promiscuity, N.Y. TIMES (June 8, 2016), http://www.nytimes.com/2016/06/09/us/brock-turner-blamed-drinking-and-promiscuity-in-sexual-assault-at-stanford.html.

[3] ACTUS REUS

Page 455: Add to Note 1:

Issues surrounding consent received widespread attention more recently in the sexual assault trial of Owen Labrie, an eighteen-year-old senior at St. Paul's, an exclusive prep school in New Hampshire. Prosecutors contended that Labrie raped a fifteen-year-old freshman as part of a school ritual called the Senior Salute. The victim agreed to meet Labrie after hours in the school's math and science building and allowed him to remove her shirt and shorts, but she testified that he ignored her when she told him she wanted to go no further and instead penetrated her with his penis, fingers, and tongue. The victim admitted exchanging friendly notes with Labrie after the incident, but said that they reflected her fear and not consent. Labrie denied that there had been any penetration, but the jury apparently disagreed and convicted him of misdemeanor statutory rape. He was acquitted of rape, however, although the jury did find him guilty on the felony charge of using the Internet to solicit sex from a minor. Labrie was sentenced to a year in jail and five years' probation, and he must register as a sex offender for the rest of his life. He is out on bail pending appeal. *See* Matthew Cooper, *How a '90s Internet Law Determined a 2014 Rape Case*, NEWSWEEK, Jan. 8, 2016, *available at* http://www.newsweek.com/2016/01/08/owen-labrie-breaks-his-silence-internet-sex-solicitation-case-st-pauls-406683.html.

Page 467: Add to Note 10:

In *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Supreme Court concluded that imposing a death sentence for the crime of child rape is cruel and unusual punishment violative of the Eighth Amendment. For further discussion of this opinion, see the material above supplementing Page 369.

Page 468: Add to Note 11:

The Model Penal Code provisions governing sex offenses are currently undergoing revision. Like the Model Penal Code promulgated more than fifty years ago, the revisions would create a number of distinct crimes, but the names and elements of those offenses differ greatly from the Code's existing provisions. For a discussion of these and other recent efforts to define the crime of rape, see Ian Urbina, *The Challenge of Defining Rape*, N.Y. TIMES, Oct. 11, 2014, at SR12.

The most recent MPC proposal, issued in 2016, has a number of offenses linked to sexual penetration, which is defined to include "any act involving penetration, however slight, of the anus or vulva by any object or body part, unless done for bona fide medical, hygienic, or law-enforcement purposes," and "direct contact between the mouth or tongue of one person and the anus, penis, or vulva of another." *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0(7) (Tentative Draft No. 2, 2016). This proposal would define forcible rape, a

second-degree felony punishable by up to twenty years in prison, to include cases where the defendant knowingly or recklessly (1) "uses physical force, physical restraint, or an implied or express threat of physical force, bodily injury, or physical restraint to cause another person to engage in an act of sexual penetration," or (2) "threatens to inflict bodily injury" on someone other than the victim or "to commit any other crime of violence." *See id.* § 213.1(2). The crime would be elevated to aggravated forcible rape, a first-degree felony punishable by up to life in prison, if it is committed under certain aggravating circumstances: where the defendant knowingly or recklessly "uses a deadly weapon," "causes serious bodily injury," or is assisted by another person who is "present at the time." *See id.* § 213.1(1).

The proposed revised draft would define sexual penetration without consent, a fourth-degree felony punishable by up to five years in prison, to apply to sexual penetration where the defendant "knows, or consciously disregards a substantial risk," that the victim "has not given consent." *See id.* § 213.2.

The revisions include two charges related to penetration of a "vulnerable person." Rape of a vulnerable person, a second-degree felony, occurs in cases of penetration when the defendant knowingly or recklessly disregards a risk that the victim (1) is "sleeping, unconscious, or physically unable to communicate … refusal" "by words or actions"; (2) is "unable to express refusal, by words or actions,… because of mental disorder or disability, whether temporary or permanent"; or (3) "lacks substantial capacity to appraise or control his or her conduct" because of drugs or alcohol that the defendant "administered" without the victim's knowledge "for the purpose of impairing [that] person's capacity to communicate … refusal." *See id.* § 213.3(1).

The second such charge, sexual penetration of a vulnerable person, is a third-degree felony punishable by a maximum ten-year sentence and encompasses cases of penetration where the defendant knowingly or recklessly disregards a risk that the victim (1) is "mentally [or] developmentally disabled, or mentally incapacitated, whether temporarily or permanently," such that the victim is "incapable of understanding the physiological nature of sexual penetration, its potential for causing pregnancy, or its potential for transmitting disease"; (2) is "mentally or developmentally disabled" such that the victim's "social and intellectual capacity" is no greater than that of a twelve-year-old and the defendant's "social and intellectual capacity" is greater than that of a sixteen-year-old; or (3) is "passing in and out of consciousness" or is in "a state of mental torpor" because of voluntary or involuntary intoxication, irrespective of who administered the substance. *See id.* § 213.3(2).

The proposed revisions would also criminalize penetration involving certain threats of nonphysical force. The crime of sexual penetration by coercion, a third-degree felony, includes cases of penetration where the defendant knowingly or recklessly "obtains … consent by threatening," for example, to accuse anyone of a crime or noncompliance with immigration regulations or to "inflict any substantial economic or financial harm that would not benefit" the defendant. *See id.* § 213.4(1)(a). This crime is also committed if the defendant knows or recklessly disregards the risk that someone other than a spouse or intimate partner is either "detained in a … custodial institution" where the defendant has "a position of authority" or is under arrest or on

probation, parole, or some "other status involving state-imposed restrictions on liberty" and the defendant "holds any position of authority or supervision" over the victim. *See id.* § 213.4(1)(b).

The revisions would define sexual penetration by exploitation, a fourth-degree felony, to include knowingly penetrating a patient who is not the defendant's spouse or intimate partner and whom the defendant is contemporaneously treating for "a mental or emotional illness, symptom, or condition" (unless "the therapy is held out as sex-based at its inception"). *See id.* § 213.4(2)(a). This section would also criminalize two cases of fraud: where the defendant knowingly (1) "misrepresents that the … penetration has curative or preventative medical properties," or (2) "leads" the victim to "believe falsely" that the defendant is "personally known" to the victim. *See id.* § 213.4(2)(b)-(c).

The proposed revisions also include two less serious charges linked to "sexual contact," which includes certain acts "done for the purpose of sexual gratification, sexual arousal, or sexual degradation": for example, "touching the clothed or unclothed intimate parts" of the victim "with any body part or object"; "touching the clothed or unclothed intimate parts" of the defendant to the victim; "touching" the victim with "ejaculate, urine, or feces"; and "lifting or removing the [victim's] clothing … to reveal intimate parts." *See id.* § 213.0(6).

Aggravated criminal sexual contact, a fourth-degree felony, occurs in three circumstances: (1) where the defendant knowingly or recklessly "causes" the victim "to submit" by using a deadly weapon or by causing or threatening to cause serious bodily injury; (2) where the defendant knowingly or recklessly uses "physical force," "physical restraint," "an express or implied threat of physical force, bodily injury, or physical restraint," or "a threat to commit a crime of violence … for the purpose of causing [another] person to submit"; or (3) where the defendant knows or recklessly disregards a risk that the victim "lacks substantial capacity to appraise or control his or her conduct" because of drugs or alcohol that the defendant "administered" without the victim's knowledge "for the purpose of impairing [that] person's capacity to communicate … refusal." *See id.* § 213.6(1).

Offensive criminal sexual contact, a petty misdemeanor punishable by up to six months in prison, includes sexual contact with someone other than the defendant's spouse or intimate partner when the defendant (1) knows the contact is "offensive" to the victim or (2) knows or recklessly disregards the risk that the victim (A) "has communicated refusal to consent," (B) is "incapable of giving consent" because he or she is "sleeping, unconscious, or physically unable to communicate … refusal" "by words or actions," or (C) is "unable to communicate refusal … because of mental disorder or disability, whether temporary or permanent." *See id.* § 213.6(2)(a)-(b). This charge may also be brought when the defendant knowingly or recklessly "obtained … consent" by threatening to accuse anyone of a crime or noncompliance with immigration regulations, or by misrepresenting that the sexual contact was "medical treatment" or that the victim was "in danger of physical injury or illness" that the contact might "serve to mitigate or prevent." *See id.* § 213.6(2)(d). Finally, this crime is committed if the defendant knows or recklessly disregards the risk that the victim is within the defendant's "custodial care" as defined in the section described above criminalizing sexual penetration by coercion. *See id.* § 213.6(2)(c) (citing *id.* § 213.4(1)(b)).

The only part of the proposed revisions that has been approved thus far is the concept of "consent," which is defined as an individual's "behavior, including words and conduct — both action and inaction — that communicates … willingness to engage in a specific act of sexual penetration or sexual contact." *See id.* § 213.0(3)(a). This provision makes clear that no form of resistance is required and that consent can be "express" or "inferred from a person's behavior," which "must be assessed in the context of all the circumstances." *See id.* § 213.0(3)(c). This section also provides that consent can be "revoked at any time … by behavior communicating that the person is no longer willing" and that a "clear verbal refusal" (such as saying "no" or "stop") "suffices to withdraw previously communicated willingness in the absence of subsequent behavior that communicates willingness before the sexual act occurs." *See id.* § 213.0(3)(d).

The proposed revisions would also recognize a defense of consent to force if a defendant charged with forcible rape, aggravated forcible rape, sexual penetration without consent, or aggravated criminal sexual contact reasonably believed that the victim "gave explicit prior verbal consent to the use of physical force, threats, or restraint, and/or permission to ignore general expressions of unwillingness." *See id.* § 213.9(1) (citing *id.* §§ 213.1, 213.2, 213.6(1)). The defendant has the burden of proving this defense by a preponderance of the evidence, and it is not available either if the defendant knows or recklessly disregards the risk that the victim withdrew consent or if the defendant "knowingly or recklessly caused serious bodily injury." *See id.*

Page 469: Add to Note 12:

The proposed revisions to the Model Penal Code's sexual offenses would eliminate the Hale instruction and the traditional rule about uncorroborated victim testimony. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Tentative Draft No. 2, 2016). But the revisions would allow the prosecutor to introduce evidence describing where and when the victim made an "[o]fficial [c]omplaint" to "a person in authority, along with evidence tending to establish the reasons for any delay," so long as that evidence was not "substantially more prejudicial than probative" and "avoid[ed] reference to the details alleged in the complaint." *See id.* § 213.10(4)(a). Evidence concerning complaints to anyone who was not "in authority" could not be introduced, however, unless they were "deemed admissible by generally applicable rules of evidence" or were used to "rebut an express or implied argument" that the victim failed to report the crime. *See id.* § 213.10(4)(b). In addition, the revisions would include a rape-shield provision. *See id.* § 213.10(1).

[4] MARITAL RAPE

Page 478: Add to Note 4:

The proposed revisions to the Model Penal Code's sexual offenses would be completely gender-neutral. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Tentative Draft No. 2, 2016). Although earlier drafts of the revisions would also have eliminated any form of marital exception, *see* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Tentative Draft No. 1, 2014), the most recent draft described above in the material supplementing Page 468 does exempt spouses and intimate partners from prosecution for certain sex offenses.

See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES §§ 213.4(1)(b), 213.4(2)(a), 213.5(3), 213.6(2), 213.7(3) (Tentative Draft No. 2, 2016). But the revisions provide that any such defense must be "specifically provided" and does not apply to any crime involving "the use or threat of physical force, physical restraint, bodily injury, or any other crime of violence … or coercion." *See id.* § 213.9(2)(a) (citing *id.* §§ 213.1, 213.4(1)(a)).

The proposed revisions also create an affirmative defense in prosecutions for rape or sexual penetration of a vulnerable person that involve no "use or threat of physical force," but instead are based only on a lack of consent on the part of a victim who was, for example, asleep or unconscious, if the defendant was the victim's spouse or intimate partner and reasonably believed, "in light of the specific facts and circumstances of th[e] relationship and the context surrounding the disputed act," that the victim "would welcome the act." *See id.* § 213.9(2)(b) (citing *id.* §§ 213.3(1)(a), 213.3(2)(c)).

Under the most recent proposal, the term "spouse" includes common-law marriages and domestic partnerships. *See id.* § 213.0(8)(a). An "intimate partner" is a defendant who was "in a sexually intimate relationship involving cohabitation" with the victim at the time of the alleged crime. *See id.* § 213.0(8)(b). But neither term applies in cases involving a temporary or permanent order of protection or separation or where the two people "no longer liv[e] together because of estrangement in the relationship." *See id.* § 213.0(8)(c).

Chapter 9

THEFT

A. INTRODUCTION

Page 480: Add to the end of the Introduction:

See John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J. L. REF. 1 (2010) (discussing the subtle and fluid distinctions between criminal and non-criminal conduct in theft and other crimes and the dangers of overcriminalization and excessive prosecutorial discretion).

B. LARCENY

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

Page 489: Add to Note 7:

Note that the California legislature has increased the amount that divides petty and grand larceny from $400 to $950.

Page 499: Add Note 6:

6. *Unauthorized Computer Use at Work.* Should it be a crime for an employee to violate an employer's computer use policy? Should an employee's unauthorized use of a company computer to access personal email or check college basketball scores be criminal if it violates company policy? Should it matter what the motive for the unauthorized use is? In *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), the defendant utilized his computer access at the Social Security Administration to obtain information about former girlfriends and other women with whom he sought a romantic relationship. He was convicted under the federal Computer Fraud and Abuse Act (CFAA) on seventeen misdemeanor counts of "intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] … information from any department or agency of the United States." 18 U.S.C. § 1030(a)(2)(B). The Eleventh Circuit held that under that provision of the statute, "use of information is irrelevant if [the defendant] obtained the information without authorization or as a result of exceeding authorized access." Accordingly, the court rejected the defendant's argument that he did not obtain the information to defraud anyone or realize financial gain, observing that the statute's misdemeanor penalty provision (unlike the felony provision) "does not contain any language regarding purposes for committing the offense." In *United States v. John*, 597 F.3d 263 (5th Cir. 2010), the Fifth Circuit likewise held that an employee of Citigroup could be convicted under subsection (a)(2) of the statute for "exceeding authorized access" if the defendant exceeded "limits placed on *the use* of information obtained by permitted access to a computer system and data

available on that system," "at least when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime."

By contrast, the en banc Ninth Circuit read the CFAA more narrowly in *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (en banc), concluding that the statutory term "exceeds authorized access" "is limited to violations of restrictions on *access* to information, and not restrictions on its *use*." The statute's purpose, the court reasoned, was "to punish hacking — the circumvention of technological access barriers — not misappropriation of trade secrets," and the court therefore was not persuaded that Congress intended to criminalize "minor dalliances" like "g-chatting with friends, playing games, shopping or watching sports highlights" on work computers. "If Congress meant to expand the scope of criminal liability to everyone who uses a computer in violation of computer use restrictions — which may well include everyone who uses a computer — we would expect it to use language better suited to that purpose," the court noted. The Ninth Circuit was critical of the decisions in *Rodriguez* and *John*, observing that the courts in those cases "looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of 'exceeds authorized access.'"

D. FALSE PRETENSES

Page 558: Add to Note 12:

In two opinions issued in June 2010 involving high-profile defendants, former Enron CEO Jeffrey Skilling and former Canadian newspaper magnate Conrad Black, the Supreme Court upheld, but narrowly interpreted, a federal honest-services fraud statute. That statute, 18 U.S.C. § 1346, provides that mail and wire fraud charges may be based on "a scheme or artifice to deprive another of the intangible right of honest services." In the lead case, *Skilling v. United States*, 561 U.S. 358 (2010), Skilling was charged with conspiring to deprive Enron's shareholders of his honest services "by misrepresenting the company's fiscal health, thereby artificially inflating its stock price." The prosecution argued at trial that Skilling "profited from the fraudulent scheme ... through the receipt of salary and bonuses, ... and through the sale of approximately $200 million in Enron stock, which netted him $89 million."

But the Supreme Court, in an opinion written by Justice Ginsburg, ruled that § 1346 "covers only bribery and kickback schemes" for fear that "[c]onstruing the honest-services statute to extend beyond that core meaning ... would encounter a vagueness shoal." Given the absence of any allegation that Skilling "solicited or accepted side payments from a third party in exchange for making these misrepresentations," the Court concluded that, "as we read § 1346, Skilling did not commit honest-services fraud." The Court stopped short of reversing his conspiracy conviction, however, giving the government an opportunity to prove on remand that the error was harmless because "the indictment alleged three objects of the conspiracy — honest-services wire fraud, money-or-property wire fraud, and securities fraud." By the same token, the Court left it open for Skilling to argue on remand that the other charges on which he was convicted (securities fraud,

making false statements, and insider trading) "hinged on the conspiracy count and, like dominoes, must fall if it falls."

In the second case, *Black v. United States*, 561 U.S. 465 (2010), prosecutors alleged that Black and two other executives of the publishing company Hollinger International "stole millions from Hollinger by fraudulently paying themselves bogus 'noncompetition fees,'" and, "by failing to disclose their receipt of those fees, ... deprived Hollinger of their honest services as managers of the company." Writing again for the Court, Justice Ginsburg concluded that the jury instructions given at Black's trial on mail fraud charges were inconsistent with the narrow reading of the honest-services fraud statute articulated in the *Skilling* decision. As in *Skilling*, however, the Court left open the possibility of harmless error as well as the question whether "spillover prejudice" also required reversal of Black's conviction on obstruction of justice charges.

Justice Scalia, joined by Justices Kennedy and Thomas, wrote separately in both cases. These three Justices would have struck down the honest-services fraud statute as unconstitutionally vague. They charged that by "transforming the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kick-backs,'" the majority was "wielding a power we long ago abjured: the power to define new federal crimes." "That is a dish the Court has cooked up all on its own," Justice Scalia wrote.

On remand, the Fifth Circuit affirmed Skilling's conviction, concluding that any error was harmless, and the Supreme Court denied his cert petition. *See United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1905 (2012). But the Fifth Circuit ordered that Skilling be resentenced, reversing the sentencing enhancement for endangerment to a "financial institution" on the ground that retirement plans do not qualify as "financial institutions." *See United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009). Skilling and prosecutors agreed that he would forego any further appeals and pay $42 million to the victims of the Enron collapse in exchange for a ten-year reduction in his sentence, thereby decreasing his prison term from 24 to 14 years. *See* Peter Lattman, *Prison Sentence of Ex-Enron C.E.O. Skilling Cut by 10 Years*, N.Y. TIMES, June 22, 2013, at B2.

In Black's case, the Seventh Circuit reversed one of the fraud charges on remand from the Supreme Court, but affirmed the rest of his conviction. *See United States v. Black*, 625 F.3d 386 (7th Cir. 2010). The Supreme Court denied certiorari, *see Black v. United States*, 131 S. Ct. 2932 (2011), though Black's sentence was also reduced from 78 to 42 months. *See* Ameet Sachdev, *Back to Prison for Black*, CHI. TRIB., June 25, 2011, at C1.

Chapter 10

AGGRAVATED PROPERTY CRIMES

A. ROBBERY

Page 572: Add to Note 12 after the discussion of *Tufunga*:

The California Court of Appeal added another wrinkle to the *Tufunga* "claim of right" defense to armed robbery in *People v. Smith*, 100 Cal. Rptr. 3d 24 (Ct. App. 2009), a case in which the owner of a jewelry store allegedly consented to its armed robbery in order to claim insurance proceeds. Two men robbed the store, forcing employees to open the store's safes at gunpoint and leaving them bound and gagged. The robbers argued that the owner of the store (who was not present during the robbery) had actually consented to the taking of the property, having arranged the apparent robbery in order to commit insurance fraud. The defendants therefore maintained that their actions could not be larceny because they took the property with the property owner's consent. The appellate court, however, rejected this argument, holding that when an owner is not present, a forcible taking from unknowing persons who are lawfully in possession of the property can be robbery, even if the robbers believe they have a "right" to the property because of the owner's consent.

Page 572: Add to the end of Note 12:

Exactly thirteen years after he was acquitted of murdering his ex-wife, O.J. Simpson was convicted on twelve felony counts, including armed robbery and kidnapping, in connection with a 2007 raid where Simpson and five others took sports memorabilia worth thousands of dollars from two dealers in a Las Vegas hotel room. Simpson claimed that the items had been stolen from him and denied knowing that his accomplices were armed. He was sentenced to nine to thirty-three years in prison, and a panel of the Nevada Supreme Court affirmed his conviction in October of 2010. In November 2013, a district judge rejected Simpson's claim that both his trial and first appeal were infected by ineffective assistance of counsel, and he has appealed that decision to the state supreme court. *See* Steve Friess, *After Apologies, Simpson Is Sentenced to at Least 9 Years for Armed Robbery*, N.Y. TIMES, Dec. 6, 2008, at A9; Adam Nagourney, *Seeking Retrial, Simpson Is Demure but Unbowed*, N.Y. TIMES, May 16, 2013, at A13; John Glionna, *Judge Denies O.J. Simpson a New Trial*, L.A. TIMES, Nov. 27, 2013, at AA2.

B. EXTORTION

Page 581: Add to Note 4:

In *Sekhar v. United States*, 133 S. Ct. 2720 (2013), the Supreme Court unanimously agreed that threats intended to induce a General Counsel to recommend that a state employee pension fund invest in certain funds could not be prosecuted as an extortion attempt under the Hobbs Act, 18 U.S.C. § 1951. Six Justices joined the majority opinion written by Justice Scalia, which held

that "attempting to compel a person to recommend that his employer approve an investment" does not qualify as "'the obtaining of property from another.'" The Court presumed that Congress intended to incorporate the traditional common law definition of extortion, noting that property must be "*transferable* — that is, capable of passing from one person to another." The remaining three Justices joined an opinion written by Justice Alito, which concurred only in the judgment and concluded that "internal recommendations regarding government decisions are not property." The concurrence therefore declined to reach the majority's argument that "the alleged property … was not transferable" and thus "not capable of being 'obtained.'"

Page 583: Add to Note 5:

Civil extortion charges were filed against Martin Singer, a high-profile Hollywood attorney, in a suit filed by reality television star Mike "Boogie" Malin of *Big Brother* fame. The extortion claim was based on a demand letter Singer sent to Malin on behalf of a client, threatening to sue Malin for embezzlement and conversion and to disclose that Malin had spent the allegedly stolen funds on various sexual encounters. The California Court of Appeal dismissed the extortion claim on the grounds that the letter did not make an "overt threat to report Malin to prosecuting agencies or the Internal Revenue Service" and therefore did not "fall under the narrow exception … for a letter so extreme in its demands that it constituted criminal extortion as a matter of law." *Malin v. Singer*, 159 Cal. Rptr. 3d 292, 304 (Ct. App. 2013). The court also concluded that the letter was protected by the litigation privilege.

Page 584: Add Note 8:

8. *Conspiracy and Extortion.* In *Ocasio v. United States*, 136 S. Ct. 1423 (2016), the Supreme Court ruled that the federal extortion statute (the Hobbs Act) reaches an agreement for one defendant to "extort" money from a co-defendant. In the case, a group of police officers agreed to "steer" accident victims to a particular automobile repair shop, and the owners of the body shop agreed to pay "kickbacks" to the police officers. So long as all parties agreed that the law would be violated, it did not matter that the money at issue came from one of the members of the conspiracy. For a description of *Ocasio*'s discussion of conspiracy law, see the material below supplementing page 746.

C. BRIBERY

Page 599: Replace *State v. Bowling* with the following:

McDONNELL v. UNITED STATES
136 S. Ct. – (2016)

ROBERTS, C.J.

In 2014, the Federal Government indicted former Virginia Governor Robert McDonnell and his wife, Maureen McDonnell, on bribery charges. The charges related to the acceptance by

the McDonnells of $175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams, while Governor McDonnell was in office. …

To convict the McDonnells of bribery, the Government was required to show that Governor McDonnell committed (or agreed to commit) an "official act" in exchange for the loans and gifts. The parties did not agree, however, on what counts as an "official act." The Government alleged in the indictment, and maintains on appeal, that Governor McDonnell committed at least five "official acts." Those acts included "arranging meetings" for Williams with other Virginia officials to discuss [a] product [developed by Williams's company], "hosting" events for [the company] at the Governor's Mansion, and "contacting other government officials" concerning studies of [the product]. The Government also argued more broadly that these activities constituted "official action" because they related to Virginia business development, a priority of Governor McDonnell's administration. Governor McDonnell contends that merely setting up a meeting, hosting an event, or contacting an official—without more—does not count as an "official act."

At trial, the District Court instructed the jury according to the Government's broad understanding of what constitutes an "official act," and the jury convicted both Governor and Mrs. McDonnell on the bribery charges. The Fourth Circuit affirmed Governor McDonnell's conviction, and we granted review to clarify the meaning of "official act."

I

A

On November 3, 2009, petitioner Robert McDonnell was elected the 71st Governor of Virginia. His campaign slogan was "Bob's for Jobs," and his focus in office was on promoting business in Virginia. As Governor, McDonnell spoke about economic development in Virginia "on a daily basis" and attended numerous "events, ribbon cuttings," and "plant facility openings." He also referred thousands of constituents to meetings with members of his staff and other government officials. According to longtime staffers, Governor McDonnell likely had more events at the Virginia Governor's Mansion to promote Virginia business than had occurred in "any other administration."

This case concerns Governor McDonnell's interactions with one of his constituents, Virginia businessman Jonnie Williams. Williams was the CEO of Star Scientific, a Virginia-based company that developed and marketed Anatabloc, a nutritional supplement made from anatabine, a compound found in tobacco. Star Scientific hoped to obtain Food and Drug Administration approval of Anatabloc as an anti-inflammatory drug. An important step in securing that approval was initiating independent research studies on the health benefits of anatabine. Star Scientific hoped Virginia's public universities would undertake such studies, pursuant to a grant from Virginia's Tobacco Commission.

Governor McDonnell first met Williams in 2009, when Williams offered McDonnell transportation on his private airplane to assist with McDonnell's election campaign. Shortly after the election, Williams had dinner with Governor and Mrs. McDonnell at a restaurant in New York. The conversation turned to Mrs. McDonnell's search for a dress for the inauguration, which led

Williams to offer to purchase a gown for her. Governor McDonnell's counsel later instructed Williams not to buy the dress, and Mrs. McDonnell told Williams that she would take a rain check.

In October 2010, Governor McDonnell and Williams met again on Williams's plane. During the flight, Williams told Governor McDonnell that he "needed his help" moving forward on the research studies at Virginia's public universities, and he asked to be introduced to the person that he "needed to talk to." Governor McDonnell agreed to introduce Williams to Dr. William Hazel, Virginia's Secretary of Health and Human Resources. Williams met with Dr. Hazel the following month, but the meeting was unfruitful; Dr. Hazel was skeptical of the science behind Anatabloc and did not assist Williams in obtaining the studies.

Six months later, Governor McDonnell's wife … offered to seat Williams next to the Governor at a political rally. Shortly before the event, Williams took Mrs. McDonnell on a shopping trip and bought her $20,000 worth of designer clothing. The McDonnells later had Williams over for dinner at the Governor's Mansion, where they discussed research studies on Anatabloc.

Two days after that dinner, Williams had an article about Star Scientific's research e-mailed to Mrs. McDonnell, which she forwarded to her husband. Less than an hour later, Governor McDonnell texted his sister to discuss the financial situation of certain rental properties they owned in Virginia Beach. Governor McDonnell also e-mailed his daughter to ask about expenses for her upcoming wedding.

The next day, Williams returned to the Governor's Mansion for a meeting with Mrs. McDonnell. At the meeting, Mrs. McDonnell described the family's financial problems, including their struggling rental properties in Virginia Beach and their daughter's wedding expenses. Mrs. McDonnell, who had experience selling nutritional supplements, told Williams that she had a background in the area and could help him with Anatabloc. According to Williams, she explained that the "Governor says it's okay for me to help you and—but I need you to help me. I need you to help me with this financial situation." Mrs. McDonnell then asked Williams for a $50,000 loan, in addition to a $15,000 gift to help pay for her daughter's wedding, and Williams agreed.

Williams testified that he called Governor McDonnell after the meeting and said, "I understand the financial problems and I'm willing to help. I just wanted to make sure that you knew about this." According to Williams, Governor McDonnell thanked him for his help. Governor McDonnell testified, in contrast, that he did not know about the loan at the time, and that when he learned of it he was upset that Mrs. McDonnell had requested the loan from Williams. Three days after the meeting between Williams and Mrs. McDonnell, Governor McDonnell directed his assistant to forward the article on Star Scientific to Dr. Hazel.

In June 2011, Williams sent Mrs. McDonnell's chief of staff a letter containing a proposed research protocol for the Anatabloc studies. The letter was addressed to Governor McDonnell, and it suggested that the Governor "use the attached protocol to initiate the 'Virginia Study' of Anatabloc at the Medical College of Virginia and the University of Virginia School of Medicine."

Governor McDonnell gave the letter to Dr. Hazel. Williams testified at trial that he did not "recall any response" to the letter.

In July 2011, the McDonnell family visited Williams's vacation home for the weekend, and Governor McDonnell borrowed Williams's Ferrari while there. Shortly thereafter, Governor McDonnell asked Dr. Hazel to send an aide to a meeting with Williams and Mrs. McDonnell to discuss research studies on Anatabloc. The aide later testified that she did not feel pressured by Governor or Mrs. McDonnell to do "anything other than have the meeting," and that Williams did not ask anything of her at the meeting. After the meeting, the aide sent Williams a "polite blow-off " e-mail.

At a subsequent meeting at the Governor's Mansion, Mrs. McDonnell admired Williams's Rolex and mentioned that she wanted to get one for Governor McDonnell. Williams asked if Mrs. McDonnell wanted him to purchase a Rolex for the Governor, and Mrs. McDonnell responded, "Yes, that would be nice." Williams did so, and Mrs. McDonnell later gave the Rolex to Governor McDonnell as a Christmas present.

In August 2011, the McDonnells hosted a lunch event for Star Scientific at the Governor's Mansion. According to Williams, the purpose of the event was to launch Anatabloc. According to Governor McDonnell's gubernatorial counsel, however, it was just lunch.

The guest list for the event included researchers at the University of Virginia and Virginia Commonwealth University. During the event, Star Scientific distributed free samples of Anatabloc, in addition to eight $25,000 checks that researchers could use in preparing grant proposals for studying Anatabloc. Governor McDonnell asked researchers at the event whether they thought "there was some scientific validity" to Anatabloc and "whether or not there was any reason to explore this further." He also asked whether this could "be something good for the Commonwealth, particularly as it relates to economy or job creation." When Williams asked Governor McDonnell whether he would support funding for the research studies, Governor McDonnell "very politely" replied, "I have limited decision-making power in this area."

In January 2012, Mrs. McDonnell asked Williams for an additional loan for the Virginia Beach rental properties, and Williams agreed. On February 3, Governor McDonnell followed up on that conversation by calling Williams to discuss a $50,000 loan.

Several days later, Williams complained to Mrs. McDonnell that the Virginia universities were not returning Star Scientific's calls. She passed Williams's complaint on to the Governor. While Mrs. McDonnell was driving with Governor McDonnell, she also e-mailed Governor McDonnell's counsel, stating that the Governor "wants to know why nothing has developed" with the research studies after Williams had provided the eight $25,000 checks for preparing grant proposals, and that the Governor "wants to get this going" at the universities. According to Governor McDonnell, however, Mrs. McDonnell acted without his knowledge or permission, and he never made the statements she attributed to him.

On February 16, Governor McDonnell e-mailed Williams to check on the status of documents related to the $50,000 loan. A few minutes later, Governor McDonnell e-mailed his counsel stating, "Please see me about Anatabloc issues at VCU and UVA. Thanks." Governor McDonnell's counsel replied, "Will do. We need to be careful with this issue." The next day, Governor McDonnell's counsel called Star Scientific's lobbyist in order to "change the expectations" of Star Scientific regarding the involvement of the Governor's Office in the studies.

At the end of February, Governor McDonnell hosted a healthcare industry reception at the Governor's Mansion, which Williams attended. Mrs. McDonnell also invited a number of guests recommended by Williams, including researchers at the Virginia universities. Governor McDonnell was present, but did not mention Star Scientific, Williams, or Anatabloc during the event. That same day, Governor McDonnell and Williams spoke about the $50,000 loan, and Williams loaned the money to the McDonnells shortly thereafter.

In March 2012, Governor McDonnell met with Lisa Hicks-Thomas, the Virginia Secretary of Administration, and Sara Wilson, the Director of the Virginia Department of Human Resource Management. The purpose of the meeting was to discuss Virginia's health plan for state employees. At that time, Governor McDonnell was taking Anatabloc several times a day. He took a pill during the meeting, and told Hicks-Thomas and Wilson that the pills "were working well for him" and "would be good for" state employees. Hicks-Thomas recalled Governor McDonnell asking them to meet with a representative from Star Scientific; Wilson had no such recollection. After the discussion with Governor McDonnell, Hicks-Thomas and Wilson looked up Anatabloc on the Internet, but they did not set up a meeting with Star Scientific or conduct any other follow-up. It is undisputed that Virginia's health plan for state employees does not cover nutritional supplements such as Anatabloc.

In May 2012, Governor McDonnell requested an additional $20,000 loan, which Williams provided. Throughout this period, Williams also paid for several rounds of golf for Governor McDonnell and his children, took the McDonnells on a weekend trip, and gave $10,000 as a wedding gift to one of the McDonnells' daughters. In total, Williams gave the McDonnells over $175,000 in gifts and loans.

B

In January 2014, Governor McDonnell was indicted for accepting payments, loans, gifts, and other things of value from Williams and Star Scientific in exchange for "performing official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products." The charges against him comprised one count of conspiracy to commit honest services fraud, three counts of honest services fraud, one count of conspiracy to commit Hobbs Act extortion, six counts of Hobbs Act extortion, and two counts of making a false statement. *See* 18 U.S C. §§ 1343, 1349 (honest services fraud); § 1951(a) (Hobbs Act extortion); §1014 (false statement). Mrs. McDonnell was indicted on similar charges, plus obstructing official proceedings, based on her alleged involvement in the scheme. *See* § 1512(c)(2) (obstruction).

The theory underlying both the honest services fraud and Hobbs Act extortion charges was that Governor McDonnell had accepted bribes from Williams.

The parties agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U. S. C. § 201. That statute makes it a crime for "a public official or person selected to be a public official, directly or indirectly, corruptly" to demand, seek, receive, accept, or agree "to receive or accept anything of value" in return for being "influenced in the performance of any official act." § 201(b)(2). An "official act" is defined as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." § 201(a)(3).

The parties also agreed that obtaining a "thing of value … knowing that the thing of value was given in return for official action" was an element of Hobbs Act extortion, and that they would use the definition of "official act" found in the federal bribery statute to define "official action" under the Hobbs Act.

As a result of all this, the Government was required to prove that Governor McDonnell committed or agreed to commit an "official act" in exchange for the loans and gifts from Williams.

The Government alleged that Governor McDonnell had committed at least five "official acts":

(1) "arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anatabloc";

(2) "hosting, and … attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients";

(3) "contacting other government officials in the [Governor's Office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine";

(4) "promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion"; and

(5) "recommending that senior government officials in the [Governor's Office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs."

The case proceeded to a jury trial, which lasted five weeks. Pursuant to an immunity agreement, Williams testified that he had given the gifts and loans to the McDonnells to obtain the Governor's "help with the testing" of Anatabloc at Virginia's medical schools. Governor McDonnell acknowledged that he had requested loans and accepted gifts from Williams. He

testified, however, that setting up meetings with government officials was something he did "literally thousands of times" as Governor, and that he did not expect his staff "to do anything other than to meet" with Williams.

… .

The jury convicted Governor McDonnell on the honest services fraud and Hobbs Act extortion charges, but acquitted him on the false statement charges. Mrs. McDonnell was also convicted on most of the charges against her. Although the Government requested a sentence of at least ten years for Governor McDonnell, the District Court sentenced him to two years in prison. Mrs. McDonnell received a one-year sentence.

… .

II

The issue in this case is the proper interpretation of the term "official act." …

According to the Government, "Congress used intentionally broad language" in § 201(a)(3) to embrace "*any* decision or action, on *any* question or matter, that may at *any time* be pending, or which may by law be brought before *any* public official, in such official's official capacity." The Government concludes that the term "official act" therefore encompasses nearly any activity by a public official. In the Government's view, "official act" specifically includes arranging a meeting, contacting another public official, or hosting an event—without more—concerning any subject, including a broad policy issue such as Virginia economic development.

Governor McDonnell, in contrast, contends that statutory context compels a more circumscribed reading, limiting "official acts" to those acts that "direct[ ] a particular resolution of a specific governmental decision," or that pressure another official to do so. He also claims that "vague corruption laws" such as § 201 implicate serious constitutional concerns, militating "in favor of a narrow, cautious reading of these criminal statutes."

Taking into account the text of the statute, the precedent of this Court, and the constitutional concerns raised by Governor McDonnell, we reject the Government's reading of § 201(a)(3) and adopt a more bounded interpretation of "official act." Under that interpretation, setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an "official act."

A

The text of § 201(a)(3) sets forth two requirements for an "official act": First, the Government must identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official. Second, the Government must prove that the public official made a decision or took an action "on" that question, matter, cause, suit, proceeding, or controversy, or agreed to do so. The issue here is

whether arranging a meeting, contacting another official, or hosting an event—without more—can be a "question, matter, cause, suit, proceeding or controversy," and if not, whether it can be a decision or action on a "question, matter, cause, suit, proceeding or controversy."

The first inquiry is whether a typical meeting, call, or event is itself a "question, matter, cause, suit, proceeding or controversy." The Government argues that nearly any activity by a public official qualifies as a question or matter—from workaday functions, such as the typical call, meeting, or event, to the broadest issues the government confronts, such as fostering economic development. We conclude, however, that the terms "question, matter cause, suit, proceeding or controversy" do not sweep so broadly.

The last four words in that list—"cause," "suit," "proceeding," and "controversy"—connote a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination.

… .

But what about a "question" or "matter"? A "question" could mean any "subject or aspect that is in dispute, open for discussion, or to be inquired into," and a "matter" any "subject" of "interest or relevance." Webster's Third New International Dictionary 1394, 1863 (1961). If those meanings were adopted, a typical meeting, call, or event would qualify as a "question" or "matter." A "question" may also be interpreted more narrowly, however, as "a subject or point of debate or a proposition being or to be voted on in a meeting," such as a question "before the senate." *Id.* at 1863. Similarly, a "matter" may be limited to "a topic under active and usually serious or practical consideration," such as a matter that "will come before the committee." *Id.* at 1394.

To choose between those competing definitions, we look to the context in which the words appear. Under the familiar interpretive canon *noscitur a sociis*, "a word is known by the company it keeps." While "not an inescapable rule," this canon "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress."

… .

Applying that … approach here, we conclude that a "question" or "matter" must be similar in nature to a "cause, suit, proceeding or controversy." Because a typical meeting, call, or event arranged by a public official is not of the same stripe as a lawsuit before a court, a determination before an agency, or a hearing before a committee, it does not qualify as a "question" or "matter" under § 201(a)(3).

… .

For its part, the Fourth Circuit found at least three questions or matters at issue in this case: (1) "whether researchers at any of Virginia's state universities would initiate a study of Anatabloc"; (2) "whether the state-created Tobacco Indemnification and Community Revitalization

Commission" would "allocate grant money for the study of anatabine"; and (3) "whether the health insurance plan for state employees in Virginia would include Anatabloc as a covered drug." We agree that those qualify as questions or matters under § 201(a)(3). Each is focused and concrete, and each involves a formal exercise of governmental power that is similar in nature to a lawsuit, administrative determination, or hearing.

The question remains whether—as the Government argues—merely setting up a meeting, hosting an event, or calling another official qualifies as a decision or action on any of those three questions or matters. Although the word "decision," and especially the word "action," could be read expansively to support the Government's view, our opinion in *United States v. Sun-Diamond Growers of Cal.*, 526 U. S. 398 (1999), rejects that interpretation.

In *Sun-Diamond*, the Court stated that it was not an "official act" under § 201 for the President to host a championship sports team at the White House, the Secretary of Education to visit a high school, or the Secretary of Agriculture to deliver a speech to "farmers concerning various matters of USDA policy." We recognized that "the Secretary of Agriculture *always* has before him or in prospect matters that affect farmers, just as the President always has before him or in prospect matters that affect college and professional sports, and the Secretary of Education matters that affect high schools." But we concluded that the existence of such pending matters was not enough to find that any action related to them constituted an "official act." It was possible to avoid the "absurdities" of convicting individuals on corruption charges for engaging in such conduct, we explained, "*through the definition of that term*," *i.e.*, by adopting a more limited definition of "official acts."

It is apparent from *Sun-Diamond* that hosting an event, meeting with other officials, or speaking with interested parties is not, standing alone, a "decision or action" within the meaning of § 201(a)(3), even if the event, meeting, or speech is related to a pending question or matter. Instead, something more is required: § 201(a)(3) specifies that the public official must make a decision or take an action *on* that question or matter, or agree to do so.

… .

Under this Court's precedents, a public official is not required to actually make a decision or take an action on a "question, matter, cause, suit, proceeding or controversy"; it is enough that the official agree to do so. The agreement need not be explicit, and the public official need not specify the means that he will use to perform his end of the bargain. Nor must the public official in fact intend to perform the "official act," so long as he agrees to do so. A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an "official act" in return. It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an "official act" at the time of the alleged *quid pro quo*. …

Setting up a meeting, hosting an event, or calling an official (or agreeing to do so) merely to talk about a research study or to gather additional information, however, does not qualify as a decision or action on the pending question of whether to initiate the study. Simply expressing

support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an "official act." Otherwise, if every action somehow related to the research study were an "official act," the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless.

Of course, this is not to say that setting up a meeting, hosting an event, or making a phone call is always an innocent act, or is irrelevant, in cases like this one. If an official sets up a meeting, hosts an event, or makes a phone call on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act. A jury could conclude, for example, that the official was attempting to pressure or advise another official on a pending matter. And if the official agreed to exert that pressure or give that advice in exchange for a thing of value, that would be illegal.

The Government relies on this Court's decision in [*United States v. Birdsall*, 223 U.S. 223 (1914),] to support a more expansive interpretation of "official act," but *Birdsall* is fully consistent with our reading of § 201(a)(3). We held in *Birdsall* that "official action" could be established by custom rather than "by statute" or "a written rule or regulation," and need not be a formal part of an official's decisionmaking process. That does not mean, however, that every decision or action customarily performed by a public official—such as the myriad decisions to refer a constituent to another official—counts as an "official act." The "official action" at issue in *Birdsall* was "advis[ing] the Commissioner of Indian Affairs, contrary to the truth," that the facts of the case warranted granting leniency to certain defendants convicted of "unlawfully selling liquor to Indians." That "decision or action" fits neatly within our understanding of § 201(a)(3): It reflected a decision or action to advise another official on the pending question whether to grant leniency.

In sum, an "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That decision or action may include using his official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or intending that such advice will form the basis for an "official act" by another official. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of "official act."

B

In addition to being inconsistent with both text and precedent, the Government's expansive interpretation of "official act" would raise significant constitutional concerns. Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an "official act." In the Government's view, nearly anything a public official accepts—from a campaign contribution to

lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*.

But conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.

… .

None of this, of course, is to suggest that the facts of this case typify normal political interaction between public officials and their constituents. Far from it. But the Government's legal interpretation is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will "use it responsibly." The Court in *Sun-Diamond* declined to rely on "the Government's discretion" to protect against overzealous prosecutions under § 201, concluding instead that "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."

A related concern is that, under the Government's interpretation, the term "official act" is not defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited," or "in a manner that does not encourage arbitrary and discriminatory enforcement." Under the "'standardless sweep'" of the Government's reading, public officials could be subject to prosecution, without fair notice, for the most prosaic interactions. "Invoking so shapeless a provision to condemn someone to prison" for up to 15 years raises the serious concern that the provision "does not comport with the Constitution's guarantee of due process." Our more constrained interpretation of §201(a)(3) avoids this "vagueness shoal."

… .

III

Governor McDonnell argues that his convictions must be vacated because the jury was improperly instructed on the meaning of "official act" under § 201(a)(3) of the federal bribery statute. According to Governor McDonnell, the District Court "refused to convey any meaningful limits on 'official act,' giving an instruction that allowed the jury to convict [him] for lawful conduct." We agree.

The jury instructions included the statutory definition of "official action," and further defined the term to include "actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law." The instructions also stated that "official actions may include acts that a public official customarily performs," including acts "in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end." In light of our interpretation of the term "official acts," those instructions lacked important qualifications, rendering them significantly overinclusive.

First, the instructions did not adequately explain to the jury how to identify the "question, matter, cause, suit, proceeding or controversy." …

Second, the instructions did not inform the jury that the "question, matter, cause, suit, proceeding or controversy" must be more specific and focused than a broad policy objective. The Government told the jury in its closing argument that "[w]hatever it was" Governor McDonnell had done, "it's all official action." Based on that remark, and the repeated references to "Bob's for Jobs" at trial, the jury could have thought that the relevant "question, matter, cause, suit, proceeding or controversy" was something as nebulous as "Virginia business and economic development," as the District Court itself concluded. To avoid that misconception, the District Court should have instructed the jury that the pertinent "question, matter, cause, suit, proceeding or controversy" must be something specific and focused that is "pending" or "may by law be brought before any public official," such as the question whether to initiate the research studies.

Third, the District Court did not instruct the jury that to convict Governor McDonnell, it had to find that he made a decision or took an action—or agreed to do so—on the identified "question, matter, cause, suit, proceeding or controversy," as we have construed that requirement. At trial, several of Governor McDonnell's subordinates testified that he asked them to attend a meeting, not that he expected them to do anything other than that. If that testimony reflects what Governor McDonnell agreed to do at the time he accepted the loans and gifts from Williams, then he did not agree to make a decision or take an action on any of the three questions or matters described by the Fourth Circuit.

The jury may have disbelieved that testimony or found other evidence that Governor McDonnell agreed to exert pressure on those officials to initiate the research studies or add Anatabloc to the state health plan, but it is also possible that the jury convicted Governor McDonnell without finding that he agreed to make a decision or take an action on a properly defined "question, matter, cause, suit, proceeding or controversy." To forestall that possibility, the District Court should have instructed the jury that merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter.

Because the jury was not correctly instructed on the meaning of "official act," it may have convicted Governor McDonnell for conduct that is not unlawful. …

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal

implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

… .

D. BURGLARY

Page 613: Add to Note 4:

In *Magness v. Superior Court*, 278 P.3d 259 (Cal. 2012), the California Supreme Court unanimously found insufficient evidence of entry when a defendant stood in a driveway and used a remote control to open the garage door. "[S]omething that is *outside* must go *inside* for an entry to occur," the court explained, and therefore the defendant could only be charged with attempted burglary.

Page 617: Add to Note 9:

On several occasions, the U.S. Supreme Court considered whether a California burglary conviction constitutes an eligible offense under the federal Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), which imposes a mandatory fifteen-year sentencing enhancement on a defendant with three prior convictions for a "serious drug offense" or "violent felony" who is found to be in possession of a weapon. The statute's definition of "violent felony" includes burglary, arson, extortion, and — under the so-called "residual clause" — crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." In *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Court confirmed that burglary in California does not qualify as a "violent felony" for purposes of the ACCA. Applying a "categorical approach," which looks only to "'the statutory definitions' — i.e., the elements — of a defendant's prior offenses, and not 'to the particular facts underlying those convictions,'" the Court reasoned that the State's burglary statute "sweeps more broadly than the generic [burglary] crime" in that it "does not require the entry to have been unlawful in the way most burglary laws do," but instead "'defines "burglary" so broadly as to include shoplifting.'" *Id.* at 2282-83 (quoting *Taylor v. United States*, 495 U.S. 575, 600, 591 (1990)). *See also Mathis v. United States*, 136 S. Ct. – (June 23, 2016) (reaching a similar conclusion with respect to Iowa's burglary statute, which punishes unlawful entries into vehicles as well as buildings and other structures). (Note that in *Johnson v. United States*, 135 S. Ct. 2551 (2015), discussed above in the material supplementing Page 41, the Court struck down as unconstitutionally vague ACCA's residual clause, but did not "call into question application of the Act to the … enumerated offenses, or the remainder of the Act's definition of a violent felony." The Court has now agreed to consider the reach of its decision in *Johnson*, including the question whether it applies retroactively on collateral review. *See Beckles v. United States*, No. 15-8544 (cert. granted, June 27, 2016).)

In 2014, following the Supreme Court's decision in *Descamps*, California voters enacted Proposition 47, which forecloses burglary charges against those who enter a commercial establishment during regular business hours with intent to steal property valued at less than $950.

As a result, this conduct instead constitutes the crime of shoplifting, which, unlike burglary, is only a misdemeanor. *See* Cal. Penal Code § 459.5. The proposition also lowered sentences for theft and drug possession crimes.

Chapter 11

CAUSATION

B. DETERMINING THE LIMITS OF CAUSATION

[4] COMPLEMENTARY AND CONCURRENT ACTS

Page 649: Add Note 3:

3. *Parolene v. United States.* In general, causation in criminal law is not partial or proportional. The criteria for causation are either satisfied or they are not. The case of *Parolene v. United States*, 134 S. Ct. 1710 (2014), can be seen as an exception. The victim was abused as a child, and images of her abuse were widely circulated. Petitioner possessed pornographic images, including relevant images of the victim. As an adult, the victim sought restitution in the amount of $3 million under 18 U.S.C. § 2259 for continuing hurt and humiliation; the Fifth Circuit held that restitution was not limited to losses proximately caused by the defendant and that each defendant/possessor of images was liable for the victim's entire loss.

The Supreme Court disagreed and ruled that restitution was mandated in "an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses." It conceded that this "amount would not be severe in a case like this" because the victim's losses were "the product of the acts of thousands of offenders." But the Court added that the restitution, "a reasonable and circumscribed award," would not be "a token or nominal amount." The Court held as well that the victim's losses were proximately caused by the petitioner and endorsed and applied the notion of aggregate causation, a concept not widely developed in prior law.

Chapter 12

ATTEMPT & SOLICITATION

A. ATTEMPT

[2] THE ELEMENTS OF ATTEMPT

Page 671: Add to Note 3:

Do obtaining a passport and boarding an international flight to Europe after doing military and physical fitness training exercises constitute acts beyond mere preparation to materially aid a terrorist organization? A Texas man, Michael Todd Wolfe, pled guilty to one count of attempting to provide material support and resources to a foreign terrorist organization after federal prosecutors charged that he committed these acts with the goal of finding a way into Syria and joining ISIS. *See* Ben Brumfield, *Texas Man Pleads Guilty to Attempting to Join ISIS' Jihad in Syria*, CNN (June 28, 2014, 1:13 AM), http://www.cnn.com/2014/06/28/justice/texas-terror-arrests/.

[4] LEGAL AND FACTUAL IMPOSSIBILITY

Page 693: Add to Note 5:

Three first-grade girls from a charter school in Anchorage, Alaska, were planning to kill a classmate by poisoning her lunch with silica gel packets under the incorrect belief that the substance was poisonous. Although the three students were suspended, no criminal charges were filed. Should the girls' conduct be considered attempted murder? *See Alaska First-Graders Accused of Plotting to Poison Classmate*, HOUS. CHRONICLE, Mar. 31, 2016, at A9.

B. SOLICITATION

Page 701: Add Note 12:

12. *The Stolen Valor Act.* In *United State v. Alvarez*, 132 S. Ct. 2537 (2012) (plurality opinion), the Supreme Court struck down as a violation of the First Amendment the Stolen Valor Act, 18 U.S.C. § 704, which made it a crime to falsely claim that one had received any military medal or decoration. Writing for the four Justices in the plurality, Justice Kennedy concluded that the statute could not satisfy the strict scrutiny used to evaluate content-based limitations on speech. Justice Breyer, joined by Justice Kagan, concurred in the result while applying a somewhat less strict "intermediate scrutiny" analysis, and suggested that a narrower statute might pass constitutional muster.

In 2013, Congress acted on Justice Breyer's suggestion and amended 18 U.S.C. § 704(b), adding a very specific intent requirement. The statute now provides that "[w]hoever, with intent

to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a [military] decoration or medal … shall be fined…, imprisoned not more than one year, or both." Does Congress' addition of the "fraudulent intent to obtain money" requirement mean the statute would now survive a First Amendment challenge?

In March 2016, federal prosecutors charged Gregory Allen with violating the new version of the statute. Allen ran a gym in California where he trained young people interested in joining the military, and he held himself out as a former Marines Corps lieutenant and drill instructor. Allen also claimed that he had received numerous military medals, including a Purple Heart, and he was captured on video at public events wearing various medals. According to federal authorities, Allen never served on active duty and was discharged from the Navy, not the Marines. The case against Allen remains pending as of July 2016. *See* Janis Mara, *Feds: Man Lied About Purple Heart*, MARIN INDEP. J., Mar. 18, 2016, at A1.

Chapter 13

ACCOMPLICE LIABILITY

A. INTRODUCTION

Page 705: Add to Note 1:

Warren Jeffs' conviction was reversed by the Utah Supreme Court on the grounds that the jury should have been instructed that he could be convicted as an accomplice to rape only if he intended for the victim's husband to rape her. *See State v. Jeffs*, 243 P.3d 1250, 1258 (Utah 2010).

B. THE EXTENT OF PARTICIPATION NECESSARY

Page 712: Add to Note 1:

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), the Supreme Court's first major pronouncement on accomplice liability in almost thirty-five years, the Court considered what evidence is required to convict an accomplice under 18 U.S.C. § 924(c), a federal statute that imposes a mandatory five-year minimum sentence on anyone who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime." Noting that the federal aiding and abetting statute, 18 U.S.C. § 2, "derives from ... common-law standards for accomplice liability," the Court observed that "[t]he common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part — even though not every part — of a criminal venture." 134 S. Ct. at 1245, 1246. As applied to § 924(c), the Court found the actus reus for accomplice liability satisfied if a defendant "facilitat[ed] either the drug transaction or the firearm use (or of course both)." "[I]n helping to bring about one part of the offense (whether trafficking drugs or using a gun), he necessarily helped to complete the whole," the Court explained, and therefore "[i]t is inconsequential, as courts applying both the common law and § 2 have held, that his acts did not advance each element of the offense." *Id.* at 1247. *Rosemond*'s discussion of mens rea is described below in the material supplementing Page 718.

C. THE STATE OF MIND NECESSARY

Page 718: Add to Note 1:

In *Rosemond v. United States*, 134 S. Ct. 1240 (2014), also discussed above in the material supplementing Page 712, the Supreme Court resolved a split in the circuits on the mens rea necessary to prove that a defendant aided a violation of 18 U.S.C. § 924(c), the federal statute imposing a mandatory minimum sentence on one who uses or carries a firearm during either a crime of violence or a drug trafficking crime. Citing Judge Learned Hand's opinion in *United States v. Peoni* as the "canonical formulation" of the mens rea required of an accomplice, the Court ruled that accomplice liability requires intent to facilitate "the specific and entire crime charged" — i.e., "here,… the full scope (predicate crime plus gun use) of § 924(c)" — and not "some

different or lesser offense." 134 S. Ct. at 1248. Nevertheless, the Court concluded, a defendant who "actively participates" in a violent or drug crime and has "advance knowledge" a codefendant will be carrying a gun has the requisite intent. *Id.* at 1248-49. Although the Court did not require proof that the accomplice "affirmatively desire[d] one of his confederates to use a gun," it also thought it insufficient if the accomplice was not aware of the weapon "until it appear[ed] at the scene." *Id.* at 1250, 1249. Rather, the Court held, the defendant's knowledge of the gun "comes too late" if the defendant is not "reasonably able to act upon it" — i.e., "after he realistically could have opted out of the crime." *Id.* at 1251. Concurring in part and dissenting in part, Justices Alito and Thomas parted company with the majority's requirement that an accomplice have "advance knowledge" of the weapon, a prerequisite that the two Justices in the minority called "seriously misguided." *Id.* at 1253 (Alito, J., concurring in part and dissenting in part). For a critical analysis of the ruling in *Rosemond*, see Kit Kinports, Rosemond, *Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133 (2015).

Page 719: Add to Note 2:

Washington's accomplice liability statute, which follows the minority view, was before the Supreme Court in *Waddington v. Sarausad*, 555 U.S. 179 (2009). The Court found no error in the instructions the trial judge gave the jury in describing the accomplice liability provision, which only requires proof that a defendant act with knowledge that his or her act "will promote or facilitate the commission of the crime." Wash. Rev. Code § 9A.08.020.

E. ACCESSORY AFTER THE FACT AND OBSTRUCTION OF JUSTICE

Page 727: Add to Note 2:

In *Yates v. United States*, 135 S. Ct. 1074 (2015), the Court interpreted 18 U.S.C. § 1519, a provision enacted as part of the Sarbanes-Oxley Act of 2002 that makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation. The Court held that the term "tangible object" was limited to something "used to record or preserve information" and therefore did not include the undersized fish Yates had thrown overboard in order to destroy evidence that he was fishing in violation of federal conservation regulations.

The decision in *Yates* may jeopardize the convictions of Azamat Tazhayakov and Dias Kadyrbayev, college friends of convicted Boston marathon bomber Dzhokhar Tsarnaev, who were charged under the federal statute at issue in *Yates*. In the wake of the bombings, Tsarnaev sent Kadyrbayev a text message that read, "yu [sic] can go to my room and take what's there." Tazhayakov and Kadyrbayev went to Tsarnaev's dorm, where Kadyrbayev took the lead in removing a laptop computer as well as a backpack containing fireworks and a thumb drive. The computer was found in the two men's apartment, and the backpack was recovered in a landfill after Kadyrbayev tossed it in a dumpster outside their apartment. Lawyers for Tazhayakov, who was convicted in July of 2014 and sentenced to three and a half years in prison in connection with the backpack but not the computer, have requested a new trial, arguing that there was no evidence

their client knew the backpack contained a thumb drive. It is less clear whether the decision in *Yates* will benefit Kadyrbayev, who pled guilty to the charges and received a six-year prison term, or a third friend, Robel Phillipos, who was convicted and sentenced to three years for lying to federal investigators when he denied being present in the dorm with Tazhayakov and Kadyrbayev. *See* Jess Bidgood, *Boston Bombing Suspect's Friend Is Convicted of Conspiracy and Obstruction*, N.Y. TIMES, July 22, 2014, at A13; John R. Ellement, *Citing a Supreme Court Ruling, Friend Wants His Conviction Voided*, BOS. GLOBE, Mar. 20, 2015, at A10; Patricia Wen & Milton Valencia, *Last 2 of Tsarnaev's Friends Get Jail Time*, BOS. GLOBE, June 6, 2015, at A1. (For discussion of the charges brought against Dzhokhar Tsarnaev, see the material supplementing Page 877 below.)

Page 735: Add to Note 4:

The perjury case against Barry Bonds was dealt a blow when Bonds' former trainer, Greg Anderson, refused to testify against the home-run hitter and to authenticate tainted urine and blood test samples as belonging to Bonds. Anderson, who had previously pled guilty to charges that he illegally distributed steroids, was jailed for contempt of court because of his refusal to testify. In June of 2010, the Ninth Circuit foiled the prosecution's efforts to resort to "Plan B," affirming a pretrial ruling that both the testimony of the coworker to whom Anderson gave the samples and the log sheets on which the test results were recorded were inadmissible hearsay. *See United States v. Bonds*, 608 F.3d 495 (9th Cir. 2010).

Bonds' trial began in March of 2011 despite Anderson's continued refusal to testify. The jury convicted Bonds on one count of obstruction of justice for being evasive in his grand jury testimony, but was unable to reach a verdict on the three perjury counts. Rejecting the prosecutor's request for a fifteen-month prison term, and departing from the range suggested by the Federal Sentencing Guidelines (fifteen to twenty-one months), the district court instead sentenced Bonds to thirty days of house arrest, two years of probation, 250 hours of community service, and a $4000 fine. *See* Jason Turbow, *Bonds Gets Probation for Obstruction of Justice*, N.Y. TIMES, Dec. 17, 2011, at D6.

On appeal, the Ninth Circuit affirmed Bonds' conviction, noting that the federal obstruction of justice statute covers "misleading or evasive testimony" even if it is "factually true." *United States v. Bonds*, 730 F.3d 890, 895 (9th Cir. 2013). When Bonds was asked in front of the grand jury whether Anderson had given him "any self-injectable substances," Bonds testified: "I became a celebrity child with a famous father. I just don't get into other people's business because of my father's situation." The court of appeals found the statement evasive because Bonds' "description of his life as a celebrity child had nothing to do with the question," and it "served to divert the grand jury's attention away from the relevant inquiry of the investigation." The court also considered the testimony misleading because "it implied that Bonds did not know whether Anderson distributed steroids." *Id.* at 896.

In 2015, however, an eleven-member en banc panel of the Ninth Circuit vacated the prior opinion and reversed Bonds' conviction. In a short, per curiam opinion, the en banc court found insufficient evidence that Bonds' "rambling, non-responsive answer to a simple question" was

"material." *United States v. Bonds*, 784 F.3d 582, 582 (9th Cir. 2015) (en banc). In a concurring opinion joined by four other judges, former Chief Judge Kozinski wrote that "if the evidence in the present case were enough to establish materiality, few witnesses or lawyers would be safe from prosecution." *Id.* at 586 (Kozinski, J., concurring).

Chapter 14

CONSPIRACY

A. THE BREADTH AND ELEMENTS OF CONSPIRACY

[2] THE AGREEMENT

Page 746: Add to Note 4:

In *Ocasio v. United States*, 136 S. Ct. 1423 (2016), the Supreme Court relied on its opinion in *Gebardi v. United States* in holding that a defendant was guilty of violating the Hobbs Act, 18 U.S.C. § 1951, when "he entered into a conspiracy that had as its objective the obtaining of property from another conspirator with his consent and under color of official right." The defendant, a former police officer who was involved in a kickback scheme whereby the police received payments from the owners of an automobile repair shop in exchange for sending them cars that had been damaged in accidents, was charged with conspiring with the body shop owners to violate the Hobbs Act. Although the shop owners could not themselves be convicted of violating the statute, which prohibits "obtaining of property *from another*, with his consent,… *under color of official right*," the Court cited *Gebardi* in determining that one "may be convicted of conspiring to commit a substantive offense that he or she cannot personally commit." The Court noted that "age-old" conspiracy principles provide that "a conspirator need not agree to commit every part of the substantive offense" so long as all conspirators act "with the intent that the underlying crime be committed." The Court concluded that the defendant and the body shop owners had the "common criminal objective" necessary to support a conspiracy charge: "[t]he objective was not that each conspirator, including [the shop owners], would obtain money from 'another' but rather that petitioner and other [police] officers would do so."

B. THE SCOPE OF CONSPIRACY LIABILITY

[3] WITHDRAWAL, RENUNCIATION, AND THE DURATION OF THE CONSPIRACY

Page 772: Add to Note 1:

Although the federal courts generally assign the burden of proving a withdrawal defense to the defendant, they disagreed which party has the burden of proof in cases where defendants claim they cannot be prosecuted because the statute of limitations expired between the date they withdrew from the conspiracy and the date they were indicted. The Supreme Court resolved that question in *Smith v. United States*, 133 S. Ct. 714 (2013), placing the burden of proof on the defense. Because the federal statutes do not specify which party has the burden of proving withdrawal, the unanimous Court presumed Congress intended to follow the common law tradition imposing the burden of proving affirmative defenses on defendants. The Court considered that assignment of the burden "both practical and fair" given that the evidence necessary to establish a withdrawal defense is in the hands of the defendant. Reasoning that withdrawal requires some

"'affirmative action'" rather than mere "[p]assive nonparticipation in the continuing scheme," the Court observed that the defendant "knows what steps, if any, he took to dissociate from his confederates" and "[i]t would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened." The Court saw no reason to reach a different conclusion "when withdrawal is the basis for a statute-of-limitations defense." "[A]s a practical matter," the Court explained, "the only way the Government would be able to establish a failure to withdraw would be to show active participation in the conspiracy during the limitations period," but "a defendant's membership in the conspiracy, and his responsibility for its acts, endures even if he is entirely inactive after joining it." *Id.* at 720-21.

The Court found no constitutional impediment to its decision, explaining that the Due Process Clause requires the prosecution to prove only the elements of the crime and withdrawal does not negate an element of the crime of conspiracy. "Withdrawal terminates the defendant's liability for postwithdrawal acts of his co-conspirators, but he remains guilty of conspiracy," the Court observed. Even in cases where withdrawal "provides a complete defense" because "the withdrawal occurs beyond the applicable statute-of-limitations period," the Court continued, it does not "establish[] the defendant's innocence" and "render the underlying conduct noncriminal." Given that "[c]ommission of the crime within the statute-of-limitations period is not an element of the conspiracy offense," it need not be alleged in the indictment or established by the prosecution. *Id.* at 719-20. For further discussion of the constitutional principles governing the burden of proof in criminal cases, see Chapter 1, Section B.2.c on Page 26 of the textbook, as well as Note 4 on Page 819 and Note 7 on Page 870.

C. RICO AND CONSPIRACY

Page 782: Add to Note 3:

In *Boyle v. United States*, 556 U.S. 938 (2009), the Supreme Court continued to broadly interpret the term "enterprise." The defendant in that case participated in a series of bank thefts committed by "a core group" of individuals the Court described as "loosely and informally organized": "[i]t does not appear to have had a leader or hierarchy; nor does it appear that the participants ever formulated any long-term master plan or agreement." *Id.* at 941. Affirming Boyle's conviction on RICO charges, the Court noted that the statute provides that the term "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals *associated in fact* although not a legal entity," 18 U.S.C. § 1961(4) (emphasis added), and that its opinion in *Turkette* had indicated that "RICO reaches 'a group of persons associated together for a common purpose of engaging in a course of conduct.'" *Boyle*, 556 U.S. at 944 (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). The Court agreed with Boyle that "an association-in-fact enterprise must have a structure" and therefore "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* at 945-46. But the Court found "no basis in the language of RICO" for requiring proof of "a hierarchical structure," "a 'chain of command,'" "a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." *Id.* at 948. "As we

said in *Turkette*," the Court concluded, "an association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Id.*

In dissent, Justices Stevens and Breyer would have limited the term "enterprise" to "business-like entities that have an existence apart from the predicate acts committed by their employees or associates." *Id.* at 952 (Stevens, J., dissenting). The majority's approach, the dissenters feared, "will allow juries to infer the existence of an enterprise in every case involving a pattern of racketeering activity undertaken by two or more associates." *Id.* at 957.

Page 782: Add to Note 6:

In *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. – (June 20, 2016), the seven members of the Supreme Court participating in the case unanimously agreed that a RICO violation may be based on a pattern of racketeering that includes "predicate offenses committed abroad" by either a domestic or a foreign enterprise, but only if those offenses "violate[] a predicate statute that is itself extraterritorial." Three Justices dissented, however, from the part of Justice Alito's majority opinion foreclosing private plaintiffs from bringing a civil RICO suit unless they can establish "a *domestic* injury to [their] business or property."

Chapter 15

JUSTIFICATION

B. SELF-DEFENSE

Page 795: Add to Note 6:

In September of 2014, a South African judge convicted Olympic runner Oscar Pistorius of culpable homicide (negligent homicide) after he shot his girlfriend, Reeva Steenkamp, four times through a locked bathroom door in his home. The prosecution argued that Pistorius, also known as "Blade Runner" because both his legs were amputated below the knee when he was an infant, deliberately killed Steenkamp following an argument. But the trial judge acquitted Pistorius of premeditated murder and murder, apparently believing that Pistorius thought he was acting in self-defense and mistook Steenkamp for an intruder. Pistorius was sentenced to five years in prison but was released on house arrest in October 2015 after serving about a year. The prosecution appealed the verdict, and South Africa's Supreme Court of Appeal reversed, concluding that the trial judge had misinterpreted the law in acquitting Pistorius of murder because the runner should have realized that his actions would kill whoever was in the bathroom. Pistorius is out on bail pending a new sentencing hearing, which is scheduled for July 2016; the murder charge carries a minimum fifteen-year sentence. *See* Norimitsu Onishi, *South African Appeals Court Convicts Pistorius of Murder*, N.Y. TIMES, Dec. 4, 2015, at A17.

Page 818: Add to Note 1:

Controversy has surrounded Florida's "stand your ground" law since February of 2012, when George Zimmerman, a neighborhood watch volunteer, shot and killed Trayvon Martin, an unarmed seventeen-year-old African-American. Martin was returning to his father's girlfriend's home on a rainy evening wearing a hoodie and carrying a drink and a box of Skittles. Zimmerman was charged with second-degree murder, but claimed that he acted in self-defense after Martin knocked him down and banged his head against the sidewalk. The all-female, six-member jury acquitted Zimmerman of both second-degree murder (requiring proof that the defendant committed an "imminently dangerous" act and acted with "a depraved mind regardless of human life") and manslaughter (requiring "culpable negligence"). *See* Fla. Stat. §§ 782.04(2), 782.07(1). The jury apparently rejected the prosecution's argument that Zimmerman initiated the confrontation that led to the teenager's death by erroneously assuming he was a criminal and then confronting him despite being advised by a police dispatcher not to follow Martin. There were no eyewitnesses to the shooting itself, and those witnesses who did testify offered conflicting accounts of the incident. *See* Lizette Alvarez, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1.

Seven months after the Zimmerman acquittal, another Florida jury failed to reach a verdict on first-degree murder charges filed against Michael Dunn, who shot and killed Jordan Davis, another seventeen-year-old African-American who, along with three friends, was parked in a

parking lot next to Dunn's car. Dunn testified that he feared for his life when Davis pointed a shotgun at him and began to get out of his vehicle. No other witness saw a gun and no weapon was recovered from Davis' vehicle, and prosecutors argued that Dunn was angered when Davis cursed at him and refused to turn down what Dunn referred to as the "thug music" blaring from his car. The jury did convict Dunn on three counts of attempted murder, finding that he was not acting in self-defense when he got out of his car and continued firing at Davis' three friends as they drove away. *See* Lizette Alvarez, *Jury Reaches Partial Verdict in Florida Killing over Loud Music*, N.Y. TIMES, Feb. 16, 2014, at A20. A second jury convicted Dunn of premeditated murder after less than six hours of deliberation; he was sentenced to life without parole on the murder charge and ninety years for attempted murder. Dunn's appeal is pending. *See* Lizette Alvarez, *Florida Man Gets Life Term in Fatal Dispute over Music*, N.Y. TIMES, Oct. 18, 2014, at A17.

Still awaiting trial in Florida is Curtis Reeves, a 71-year-old retired police captain who shot and killed 43-year-old Chad Oulson in a movie theatre. Reeves became angry when Oulson refused to stop texting during the previews and claims that he acted in self-defense after Oulson stood up, yelling and swearing, and threw popcorn (and possibly his cellphone) at Reeves. Reeves, who was charged with second-degree murder, is awaiting a hearing on his stand your ground claim. *See* Frances Robles, *Retired Police Captain Feared Attack Before Shooting in Theater, Officials Say*, N.Y. TIMES, Jan. 15, 2014, at A15; Anna M. Phillips, *Reeves' Wife Missed Shooting*, TAMPA BAY TIMES, Dec. 11, 2015, at 1.

In February of 2015, the American Bar Association's House of Delegates passed a resolution advocating the repeal of stand your ground laws. The move came after an ABA task force report released the results of empirical studies of the thirty-three states that have stand your ground laws as a result of either legislation or judicial opinion. The ABA task force reported that the laws have increased the number of homicides, have not deterred crime, and have been most likely to benefit whites who used force against African-American victims. *See* ABA NATIONAL TASK FORCE ON STAND YOUR GROUND LAWS, PRELIMINARY REPORT AND RECOMMENDATIONS 17-22 (Aug. 8, 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_justice/aba_natl_task_force_on_syg_laws_preliminary_report_program_book.authcheckdam.pdf.

C. OTHER USES OF DEFENSIVE FORCE

[2] LAW ENFORCEMENT

Page 834: Add to Note 1:

The Supreme Court applied *Scott v. Harris* in a more recent case involving a high-speed chase, concluding that officers did not use excessive force in violation of the Fourth Amendment when they fired fifteen shots at a fleeing vehicle, killing the driver and his passenger. *See Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014). The Court reasoned that "Rickard's outrageously reckless driving posed a grave public safety risk" when he led police on a chase that "exceeded 100 miles per hour and lasted over five minutes." In response to concerns raised about the number of shots fired, the Court observed that "if police officers are justified in firing at a suspect in order to end a

severe threat to public safety, the officers need not stop shooting until the threat has ended," and here, "during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee" and had not "clearly given himself up." The presence of a passenger in Rickard's car did not alter the Court's conclusion because "the question … is whether petitioners violated Rickard's Fourth Amendment rights, not Allen's," and her "presence in the car cannot enhance Rickard's Fourth Amendment rights."

Page 835: Add to Note 3:

The racial disparities in law enforcement's use of deadly force against people of color have recently received international attention, as the result of widely publicized incidents where police officers have killed unarmed African-American men. Grand jurors refused to indict Officer Darren Wilson in connection with the shooting of Michael Brown in Ferguson, Missouri, Officer Daniel Pantaleo, who was videotaped seemingly choking Eric Garner while trying to arrest him in Staten Island, New York, and Officer Timothy Loehmann, who shot Tamir Rice as the twelve-year-old was playing with a fake plastic pistol. On the other hand, murder charges have been filed against Officer Michael Slager, who shot Walter Scott in the back as he ran away following a traffic stop in North Charleston, South Carolina, and against Officer Jason Van Dyke, who shot Laquan McDonald sixteen times in Chicago as videos showed the seventeen-year-old walking away. Six officers also face charges ranging from second-degree murder to reckless endangerment in connection with the death of Freddie Gray in a police van in Baltimore, Maryland, although the first three trials ended with two acquittals and a hung jury. The Brown family's civil suit is still pending, but the other five families have each received settlements of their civil claims ranging between five and six and a half million dollars. *See* Jess Bidgood & Sheryl Gay Stolberg, *Another Acquittal in Gray Case Casts Doubts About Future Trials*, N.Y. TIMES, June 24, 2016, at A1; Mitch Smith, *Cleveland Will Pay $6 Million to Family of Boy Killed by Police*, N.Y. TIMES, Apr. 26, 2016, at A2; *see generally Developments in the Law — Policing*, 128 HARV. L. REV. 1706 (2015).

D. NECESSITY

Page 848: Add to Note 7(a):

The number of states allowing some medical use of marijuana has now increased to twenty-four, in addition to the District of Columbia. In D.C., although residents initially voted in support of a referendum allowing the use of medical marijuana in 1998, Congress intervened to block the move until 2010. *See* Tim Craig, *Medical Marijuana Will Take Time in D.C.*, WASH. POST, July 28, 2010, at B1. In Arizona, another state that joined this group in 2010, a proposition to approve medical marijuana passed by a margin of only 4,341 of the more than 1.67 million votes cast. *See* Michelle Ye Hee Lee, *Medical Marijuana Passes*, ARIZ. REPUBLIC, Nov. 14, 2010, at B1.

The specific provisions in effect in these jurisdictions vary. For example, in response to concerns that medical marijuana is "so loosely regulated" in some states that the drug "has essentially been decriminalized," New Jersey only permits patients to use a maximum of two ounces of marijuana per month if they suffer from "a set list of serious, chronic illnesses." *See*

David Kocieniewski, *New Jersey Vote Backs Marijuana for Severely Ill*, N.Y. TIMES, Jan. 12, 2010, at A1. By contrast, California has the most liberal policy, requiring only "written or oral recommendation or approval of a physician." But a unanimous California Supreme Court ruled that the state's medical marijuana laws did not preempt cities and counties from using their zoning rules to ban medical marijuana dispensaries, as an estimated two hundred jurisdictions in the state have done. *See City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 300 P.3d 494 (Cal. 2013). For details about the policies followed in each of the states that authorize the medical use of marijuana, see *24 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, *at* http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881.

Page 857: Add to Note 4:

In May of 2009, Scott Roeder shot and killed Dr. George Tiller, one of the country's few providers of late-term abortions, while the physician was attending church. The trial judge refused to allow Roeder to put on a necessity defense, but did "leave the door open" for him to argue that he believed he was acting to protect the lives of others. *See Trial Is Set in Slaying of Kansas Abortion Doctor*, L.A. TIMES, Dec. 23, 2009, at A15. Thus, Roeder was allowed to testify that he killed Tiller because "[if] someone did not stop him, ... babies were going to continue to die," and defense counsel was permitted to argue that Roeder honestly believed "he had no choice" because "the law had failed him." Ultimately, however, the judge found insufficient evidence that Roeder honestly but unreasonably believed he needed to use "deadly force to stop imminent, unlawful harm" and refused to instruct the jury on voluntary manslaughter. *See* Robin Abcarian, *Killer Says Church Was Only Option*, L.A. TIMES, Jan. 29, 2010, at A20. A Kansas jury convicted Roeder of first-degree murder after deliberating for only thirty-seven minutes, and he received the maximum sentence of life in prison with no possibility of parole for fifty years. *See Abortion Foe Gets Life Term for Killing Kansas Doctor*, WASH. POST, Apr. 2, 2010, at A4.

In affirming the conviction on appeal, the Kansas Supreme Court upheld the trial judge's decision to reject Roeder's necessity and imperfect self-defense claims on the grounds that abortion is constitutionally protected and the harms Roeder was allegedly attempting to prevent were not imminent. But the court ordered that Roeder be resentenced after finding that his Sixth Amendment rights were violated when his ineligibility for parole was increased from twenty-five to fifty years based on aggravating factors found by the trial judge by a preponderance of the evidence. *See State v. Roeder*, 336 P.3d 831 (Kan. 2014), *cert. denied*, 135 S. Ct. 2316 (2015).

Chapter 16

EXCUSE

A. DURESS

Page 877: Add to Note 9(c):

In April of 2015, a federal jury in Boston convicted Dzhokhar Tsarnaev on each of the thirty charges brought against him in connection with the April 2013 Boston Marathon bombings that killed three people and injured more than 260 others. Despite public opinion polls showing that Massachusetts residents overwhelmingly favored sentencing Tsarnaev to life in prison, the jury sentenced him to die on six of seventeen capital counts, all six of which involved Tsarnaev's placing a bomb on the street near the marathon's finishing line. The jury thereby rejected defense counsel's principal argument that Tsarnaev, who was nineteen years old at the time of the bombings, was manipulated by his twenty-six-year-old brother Tamerlan, who masterminded the attacks and died while the two brothers were trying to avoid apprehension. The jury verdict forms indicated that only three jurors thought the defendant was acting under his brother's influence. *See* Katharine Q. Seelye, *Tsarnaev Given Death Sentence in Boston Attack*, N.Y. TIMES, May 16, 2015, at A1. Defense attorneys are expected to appeal at least the sentence, possibly challenging the trial judge's denial of their motion for a change of venue and failure to instruct the jurors that their inability to reach a unanimous decision at the sentencing phase would lead to a life sentence and not a new trial. *See* Katharine Q. Seelye, *Boston Bomber to Be Formally Sentenced in June, but Process Is Far from Over*, N.Y. TIMES, May 20, 2015, at A12.

B. ENTRAPMENT

Page 898: Add to Note 5(a):

In March 2011, a Minnesota jury acquitted "Wally the Beer Man," a popular seventy-six-year-old who had been selling beer at Minnesota sporting events for forty-one years, of charges that he sold beer to an underage policy decoy. The beer vendor, Walter McNeil, was caught in a police sting operation that also led to the arrest of seven others. At his trial, McNeil testified that the undercover agent looked younger in the courtroom than he had at the baseball game, and that he had claimed, in response to McNeil's question, that he was twenty-one. The nineteen-year-old decoy, by contrast, testified that McNeil had neither asked him his age nor requested identification. Interviews conducted after the trial suggested the jury believed McNeil had been entrapped. *See* Abby Simons, *Wally the Beer Man Walks*, MINNEAPOLIS STAR TRIB., Mar. 23, 2011, at 1A.

C. INSANITY

[1] THE SCOPE OF THE INSANITY DEFENSE

Page 914: Add to Footnote *:

In 2009, the district court allowed John Hinckley to obtain a driver's license and extended the length of his visits to his mother's home to a maximum of ten days. Under the terms of the order, Hinckley was permitted to do volunteer work while visiting his mother, but he was not allowed to leave her subdivision unless accompanied by a family member and was required to use a cellphone equipped with GPS technology so that the Secret Service could track his location. *See United States v. Hinckley*, 625 F. Supp. 2d 3 (D.D.C. 2009). In 2013, the district court increased the length of Hinckley's unsupervised visits to his mother's home to seventeen days a month. This latest ruling also allows Hinckley to drive to certain specified places on his own during those visits, but still requires him to carry the cellphone when he is unsupervised. *See United States v. Hinckley*, 40 F. Supp. 3d 8 (D.D.C. 2013).

The case returned to court in the Spring of 2015, as the district judge held six days of hearings on Hinckley's request to be released from the hospital and permitted to live with his mother on a full-time basis. Lawyers for the sixty-one-year-old patient maintained "there is no disagreement that Hinckley's psychosis and depression are in 'full, stable, sustained remission' and that any slide back to depression would be 'gradual and . . . detectable.'" The Government did not seem opposed to the request, though the parties differed on what conditions should accompany Hinckley's release. Prosecutors argued in favor of permanently requiring Hinckley to wear an ankle-monitoring device, limiting his access to the Internet and barring him from setting up accounts on social media sites like Facebook, allowing the Government to continue to monitor his itinerary and cellphone, and banning him from travelling more than fifty miles from his mother's home. *See* Victoria St. Martin & Spencer S. Hsu, *Hearings Point to Release of Hinckley*, WASH. POST, May 3, 2015, at C1; Spencer S. Hsu, *Final Appeals Heard for Hinckley's Possible Release*, WASH. POST, May 13, 2015, at B2; Spencer S. Hsu, *Sharp Split on Potential Release for Hinckley*, WASH. POST, June 18, 2015, at B1.

[2] THE CURRENT STATE OF THE LAW

Page 919: Add to Footnote *:

When Jared Lee Loughner was found incompetent to stand trial on charges that he shot U.S. Congresswoman Gabrielle Giffords and numerous other people, he was committed and forcibly medicated. In *United States v. Loughner*, 672 F.3d 731 (9th Cir. 2012), the Ninth Circuit rejected Loughner's constitutional challenge to the medication. Rather than applying *Sell*, the Ninth Circuit relied on the more lenient due process standard set out in *Washington v. Harper*, 494 U.S. 210 (1990), which allows the involuntary medication of prisoners with a serious mental illness if they are a danger to themselves or others and the medication is in their medical interest. Loughner subsequently pled guilty and was sentenced to seven consecutive life terms plus an additional 140

years in prison. *See* Fernanda Santos, *Gunman Gets 7 Life Terms in Tucson Shooting of Congresswoman and Others*, N.Y. TIMES, Nov. 9, 2012, at A16.

Page 933: Add to Note 2:

The Supreme Court came one vote short of granting review in a case raising the question left open in *Clark*. Justice Breyer, joined by Justices Ginsburg and Sotomayor, would have granted certiorari to consider whether the Due Process Clause forecloses states from abolishing insanity as a separate defense. *See Delling v. Idaho*, 133 S. Ct. 504 (2012) (Breyer, J., dissenting from denial of certiorari).

Page 934: Add to Note 5:

Before the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) was even released in May of 2013, it had already generated controversy. The head of the National Institute of Mental Health, the federal agency that funds mental health research, criticized the book for its "lack of validity" and said the agency would be "reorienting its research away from D.S.M. categories" to focus on the biological causes of disorders rather than their symptoms. *See* Pam Belluck & Benedict Carey, *Psychiatry's New Guide Falls Short, Experts Say*, N.Y. TIMES, May 7, 2013, at A13.

For a fascinating autobiographical account of schizophrenia written by a respected law professor, see ELYN R. SAKS, THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS (2007).

Page 936: Add to Note 5(b):

In *Porter v. McCollum*, 558 U.S. 30, 30 (2009) (per curiam), the Supreme Court unanimously reversed the death sentence imposed on George Porter, a decorated Korean War veteran who returned from combat "a traumatized, changed man" and later killed his former girlfriend and her boyfriend. The Court concluded that Porter was denied effective assistance of counsel because his lawyer failed to present mitigating evidence that according to one expert "would 'easily' warrant a diagnosis" of PTSD, including testimony that Porter "suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night." *Id.* at 35 & n.4.

By contrast, a Texas jury rejected the insanity defense raised by Eddie Ray Routh, who was convicted in February of 2015 and sentenced to life in prison without parole after he shot former Navy SEAL Chris Kyle and his friend Chad Littlefield at a gun range. Although the defense introduced expert testimony that Routh was psychotic and believed the victims were "'pig assassins' sent to kill him," as well as a text message Kyle sent to Littlefield on the way to the gun range calling Routh "'straight-up nuts,'" the prosecution argued that Routh did not suffer from PTSD, feigned the symptoms of his illness, exaggerated the suffering he had witnessed during his service in the Marines in Iraq, and knew that his actions were wrong. The defense is expected to appeal the verdict, challenging the trial judge's refusal to postpone or move the trial despite the fact that the Oscar-nominated film *American Sniper* based on Kyle's autobiography was released

three weeks before the trial began and viewed by some of the jurors. *See* Manny Fernandez & Kathryn Jones, *Life Term in 'American Sniper' Trial*, N.Y. TIMES, Feb. 25, 2015, at A11; Manny Fernandez, *'Sniper' Case Is Headed to Appeal, Lawyers Say*, N.Y. TIMES, Feb. 27, 2015, at A16.

Page 938: Add to Note 5(c):

In 2012, a Texas judge rejected a request made by Andrea Yates' doctors that she be allowed to leave the hospital to attend church services. Two years later, the doctors asked the court to permit Yates to attend events like picnics with other patients but withdrew the request because of the public controversy it generated. Yates, who is now in her fifties, is the only patient in the state hospital who has never been permitted to attend a supervised group outing and her only visitors are her attorney, his wife, and one other friend. Her husband Rusty has remarried and has a new family. *See* Craig Hlavaty, *13 Years Later, the Andrea Yates Drownings Still Haunt*, HOUS. CHRONICLE (June 20, 2014), *available at* http://www.chron.com/neighborhood/bayarea/crime-courts/article/Andrea-Yates-Rusty-Yates-5567726.php.

Page 942: Add Note 8:

8. *Insanity and the Death Penalty*. Insanity was the key issue in the trial of James Holmes, who was convicted of killing twelve people and wounding seventy others at an Aurora, Colorado, movie theatre during a July 2012 midnight screening of *The Dark Knight Rises*. Holmes, who was charged with more than 160 counts of murder, attempted murder, and other crimes in connection with the shootings, entered an insanity plea.

In some states, a jury considers an insanity defense in a separate, bifurcated proceeding after reaching a verdict of guilty, but guilt and sanity are decided in the same trial in Colorado. The prosecution has the burden of disproving insanity, which is defined to include either a defendant "who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act" or who "suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element" of the crime. Colo. Rev. Stat. § 16-8-101.5(1). The definition of "mental disease or defect" includes "only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality" and, in addition to the MPC's caveat paragraph, also excludes conditions resulting from the voluntary consumption of drugs or alcohol as well as "moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions." *Id.* § 16-8-101.5(1)-(2).

At trial, the prosecution argued that Holmes carefully planned the attack in order to bolster his sense of self-worth after he dropped out of graduate school and his girlfriend broke up with him. The prosecution introduced a notebook in which Holmes wrote about a "mass murder spree" and considered what location would lead to "maximum casualties." Two psychiatric experts testified for the prosecution that, while Holmes suffered from a severe mental illness on a spectrum with schizophrenia, he knew what he was doing and realized that it was wrong. During a twenty-two hour recorded interview with one of the State's psychiatric witnesses, much of which was

played for the jury at trial, Holmes spoke without affect and explained that, although he knew he was likely to be caught, "[t]hat's just the price you have to pay for completing the mission."

Lawyers for Holmes, who was prescribed antidepressants and antipsychotic medication after his arrest, also called two expert psychiatrists, who testified that the defendant was unable to distinguish right from wrong and therefore was legally insane. One concluded that Holmes suffered from "a 'psychotic mental illness' that revealed itself through delusions, severe anxiety and a stark emotional disconnect from the world." The second testified that Holmes was schizophrenic and "began to believe he could replenish his own worth only by killing others."

Although the jurors rejected Holmes' insanity defense and convicted him on every count, they did not sentence him to death. Nine members of the jury were in favor of the death penalty and two were on the fence, but one was unalterably opposed and Colorado law requires a unanimous jury vote in favor of a capital sentence. The trial judge then sentenced Holmes to twelve life sentences, one for each murder victim, and an additional 3318 years on the nonhomicide charges. Holmes' attorneys said they were not planning to file an appeal. *See* Julie Turkewitz, *Aurora Gunman Receives 12 Life Terms in Prison*, N.Y. TIMES, Aug. 27, 2015, at A15; Jack Healy, *Theater Gunman Is Spared Death in Aurora Case*, N.Y. TIMES, Aug. 8, 2015, at A1; Julie Turkewitz, *Aurora Gunman Legally Insane, Psychiatrist Says*, N.Y. TIMES, July 9, 2015, at A19; Jack Healy, *Defense Tries to Put Focus on Sanity of Gunman*, N.Y. TIMES, June 26, 2015, at A12; Jack Healy, *Ex-Girlfriend of Aurora Gunman Recalls Awkwardness and Ghoulish Remarks*, N.Y. TIMES, June 12, 2015, at A16; Jack Healy, *Gunman Calmly Recalls Theater Rampage in Video*, N.Y. TIMES, June 3, 2015, at A12; Jack Healy, *Colorado Killer's Notes: Detailed Plans vs. 'a Whole Lot of Crazy'*, N.Y. TIMES, May 29, 2015, at A1.

[3] THE EFFECT OF AN INSANITY ACQUITTAL

Page 950: Add to Note 4:

In *United States v. Comstock*, 560 U.S. 126 (2010), the Court upheld the federal law authorizing the civil commitment of mentally ill, "sexually dangerous" offenders after the expiration of their prison sentence, 18 U.S.C. § 4248. Justice Breyer's opinion for the majority concluded that the statute was a proper exercise of Congress' power under the Necessary and Proper Clause, Art. 1, § 8, cl. 18, and did not violate the Tenth Amendment. Writing in dissent for himself and Justice Scalia, Justice Thomas thought that the statute exceeded Congress' Article I power because it was not "'necessary and proper for carrying into Execution' one or more of those federal powers actually enumerated in the Constitution." *Comstock*, 560 U.S. at 163 (Thomas, J., dissenting).