

**CRIMINAL LAW:
CASES AND MATERIALS**

Third Edition

2012 Supplement

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Chapter 1

THE NATURE AND STRUCTURE OF CRIMINAL LAW

A. THE CORE AND PERIPHERY OF CRIMINAL LAW

[5] SUMMARY

Page 17: Add to the end of the Summary:

Many, if not most, of the dilemmas that appear at the periphery of criminal law involve the effects of technological progress on social conditions. 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 others' 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 recently in *Robertson v. United States ex rel. Watson*, [130 S. Ct. 2184](#) (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 pleaded 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, [130 S. Ct. at 2186, 2188](#) (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. Terrorist 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 Note 10:

10. *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 was one of jurisdiction and standing. It concerned 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*, [130 S. Ct. 2011](#) (2010), and *Alabama v. Miller*, 132 S. Ct. — (June 25, 2012), which are described below in the material supplementing page 140.

C. METHODS OF PUNISHMENT

[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 Carlos DeLuna was wrongfully executed in 1989 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. HUMAN RIGHTS L. REV. 711](#) (2012). For additional information about the case, see <http://www3.law.columbia.edu/hrlr/lrc/>.

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*, [130 S. Ct. 2896](#) (2010), but was subsequently reaffirmed by the Fifth Circuit on remand.

[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, [130 S. Ct. 2169](#) (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. — (June 21, 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.

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]:

In *Pepper v. United States*, [131 S. Ct. 1229](#) (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*, [131 S. Ct. 2382](#) (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.

[3] PROPORTIONALITY

Page 140: Add to Note 5:

In *Dillon v. United States*, [130 S. Ct. 2683](#) (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, 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. The Sentencing Commission voted unanimously to make the change retroactive, paving the way for some 12,000 federal prisoners serving sentences averaging thirteen years to seek sentence reductions that are likely to average about three years. *See* John Schwartz, *Drug Terms Reduced, Freeing Prisoners*, N.Y. TIMES, Nov. 2, 2011, at A18. Most recently, in *Dorsey v. United States*, 132 S. Ct. — (June 21, 2012), the Court held 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.

Page 140: Add Note 6:

6. Proportionality and Crimes Committed by Minors. In *Graham v. Florida*, [130 S. Ct. 2011](#) (2010), the Supreme Court held that the prohibition on cruel and unusual punishment does not allow defendants to be sentenced to life in prison without parole for nonhomicide crimes committed before they turned eighteen. The Court made clear that this 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 the possibility of identifying "the few juvenile offenders having sufficient psychological maturity and depravity to merit a life without parole sentence."

In *Alabama v. Miller*, 132 S. Ct. — (June 25, 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."

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. The woman (a police officer's wife), however, 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.

C. DEFENSES BASED ON MENS REA

[2] MISTAKE OF LAW

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

In one recent prominent case, Wesley Snipes, the actor in 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 failing to file a tax return and sentenced to one year in prison on each count. His conviction was affirmed on appeal, *see United States v. Snipes*, [611 F.3d 855](#) (11th Cir. 2010), and the Supreme Court denied certiorari. *See Snipes v. United States*, [131 S. Ct. 2962](#) (2011). Snipes began serving his sentence in December of 2010. *See* Dave Itzkoff, *Snipes Goes to Prison*, N.Y. TIMES, Dec. 10, 2010, at C2.

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 imposes 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).

By contrast, in *Dean v. United States*, [556 U.S. 568](#) (2009), an opinion issued the week before *Flores-Figueroa*, the Court reached a different conclusion. 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.*

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 trip 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.'" 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. Bob Egelko, *Knoller Gets 15 to Life in Mauling Death*, S.F. CHRON., Sept. 23, 2008, at B1.

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 *1234](#) (Aug. 20, 2010). The California Supreme Court denied review. See *People v. Knoller*, [2010 Cal. Lexis 12088](#) (Dec. 1, 2010).

[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 300 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*, BOSTON 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 cell phone. 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. See Harriet Ryan, *Murray Gets the Maximum*, L.A. TIMES, Nov. 30, 2011, at A1. He is expected to serve no more than two years of the sentence and has asked for appointed counsel to represent him on appeal. See Harriet Ryan, *Dr. Murray Tells Court He's Broke*, L.A. TIMES, Dec. 15, 2011, at A4.

D. FELONY MURDER

[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

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.]

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.

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

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.

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 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”

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.”

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....

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*....

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.

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 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.

E. THE DEATH PENALTY

[1] THE HISTORY AND CONSTITUTIONALITY OF THE DEATH PENALTY

Page 366: Add to Note 2:

In 2009, the New Mexico legislature abolished the death penalty in that state, and the Illinois and Colorado legislatures followed suit in 2011 and 2012, bringing the number of states without capital punishment statutes up to sixteen. In addition, the Governor of Oregon, a former emergency room doctor, announced that he would block all executions in that state during his tenure as governor. *See Oregon and the Death Penalty*, N.Y. TIMES, Nov. 25, 2011, at A34.

The Maryland legislature rejected a proposal to abolish capital punishment in that state, but passed a compromise bill that limits the death penalty to cases with “biological or DNA evidence, a videotaped confession or a videotape linking the defendant to a homicide.” John Wagner, *Maryland Likely to Pass Death Penalty Bill*, WASH. POST, Mar. 26, 2009, at B1. To date, no defendant has been sentenced to death under the new legislation.

In June of 2012, the Arkansas Supreme Court struck down the state’s Method of Execution Act of 2009 as a violation of the state constitution’s separation of powers doctrine. The court reasoned that only the legislature can determine death penalty policy, and that the legislature had “abdicated its responsibility” by giving the Department of Corrections “unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution.” *Hobbs v. Jones*, No. 11-1128 (Ark. June 22, 2012).

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.” 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>.

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 as a part of our law 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 371.

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.

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 371: 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 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 when given in the amounts used for lethal injection. 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, 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 here 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. The dissenters pointed out that the second and third drugs in the protocol would unquestionably “cause a conscious inmate to suffer excruciating pain”: “[p]ancuronium bromide paralyzes the lung muscles and results in slow asphyxiation[, and] [p]otassium chloride causes burning and intense pain as it circulates throughout the body.” Therefore, in the dissenters’ view, the constitutionality of the lethal injection procedures “turn[ed] on whether inmates [were] adequately anesthetized by the first drug in the protocol, sodium thiopental.” 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 endorsed 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 evidence adduced by petitioners fails to prove that Kentucky’s lethal injection protocol violates the Eighth Amendment.” [Id. at 87](#). 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](#).

Perhaps heeding Justice Stevens’ advice, in November of 2009 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 execution attempt where an Ohio inmate “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.” Ian Urbina, *Ohio Is First to Change to One Drug in Executions*, N.Y. TIMES, Nov. 14, 2009, at A10. Although several other states have followed Ohio’s lead, Missouri recently became the first state to announce that it would use the single drug propofol (rather than sodium thiopental or pentobarbital) in executing death row inmates. *See Missouri Using Untested Drug for Executions*, PITTSBURGH POST-GAZETTE, May 24, 2012, at A3.

The announcement by the sole American manufacturer of sodium thiopental that it was no longer producing the drug led prisons in death penalty jurisdictions to scramble to obtain the drug from other states or other suppliers in other countries, and some have begun to substitute another sedative, pentobarbital, for sodium thiopental. *See* John Schwartz, *Legal Questions Are Raised as States Seek Death Penalty Drug*, N.Y. TIMES, Apr. 14, 2011, at A14. A federal judge recently blocked the importation of sodium thiopental on the grounds that it has not been approved by the FDA. *See* *Beatty v. FDA*, [2012 U.S. Dist. LEXIS 41397](#) (D.D.C. March 27, 2012).

Page 382: Add to Note 4:

In 2009, the North Carolina legislature passed the Racial Justice Act, which bars use of the death penalty if defendants can 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 authorizes 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 have sought relief under the statute, citing a study which found that capital defendants in the state are 2.6 times more likely to be sentenced to die in cases where at least one of the victims was white. In the first of these cases 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/documents/RobinsonRJAOrder.pdf>. Prosecutors plan to appeal the judge’s ruling.

In the meantime, efforts continue in the North Carolina legislature to limit the reach of the Racial Justice Act. Although a bill to repeal the statute was vetoed by the Governor last year, the legislature has now passed another bill that would restrict the act in a number of ways. The bill no longer allows relief based on proof of racial disparities tied to the race of the victim, it requires that any statistical evidence relate to the particular county or prosecutorial district where the defendant was tried, and it provides that statistical evidence is insufficient by itself to make the required showing that “race was a significant factor in decisions to seek or impose the sentence of death in the defendant’s case in the county or prosecutorial district at the time the death sentence was sought or imposed.” N.C. Senate Bill 416, available at 2011 Bill Text NC S.B. 416. Although the Governor may veto that legislation as well, its supporters may have enough votes to override her veto. *See Legislature Sends RJA Changes to Perdue*, WINSTON-SALEM JOURNAL, June 21, 2012, at A2; *A Test of Racial Justice*, N.Y. TIMES, June 18, 2012, at A22. 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).

[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.

Page 386: Add to Note 4:

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

Page 402: Add to Note 7:

See also 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

B. FORCIBLE RAPE

[1] PERSPECTIVES

Page 424: Add to Footnote *:

In August 2010, the Justice Department's Bureau of Justice Statistics issued a report summarizing the results of a survey of more than 80,000 inmates conducted pursuant to the Prison Rape Elimination Act:

An estimated 4.4% of prison inmates and 3.1% of jail inmates reported experiencing one or more incidents of sexual victimization by another inmate or facility staff in the past 12 months Nationwide, these percentages suggest that approximately 88,500 adults held in prisons and jails at the time of the survey had been sexually victimized.

ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09, at 5 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

[3] ACTUS REUS

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.

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 criminal 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 [is] 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*, [130 S. Ct. 2896](#) (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*, [130 S. Ct. 2963](#) (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. *See United States v. Skilling*, [638 F.3d 480](#) (5th Cir. 2011). The Supreme Court denied Skilling’s cert petition. *See Skilling v. United States*, [132 S. Ct. 1905](#) (2012).

In Black’s case, however, the Seventh Circuit reversed on one of the fraud charges, but affirmed the rest of his conviction. *See United States v. Black*, [625 F.3d 386](#) (7th Cir. 2010). The Supreme Court denied cert, *see Black v. United States*, [131 S. Ct. 2932](#) (2011), though Black’s sentence was ultimately reduced from 78 to 42 months. *See Ameeet 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](#) (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, 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 was sentenced to a minimum of nine years in prison. See Steve Friess, *After Apologies, Simpson Is Sentenced to at Least 9 Years for Armed Robbery*, N.Y. TIMES, Dec. 6, 2008, at A9. A panel of the Nevada Supreme Court affirmed Simpson’s conviction in October of 2010, and he now has a different lawyer who is seeking a new trial for Simpson on the grounds of ineffective assistance of counsel.

D. BURGLARY

Page 613: Add to Note 4:

In *Magness v. Superior Court*, [2012 Cal. LEXIS 5206](#) (June 7, 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 door to a garage. “[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.

Chapter 12

ATTEMPT & SOLICITATION

B. SOLICITATION

Page 700: Add to Note 10:

In *United State v. Alvarez*, 132 S. Ct. — (June 28, 2012), the Supreme Court struck down as a violation of the First Amendment the Stolen Valor Act, [18 U.S.C. § 704](#), which makes it a crime to falsely claim that one has received any military medal or decoration. The four Justices in the plurality, in an opinion written by Justice Kennedy, concluded that the statute could not satisfy the strict scrutiny used to evaluate content-based limitations on speech. Justices Breyer and Kagan concurred in the result, taking the position that the statute was so broad that it failed intermediate scrutiny but that a narrower statute might pass constitutional muster.

Chapter 13

ACCOMPLICE LIABILITY

A. INTRODUCCION

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).

C. THE STATE OF MIND NECESSARY

Page 718: 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 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 earlier pleaded 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," holding 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 the jurors deadlocked 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 sentenced Bonds to

thirty days of house arrest, two years of probation, 250 hours of community service, and a \$4000 fine. The sentence was stayed while Bonds appeals his conviction to the Ninth Circuit. *See* Jason Turbow, *Bonds Gets Probation for Obstruction of Justice*, N.Y. TIMES, Dec. 17, 2011, at D6.

Chapter 14

CONSPIRACY

B. THE SCOPE OF CONSPIRACY LIABILITY

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

Page 771: Add to Note 1:

Although the federal courts generally assign the burden of proving a withdrawal defense to the defendant, they disagree 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 of their withdrawal from the conspiracy and the date of their indictment. The Supreme Court has agreed to resolve that question. See *Smith v. United States*, No. 11-8976 (cert. granted, June 18, 2012).

C. RICO AND CONSPIRACY

Page 781: 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*, [129 S. Ct. 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](#).

Chapter 15

JUSTIFICATION

B. SELF-DEFENSE

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 17-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, who thought the teenager appeared suspicious and claims he acted in self-defense, is facing second-degree murder charges. *See* Lizette Alvarez & Michael Cooper, *Prosecutor Files Charge of 2nd-Degree Murder in Shooting of Martin*, N.Y. TIMES, Apr. 12, 2012, at A1.

D. NECESSITY

Page 848: Add to Note 7(a):

In January of 2010, New Jersey became the fourteenth state to approve some medical uses of marijuana. In response to concerns that medical marijuana is "so loosely regulated" in some states that the drug "has essentially been decriminalized," the New Jersey statute 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." By contrast, in California, marijuana can be obtained for "a list of maladies as common, and as vaguely defined, as anxiety or chronic pain." *See* David Kocieniewski, *New Jersey Vote Backs Marijuana for Severely Ill*, N.Y. TIMES, Jan. 12, 2010, at A1.

In May of 2010, the D.C. City Council approved a referendum allowing the use of medical marijuana. For the first time since D.C. residents initially voted in support of the referendum in 1998, Congress failed to intervene and the measure became law at the end of July 2010. The D.C. law is unique in requiring that medical marijuana be priced on a sliding scale so that it is available free of charge to those with the lowest incomes. *See* Tim Craig, *Medical Marijuana Will Take Time in D.C.*, WASH. POST, July 28, 2010, at B1.

In the November 2010 elections, Arizona became the sixteenth jurisdiction in this country to allow medical marijuana, as voters in that state narrowly approved a medical marijuana measure. The proposition 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 Delaware legislature added its state to this group in 2011, passing legislation bringing the number of jurisdictions allowing medical uses of marijuana up to

seventeen. *See State Legalizes Medical Pot*, L.A. TIMES, May 14, 2011, at A10. For details of the policies followed in each of these states, see 17 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits, available 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. *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,... these 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. 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.

Chapter 16

EXCUSE

B. ENTRAPMENT

Page 897: 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 led to the arrest of seven others as well. 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 June of 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, “slowly preparing him for what [some] see as inevitable: his release from St. Elizabeths.” Hinckley is permitted to do volunteer work while visiting his mother, but he is not allowed to leave his mother’s subdivision unless accompanied by a family member and is required to use a cell phone equipped with GPS technology so that the Secret Service can track his location. Annys Shin, *Steps Toward Freedom*, WASH. POST, Apr. 26, 2010, at A1. The district court is now considering Hinckley’s request to extend the length of his unsupervised visits to his mother’s home to twenty-four days. *See* Del Quentin Wilber, *After Closing Arguments, Hinckley Awaits Ruling*, WASH. POST, Feb. 10, 2012, at B6.

[2] THE CURRENT STATE OF THE LAW

Page 919: Add to Footnote *:

When Jared Lee Loughner, the man accused of shooting U.S. Congresswoman Gabrielle Giffords and numerous other people, was found incompetent to stand trial, 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.

Page 936: Add to Note 5(b):

In *Porter v. McCollum*, [130 S. Ct. 447, 448](#) (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 450 & n.4.](#)

[3] THE EFFECT OF AN INSANITY ACQUITTAL

Page 950: Add to Note 4:

In *United States v. Comstock*, [130 S. Ct. 1949](#) (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.” *Id.* at 1973 (Thomas, J., dissenting).