CHAPTER 1: PURPOSES OF PUNISHMENT

Page 11: Insert after last full paragraph:

A review of sixteen recent studies on the relationship between sentence length and recidivism found inconsistent results and effects that were generally small or insignificant:

> Eight studies suggested an aggregate deterrent effect in their results, five of which were statistically significant, but effect sizes were small. Two studies suggested a significant aggregate criminogenic effect, but one of these studies suffered from a confound that rendered its results meaningless. Six studies had mixed results, suggesting both criminogenic and deterrent effects of longer sentences, with some finding mixed effects based on the recidivism measure used.

Elizabeth Berger & Kent S. Scheidegger, *Sentence Length and Recidivism: A Review of the Research*, 35 FED. SENT'G RPTR. 59, 68 (2022).

Page 34: Insert at end of footnote 24:

See also Paul H. Robinson & Lindsay Holcomb, *The Criminogenic Effects of Damaging Criminal Law's Moral Credibility*, 31 S. CAL. INTERDIS. L. J. 277 (2022) (marshaling evidence in support of Robinson's theory and responding to critics).

CHAPTER 2: SENTENCING SYSTEMS—PAST & PRESENT

Page 76: Insert new footnote 41.5 after first full paragraph:

[41.5] A recently published study provides new perspectives on the role of race in arrest and charging decisions. Erin E. Meyers, *Mass Criminalization and Racial Disparities in Conviction Rates*, 73 HASTINGS L. J. 1099 (2022). The author used data from the National Longitudinal Study of Youth, which has for many years collected information from a nationally representative sample of individuals who were born between 1980 and 1984. The data include various personal characteristics that are often omitted from courts and corrections data. The personal data provide some ability to disentangle race effects from other socioeconomic factors, such as education and financial wellbeing. After controlling for such personal characteristics, the data indicated that the likelihood for a Black male to be arrested in any given year was about 6.7 percentage points higher than for a White male. *Id.* at 1120. However, among those who were arrested, conviction rates were actually *lower* for Black males by about 15.7 percentage points, again controlling for various personal characteristics. *Id.* at 1123. The author found that the racial disparities in convictions per arrest were driven by differences in "victimless" crimes, e.g., drug offenses and public disorder, as to which police have a great deal of arrest discretion. *Id.* at 1106. For victimizing crimes, as to which police may encounter more pressure to make an arrest, no statistically significant racial disparities in conviction rates were found. The author inferred that prosecutors were to some extent correcting for the tendency of police to exercise their arrest

discretion more aggressively with Black than White suspects. *Id.* In other words, prosecutors may have dismissed charges against Black suspects more frequently than White because the cases against Black suspects tended to be weaker or otherwise less appropriate for prosecution. The author noted, however, that any prosecutorial "correction" may come too late to fully ameliorate the harms of an unwarranted arrest; for instance, an arrest record may affect an individual's ability to obtain employment or education regardless of what ultimately happened in the case.

To be sure, there are some other studies, based on other sources of data, that do find possible indications of prosecutorial bias. For an overview of some of the mixed research in this area, see Darryl K. Brown, Batson *v.* Armstrong*: Prosecutorial Bias and the Missing Evidence Problem*, 100 OR. L. REV. 357, 365-74 (2022).

Page 103: Insert before "2. GUIDELINES":

The Robina Institute has prepared a detailed set of reports on the overall degree of indeterminacy in prison release dates in more than 30 states. The reports are available at https://robinainstitute.umn.edu/publications/prison-release-discretion-and-prison-population-size-state-reports.

Page 117: Insert new note 6:

6. **Other Proceedings.** The Court of Appeals of Minnesota affirmed Chauvin's sentence in April 2023. *See* 2023 WL 2960366. Meanwhile, Chauvin pled guilty in federal court to criminal violations of George Floyd's civil rights, resulting in a federal sentence of 252 months, to be served concurrently with his state sentence. Paul Vercammen & Steve Almasy, *Derek Chauvin sentenced to 21 years in federal prison for depriving George Floyd of his civil rights*, CNN, July 7, 2022, https://www.cnn.com/2022/07/07/us/derek-chauvin-federal-sentencing/index.html. It was reported at the time that Chauvin was mostly living in solitary confinement in a Minnesota prison, *id.*—a difficult but not unexpected arrangement for an inmate who might be targeted for violence by other prisoners. His federal sentence entailed a transfer to a potentially safer federal institution. We will consider the experience of solitary confinement in Chapter 5 below.

Three other officers were also convicted in federal court for their parts in Floyd's death. *Id.* They received sentences ranging from 2.5 to 3.5 years. Jeffrey C. Kummer & Nicholas Bogel-Burroughs, *Last 2 Officers Involved in George Floyd's Death Are Sentenced to Prison*, N.Y. TIMES, July 27, 2022, https://www.nytimes.com/2022/07/27/us/george-floyd-j-alexander-kueng.html#:~:text=Civil%20rights%20trial.,and%20half%20years%20in%20prison. All three were also convicted in state court. The first two sentenced in state court received terms of three and three and a half years, respectively. The third is scheduled for sentencing in August 2023. Eric Levenson & Brad Parks, *Officer who held back crowd during George Floyd's murder convicted of aiding and abetting manslaughter*, CNN, May 2, 2023, https://www.cnn.com/2023/05/02/us/tou-thao-george-floyd-trial/index.html.

Page 133: Insert at end of note 7:

Over the years, different Attorneys General have issued varying guidance documents for federal prosecutors regarding the exercise of charging and plea-bargaining discretion and the extent to which prosecutors should seek to maximize sentence severity. Of particular note has been the guidance on seeking mandatory minimums. For a discussion of the latest guidance document, which was issued by Attorney General Merrick Garland in December 2022, see Alan Vinegrad & Douglas A. Berman, *More Justice from Justice: The DOJ's Latest Charging, Plea, and Sentencing Policies*, 35 FED. SENT'G RPTR. 153 (2023). The authors predict "some decline, perhaps a quite significant decline" in the use of mandatory minimums in light of the new document. *Id.* at 154.

Page 146:

The final row in Table 2-2 should read, "Ethnicity effects: length of jail sentence."

CHAPTER 3: SENTENCING PROCESS

Page 196: Insert at end of note 4:

For more background on the *Williams* case and a critique of the Supreme Court's analysis, see Shaakirrah R. Sanders, *Two Rules for Cross-Examination at Drug Sentencing*, 20 OHIO ST. J. CRIM. L. 527 (2023).

Page 230: Insert at end of note 7:

For a critical review of the caselaw on the Fourth Amendment exclusionary rule at sentencing, see Brian Beaton, Note, *Mistaking a Backdoor for No Door at All: Sentencing and the Exclusionary Rule*, 16 HARV. L. & POL'Y REV. 217 (2021).

Page 243: Insert at end of note 3:

For a recent critique of the use of victim impact statements, see Susan A. Bandes, *What Are Victim Impact Statements For?*, 87 BROOK. L. REV. 1253 (2022). Professor Bandes asserts,

> Research is ongoing on whether—and how—VIS [victim impact statements] aid victims with the healing process. For some victims and survivors, particularly those whose wishes are not aligned with the goals of the prosecution, or those whose expectations about the effects or outcomes of VIS are not met, the VIS regime may inflict secondary trauma. Moreover, the early enthusiasm that propelled the rapid adoption of VIS statutes was based on a host of untested assumptions, and in the subsequent decades we have begun to amass a trove of empirical data challenging and often undermining those assumptions. There is evidence of differential treatment of victims, both in terms of who is given information about VIS and in terms of who is encouraged to exercise the right. More research is needed now on how widespread these disparities are.

> Researchers are still investigating whether the statements lead to increased sentences, and whether they increase sentencing disparities based on race, gender, or social class.

Id. at 1257-58. Professor Bandes further argues that the nature of victim participation in the sentencing process—focused as it is on the culpability of a single individual—may sometimes direct attention away from larger structural or institutional causes of victimization. As an example, she cites the sentencing of Larry Nassar, the former physician of the U.S. women's national gymnastics team, in which the impact evidence, though powerful, left largely unaddressed the apparent negligence of various institutions that failed to protect the victims. *Id.* at 1267, 1274-75.

CHAPTER 4: SENTENCING FACTORS

Page 269: Insert at end of note 3:

The most commonly used RAI for individuals convicted of sexual offenses is said to be the Static-99R. A recent article provides a systematic review of the literature and meta-analysis of the quantitative research on the Static-99R. L. Maaike Helmus et al., *Static-99R: Strengths, Limitations, Predictive Accuracy Meta-Analysis, and Legal Admissibility Review*, 28 PSYCHOL., PUB. POL'Y & L. 307 (2022). Among other objectives, the authors sought to assess the predictive accuracy of the instrument. Accuracy might be considered in two different senses: relative and absolute. Relative accuracy refers to the ability of an RAI to accurately rank-order the risk of different subjects. Relative accuracy would be important, for instance, if an RAI were used to determine how to allocate a limited quantity of treatment or supervision resources among a population of subjects presenting varying levels of risk. The most commonly used metric is "area under the curve" (AUC). If an RAI has an AUC of 0.5, it is doing no better than random chance in distinguishing the risk of different subjects. On the other hand, an AUC of 1.0 would indicate perfect performance. Based on an assessment of 52 studies, the authors of the new meta-analysis found that the STATIC-99R has an AUC of about 0.68 to 0.69, which is considered moderately accurate in the relative sense.

There are many fewer studies measuring predictive accuracy in the *absolute* sense, and the studies that do exist are subject to a number of difficulties in measuring the absolute incidence of recidivism, e.g., low reporting rates for many types of crime. With this caveat, the available research suggests that the Static-99R may substantially overestimate the amount of recidivism, predicting about 73% more recidivism than actually occurs.

The authors offered a host of additional observations about the Static-99R, many of which would probably also be true to at least some extent of many other RAIs. These include the following:

- Proper use of the Static-99R is no easy matter—the coding manual is 94 pages long, and instruction from a certified trainer is recommended for use of the RAI.

- Errors in scoring and application are regularly encountered.
- Static-99R is commonly used for populations for which it was not designed to be used, including women and those convicted only of possession of child pornography or statutory rape.
- When users are given discretion to adjust risk scores based on their own professional judgment, the available research suggests that predictive accuracy is diminished.
- Admissibility of Static-99R scores in court, e.g., in civil commitment trials, has been challenged frequently, but courts have overwhelming (though not quite universally) rejected these challenges.

The authors conclude their assessment as follows:

> [It is] important to remember that Static-99R was not developed specifically for a legal context or any particular legal decision. It is designed to rank order individuals in their likelihood of reoffending, primarily to inform resource allocation. It does fairly well at that. Any legal question that is more specific involves some gap between the legal question and what the scale is designed to measure. The size and type of the gap depend on the legal question. Evaluators should not treat Static-99R as if it provides a direct answer to the legal question.

Again, similar comments might be made with respect to other RAIs.

Page 270: Insert at end of note 2:

The added points under § 4A1.1(d) resulting from committing the instant offense while under another sentence are referred to as "status points." In April 2023, the U.S. Sentencing Commission promulgated amendments to § 4A1.1 that reduce the number of status points from one to two and limit the number of cases in which status points can be imposed. This change was adopted because the Commission's research showed that status points add little to the ability of the criminal history score to predict recidivism. Unless Congress takes contrary action, the amendments take effect in November 2023.

Page 272: Insert new note 9:

9. **Zero-Point Defendants.** Criminal History Category I lumps together defendants who have either 1 or 0 points. However, Commission research finds a substantial difference in the recidivism risk of these two groups. *See, e.g.*, U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021). As a result, the Commission's April 2023 amendment package included a new § 4C1.1, which reduces the offense level by two for zero-point defendants, assuming the instant offense is not sexual and does not involve any of a list of specific aggravating circumstances.

Page 284: Insert new note 9:

9. **"Different Occasions."** In order to count as predicates under the ACCA, prior offenses must have been "committed on occasions different from one another." 18 U.S.C.A. § 924(e)(1). But how exactly does one know whether two offenses committed sequentially were

committed on one occasion or two? The Supreme Court has recently held that the "different occasions" analysis is "multi-factored in nature." *Wooden v. United States*, 142 S. Ct. 1063, 1070 (2022). The Court elaborated:

> Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.

Id. at 1071.

The Court did not address an important procedural question: does *Apprendi* give defendants a right to a jury trial on the occasions question? As you may recall from Chapter 3, *Apprendi* itself recognized an exception to the jury-trial right when punishment is increased on the basis of a prior conviction. Yet, the occasions analysis involves more than simply confirming that a particular defendant committed certain specified offenses sometime in the past; there must also be a consideration of such facts as the specific time and location of the different offenses—facts that were not necessarily encompassed within the earlier findings of guilt. For an argument, that *Apprendi* does apply to the occasions question, see Note, *The Occasions Clause Paradox*, 136 HARV. L. REV. 717 (2022). However, all circuits to have considered the issue so far have concluded that the occasions question can be answered by a judge using the preponderance standard. *Id.* at 718.

Page 299: Insert new note 11:

11. **Family Impact Assessments.** Do minor children have a constitutional right to maintain family integrity, and, if so, does this have any procedural or substantive implications for the sentencing of parents? In a recent article, Professor Shanta Trivedi answers the first question in the affirmative, invoking Supreme Court dicta and lower-court precedent. *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267 (2021). In recognition of the child's right to family integrity, Professor Trivedi proposes that family impact assessments should be a routine part of the sentencing process. She suggests an analogy to victim impact evidence (discussed in Chapter 4 above). As one possible model, she points to San Francisco's Adult Probation Department, which prepares a family impact assessment regarding each defendant for the sentencing court's use. *Id.* at 310. She further recommends that greater consideration be given to "deferred sentencing" (delaying the start of incarceration until after the defendant's minor child reaches the age of majority); correctional facilities that can accommodate placement of very small children with an incarcerated single parent as an alternative to foster care; and assigning incarcerated parents to prisons that are as close as possible to their children.

Page 304: Insert at end of note 3:

For a survey of current state laws defining intellectual disability in varied ways, see Daniel Flack, *Following Up After* Moore *and* Hall*: A National Survey of State Legislation Defining Intellectual Disability*, 28 PSYCHOL., PUB. POL'Y & L. 459 (2022).

Page 304: Insert at end of note 3:

For an argument, based on the neurological impact of long-term drug use, that substance abuse disorder mitigates culpability and should be utilized more widely by federal judges as a basis for below-guidelines sentences, see Leslie E. Scott, *Substance Use Disorder's (SUD) Impact on Criminal Decision-Making and Role in Federal Sentencing Jurisprudence: Arguing for Culpability-Based SUD Mitigation*, 20 OHIO ST. J. CRIM. L. 471 (2023).

Page 315: Insert at end of footnote 14:

A recent comparison of service members with combat and non-combat deployments found that combat exposure significantly increased the likelihood of a subsequent civilian arrest for violent and property crime. Resul Cesur, Joseph J. Sabia & Erdal Takin, *Post-September 11 War Deployments and Crime Among Veterans*, 65 J. L. & ECON. 279 (2022). The evidence suggested that much of this increased crime risk could be attributed to traumatic brain injuries and post-traumatic stress disorder. *Id.* at 305.

A number of studies have found connections between a person's exposure to violence and subsequent criminal behavior, which may result from changes in brain functioning that are associated with severe or sustained trauma. Rachael Liebert, *Trauma and Blameworthiness in the Criminal Legal System*, 18 STAN. J. C.R. & C.L. 225, 241-49 (2022). In light of such research, do you think that the combat veteran's exposure to violence should be treated as a mitigating factor at sentencing? Of course, combat veterans are far from the only people in our society who are exposed to potentially traumatizing violence. If you think that trauma should be treated as a mitigating factor for combat veterans, how about for individuals who grow up in violent neighborhoods? For an argument that these groups should not be distinguished, see *id.* at 262-69.

Page 331: Insert new note 5:

5. **A Contrasting Holding.** The holding in *Irlmeier*, affirming the defendants' aggravating roles, may be contrasted with the D.C. Circuit's recent decision in *United States v. Johnson*, 64 F.4th 1348 (D.C. Cir. 2023). The district court enhanced Johnson's drug-trafficking sentence based on his management or supervision of five individuals, including his wife. However, on appeal, the D.C. Circuit determined that the evidence did not support the enhancement. In particular, the key exchange between Johnson and his wife did not indicate that he was in a position of authority over her, but instead reflected "give-and-take." She was said to be "a very strong person" who was merely "willing to help" her husband. The D.C. Circuit further suggested that evidence of control might need to be stronger in the context of a spousal or familial relationship. Finally, the D.C. Circuit was unpersuaded that Johnson was fairly

characterized as a manager or supervisor of other individuals who obtained drugs from him; his directions to them "reveal[ed] nothing more than a seller setting the terms of sale." Do you see tensions between the reasoning in *Irlmeier* and the reasoning in *Johnson*?

Page 336: Insert at end of note 2:

New guidance for federal prosecutors issued by Attorney General Merrick Garland in December 2022 seeks to limit the use of drug mandatory minimums to cases in which other available charges are inadequate in light of the basic purposes of punishment; in effect, there is now a sort of presumption against charging drug defendants under statutes that carry a mandatory minimum. *See* Alan Vinegrad & Douglas A. Berman, *More Justice from Justice: The DOJ's Latest Charging, Plea, and Sentencing Policies*, 35 FED. SENT'G RPTR. 153 (2023).

Page 340: Insert at end of note 7:

MDMA ("Ecstasy") is another drug as to which the guidelines' weight-based approach has been criticized. In 2001, the Sentencing Commission adopted a 500:1 ratio in setting MDMA sentences in relation to marijuana, notwithstanding arguments by some experts that 10:1 would be more appropriate. Jonathan Perez-Reyzin, Leslie Booher & Ismail L. Ali, *Unfinished Business: Revisiting the Drug Conversion Tables and Their Treatment of MDMA*, 35 FED. SENT'G RPTR. 24, 24 (2022). Today, reform advocates contend that "it has become even clearer that the Commission relied on incomplete, and sometimes incorrect, data" in setting the 500:1 ratio. *Id.*

Page 346: Insert at end of note 1:

There are concerns that the Department of Justice's survey-based estimates may overcount hate crimes, due, for instance, to the statistical methodology that is used to extrapolate from a limited number of survey responses. Jeannine Bell, *Pick the Lowest Hanging Fruit: Hate Crime Law and the Acknowledgment of Racial Violence*, 112 J. CRIM. L. & CRIMINOLOGY 691, 702 (2023). The other major effort by the federal government to track hate crime numbers and trends is through the FBI's collection of hate crime reports from about 15,000 police agencies from around the nation. The FBI data are thought to represent an undercount because they are dependent on (1) the reporting of hate crimes to the local police by victims, who might distrust the police or otherwise not think it worthwhile to seek official redress for their victimization; and (2) voluntary participation in the national reporting program by local agencies that have varying levels of commitment to addressing hate crime and capacity to comply with the FBI's reporting protocols.

Although the FBI numbers are suspect in absolute terms, they may nonetheless be of some value in identifying trends over time, on the assumption that the weaknesses of the reporting program have been fairly consistent since its inception in the 1990s. A new, close analysis of the FBI data reveals several notable trends. Brian Levin, James Nolan & Kiana Perst, *U.S. Hate Crime Trends: What Disaggregation of Three Decades of Data Reveals About a Changing Threat and an Invisible Record*, 112 J. CRIM. L. & CRIMINOLOGY 749 (2023). From a

low in 2014, the FBI numbers indicate a steady rise in hate crimes through at least 2020. Due to difficulties relating to a switchover in FBI reporting protocols, the official 2021 data are not complete, but combining the FBI figures with privately collected data from missing jurisdictions suggests that 2021 may have hit a three-decade high in the number of hate crimes in the U.S. *Id.* at 756. The authors of the new study also note a shift in hate crimes away from property- to person-directed offenses, including mass homicides perpetrated by white supremacist "mission offenders." *Id.* at 760. Month-by-month analysis of the FBI data suggests that high-profile catalyst events drive spikes in hate crimes. For instance, the highest-ever month for hate crimes in the FBI data was September 2011, in the wake of the 9/11 terror attacks. *Id.* at 733. The second-highest month was June 2020, in the wake of George Floyd's murder and national social-justice protests. Similarly, anti-Asian hate crimes hit a peak in the spring of 2020 as the nation experienced its first wave of COVID-19 infections. *Id.* at 762.

Page 346: Insert at end of note 2:

In May 2022, in a mass shooting that was apparently motivated by white supremacist beliefs, Payton Gendron killed ten African-Americans at the Tops Friendly Market in Buffalo. A national poll of African-Americans taken in the wake of the shooting found that 70% believed that "at least half of white Americans hold white supremacist beliefs"; 75% characterized white supremacists as a major threat; and 66% said that white supremacy was a growing problem. Bell, *supra*, at 726. Is this evidence that hate crimes can have broader adverse effects beyond the immediate victims? Would such broader effects justify the adoption of hate crime laws? On the other hand, if convicted, Gendron and other perpetrators of hate-motivated murders are likely to receive very severe (death or life-term) sentences anyway. Is there any point to charging them with hate crimes, too? *See id.* at 727 ("One of the values of hate crime trials is that they are widely publicized acknowledgements of racism. If American society is going to conquer racial bias, we must engage in deeper examination and confrontation of racist ideas.").

Researchers have differentiated among hate crime offenders based on three different reasons for offending: "psychological thrill and group bonding (thrill-seeking offenders), fear and anger triggered by a perceived attack (defensive offenders), and to rid the world of groups deemed evil (mission offenders)." Leven, Nolan & Perst, *supra*, at 789. Might hate crime laws be more appropriate or effective with some of these groups than others? Should we be concerned that some perpetrators consider themselves to be "martyrs" to a cause and even actively seek to publicize their offenses—does that drain hate crime enhancements of their deterrence benefit? *See* Avlana Eisenberg, *A Trauma-Centered Approach to Addressing Hate Crimes*, 112 J. CRIM. L. & CRIMINOLOGY 729, 730, 735 (2023). And what, if anything, should be made of the apparent prevalence of mental illness among hate-crime perpetrators? For instance, in May 2021, the New York Police Department reported that 48% of the people it arrested for anti-Asian hate crimes had a "documented history of psychiatric disturbance." Leven, Nolan & Perst, *supra*, at 789.

Hate crime laws are sometimes defended for their expressive value. *See* Eisenberg, *supra*, at 730 ("When enacting hate crime laws, legislators at both the state and federal levels have

emphasized the expressive weight of these laws and the importance of sending messages to victims, defendants, and society at large promoting tolerance and equality and condemning bigotry and bias."). However, Professor Avlana Eisnberg argues that "while some victims may gain solace from the labeling of a crime as hate-motivated, a hate-crime conviction is unlikely to address the victim's deep-seated trauma; the criminal law is ill-equipped to address the emotional harms experienced by individual victims." *Id.* In order to better address these emotional harms, she recommends wider use of restorative justice processes in situations of hate crime. *Id*. at 739. By way of illustration, she describes recent cases in which restorative processes were used in Portland, Oregon; San Francisco; and Edmonton. *Id.* at 739-41.

In a recent article, Professor Lu-in Wang succinctly summarizes a number of notable criticisms of hate crime laws:

> [Critics] argue that the laws fail to address the systemic causes of racist violent, instead offering a diversionary, feel-good alternative that makes scapegoats of individual perpetrators. This point may be juxtaposed with the concern that hate crime laws potentially fight injustice through unjust systems. That is, the laws take a carceral approach to protecting the very communities that have suffered disproportionately from law enforcement surveillance, prosecution, and imprisonment, and offer the state yet another means by which to impose those burdens on members of these same communities through differential enforcement.
>
> A related concern is that hate crime laws do little to protect marginalized communities in light of widespread distrust of law enforcement, which often dissuades members of these communities from reporting hate crime incidents. Critics further argue that hate crime laws exacerbate rather than ameliorate tensions among social groups by drawing attention to their differences.

Reframing Hate, 112 J. CRIM. L. & CRIMINOLOGY 847, 852-53 (2022) (quotation marks, alterations, and citations omitted).

CHAPTER 5: DOING TIME

Page 376: Insert at end of paragraph beginning with "whether inmates feel coerced…":

For a critical evaluation of using inmates to perform public works and government services (as opposed to "prison industries," producing goods for sale, and "prison maintenance," operating the prison), which the author asserts among other things discourages reduction of inmate populations, see Tiffany Yang, *Public Profiteering of Prison Labor*, 101 N.C. L. REV. 3132 (2023).

Page 383: Insert at end of the last full paragraph and Holzer-Glier cite:

For a troubling account of the comparatively more difficult conditions in jail, which include higher rates of suicide and mental illness and insufficient or no programming, as well as exorbitant commissary costs, see Christopher Blackwell, *Two Decades of Prison Did Not Prepare Me for the Horrors of County Jail*, N.Y. TIMES, May 16, 2023.

CHAPTER 6: CONSTITUTIONAL LIMITS ON PUNISHMENT (NON-CAPITAL)

Page 410: Insert at top after Frase cite:

; Robert J. Smith et al., *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537 (2023).

Page 429: Insert new note 12:

12. **Merge JLOP and Death Penalty Reasoning?** The Supreme Court regards juvenile offenders as a distinct subclass, warranting special scrutiny and treatment when it comes to imposition of life without parole. But, as Chapter 7 makes clear, adults sentenced to death are also subject to distinct scrutiny and treatment, because death is unique in its severity and irrevocability. Is there a persuasive reason to extend the several special categories carved out by the Court for use of the death penalty, such as the prohibition of the execution of the mentally disabled and for certain felony murder circumstances, to JLWOP? For an argument in support, see William W. Berry III, *Unconstitutional Punishment Categories*, 84 OHIO ST. L.J. 1 (2023).

CHAPTER 7: CAPITAL PUNISHMENT

Page 452: Insert new bullet point at top:

- **Gendered Outcomes:** One of the striking statistical realities of death row populations is the relative paucity of women. As of July 2022, only 50 women were on the nation's death rows. Death Penalty Information Center, https://deathpenaltyinfo.org/death-row/women. Among women on death row, a very high percentage have suffered gender-based violence. According to one recent study, almost all experienced gender-based violence, with the great majority experiencing more than one incident during their lives, and the occurrence is rarely brought to the attention of juries. Sandra Babcock & Nathalie Greenfield, *Gender, Violence, and the Death Penalty*, 53 CALIF. W. INTER'L L.J. __ (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4416558. Moreover, according to one study, women are more likely to be sentenced to death if their crime or behavior deviates from society's expectation of what constitutes a "good woman." Cornell Law School Center for the Study of the Death Penalty Worldwide, *Judged for*

More than Her Crime, https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf.

Page 456, note 8: Omit text after Alabama statute and insert the following:

Fla. Stat. § 921.142 (if jury unanimously finds beyond a reasonable doubt that at least one aggravating factor is satisfied, death will be recommended if eight or more jurors vote in favor of death). Also, in Florida, if less than eight jurors vote for death, the recommendation is life without parole, which the judge must impose. If the jury's recommendation is for death, the judge may impose that sentence or life without parole. *Id.* Nationally, Nebraska and Montana allow judges to make the final capital decision in all cases while Indiana and Missouri allow judges to impose death when a jury is deadlocked. Richa Bijlani, Note, *More Than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. REV. 1499 (2022).

Page 462: Insert before new section (after note 19 in text):

Another area of concern relates to how capital jurors are selected. During the *voir dire* process potential capital jurors are questioned about their views regarding capital punishment in order to determine if they will be able to follow the law when deciding a sentence. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court held that philosophical opposition to the death penalty did not disqualify a potential juror automatically, inasmuch a person might oppose capital punishment generally yet believe it is appropriate based on the facts of the case. However, an individual categorically opposed to a death sentence must be stricken for cause. A jury composed without such individuals is "death-qualified." Jurors must also be "life-qualified": they cannot be categorically inclined to impose death, but rather willing to impose a non-death sentence if warranted by the facts. *Morgan v. Illinois*, 504 U.S. 719 (1992). Critics of the process, however, have long argued that juries resulting from the process, especially death-qualification, are unfairly predisposed to imposing death. *See, e.g.*, Craig Haney et al., *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, 28 PSYCHOL., PUB. POL'Y & L. 1 (2022). Research suggests, moreover, that the selection process more generally fails to root out problematic jurors: that up to 30% of potential jurors may be automatic death penalty voters and up to 34% automatic life sentence voters. Eric C. Carpenter, *Hidden Killers and Imagined Saints: Why Courts Fail to Identify Unconstitutional Jurors in Death Penalty Cases*, 2021 MICH. ST. L. REV. 449.

Page 505: Insert after the end of the first paragraph:

Florida, it seems, embraced the Brandeisian model in late spring 2023 when it enacted a new law expressly allowing for death to be imposed upon an individual convicted of sexual battery upon a child under the age of twelve. The law's legislative intent provision states that

> The Legislature finds that a person who commits a sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age carries a great risk of death and danger to vulnerable members of

> this state. Such crimes destroy the innocence of a young child and violate all standards of decency held by civilized society. The Legislature further finds that…Kennedy v. Louisiana, 554 U.S. 407 (2008), was wrongly decided and an egregious infringement of the states' power to punish the most heinous of crimes.

Fla. Stat. § 921.1425.

CHAPTER 8: COMMUNITY SUPERVISION

Page 534: Insert at end of note 2:

Many conditions of supervised release effectively delegate to a probation officer broad discretionary authority over important aspects of the defendant's life. Is it possible for the delegation to go too far? In considering a recent constitutional challenge to one of the standard conditions in the federal guidelines, the Tenth Circuit agreed with the defendant that the delegation was indeed impermissibly excessive. *United States v. Cabral*, 926 F.3d 687 (10th Cir. 2019). At issue was the so-called "risk-notification" condition, which provides as follows:

> If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify that person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

§ 5B1.3(c)(12) (probation); § 5D1.3(c)(12) (supervised release). Cabral, the defendant, contended that the condition "improperly delegates the power to define the term 'risk'—and thus 'to determine what conduct the condition proscribes, and when it will be enforced'—without meaningful guidance from the district court." 926 F.3d at 697 (quoting brief).

In overturning the risk-notification condition, the Tenth Circuit observed, "Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer." *Id.* (quoting *United States v. Bear*, 769 F.3d 1221, 1230 (10th Cir. 2014)). The court elaborated:

> In an improper-delegation challenge to a supervised-release condition, we distinguish between permissible delegations that merely task the probation officer with performing ministerial or support services related to the punishment imposed and imermissible delegations that allow the officer to decide the nature or extent of the defendant's punishment. This inquiry turns on the liberty interest affected by the probation officer's discretion. Thus, allowing a probation officer to make the decision to restrict a defendant's significant liberty interest constitutes an improper delegation of the judicial authority to determine the nature and extent of a defendant's punishment. By tasking Mr. Cabral's probation officer with determining whether Mr. Cabral poses a "risk" to others in any facet of his life and requiring Mr. Cabral to comply with any order to notify someone of any such

> risk, the district court delegated broad decision-making authority to the probation officer that could implicate a variety of liberty interests.

Id. (internal quotation marks and citations omitted). For instance, the court observed, "If Mr. Cabral's probation officer orders him to notify family members that he poses a risk to them, the condition may infringe on his fundamental right of familial association." *Id.* at 698 (citation omitted). Likewise, the court noted, "Mr. Cabral's probation officer might order him to warn an employer or prospective employer about a perceived risk," which might amount to "an impermissible occupational restriction." *Id.*

Despite Cabral's success in the Tenth Circuit, similar excessive-delegation challenges to the risk-notification condition have been rejected in at least five other circuits. *United States v. Hollingsworth*, 2023 WL 2771497 (11th Cir.).

Page 538: Insert at end of note 10:

See also Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403 (2022) (predicting that evidence-based "paradigm will reproduce the disparities and dysfunctions of the existing system—albeit, perhaps, on *a slightly* smaller scale, and under the veneer of scientific objectivity").

Page 550: Insert at end of note 5:

But cf. People v. McWilliams, 524 P.3d 768 (Cal. 2023) (gun and drugs seized from parolee following parolee's unlawful detention should have been suppressed in new criminal prosecution that was based on possession of the gun and drugs; police officer's discovery between time of detention and time of search that parolee was subject to a suspicionless search condition did not sufficiently attenuate the connection between the unlawful detention and the search).

Page 558: Insert at end of note 1:

Central to the approach recommended by Latessa and Schweitzer is the use of a validated risk-assessment tool. We considered such tools in Chapter 4 above (see page 267, note 2). Many supervision agencies do routinely perform risk assessments, but that does not necessarily mean the results always control supervision decisions. For instance, a recent audit of the Wisconsin Department of Corrections found that field agents, who have the discretion to override the tool they are assigned to use, increase supervision intensity beyond what is indicated by the tool in more than one-third of cases. WIS. LEG. AUDIT BUREAU, COMMUNITY CORRECTIONS PROGRAM 29 (2023). By contrast, *decreases* in supervision intensity occurred in fewer than 1% of cases. Might this be an indication of excessive risk-aversion on the part of agents? Overall, agents placed 42.3% of their supervisees in the "high" supervision category. *Id.* at 31. Are there any potential downsides to placing low-risk individuals into high-intensity supervision?

Page 559: Insert new note 6:

6. **Challenges Facing the Supervised Population.** For many supervised individuals, the demands of supervision are layered on top of multiple forms of background disadvantage.

For instance, a recent analysis of data collected through the National Survey on Drug Use and Health found the following:

- More than one in five supervised individuals have a mental health diagnosis, a figure that is about twice as high as the general population;
- More than one in four have a substance abuse disorder, a figure that is about four times as high as the general population;
- More than one in four lack health insurance;
- More than two-thirds of supervised individuals with a substance abuse disorder are unable to obtain treatment;
- Supervised individuals report higher rates of various chronic health conditions and physical and mental disabilities than the general population;
- Unemployment rates are about three to four times higher; and
- More than half of supervised individuals have a high school education or less, as compared to only one-third of the general population.

Emily Widra & Alexi Jones, *Mortality, Health, and Poverty: The Unmet Needs of People on Probation and Parole*, Prison Policy Initiative, April 3, 2023, https://www.prisonpolicy.org/blog/2023/04/03/nsduh_probation_parole/.

Page 562: Insert at end of note 2:

Although the statutory provisions governing revocation are otherwise very similar, the statute for supervised release does differ in one potentially significant respect: rather than broadly invoking 18 U.S.C. § 3553(a) as the source of the criteria to be used in making a revocation decision, the supervised release statute specifically excludes § 3553(a)(2)(A)—the provision that directs the court to consider desert. Does this mean that revocation of supervised release should exclusively be a matter of implementing the utilitarian purposes of punishment? A circuit split has developed around this question. For a breakdown of the split and a summary of the key arguments, see Congressional Research Service, *Can Retribution Justify the Revocation of Supervised Release*?, March 13, 2023.

Page 564: Insert at end of note 11:

According to a recent audit of the Wisconsin Department of Corrections, in 97.7% of their investigations, POs substantiated allegations of a violation. WIS. LEG. AUDIT BUREAU, COMMUNITY CORRECTIONS PROGRAM 53 (2023). How should this high figure be interpreted—as a reassuring indicator of PO investigative efficiency; as a sign that violations are so pervasive as to be easy for anyone to find (perhaps because conditions are excessive and unreasonable); or as a function of weak due process safeguards that leave supervised individuals (mostly unrepresented by counsel) with little ability to contest allegations effectively?

Each year, about 40% of the individuals on supervision in Wisconsin are found guilty of a violation. *Id.* at 57. During the three years covered by the audit, more than half (54%) of the

substantiated violations were for noncriminal (technical) violations. *Id.* at 55. Nearly half of the technical violations were for noncriminal alcohol or drug violations (e.g., abuse of over-the-counter drugs). *Id.* at 54. Of the criminal violations, more than 20% were for "drug-related conduct."

Wisconsin uses guidelines in order to determine the sanction that will be imposed for violations. Under the guidelines, sanction severity is based on the seriousness of the violation and the individual's risk level. However, with a supervisor's approval, a PO may override the guidelines. The PO departed upward in about 22% of cases, but downward in only about 7% of cases. *Id.* at 64. Revocation was ordered in about 16% of the cases with a sanction, while shorter jail sanctions were used in another 37% of cases. *Id.* at 67. Thus, some form of incarceration was employed more than half the time that sanctions were imposed.

Page 564: Insert new note 12:

12. **Community Supervision and Drug Enforcement.** In a new article, Professor Jacob Schuman argues that drug control has become central to community supervision, at least in the federal system. *Drug Supervision*, 20 OHIO ST. J. CRIM. L. 431 (2023). He asserts "that the entire legal framework of supervised release is devoted to drug control. Congress created supervised release as a limited, rehabilitative program for former prisoners, yet the system has instead evolved into a vast public-safety network dedicated [to] monitoring, restricting, and punishing drug activity." *Id.* at 433. He argues that official statistics on the proportion of revocations for drug use or possession (in the range of about 15-25% in some jurisdictions) understate the true role of drug use on returns to prison. For instance, drug use may be the underlying cause of other violations, such as missed appointments or job loss. *Id.* at 436. Additionally, defendants with a history of drug use are often subject to additional conditions of release and closer surveillance, which can lead to more violations and sanctions. *Id.* at 443. Difficulties in addiction treatment can have the same consequences. *Id.* at 445. Moreover, given large numbers of overlapping conditions, episodes of drug use by a supervised person may give rise to multiple chargeable violations. In such circumstances, sanctions might be sought only for the most easily provable, e.g., missing treatment sessions, rather than the underlying drug use itself, which is often only provable circumstantially. *Id.* at 453. Finally, Professor Schuman notes that the mandatory revocation rule for drug violations, *see* 18 U.S.C. § 3565(b), *supra*, is sometimes used by probation officers and prosecutors to obtain leverage over defendants, pressuring them to concede other violations in order to avoid being charged with a violation that would automatically result in imprisonment. *Id.* at 454.

Page 575: Insert at end of note 2:

Lower courts are divided on the question of whether *Brady* discovery rights (described on page 224 above) apply to revocation proceedings. *See* Alex Breindel, Note, *Does* Brady *Apply to Supervised Release Revocation Hearings?*, 91 FORDHAM L. REV. 127 (2022) (arguing that *Brady* should be understood to apply to revocation).

Page 578: Insert at end of note 3:

For an argument that *Haymond* should be extended to mandatory revocation for drug violations under 18 U.S.C. § 3583(g), see Jacob Schuman, *Drug Supervision*, 20 OHIO ST. J. CRIM. L. 431, 463-70 (2023).

Page 579: Insert new note 7:

7. **Practice Under *Morrissey*.** Research conducted under the auspices of the Yale Law School Samuel Jacobs Criminal Justice Clinic and Advanced Sentencing Clinic reveals that the procedural safeguards recognized in *Morrissey* might not accomplish much in practice due to lack of access to counsel, widespread misunderstanding and waiver of legal rights, and strong institutional preferences for parolees to accept responsibility for violations. Fiona Doherty, *The Revocation of Community Supervision: A Reform Project*, 20 OHIO ST. J. CRIM. L. 1 (2023). The researchers attended all parole revocation hearings in Connecticut in one month in 2015 (49 in all), and then later interviewed most of the defendants. Their findings included the following:

- The parole board revoked parole and imposed a prison sanction in all of the cases;
- Hearing examiners relied on written violation reports from POs without requiring the POs to attend the hearing, which precluded cross-examination;
- All of the parolees had been incarcerated for at least three months while awaiting their hearings;
- Nearly all of the parolees had waived their right to a preliminary hearing;
- Most of the parolees who waived their right to a preliminary hearing did not understand what a preliminary hearing was;
- Only three of the parolees appeared with lawyers, all of whom had been privately paid;
- All of the remaining parolees had waived the right to request appointed counsel;
- Many of the parolees had been advised by a PO to waive their rights to a preliminary hearing and to request appointment of counsel; and
- 79% of the interviewees reported that they lost their jobs as a result of the revocation process, while 47% reported they lost their housing.

In light of these findings, the state created a new unit of its public defender office to handle revocations. The unit has since represented hundreds of individuals and had success with many, including some at the preliminary hearing stage.

CHAPTER 9: ECONOMIC SANCTIONS

Page 604: Insert at end of note 12:

It can be controversial when a judge reduces incarceration time in order to facilitate restitution. For instance, in *United States v. Watts*, more than a half-dozen individuals were convicted in federal court for their roles in a large-scale securities fraud scheme with hundreds of victims. 2023 WL 2910634 (2d Cir.). One defendant, Mr. Watts, was ordered to pay more than

$4.4 million in restitution. His guidelines range called for a prison sentence of 235 to 293 months. However, the district court imposed a sentence of only one year and a day so as to enhance the likelihood that the victims would eventually get paid. On the government's appeal, the Second Circuit reversed. The appellate court faulted the district judge for giving too much weight to the restitution consideration relative to the competing demands of deterrence and desert. Additionally, Watts's sentence was far below those of his co-conspirators, creating an unwarranted disparity. The Second Circuit thus concluded that the sentence was substantively unreasonable.

Page 617: Insert new note 7:

7. **The Aftermath of *Paroline*.** In the wake of the Supreme Court's decision, Congress adopted the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, which established a new mandatory minimum $3,000 restitution amount for child pornography cases. 18 U.SC. § 2259(b)(2)(B). The Act also created a new Child Pornography Victims Reserve. Child pornography victims are entitled to seek a one-time payment from the Reserve of $35,000 (adjusted for inflation). 18 U.SC. § 2259(d)(1)(D). The Reserve is funded by a special assessment imposed on child pornography offenders of up to $50,000 each. 18 U.SC. § 2259A. For more background on the Act, see MacKenzie Durkin, *Restitution for Child Pornography: Reframing A System for Victims Harmed by Too Many*, 52 LOY. U. CHI. L.J. 557, 599–600 (2021). Might the combined amounts for mandatory restitution and special assessment violate the Excessive Fines Clause in some cases?

Page 648: Insert new notes 5 and 6:

5. **Views of Department of Justice.** In April 2023, the U.S. Department of Justice issued a "Dear Colleague" letter to state and local court officials across the country reminding them of constitutional limitations on the imposition and enforcement of fines and fees, including under *Bearden*, and also highlighting some public policy concerns with economic sanctions. DOJ observed,

> Imposing and enforcing fines and fees on individuals who cannot afford to pay them has been shown to cause profound harm. Individuals confront escalating debt; face repeated, unnecessary incarceration for nonpayment of fines and fees; experience extended periods of probation and parole; are subjected to changes in immigration status; and lose their employment, driver's license, voting rights, or home. This practice far too often traps individuals and their families in a cycle of poverty and punishment that can be nearly impossible to escape. The detrimental effects of unjust fines and fees fall disproportionately on low-income communities and people of color, who are overrepresented in the criminal justice system and already may face economic obstacles arising from discrimination, bias, or systemic inequities.

> Fines and fees can be particularly burdensome for youth, who may be unable to pay court-issued fines and fees themselves, burdening parents and guardians who may face untenable choices between paying court debts or paying for the entire family unit's basic necessities, like food, clothing, and shelter. Children subjected to unaffordable fines and fees often suffer escalating negative consequences from the justice system that may follow them into adulthood.
>
> Notably, in addition to raising serious legal and practical concerns, assessment of unaffordable fines and fees often does not achieve the fines' and fees' stated purposes. In many cases, unaffordable fines and fees undermine rehabilitation and successful reentry and increase recidivism for adults and minors. And to the extent that such practices are geared toward raising general revenue and not toward addressing public safety, they can erode trust in the justice system.

Among many other recommendations, for purposes of applying *Bearden*, DOJ encourages states to recognize a presumption that youth are unable to pay fees and fines. DOJ further recommends that *Bearden*'s protections for indigent defendants be extended from incarceration to other sanctions for nonpayment, e.g., extended terms or more onerous conditions of supervision. The DOJ letter is available on-line at https://www.justice.gov/opa/press-release/file/1580546/download.

6. **A Civil Remedy for Indigent Defendants Subject to Aggressive Debt-Collection Practices?** An ongoing civil class action lawsuit challenges certain debt-collection practices used to enforce fines and fees in Oklahoma. In a recent decision, the Tenth Circuit summarized the key allegations of the complaint as follows:

> Plaintiffs are impoverished individuals convicted of criminal or traffic offenses and assessed fines and fees as part of their sentences. At sentencing, or after release from incarceration following a prison sentence, Plaintiffs were instructed to make payments or set up payment plans with a "cost administrator." According to the [complaint], the illegal debt-collection scheme begins when, after a missed payment, delay in payment, or multiple requests for an extension, a court clerk or cost administrator seeks a failure-to-pay arrest warrant without providing notice to the debtor. This warrant request is signed by a state-court judge as a matter of course, without any scrutiny or hearing, and is executed by a sheriff who is aware no notice or hearing has been provided. . . .
>
> After an initial warrant for nonpayment is issued, the court clerk or sheriff has discretion to transfer a case to Aberdeen [Enterprizes, II, Inc.] for collection, at which point a 30% surcharge is added to the total debt owed. Transfer results from a contract between Aberdeen and [the Oklahoma Sheriffs Association]; OSA pays Aberdeen for its collection services from the amount of the surcharge collected from the debtor. Aberdeen has no revenue source other than payments

by court debtors. The process of transferring a case to Aberdeen and adding the surcharge occurs without notice to the debtor; without involvement of a judge; and without any opportunity for the debtor to be heard.

Once Aberdeen takes over collection, it begins repeatedly contacting the debtor and his or her family and threatening arrest to coerce payment. Aberdeen makes such threats even when it knows the debtor is too poor to pay. Aberdeen has trained its employees to coerce debtors into making payments they cannot afford by (1) claiming the only way to remove an active arrest warrant is to make a payment Aberdeen deems sufficient and (2) threatening the debtor's imminent arrest. . . .

If its threats are unsuccessful, Aberdeen contacts court clerks and/or cost administrators to request an arrest warrant for nonpayment. When Aberdeen makes this request, it does not provide court officials with any of the information it possesses about the debtor's inability to pay. Court clerks help Aberdeen seek new arrest warrants based solely on unsworn allegations of nonpayment and without inquiry into the reason for nonpayment or ability to pay. These warrants, like the initial failure-to-pay warrants, are routinely issued by judges—without a hearing or providing the debtor any opportunity to explain why he or she did not pay—and executed by the county sheriffs. . . . Because these warrants are sought without a factual basis in the warrant application or findings in the record about ability to pay, the [complaint] alleges the warrants violate, inter alia, the Fourth and Fourteenth Amendments.

When debtors are arrested on failure-to-pay warrants, Sheriffs keep them in jail if they are too poor to pay a fixed sum required for their release—$250 in Tulsa County and the amount of debt owed in Rogers County. Those who cannot pay remain in jail for days before they see a Judge. Those delayed hearings are often the first time an indigent debtor has a chance to explain to a Judge that she is financially unable to pay. Nevertheless, some Judges, specifically including judges in Rogers County, order individuals to remain in jail and "sit out" their debt if they cannot make a payment when they are eventually brought to court. Neither Sheriffs, Judges, nor anyone else provide any of the inquiries, findings, or procedural safeguards required by Supreme Court precedent and state law before a person can be jailed for nonpayment.

Graff v. Aberdeen Enterprizes, II, Inc., 65 F.4th 500 (10th Cir. 2023) (citations to complaint omitted). If the allegations are proven to be true, do you think the Oklahoma practices do, in fact, violate *Bearden* or any other constitutional doctrine?

Page 626: Insert at end of note 2:

In April 2023, in a case exploring the constitutional rights of innocent owners, the U.S. Supreme Court granted *certiorari* to determine whether a car owner has a right to an immediate hearing when his or her vehicle is seized by the government based on the illegal activity of another, e.g., when a parent loans the family car to a child, who then uses the car to transport drugs. The case is *Culley v. Marshall*.

CHAPTER 11: COLLATERAL CONSEQUENCES OF CONVICTION

Page 691, top: Omit last sentence in the paragraph ("Florida is not alone…") and insert:

Florida is not alone in its approach. According to one recent account:

> Alabama, Arizona, Arkansas, Connecticut, Georgia, Kansas, South Dakota, Tennessee, and Texas also deny re-enfranchisement indefinitely based on nonpayment of certain criminal assessments. Another fifteen states practice an indirect form of [felony financial disenfranchisement], whereby parole or probation can be extended for those who do not repay criminal assessments; in turn, voting rights are delayed for those still under supervision. In sum, nearly 160 million Americans live in states where [felony financial disenfranchisement] is regularly practiced.

Neel U. Sukhatme et al., *Felony Financial Disenfranchisement*, 76 VAND. L. REV. 143, 148-49 (2023).

CHAPTER 12: SENTENCE REVIEW & MODIFICATION

Page 779: Insert at end of note 3:

In April 2023, the U.S. Sentencing Commission promulgated amendments to its "compassionate release" guideline (§ 1B.13) in response to the First Step Act and the burgeoning case law on 18 U.S.C. § 3582(c)(1)(A). Unless Congress takes contrary action, the amendments take effect in November 2023. Key aspects of the amendments include the following:

- Clarification that the guideline applies to both defendant- and Bureau-initiated motions for early release;
- Clarification that rehabilitation can be considered in combination with other circumstances as a basis for release;
- Broadening of medical conditions that are recognized as sufficient to support release;
- Broadening of family circumstances that are recognized as sufficient to support release;
- Addition of a newly recognized ground for release, that is, the defendant's victimization (sexual or physical) while in Bureau custody by Bureau personnel or contractors; and

- Resolution of the circuit split on the important question of whether non-retroactive changes in the law can be the basis for release.

With respect to the latter point, the Commission adopted a middle-ground position, authorizing use of non-retroactive changes in the law, but only in certain limited circumstances involving a defendant who has served at least ten of years of an unusually long sentence.

Page 779: Insert at end of note 6:

For more background on second-look in the MPC:S, including arguments made by opponents of the provision, see Kathryn E. Miller, *A Second Look for Children Sentenced to Die in Prison*, 75 OKLA. L. REV. 141, 146-48 (2022).