

SAMPLE ANSWER TO FINAL EXAM

MULTIPLE CHOICE

1. (A) is incorrect, because a mistake regarding the status of the hammer as a deadly weapon is a question of law, not fact. (B) is incorrect for the same reason as (A); (C) is correct, because involuntary intoxication is treated the same way as mental disease or defect; (D) is incorrect, because (A) and (B) are incorrect; (E) is incorrect because (C) is correct.

2. (A) is incorrect because it is a mistake of law; (B) is incorrect for the same reason; (C) is correct, because it would mean that Rose was not negligent in making the mistake of fact regarding Sarah's age. Since there is only one correct answer, (D) and (E) are incorrect.

3. (A) is incorrect, because possession is different from legal ownership. Barry possessed the car as well as the contents of the car; (B) is incorrect, because one can still be in possession of something even if one isn't thinking about it specifically at the time. (C) is incorrect, because there is no duress involved; (D) is correct, because a mistake of fact is a defense to the charge of possession.

4. (A) is incorrect, because one can be an accomplice by agreeing to aid another, and the other actually attempts to commit the crime. (B) is incorrect, because agreeing to aid is sufficient to make one an accomplice; (C) is correct, because of the rule of merger in MPC § 5.05(3).

5. (A) is incorrect, because duress can only come from a human source threatening adverse consequences; (B) is incorrect, because there is no showing that her behavior resulted from a mental disease or defect; (C) is the best answer, even though she would likely lose. Unlike the *Schooner* case, here the behavior was actually directed at preventing the harm that she believed was greater than the harm she caused. (D) is incorrect, because there is no mistake of fact that would change her culpability; and (E) is incorrect because mistake of law is typically no defense.

6. (A) is correct, because force or the use of force is necessary to convict for rape; (B) is incorrect, because rape can only occur if the intoxication is produced *for the purpose* of lowering resistance; here Becky got intoxicated on her own; (C) is incorrect, because he could be reckless in failing to recognize that she was submitting out of fear; and (D) is incorrect, because the mens rea required for rape is recklessness, and intoxication is not a defense in such cases.

7. (A) is incorrect, because the MPC doesn't recognize legal impossibility as a defense; (B) is incorrect, because he actually manufactured a driver's license, and delivered it; (C) is correct, because of the merger rule stated in § 5.05(3); (D) is incorrect, because he agreed with Cindy that he should commit the crime

8. (A) is correct, because knowledge of a "high probability" of a fact may be sufficient to establish knowledge; (B) is incorrect, because knowledge is still required for the element of whether they were explosives; (C) is incorrect, because Leonard's mens rea is irrelevant; (D) is similarly incorrect.

9. (A) is incorrect, because there must be actual subjective knowledge on Olivia's part; (B) is incorrect, because one is still obligated to retreat if one knows that he or she can retreat with complete safety; (C) is correct, because it would be "imperfect" self-defense; (D) is incorrect, for the same reason as (B).

10. (A) is incorrect, because the MPC does not use the "natural and probable consequences" doctrine in conspiracy law; (B) is incorrect, because knowledge is insufficient; there must be agreement; (C) is incorrect, because there could be "unilateral conspiracy"; (D) is therefore

the correct answer.

11. (A) is incorrect, because the statute imposes a duty of care; (B) is incorrect, because an omission can cause harm if there is a duty to act; (C) is correct, because the statute doesn't employ a mens rea standard, and thus recklessness in the minimum mens rea (even if the "reasonable assistance" is a mens rea term, rather than a description of the type of assistance required, recklessness would satisfy the negligence standard); (D) is incorrect, because there is no requirement of a purpose to harm.

12. (A) is correct, because the standard is whether a reasonable person could discern the line between lawful and unlawful conduct; the defendant's state of mind is irrelevant to the determination of vagueness, which is an issue of law. (B) is incorrect, for the same reasons explained in (A); (C) is incorrect, because the statute only employs the purpose standard with respect to *following* the person; whether or not they were put in fear is a question of recklessness. (D) is incorrect for the same reason.

ESSAY QUESTION 1

Historically, suicide was a crime, and attempts to commit suicide were also criminal. In addition, one could be charged with being an accomplice to committing suicide, or with murder, if one encouraged another to commit suicide). But to avoid confusion and to prevent the defendant from arguing that the act of the suicide was a superseding cause, states adopted laws that make assisting suicide a crime. Apparently there is a bill that would repeal this law.

Before getting into the merits of the legislation, it is important to identify the distinction between merely "letting nature take its course" -- rejecting efforts to keep oneself alive -- and affirmative efforts to end one's life (suicide) or the life of another (assisted suicide). Not only is it legally permissible to allow someone to die of natural causes (rather than doing things like using a respirator to keep them alive), but it is actually illegal to sustain life when the individual rejects life-saving treatment. Because health care providers are required to obtain the informed consent of the patient before treating the patient, an individual who wants to let "nature take its course" can refuse medical treatment (including food and water), accepting only pain medication, and death will result. This is not considered suicide, or assisted suicide. By contrast, taking (or administering) medication for the purpose of causing death (as distinguished from relieving pain, even if the effect is to hasten death) is forbidden in most jurisdictions.

As described below, advocates of "death with dignity" think this distinction is artificial. The first efforts to create a right to assisted suicide were constitutional challenges (*Glucksberg* and *Quill*) that argued for recognition of a "right to die" similar to the right to reproductive choice (*Roe*), later characterized as the freedom to "define one's own concept . . . of the mystery of human life." Although this was later invoked to defend the right to sexual autonomy (*Lawrence*), the Supreme Court in *Glucksberg* rejected the claim that among the "fundamental liberties" protected by the constitution was the right to cause one's own death.

Nonetheless, while the constitution does not contain a *right* to assisted suicide, it *permits* states to remove legal prohibitions against assisted suicide; first Oregon, then Washington, passed "Death with Dignity" initiatives that modified the law on assisted suicide. These laws carve out a (narrow) exception to laws prohibiting assisted suicide that permit an individual to obtain the means (typically lethal doses of medication like barbiturates) to commit suicide if they meet certain criteria. The individual must face a terminal illness, have consulted with physicians who verify the condition, and must wait a period of time between requesting the assistance and actually ending their lives.

Pro. Those who favor adopting "death with dignity" statutes rely on three distinct arguments.

First, they challenge the distinction between choosing not to live and choosing to die. If everyone agrees that an individual has a fundamental right to refuse medical treatment--even food and water--that will keep them alive, then it is inconsistent to deny them the means to accomplish the same end by a more humane means. In particular, using the criminal law to restrict how physicians and loved ones honor the wishes of a dying person is a misuse of the criminal law. Even Justice Scalia has sympathy with this argument. Second, reviving the arguments made by the plaintiffs in *Glucksberg*, even if the federal constitution doesn't explicitly protect the "right to die," the respect for individual autonomy should extend to the choices made at the end of life as to how we make our final exit. Third, the practice of hastening death has been around for a long time, and by pretending that health care providers aren't already practising a form of "death with dignity" makes it more difficult to prevent abuses. By giving legal sanction to the right forms of euthanasia, we are more likely to identify and prevent the abuses that opponents rightly fear.

Con. Opponents of "death with dignity" statutes defend the distinction between letting nature take its course and affirmatively killing someone. It is a bright line that limits the power of the state and protects the weak from exploitation by the strong. Second, the "right to die" is easily converted into the "obligation to die." The sick, the elderly, the handicapped will be told, in effect, that they are a burden on their loved ones, and on society generally, and that it is their duty to stop depleting society's limited resources. This was the beginning of the Nazi program of euthanasia that ended in genocide. Third, the legal protections typically offered to prevent abuse are easily manipulated, and once a small group (doctors, relatives) are entrusted with the authority to kill a weak or vulnerable person, it is a short step to the "death panels" that history has shown will be entrusted with deciding who lives and who dies.

On a technical note, the description of the bill as "repealing" the assisted suicide statute is more radical than the "death with dignity" initiatives passed in Oregon and Washington. Those initiatives created exceptions to existing law, but didn't repeal the statute entirely. That alone suggests that the bill as it currently stands shouldn't be adopted.

ESSAY QUESTION 2

The facts for this question were drawn from the case of *State v. Stark*, 158 Wash.App. 952, 244 P.3d 433 (2010), which reversed her convictions for murder and conspiracy to commit murder based upon errors in the instructions. In *Stark* the defendant actually killed the victim, but the self-defense issues are pretty much the same. Lenore Walker, the expert who testified in *State v. Kelly*, testified on Stark's behalf.

Overview. Angela Sprague could be charged with attempted murder and with conspiracy to commit murder. While she cannot be convicted of both (MPC § 5.05(3)), she can be tried for both, and the evidence might support one but not the other.

Attempted Murder

A person is guilty of murder if she causes the death of another human being purposely or knowingly. MPC § 210.2. A person is guilty of an attempt to commit murder if she does something

(in this case, firing several shots at Duane) with the purpose of causing his death. There seems to be little doubt that Angela was attempting to kill Duane. She admits as much. The big question is whether or not she is entitled to self-defense as justification.

Self-Defense. MPC § 3.04 permits Sprague to use deadly force if she believed that such force was "immediately necessary" to protect herself from a threat of death or serious bodily harm (§ 3.04(2)(b)) directed at her by Duane. Obviously, since she is the only person who is able to testify first-hand as to what happened when Duane came into the kitchen. If the jury believes that he was threatening her with unlawful force, then she might be entitled to use deadly force to defend herself. However, there are a number of considerations.

"Imperfect" Self-Defense. MPC § 3.04 permits the use of deadly force, even if it is unnecessary, so long as the actor *believes* that such force is necessary. While she would still be guilty of crimes (such as assault, including aggravated assault) that require only recklessness or negligence (MPC § 3.09(2)), the assignment here was to analyze crimes based upon murder (§ 210.2), which would be attempted murder or conspiracy to commit murder, there must be a *purpose* to cause death. Thus, even if Angela was reckless, or just negligent, in using deadly force against Duane, she is not guilty of attempted murder so long as she *believed*, however unjustifiably, that deadly force was *immediately* necessary. Thus, her credibility will be critical. The fact that she ordered the two people who might have helped protect her from Duane to leave the home, and *then* she fired the gun, suggests that she was not acting to protect herself, but rather wanted to kill Duane.

Relevance of "battered person" syndrome. It is clear that Angela had been the victim of domestic abuse. Ordinarily that evidence would be significant, and the defense will undoubtedly try to get the jury to see how the years of abuse would have colored Angela's perception, but the prosecution might seek exclusion of this evidence for two reasons. First, the simple question for the jury is whether or not Angela's testimony should be believed. Whether her behavior under the circumstances was reasonable or even reckless is beside the point. Second, Angela is not trapped in a domestic abuse situation now. She is unlike the typical victim who argues that deadly force was her only way out. Nonetheless, the defense would still argue that the question of believability is directly affected by whether the jury understands how the world appears to a woman who has been battered. The MPC doesn't address the question of when expert testimony concerning the "battered person" is admissible, or how to instruct the jury regarding such testimony.

Retreat. Ordinarily, a defendant is required to retreat rather than use deadly force (§ 3.04(2)(b)(ii)). However, there is no obligation to retreat when the defendant is in his or her dwelling (§ 3.04(2)(b)(ii)(1)), so long as she is not the initial aggressor. Since Angela had been granted the right to the family home, she was in her own dwelling and therefore wouldn't have to retreat.

If Angela is guilty of attempted murder, it is a second degree felony (§ 5.05(1)).

Conspiracy to Commit Murder

Even if the jury can't find beyond a reasonable doubt that Angela was not justified in believing that deadly force was necessary to protect herself, Angela may have planned to kill Duane anyway, making her guilty of conspiring to commit murder.

Angela is guilty of conspiring to commit murder if she "agrees with [Moore] that . . . [she] will engage in conduct that constitutes such crime." (MPC § 5.03(1)(a)) The question is whether Brian will testify concerning what the detectives believe to be the conversation that Angela had with Brian a week before the shooting. Prosecutors would have to prove an agreement that Angela would kill Duane under circumstances that would make it appear that Angela was acting in self-defense, but in fact was murder, because she would have "provoked the use of force against [her]self" (MPC § 3.04(2)(b)(i)). No overt act is required, because it is a crime of the first or second degree (MPC §

5.03(5)).

If Brian testifies that Angela agreed to a plan for her to "stage" self-defense, then it seems likely that the jury would believe that Angela was guilty both of conspiring to commit murder, and also of attempted murder. However, under the MPC she cannot be convicted of both (MPC § 5.05(3)).

QUESTION 2½

There are two primary differences if the MPC did not apply. First, the rules for self-defense may differ from the MPC, and the rules for conspiracy may be different.

Self-defense. Many jurisdictions (such as New York, in the *Goetz* case), do not permit "imperfect" self-defense. Instead, they require that the use of force in self-defense be both honest *and* reasonable. This would make it easier for Angela to be convicted. In addition, there may be more restrictive rules regarding the requirement to retreat. The MPC does not require a person to retreat from their own home, but there may be different interpretations of whose home it was. Particularly in a domestic dispute such as this, if Angela could have retreated with complete safety, she might have an obligation to do so.

Conspiracy. Many jurisdictions (such as the federal system) do not merge the commission of the crime with a conspiracy to commit the crime. (The so-called *Pinkerton* rule) Thus, if Angela were found guilty of attempted murder, she could also be found guilty of conspiring to commit murder, and punished for both crimes. This would effectively double the punishment compared to the MPC. On the other hand, many jurisdictions don't permit so-called unilateral conspiracy, and there would have to be a true "meeting of minds" with Brian Moore. (The MPC, by contrast, permits conviction for conspiracy even if only one of the conspirators actually intended to have the crime committed.)

Spring 2011 Criminal Law Checklist

QUESTION 1

- | | |
|--|---|
| <input type="checkbox"/> History of Suicide / Assisted | <input type="checkbox"/> Pro: Letting die / killing indistinguishable |
| <input type="checkbox"/> Intervening / Superseding Act doctrine | <input type="checkbox"/> (Scalia agrees) |
| <input type="checkbox"/> | <input type="checkbox"/> (2) Personal autonomy over state control |
| <input type="checkbox"/> Distinguishing Letting Die from Killing | <input type="checkbox"/> Constitution supports if not requires |
| <input type="checkbox"/> Consent required for med. treatment | <input type="checkbox"/> (3) Provide rules for existing practice |
| <input type="checkbox"/> Thus, individual can always refuse | <input type="checkbox"/> Otherwise , practice persists w/o control |
| <input type="checkbox"/> Right to let nature "take its course" | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> Con: Killing is different from letting die |
| <input type="checkbox"/> Constitutional challenges | <input type="checkbox"/> Weak should be protected |
| <input type="checkbox"/> <i>Glucksberg / Quill</i> | <input type="checkbox"/> Right to die ==> duty to die |
| <input type="checkbox"/> No " fundamental liberty " in constitution | <input type="checkbox"/> No legal limitations in this legislation |
| <input type="checkbox"/> PP v. Casey mystery passage doesn't apply | <input type="checkbox"/> |
| <input type="checkbox"/> State initiatives | <input type="checkbox"/> |

QUESTION 2

- | | |
|--|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Retreat Rule |
| <input type="checkbox"/> Attempted Murder | <input type="checkbox"/> Not required in one's dwelling |
| <input type="checkbox"/> Purpose of causing death | <input type="checkbox"/> Court order made it her dwelling |
| <input type="checkbox"/> Shooting at Duane appears to satisfy | <input type="checkbox"/> Attempted murder = 2d degree felony |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Self-Defense (MPC § 3.04) | <input type="checkbox"/> Conspiracy to Commit Murder |
| <input type="checkbox"/> " Imperfect " Self-Defense permitted | <input type="checkbox"/> Will Moore incriminate Angela? |
| <input type="checkbox"/> A must Believe force immediately necessary | <input type="checkbox"/> Solicitation not enough; A must agree |
| <input type="checkbox"/> Deadly Force OK if death/Ser.Bod.Inj | <input type="checkbox"/> No need for overt act |
| <input type="checkbox"/> What will jury believe? | <input type="checkbox"/> Conspiracy may be unilateral |
| <input type="checkbox"/> Why did A order friends to leave? | <input type="checkbox"/> If done to provoke , no self-defense |
| <input type="checkbox"/> | <input type="checkbox"/> Attempt or conspiracy / not both |
| <input type="checkbox"/> " Battered woman " syndrome | <input type="checkbox"/> |
| <input type="checkbox"/> Is it admissible re why she fired? | <input type="checkbox"/> |
| <input type="checkbox"/> BWS could help jury assess believability | <input type="checkbox"/> |
| <input type="checkbox"/> MPC doesn't specify when relevant | <input type="checkbox"/> |

QUESTION 2½

- | | |
|--|--|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Conspiracy |
| <input type="checkbox"/> Difference in self-defense | <input type="checkbox"/> No <i>Pinkerton</i> rule |
| <input type="checkbox"/> No imperfect self-defense | <input type="checkbox"/> Thus dual conviction permissible |
| <input type="checkbox"/> Belief must be reasonable | <input type="checkbox"/> But no unilateral conspiracy |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | |

Exam Number _____