

FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1. **(A) is the BEST** answer, because it includes the requirement that he be negligent in failing to recognize the danger to Tracie; (B) is incorrect, because even if he had a duty to her, he may not have been negligent in failing to recognize that she was in danger; (C) is incorrect, because it imposes a standard of recklessness, whereas the crime only requires negligence; (D) is incorrect, because he may have had a duty to prevent the injury.

2. **(A) is correct**, because a recklessness standard applies to the element of the non-recyclable character of the material; (B) is incorrect, because even if he removed the bag, he still could be convicted of committing the crime; (C) is incorrect because it imposes a higher culpability standard for the circumstance elements than is required for the commission of the crime; and (D) is incorrect because it requires a knowledge standard for the circumstance element.

3. (A) is incorrect, because knowledge isn't enough to satisfy the requirement that she have the *purpose* of facilitating his commission of the crime; (B) isn't the best answer, but it isn't exactly wrong either, so I gave it credit as a correct answer. The MPC is deliberately ambiguous with respect to the circumstance element (in this case, the amount of the cocaine). Thus, it's possible that she could be convicted even if she had no culpability with respect to the amount; **(C) is correct**, because if the crime didn't occur, Sally isn't an accomplice to committing the crime; (D) is incorrect, because Tom might have some personal defense (e.g., insanity) that doesn't apply to Sally.

4. **(A) is correct**, because the defense of necessity doesn't apply unless the harm to be avoided is greater than the harm that he seeks to avoid; (B) is incorrect, because negligence isn't sufficient to satisfy the mens rea of the crime, which requires intent or purpose; (C) is incorrect for the same reason; (D) is incorrect, because the sincerity of his belief is insufficient to invoke the justification; he has to be right about it.

5. **(A) is correct**, because she committed a substantial step in approaching his house; the only question is whether her conduct was strongly corroborative; (B) is incorrect, because her actual belief is not inconsistent with a finding that she had the purpose of entering a place where she did not have a right to be. (C) is incorrect, because it employs a standard that is higher than the one used by the MPC; (D) is incorrect, because her choice to leave was not voluntary; it was a result of being unsuccessful in entering the house.

6. (A) is incorrect, because it is not enough to have a mental disease or defect; the mental disease must have been the reason for the criminal conduct; (B) is incorrect, because the act of driving was voluntary, even though falling asleep was not; (C) is incorrect, because he might have a defense based upon the first prong of the insanity defense even though the second one didn't apply; and thus **(D) is the correct answer**.

7. (A) is an incorrect answer, because the MPC permits a unilateral conspiracy; (B) is incorrect, because again it is sufficient if the defendant believes that there was an agreement; (C) is **correct**, because it is sufficient for a conspiracy conviction; and (D) is incorrect because it imposes a requirement of an overt act, which doesn't apply to first or second degree felonies.

8. (A) is incorrect, because she may have owed a duty to help him because of the contractual relationship between them; (B) is incorrect, because whether her conduct was

reasonable would be a question for the jury; **(C) is correct**; even though it specifies a standard of recklessness, it would be enough to satisfy the negligence standard; and (D) is incorrect for the same reason as (B).

9. (A) is incorrect, because it doesn't posit that intoxication had anything to do with the decision to shoot Leon; **(B) is correct**, because he would qualify for the imperfect self-defense rule; (C) is incorrect, because Walter still may have honestly believed that he was about to receive a serious bodily injury; and (D) is incorrect because attempted murder is not a general intent crime.

10. (A) is incorrect, because the "transferred intent" rule could apply; (B) is incorrect, because under the transferred intent rule, the injury to a third person doesn't need to be foreseeable; **(C) is correct**, because of the principle of transferred intent; and thus (D) is incorrect, because the defenses applied earlier to the shooting of Leon might also apply to Donna.

11. **(A) is correct**, because Jason may otherwise satisfy the requirements of § 8967; (B) is incorrect, because what state you are in would be a question of fact rather than a question of law; (C) is incorrect, because even if Jason didn't intend to do so, it might be sufficient to show that he was reckless as to which state he was in; (D) is incorrect, because his motivation and Susan's best interests are not relevant to whether he violated § 8967.

12. (A) is incorrect, because the *application* of the penal code to these particular facts is a mistake of law for which no culpability is required; (B) is incorrect, since he operated the yacht and allowed the thing to fill up; so long as there is a voluntary act that leads to the bad result, the requirement is satisfied; **(C) is correct**, because Ben only has to be reckless with respect to the discharge; and (D) is incorrect because it doesn't take into account whether Ben was aware of the risk that the holding tank would overflow.

ESSAY 1

The retreat rule was inherited from the common law, and placed a higher value on the protection of human life, even if it required the surrender of a right that the actor might otherwise enjoy. For example, if a man in a wheelchair approaches you with a knife, and you have the opportunity to run away with complete safety, the Model Penal Code approach requires you to do so, even though the person wielding the knife had no right to force you to do so. By contrast, so-called "stand your ground" laws authorize an actor's use of deadly force if he faces a threat of sufficient magnitude (e.g., death, rape, or kidnapping), even if the actor could also avoid the threat by retreating.

Even though many states adopted the common law view of retreat, some states (influenced by the culture of the West) thought it was "unmanly" to require a person to retreat, and therefore rejected the retreat rule inherited from the common law. The MPC retreat rule is actually quite restrictive: it only requires that one retreat when one *knows* (not simply believes there is a high probability, or even should know) that the actor can do so *with complete safety*. Thus, the rule doesn't apply if the jury finds (or, more accurately, unless the jury believes the contrary beyond a reasonable doubt) that the defendant harbored some belief, however unreasonable or however improbable, that he might suffer *some* injury if he tried to flee.

Nonetheless, some people support a "stand your ground" law in the belief that the threat of using deadly force in self-defense actually makes the community safer. There is some empirical evidence to support the (counterintuitive) theory that "more guns, less crime" – restricting the availability of handguns actually makes a community more dangerous rather than safer. Along those lines, it might be thought (and it might turn out to be true) that by adopting a "stand your ground" law, a state will experience less crime because of the fear that more citizens will use deadly force in self-protection than if the law seems more sympathetic to the criminal.

By contrast, those who oppose a "stand your ground" law believe that, given the already

generous provisions for a defendant under the MPC, revising the statute to permit the defendant to use deadly force even when he knows he can retreat with complete safety reflects a profound disrespect for the value of human life, and permits a disproportionate and unnecessary use of deadly force. It permits the gratuitous use of deadly force essentially for a trivial reason – to protect a relatively minor property right or to support a “manly” approach to confrontation.

ESSAY 2

The facts of this case were (loosely) drawn from *State v. Almaguer*, 232 Ariz. 190, 303 P.3d 84 (2013), which affirmed the defendant’s conviction for manslaughter. It was modified to focus on the behavior of Cota rather than Almaguer.

There are two ways that Cota could be convicted of manslaughter. First, the jury might find that Cota recklessly caused Antonio Jr.’s death. The second would be if he were found to be an accomplice to Almaguer’s killing of Antonio Jr. Both will be analyzed below. Cota would have available to him defenses based upon his intoxication and self-defense.

Manslaughter

Manslaughter is defined as causing the death of another human being (MPC § 210.1) recklessly (MPC § 210.3). The first requirement would be to show that Cota actually caused Antonio Jr.’s death. It is unclear from the facts exactly what happened. The report says that “Almaguer’s gun went off,” but it’s not clear whether Almaguer actually fired the gun, or it somehow went off while the two were struggling. Cota wasn’t directly involved in this part of the fight. He could only be blamed for his initial act of urinating from the balcony, and his later act of removing his shirt and preparing to join the fight. However, both suffer from a defect in causation. Even if the act of urinating from the balcony was a but-for cause of Antonio Jr.’s death, it could hardly be said to be a proximate cause, which does not allow a finding of causation if the later result is so remote and/or accidental as to lack a just bearing on the defendant’s guilt. On the other hand, Cota’s removing his shirt, which is more directly involved in the fatal shooting, seems to lack the element of but-for cause.

In addition, even assuming the MPC causation test were satisfied, the prosecution would still have to prove beyond a reasonable doubt that Cota had the *mens rea* of recklessly killing Antonio Jr. Urinating from the balcony would have to be done with a conscious awareness of the potential that this act could lead to someone’s death. Cota would persuasively deny any such awareness (although his later encouragement of Almaguer to shoot again could be used to suggest that Cota and Almaguer were deliberately provoking a confrontation).

Accomplice to manslaughter

More plausible is the charge that Cota was an accomplice to manslaughter. To convict Cota, the prosecution would have to show that Cota had the purpose of facilitating the conduct that risked the death of Antonio Jr., and that with respect to that risk Cota acted recklessly.

Actus reus of Accomplice Liability. The *actus reus* of accomplice liability is satisfied if the defendant “aids or agrees or attempts to aid [the principal] in planning or committing” the offense (MPC § 2.06(3)(ii).) Here the prosecution would argue that in taking off his shirt and getting ready to join the fight, Cota was agreeing to aid or attempting to aid Almaguer in fighting Antonio Sr. One difficulty with this is for the prosecution is that it is only later that Antonio Jr. joined the fight. However, to the extent that Cota was reckless with respect to the fact that *somebody* might be

fatally shot as a result of the fight, the change in identity of the victim doesn't prevent a conviction.

The *mens rea* for accomplice liability distinguishes between the *conduct* element(s) and the *result* element(s). The *mens rea* of *purpose* applies to the conduct element – and based on the above discussion a jury could find that Cota had the purpose of helping Almaguer in the fight. On the other hand, mere *recklessness* is sufficient with respect to the result (death). In this context Cota would be found reckless if he was aware of a risk that death might result and his choice of encountering the risk was a gross deviation from the standard of a law-abiding person. So long as Cota was reckless with respect to the risk that fighting could lead to death, the fact that he didn't have the *purpose* of causing anyone's death doesn't prevent his conviction. In this respect the case is similar to *McVay* or the dragracing cases, where the defendant intended to facilitate conduct that the defendant was aware recklessly risked death.

With respect to Cota's actually was aware of the risk of death we have conflicting evidence. On the one hand, Cota would undoubtedly claim that he only wanted to fight – he didn't want to kill anybody. (His phone call from the car seems to support this.) On the other hand, immediately after the shot was fired, Cota seemed to want Almaguer to continue shooting (although it's unclear who he wanted Almaguer to shoot, since Almaguer was pointing the pistol at two other men, not Antonio Jr. Even though this encouragement occurred after the fact, it suggests that Cota was not simply anticipating a fight and was surprised that it resulted in a fatal shooting.

A key question would be whether Cota was aware at the time they arrived at the party that Almaguer had a handgun in his belt, and/or that Almaguer was likely to bring it out if a fight erupted. If he was aware of that fact, worse yet somehow deliberately provoked a fight knowing that it might end badly, the prosecution would have strong evidence that Cota was aware of the risk of a fatal shooting when he took off his shirt. On the other hand, if Cota had no idea that Almaguer was armed, it would be easier to show that he thought the risk was limited to injury in a fistfight, and he would then lack the *mens rea* necessary for manslaughter. Even if he *should* have been aware of that risk, unless the jury finds that he was consciously aware of a risk of death when he prepared to join the fight, unless the jury finds that he was *actually* aware of that risk the jury couldn't convict.

In summary, if Cota wanted to help Almaguer fight with Antonio, and Cota thereby recklessly risked a fatal shooting, Cota could be convicted of manslaughter.

Defenses

Cota could assert self-defense (or defense of others) and intoxication as defenses.

Self-defense (or defense of others). Under the MPC, an actor is justified in using force to defend himself or others (§ 3.04 and § 3.05). However, it is only justified if the actor believes such force is “immediately necessary” for the purpose of protecting himself or another person (§ 3.04(1) and § 3.05(1)(a)). Moreover, the justification is unavailable if the actor is reckless in forming the belief that such force is necessary (if the *mens rea* of the crime for which the defense is offered is satisfied by recklessness). To the extent that Cota asserts self-defense as a defense to manslaughter, he would lose the defense if he were reckless with respect to the need for using self-defense.

The facts aren't clear as to why Cota made preparations to join Almaguer in the fight. He may have believed that either he or Almaguer would be injured, perhaps seriously, and the use of force was necessary to prevent such injury. And Cota may have believed that, even if they weren't going to follow the Marquess of Queensbury rules, there would be appropriate limits on the fight. On the other hand, Cota may have been less interested in simply preventing harm and more prepared to exact some kind of revenge. The jury could still reject Cota's claim of self-defense (or defense of others) as being either insincere or recklessly formed.

It is a more difficult determination as to accomplice liability. Since Cota must have the *purpose* of helping Almaguer in the fight, it would be sufficient if Cota *actually* believed that such assistance was necessary, even if he formed such a belief recklessly. Particularly if Cota were

aware of Almaguer's possession of a handgun, he might have believed that once a fight got started it would escalate and cause harm. Even so, Cota's encouragement to keep shooting Antonio Jr. is in conflict with a claimed motive to prevent anybody from getting hurt.

An additional aspect of self-defense is the requirement to retreat if one *knows* that one can do so with *complete safety*. (§ 3.04(2)(b)(ii).) The prosecution might claim that any self-defense argument is unavailable because Cota could have simply stayed out of the fight. On the other hand, Cota could plausibly claim that once the fight started (since it had a lot to do with his own behavior), retreat in complete safety was not available. Moreover, retreat is only required in preference to the use of deadly force if the other can avoid injury with complete safety. (§ 3.05(2)(a))

Intoxication. Intoxication is available as a defense if the *mens rea* that the prosecution must prove is higher than recklessness. Otherwise, it is of no use. Thus, if Cota says he was so drunk he wasn't aware of the potential that Almaguer's gun might be involved in a fatal shooting, such awareness is immaterial. On the other hand, as with self-defense, the prosecution would have to prove purpose with respect to the conduct element of the accomplice charge. If Cota claims that as a result of his intoxication (by alcohol or marijuana) he didn't actually intend to assist Almaguer in the fight, it would be relevant evidence. However, the jury would very likely disbelieve him.

QUESTION 2½

The major differences in a non-MPC jurisdiction would be:

(1) *Standard for accomplice liability.* The common law classifications had principals and accessories, and accessories before the fact and after the fact. Also, in non-MPC jurisdictions (such as California in the *Luparello* case), one can be convicted not only for those crimes resulting from the conduct which the defendant aided or attempted to aid, but also for those crimes that are the "natural and probable consequence" of the original venture. Thus, in a non-MPC jurisdiction it would be sufficient if Cota only intended to assist Almaguer in fighting, if a natural and probable consequence of doing so would be a deadly encounter (similar to the facts in *Luparello*). It would not be necessary to show that Cota was aware of the risk of death.

(2) *Self-defense.* Whereas the MPC recognizes "imperfect" self-defense, and permits a belief in the need for force as a justification, many jurisdictions (such as NY in the *Goetz* case) reject imperfect self-defense and insist that the belief be both honest *and* reasonable. Thus, if Cota actually (but negligently) believed that his assistance in the fight was justified, a non-MPC jurisdiction would give him no credit.

(3) *Retreat.* Some jurisdictions would require retreat without the *knowledge* that retreat could be accomplished with *complete safety*.

(4) *Intoxication.* Some jurisdictions only permit evidence of intoxication as a defense to murder, rather than admitting it for any specific intent crime.

CHECKLIST

ESSAY 1

- | | |
|---|--|
| <input type="checkbox"/> Explanation of the Retreat Rule | <input type="checkbox"/> Pros |
| <input type="checkbox"/> Origin at Common Law | <input type="checkbox"/> Politically popular |
| <input type="checkbox"/> Rejection by Western “ manly ” states | <input type="checkbox"/> Sends a message re criminality |
| <input type="checkbox"/> MPC’s restrictive version | <input type="checkbox"/> May deter other criminal behavior |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> Cons |
| <input type="checkbox"/> | <input type="checkbox"/> Encourages disrespect for human life |
| <input type="checkbox"/> | <input type="checkbox"/> MPC rule already quite generous |
| <input type="checkbox"/> | <input type="checkbox"/> |

ESSAY 2

- | | |
|--|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Defenses |
| <input type="checkbox"/> Two theories for conviction | <input type="checkbox"/> Self-defense , MPC § 3.04 / 3.05 |
| <input type="checkbox"/> Manslaughter | <input type="checkbox"/> Only to protect against unlawful force |
| <input type="checkbox"/> | <input type="checkbox"/> Imperfect Self-defense |
| <input type="checkbox"/> Actus Reus + Mens Rea | <input type="checkbox"/> Belief is sufficient, even if unreason. |
| <input type="checkbox"/> Actus Reus : causing death | <input type="checkbox"/> No evidence he thought it necessary |
| <input type="checkbox"/> Urination “too remote / accidental” | <input type="checkbox"/> Retreat rule doesn’t seem to apply |
| <input type="checkbox"/> Shirt removal wasn’t a but-for cause | <input type="checkbox"/> Imperfect self-defense for accomplice |
| <input type="checkbox"/> Mens rea | <input type="checkbox"/> |
| <input type="checkbox"/> Recklessness is minimum standard | <input type="checkbox"/> Intoxication , MPC § 4.01 |
| <input type="checkbox"/> Conscious of risk + gross deviation | <input type="checkbox"/> Doesn’t help if recklessness is suff. |
| <input type="checkbox"/> C consciously aware of risk of death? | <input type="checkbox"/> Relevant to accomplice liability |
| <input type="checkbox"/> | <input type="checkbox"/> Did it affect his decisionmaking? |
| <input type="checkbox"/> Accomplice liability | <input type="checkbox"/> |
| <input type="checkbox"/> Aid/Attempt/Agree to assist in fight? | <input type="checkbox"/> |
| <input type="checkbox"/> Requires purpose to aid conduct | <input type="checkbox"/> |
| <input type="checkbox"/> Was C reckless re risk of death? | <input type="checkbox"/> |
| <input type="checkbox"/> Did C know about the handgun | <input type="checkbox"/> |
| <input type="checkbox"/> Post-shooting stmt v. “ accident ” | |
| <input type="checkbox"/> | |

ESSAY 2½

- | | |
|---|--|
| <input type="checkbox"/> Different test for accomplice | <input type="checkbox"/> Retreat rule might be more restrictive |
| <input type="checkbox"/> Use of nat. & prob. doctrine | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> Intoxication rules |
| <input type="checkbox"/> Different standard for self-defense | <input type="checkbox"/> Excluded from “ specific intent ” crimes |
| <input type="checkbox"/> No imperfect self-defense | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | |

Exam # _____

