Professor DeWolf Fall 2015
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FINAL -- SAMPLE ANSWER

MULTIPLE CHOICE

1. (a) is incorrect because he still has to complete a "substantial step." **(b) is the correct answer**; it may or may not be considered reconnoitering the place, but if it is so considered, it would qualify as a substantial step; (c) is incorrect because we don't know what his intentions were; and (d) is incorrect because it might be a substantial step

2. **(a) is correct** because the crime only requires negligence; (b) is incorrect, because even if it caused the death, we don't know if it was negligent or not; (c) is incorrect, because Steve assumed a duty by taking a job as the security guard; (d) is incorrect because a jury could find that it was not too remote or accidental.

3. (a) is incorrect, because the evidence might not support the finding of negligence; **(b) is correct**, because duress only applies where force is threatened; (c) is incorrect, for the same reason that (b) is correct; and (d) is incorrect, for the same reason.

4. (a) is incorrect, because it ignores the mens rea element; (b) is incorrect, because if he is at least reckless in failing to recognize that she was unconscious, he can be convicted; **(c) is correct**, because Peter must be at least reckless in failing to recognize that Stephanie was unconscious; (d) is incorrect, because one doesn't have to use force if the victim is unconscious

5. **(a) is correct**, because necessity requires that the crime inflict lesser harm than the harm sought to be avoided; (b) is incorrect, because it might still justify the defense of necessity; (c) is incorrect, for the same reason that (a) is correct; (d) is incorrect, because it doesn't require that the harm avoided exceed the harm committed;

6. (a) is incorrect, because the mistake was one of fact; (b) is incorrect, because the mens rea is knowingly or intentionally; (c) is incorrect for the same reason; and **(d) is thus correct.**

7. (a) is incorrect, because she may have a self-defense argument; (b) is incorrect because she might be suffering from a mental disease; **(c) is true and thus correct** – it seems unlikely that she would reasonably believe that, but given that assumption, she would be acquitted. (d) is incorrect, because intoxication would not provide a defense to a crime requiring only recklessness.

8. **(a) is correct;** (b) is incorrect, because he must be at least reckless with respect to the element of the nonrecyclable nature of roofing shingles; (c) is incorrect, because one can be an accomplice without meeting of the minds; (d) is incorrect, because it does not take Chelsea's actual mens rea into account

9. **(a) is correct;** (b) is incorrect, because the MPC doesn't recognize the distinction between factual and legal impossibility; (c) is incorrect, for the same reason; and (d) is incorrect because it was a mistake of fact, not law.

10. **(a) is correct;** (b) is incorrect, because the Code doesn't require dangerous proximity; (c) is incorrect, because Walter's abandonment was not voluntary; he was afraid of getting caught; (d) is incorrect, because he is charged with attempt.

11. (a) is incorrect, because Charles could still be charged with causing Bill's injury; (b) is incorrect, because one only need be reckless; **(c) is correct;** (d) is incorrect because it doesn't state the mens rea requirement.

12. (a) is incorrect, because he must be at least reckless with respect to the result element; **(b) is correct;** (c) is incorrect, because he could still be aware of a risk of harm; (d) is incorrect, because even minor participants can be found to be accomplices.

ESSAY 1

There are several key features of the Model Penal Code approach to the insanity defense. It builds upon previous formulations, such as the *M'Naghten* standard, but it also introduces some innovations. Like other versions, it applies the insanity defense only to one who suffers from a "mental disease or defect," who as a result lacks "substantial capacity" in one of two areas: either (1) to *appreciate the wrongfulness of his conduct*; or (2) to *conform his conduct to the requirements of law*. The first "prong" is sometimes referred to as the cognitive prong, while the second is referred to as the control prong. The MPC test differs in part from previous tests because it does not require what one court called a "complete prostration of faculties"; even if the defendant has some capacity to appreciate the wrongfulness of his conduct or to control it, if he lacks *substantial capacity* he may be acquitted.

The cognitive prong is fundamentally similar to the *M'Naghten* test in that it relieves the defendant of responsibility for criminal conduct if there is an inability to *understand the nature of his actions* (for example, if the defendant thinks that he is shooting a Martian rather than a human being); or if because of mental disease he doesn't understand the wrongfulness of committing crime (e.g., the defendant thinks that he is a secret agent who has a license to kill). The major difference between the cognitive prong of the MPC test and the earlier *McNaghten* test is that it is not simply a recognition test, but permits the defendant to avoid conviction if he lacks substantial capacity to *appreciate* the wrongfulness of his conduct. Thus, John Hinckley avoided conviction for shooting President Reagan in part because the jury found that he was unable to *appreciate* that what he was doing was wrong.

The second prong of the test – the control prong – is based on the MPC authors' belief that criminal conviction should only follow from acts over which the defendant has meaningful control. If a jury finds that the defendant, as a result of mental disease or defect, is unable to *control* his conduct, then it makes no more sense to punish him than it would to punish someone because their leg pops up after someone struck his kneecap with a reflex hammer.

Critics of the MPC test have focused on two areas. First, they doubt that the "appreciation" or "substantial capacity" provisions of the test are an improvement over the earlier requirements

that the defendant's mental disease or defect *prevented* the defendant from recognizing the wrongfulness of conduct. The fact that the defendant understands what he is doing, but doesn't *appreciate* the wrongfulness of his conduct, shouldn't be a bar to criminal conviction. (I may understand the service that Navy Seals provide without *appreciating* them.) And criminal guilt is not limited to those who have an unimpaired ability to abide by the law. Even those for whom lawful behavior is difficult are still subject to criminal conviction if they disobey. Why should it be different for someone who has some capacity, but perhaps lacks substantial capacity in these areas?

The more severe criticism has been leveled at the control prong. The theory of the MPC – that science (particularly the science of psychiatry) would be able to identify those who are *unable* to control their conduct (as distinguished from those who *can, but prefer not to*) has not held up over time. Psychiatrists can debate one another as to whether a particular individual suffers from some mental disease, and how most effectively to treat it, but they cannot provide reliable guidance in distinguishing from those who cannot obey the law, as distinguished from those who simply choose not to. Consequently, courts like *Lyons* decided that they would no longer recognize the control prong of the MPC test. Other jurisdictions have similarly reformulated their test for insanity. Congress eliminated the control prong after the *Hinckley* case.

Another approach has been to offer the jury a third alternative in addition to guilt or acquittal by reason of insanity: guilty but mentally ill. This approach is favored by those who recognize that a person may be mentally ill and yet still responsible for their criminal conduct. Moreover, it assures the jury that the defendant will be incarcerated in a place where they cannot harm the public further. Thus, defendants like Andrea Yates, who drowned her five children in the bathtub, may clearly be mentally ill, but she isn't free from responsibility for her conduct.

Nonetheless, many commentators point out that the debate over the insanity defense is overblown because very few cases actually raise the defense, and fewer still are successful. In addition, studies of jury verdicts comparing the different formulation of the test seem to make little difference in whether the jury applies the defense or not. Thus the debate is a tempest in a teapot rather than a genuine source of concern about the effectiveness of the criminal justice system.

ESSAY 2

Milton could be charged with two different kinds of crimes: first, he could be charged with *conspiracy* to commit arson; second, with being *an accomplice* to arson. He would assert the defense of duress, and would deny that he committed any *actus reus* on either charge.

Conviction of either crime requires proof of two elements: that the defendant committed a criminal act (*actus reus*) and that he did so with the requisite *mens rea* ("guilty mind").

Conspiracy to Commit Arson

Actus Reus. Milton would be guilty of conspiring to commit arson if he agreed with Earnest that Earnest should commit arson. MPC §§ 5.03(1)(a); 220.1(1)(b). The question here is whether Milton actually agreed with Earnest. Earnest made the proposal, and the facts are silent as to whether Milton verbally responded. If Milton didn't actually agree, he can't be convicted of conspiring. Milton's inquiry about what Earnest wanted him to do, followed by arguably doing what Earnest asked, could support a finding that he did actually agree. On the other hand, mere silence coupled with a failure to do something wouldn't be agreement.

There is no overt act requirement, because this is a felony of the second degree. MPC § 5.03(5). Moreover, so long as Earnest committed an overt act (which he did), that requirement would be fulfilled.

Mens rea. The jury would have to be convinced that if Milton agreed with Earnest, he did so for the purpose of promoting or facilitating the commission of the crime. It sounds from the facts as though Milton was at least ambivalent – the arson wasn't his idea, and he might deny that he actually *desired* that the arson take place. In cases where the defendant actually aided another, but denied having the *purpose* of doing so, courts have looked to whether the defendant, in addition to *knowing* of the criminal purpose of those they were working with, actually *had a stake in the outcome* or otherwise benefitted from the "co-conspirator's" activities to the point where you could fairly say that the defendant did more than just his daily work. Earnest offered to "remember" Milton when he got his money, so a jury could find that Milton agreed with Earnest for the purpose of obtaining a financial pay-off.

Accomplice to Arson

Actus reus. Milton might be accused of helping Earnest commit arson: MPC § 2.06(3)(a)(ii) makes him an accomplice if, with the purpose of promoting the commission of the offense, he aids or agrees or attempts to aid another in committing it. Milton might argue that he didn't *do* anything, and therefore (a)(ii) wouldn't apply. However, if Milton changed his cleaning routine so that he was on a different floor, and therefore wouldn't smell the smoke, then a jury could find that he aided Earnest in the commission of the crime.

MPC § 2.06(3)(a)(iii) would also make him an accomplice if, having the legal duty to prevent the commission of the offense, he failed to do so. Ordinarily, one does not have a duty to prevent another from harm. One can decline to be a "good Samaritan" without legal consequence. However, if there is a *duty to act* then the failure to act can be considered criminal (if it otherwise meets the requirements). So, for example, a parent who neglects a child and thereby causes the child's death may be convicted of a form of homicide (depending upon the culpability involved). Here the prosecution would have to prove that Milton had a duty to report the fire. Legal duties can arise from a statute, from a status relationship (e.g., family), from a contractual relationship, and from voluntarily assuming a duty to act. The only applicable category would be the third – the existence of a contractual relationship. Because he was an employee, Milton could be found to have a duty to his employer to call the fire department or perhaps to alert the police regarding Earnest's plans. His failure to do so could be considered a culpable act, just as if he had actually observed a fire in the building and deliberately neglected to call the fire department.

Mens rea. The prosecution would also have to prove that Milton had the requisite *mens rea* to be an accomplice. Ordinarily, to be an accomplice one must act with the purpose of facilitating or promoting the offense. As with conspiracy, it's unclear from the facts what he actually *did* or *didn't do*. Perhaps he simply did his normal routine, and wasn't sure whether Earnest was serious about what he told him. Perhaps he altered his routine and would normally have been in a place where he would have smelled smoke and called the fire department, but deliberately chose to be elsewhere—pursuant to Earnest's request—so that he would have "plausible deniability." It's not enough to show that Milton *knew* that by going elsewhere he was making it easier for Earnest's plans to succeed – he has to have done so with the *purpose* of helping Earnest. The analysis would depend upon whether Milton were prosecuted under MPC § 2.06(3)(a)(ii) and/or § 2.06(3)(a)(iii). Under (a)(ii), the prosecution could argue that he altered his

way of cleaning for the purpose of helping Earnest commit the crime. Under (a)(iii), it would have to be shown that he "failed" to make a "proper" effort to prevent the crime.

Just as in the analysis of conspiracy, Milton's *purpose* may be inferred from the fact that he stood to gain something from the arson. Earnest promised to "remember him" when he got his money. If the jury finds that Milton was motivated to stand by and do nothing while the fire burned because he thought he would be rewarded for this conduct, then he could be said to have the purpose of facilitating the commission of the crime.

Duress

An otherwise criminal act can be excused if it resulted from duress. Under MPC § 2.09, Milton would be excused if Milton "was coerced to [commit arson] by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist." The first question is whether there was the use of or threat of the use of unlawful force against his person. Milton was afraid of Earnest, but he wouldn't be entitled to the defense unless there was a use of force or threat of the use of unlawful force. Even if he had evidence that Earnest had threatened him, Milton still wouldn't be entitled to the defense unless a person of *reasonable firmness* would have been unable to resist. If a person of reasonable firmness would have gone to the police rather than capitulate to Earnest, then he would be denied the defense.

If found guilty of both conspiracy and complicity, Milton could only be convicted of one, because the conspiracy to commit a crime and the actual commission merge. MPC § 1.07(1)(b).

ESSAY 2½

There are several differences if the MPC is not followed.

Overt Act for Conspiracy. Some jurisdictions would include a requirement for a conspiracy conviction that the defendant commit an overt act.

Multiple Prosecutions. Under the MPC, Milton could not be convicted of conspiring to commit arson and committing arson, even if all the elements of both crimes were proven. Under the MPC they merge. However, in jurisdictions like the federal system, following the *Pinkerton* rule, Milton could be convicted both of conspiracy and of arson, if both crimes were proven.

Different standard for accomplice liability. Under the MPC, Milton has to have the purpose of facilitating this particular crime. Some jurisdictions could permit an accomplice who merely **knows** of the assistance they are providing to be convicted of being an accomplice. Other jurisdictions might only permit an accomplice to be convicted if the principal is also convicted.

Different formulation of duress. Some jurisdictions would not use the "reasonable firmness" standard; some would require that the use of force or threat be *imminent* in order to entitled use of the defense.

MC Score _____ CHECKLIST

ESSAY 1

- ☐ **Description** of MPC Insanity Defense
- ☐ Requires proof of **mental disease/defect**
- ☐ **Cognitive** prong
- ☐ **Control** prong
- ☐ **Appreciation**
- ☐ **Substantial capacity**
- ☐
- ☐ **Criticism**
- ☐ "**Appreciation"** too generous
- ☐ **Control prong**
- ☐ Lack of **scientific basis**
- ☐ **Congress** abandoned control prong
- ☐ **GBMI**
- ☐ Different tests yield **similar results**
- ☐ **Few cases** invoke defense/fewer succeed
- ☐
- ☐

ESSAY 2

- ☐ **Overview**
- ☐ **Actus reus + mens rea**
- ☐ **Conspiracy**
- ☐ Did Milton **agree**
- ☐ Agreement inferred from **behavior**
- ☐ Must be proof of **agreement?**
- ☐ No **overt act** requirement
- ☐
- ☐ **Mens rea**
- ☐ Did he **intend** to agree
- ☐ Did he have a **stake in the outcome**?
- ☐
- ☐ **Accomplice** liability
- ☐ **Actus reus**: act or failure to act
- ☐ 2.06(3)(a)(iii): did he have a **duty** to act?
- ☐ 2.06(3)(a)(ii): did he **act** to facilitate
- ☐ **Contract** as basis for duty
- ☐ Did Milton **fail** to prevent crime?
- ☐ What would be a **proper** effort?
- ☐ Did M have **mens rea** for complicity?
- ☐ Must have **purpose** of facilitating
- ☐
- ☐ **Duress**
- ☐ No use of **force** or threat of force
- ☐ Did M exhibit **reasonable firmness?**
- ☐ **Merger** of complicity and conspiracy
- ☐
- ☐
- ☐
- ☐

ESSAY 2½

- ☐ **Overt act** might be required
- ☐ **Multiple prosecutions**
- ☐ Lower standard for **complicity**
- ☐ Different standard for **duress**
- ☐
- ☐

Exam # _____