

Exam # _____

Professor DeWolf
Summer 2011

Criminal Law
August 2, 2011

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL YOU ARE TOLD TO BEGIN.

THIS EXAM WILL LAST 3 HOURS. Part I is a CLOSED BOOK EXAM. It will last **90 minutes**. After 90 minutes the proctor will collect the answer to Essay Question #1, and the multiple choice answer sheet. You will then receive Part 2 of the exam.

Part II is a modified OPEN BOOK exam. It will last **90 minutes**. You may use any notes you have made yourself, your textbook(s), and any materials that I (or the student tutor) have distributed to you. YOU MAY NOT use any commercially printed outlines, hornbooks, treatises, articles, etc., except that you may use the textbook, the recommended hornbook, and up to 100 pages photocopied from other commercial materials.

While waiting for the exam to begin, please read these instructions carefully and be sure that you are otherwise ready to begin.

POINTS are assigned based upon the rough number of minutes it should take to complete each section. The division is as follows:

Part I (CLOSED BOOK)	MULTIPLE CHOICE:	60 points
	<u>Question 1:</u>	<u>15 points</u>
Part II (OPEN BOOK)	Question 2:	60 points
	Question 3:	15 points
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	TOTAL	150 points

The MODEL PENAL CODE applies to all multiple choice questions and Question 2.

(1) MULTIPLE CHOICE. Tear off the answer sheet on the last page and use it to record your answers. Please select the *best* answer. Some answers may give a wrong reason for an otherwise correct result. Make sure that you read *all* the answers thoroughly and select the one that comes closest to a correct statement of the law.

(2) ESSAYS. You will have three essay questions. Question 1 (closed book) asks for your reflection on a question involving some policy aspect of criminal law. Question 2 (open book) will ask you to assess criminal liability under the Model Penal Code given a hypothetical set of facts. Question 2½ (open book) asks you to describe how your analysis of criminal liability would change if the jurisdiction in which the hypothetical arose (the hypothetical state of Linden) had rejected one or more features of the Model Penal Code.

GOOD LUCK! ENJOY YOUR BREAK!

MULTIPLE CHOICE (60 points)

1. Betty lived with her boyfriend Mike and her 13-year-old daughter, Shauna. One day Shauna reported to Betty that Mike had initiated inappropriate sexual contact with Shauna. Which of the following is true?

- (a) Betty had a duty to report Mike's abuse to the authorities, regardless of whether she believed Shauna or not;
- (b) Betty would not have a duty to report Mike's abuse unless she knew that Mike was abusing Shauna;
- (c) Betty would be an accomplice to Mike's abuse if she knew that Mike was abusing Shauna and she failed to prevent it.
- (d) Betty would be an accomplice to Mike's abuse if (but only if) she had the purpose of facilitating the abuse and did nothing to prevent it.

2. Frank was charged with violating Penal Code § 1234, which states, "A person is guilty of defrauding a public utility if he tampers with a public utility meter for the purpose of avoiding lawful payment. [¶] *Value in Excess of One Hundred Dollars.* Defrauding a public utility in the second degree is a gross misdemeanor if the value of the utility service diverted or used exceeds one hundred dollars. [¶] *Value in Excess of One Thousand Dollars.* Defrauding a public utility in the first degree is a third degree felony if the value of the utility service diverted or used exceeds one thousand dollars." Frank used jumper cables to bypass his electric meter so that he could save money on his electric bill. Which of the following is true:

- (a) Frank is not guilty of defrauding a public utility in the second degree unless he was at least reckless with regard to the amount of electricity he was diverting;
- (b) Frank is not guilty of defrauding a public utility in the second degree unless it was his purpose to divert at least one hundred dollars of electricity;
- (c) Frank is guilty of defrauding a public utility in the first degree if the value of the electricity he diverted was more than one thousand dollars, even if he reasonably believed that the amount of electricity was less than one thousand dollars;
- (d) None of the above.

3. Eleanor has been charged with a violation of Penal Code § 5432, which provides, “A person commits the crime of stalking, a felony of the third degree, if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (1) He or she intentionally and repeatedly harasses or repeatedly follows another person; and (2) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances.” Eleanor’s best argument to avoid conviction under this part of the code would be:

- (a) Eleanor did not have reasonable notice of the acts that would subject her to criminal liability;
- (b) A reasonable person could not determine from the statute what acts would result in criminal liability, even if Eleanor knew that her conduct was against the law;
- (c) Eleanor’s guilt or innocence would depend upon the subjective feelings of a person other than the defendant;
- (d) Imposing criminal punishment upon Eleanor would serve no deterrent purpose.

4. Harold has been convicted of capital murder and has been sentenced to death. He is now appealing his death sentence to the state supreme court. The LEAST effective argument his attorneys can make in asking for the death sentence to be commuted to life is:

- (a) Harold’s mental ability is so low that he could not fairly be held accountable for the harm that he caused;
- (b) The death penalty is disproportionately imposed upon racial minorities, even when factors such as the gravity of the offense, past criminal conduct, etc. have been taken into account;
- (c) The death penalty in itself is cruel and unusual punishment;
- (d) Mistakes made in carrying out the death penalty can’t be corrected.

5. Jack was working on his car in his garage when he tried to weld a new piece of metal onto the frame of his car. It was too near the gas tank, and the heat from the welding caused the remaining gasoline in the gas tank to ignite. Soon Jack’s garage was on fire. A tow truck was parked on the street next to his house, and Jack smashed a window of the truck, hoping to find a fire extinguisher inside. He found one, took it and used it to extinguish the flames. If Jack were charged with theft of the fire extinguisher (where theft is defined as taking the property of another with the purpose of depriving the owner of it), his best defense would be:

- (a) Jack should be excused based upon the principle of duress, since a person of reasonable firmness in Jack’s position would likely have done the same thing;
- (b) Jack was justified, based upon the defense of necessity, but only if he was not reckless in bringing about the conditions and the conduct he is seeking to justify;
- (c) Jack was justified, based upon the defense of necessity, but only if he was not negligent in bringing about the conditions and the conduct he is seeking to justify;
- (d) Jack was justified, even if he was reckless in bringing about the conditions and the conduct he is seeking to justify.

6. Nancy was afraid of her next-door neighbor Tom. Nancy's dog barked repeatedly during the night, and the next morning Tom yelled at Nancy as she got into her car to go to work that if the dog kept barking like that again he would shoot the dog. Nancy said nothing to him in response, but she decided she would keep the dog inside at night. Three weeks later Nancy's brother Wesley stayed over at her house, and Nancy forgot to tell Wesley about the dog. Wesley let the dog out, and the dog began barking. Fifteen minutes later Tom emerged from his house with a gun intending to kill the dog. He yelled loudly, "I told you I would shoot him!" Wesley was awake and looked out the back door to see Tom striding from his house toward Nancy's backyard. Wesley grabbed a gun and pointed it at Tom, yelling "Drop that gun or I'll shoot you." Tom then fired at Wesley, causing him minor injuries. Which of the following is true?

- (a) Tom could be convicted of attempted murder unless he had a genuine belief that he faced death or serious bodily injury;
- (b) Tom could not be convicted of attempted murder, even if he knew he could retreat with complete safety;
- (c) Tom was not entitled to use deadly force because he was the initial aggressor;
- (d) Tom was not entitled to use deadly force because he was initially concerned only about property (the dog).

7. Bob was married to Susan; Dennis was married to Patsy. Bob fell in love with Patsy, and vice versa. The two married couples spent time together at church functions, along with their children. Patsy wanted Bob to confront Dennis and tell him that he and Patsy wanted to divorce their respective spouses so that they could be together. Patsy had previously told Bob that the only way they would be together is if Bob outlived Dennis. One early morning Bob confronted Dennis at work and stabbed him several times, fatally. Bob admitted he had killed Dennis, but said that Patsy had told him to do it. Patsy was charged with murder. Which of the following is true?

- (a) Patsy would be an accomplice to murder only if she had the purpose of causing Dennis' death;
- (b) Patsy could not be convicted of murder if Bob was convicted of manslaughter but acquitted of the murder charge
- (c) Patsy could be convicted of conspiring to murder Dennis if Patsy intended her words to Bob to cause him to kill Dennis;
- (d) None of the above.

8. Aaron noticed that another tenant in his apartment building, Walter, rode a very expensive bicycle. Walter sometimes left his unlocked bicycle leaning against a wall in the entryway of their apartment building. Aaron told his friend Elmer about how stupid Walter was for leaving such an expensive item in a place where it might be stolen. Elmer later saw the bicycle, unlocked, just where Aaron had said. Elmer looked around, didn't see anyone, and began rolling the bicycle toward the door. Before he could open the door to the apartment building Walter came out of his apartment wearing his bicycle helmet and yelled, "Stop, thief!" Elmer dropped the bicycle and yelled back that he was only moving the bicycle so that it wouldn't be in anybody's way. Elmer was charged with attempted theft (theft defined as taking the property of another with the purpose of depriving the owner of it). Which of the following is true?

- (a) A jury could infer from Elmer's behavior that he had the purpose of depriving Walter of the bicycle;
- (b) If Elmer was charged with attempted theft, his conduct constituted a "substantial step" toward completion of the crime;
- (c) If Elmer was intoxicated at the time of the alleged crime, he could introduce evidence of his intoxication to show that he lacked the required mens rea;
- (d) All of the above.

9. Olivia's boyfriend Peter told her he was going out to "scare up some cash." When he returned he told Olivia that he had seen two liquor stores that were "waiting to be knocked off," but he needed somebody to drive the getaway car. Olivia was afraid of Peter and so she neither said yes, nor did she say no. Peter got a gun and a mask and handed Olivia the keys to the car, telling her that he would give her directions. Olivia got into the driver's seat and Peter told her to turn left at the next intersection. After traveling a mile and a half, they reached the first liquor store, but Peter thought there were too many people inside, so he directed Olivia toward the second liquor store. After they had traveled eight blocks Olivia made an illegal left turn and was pulled over by a police officer. Olivia broke down and told him everything. Olivia and Peter were charged with conspiracy to commit robbery (the use of force or the threat of force to commit theft) and attempted robbery. Which of the following is true?

- (a) Olivia could be convicted of conspiring to commit robbery, or of being an accomplice to attempted robbery, but not both;
- (b) Even if Olivia agreed with Peter to help him rob both liquor stores, she could only be convicted of two conspiracy charges;
- (c) Olivia is not guilty of attempting to rob the first liquor store, because she and Peter abandoned their attempt to do so;
- (d) Olivia would be entitled to assert the defense of duress even if Peter didn't threaten her (or anyone else) with physical force if she did not help him.

10. Larry had plans to go hunting with his friend Ken. Larry had a “tag” that permitted him to shoot and kill a white-tailed deer. The weekend they planned to go there was an emergency at the plant where they both worked and they had to work that weekend. They postponed their trip to the following weekend. While hunting, Ken spotted a white-tailed deer and told Larry to shoot it, which he did, but he missed. The game warden heard the shot and came to investigate. It turned out that the tag Larry had obtained expired two days before. Larry was charged with violating § 888 of the Penal Code, which states, “It is a third degree felony to take, or to attempt to take, deer, elk or moose without a lawful permit.” Which of the following is correct?

- (a) Larry would be entitled to raise a mistake of fact defense so long if he reasonably believed that the tag was still valid;
- (b) Ken could be convicted of being an accomplice to violating § 888 only if he actually knew that the tag had expired;
- (c) Ken could not be convicted of being an accomplice to violating § 888 unless Larry was also guilty of violating § 888;
- (d) Ken could be convicted of conspiring to violate § 888 only if Larry also conspired to violate § 888.

ESSAY QUESTION 1 (15 points)

You are legislative counsel to Senator Sturm, who was recently elected to the Linden State Senate from a “swing” district that contains roughly equal numbers of liberal and conservative voters. Senator Sturm recently picked up a copy of the daily newspaper with the largest circulation in his district. On the opinion page is an open letter from a former governor urging passage of a “three-strikes” law, which would require offenders convicted of a third felony to be sentenced to life imprisonment. Senator Sturm is getting ready for a noon appearance at the Commonwealth Club, where he anticipates that there will be questions as to whether he supports or opposes this proposal. He would like you to brief him on the topic. Please provide an analysis of the issue.

Senator Sturm would like your comments. Please illuminate the issue for him.

END OF THE CLOSED BOOK PORTION OF THE EXAM

MAKE SURE YOU TURN IN THE MULTIPLE CHOICE ANSWER SHEET

MULTIPLE CHOICE ANSWER SHEET

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

9. _____

10. _____

TURN THIS IN TO THE PROCTOR AT THE CONCLUSION OF THE
CLOSED BOOK PORTION OF THE EXAM

OPEN BOOK PORTION OF EXAM

ESSAY QUESTION 2 (60 points)

John Berry IV is an alcoholic. Born in May 1971, he began drinking when he was nine years old and was drinking to intoxication on a daily basis by the time he was a high school sophomore. When he was fifteen, his mother sent him to Koala Hospital for substance abuse treatment, but he resumed drinking shortly thereafter. Berry also used marijuana and cocaine on a daily basis and took LSD, ecstasy, and methamphetamine. When he was thirty years old, he went to Fairbanks Hospital for alcoholism. After age thirty, he continued to drink large amounts of alcohol, but he stopped using the other drugs.

In 1999, following two arrests for driving under the influence, Berry was hospitalized at Community North Hospital and diagnosed with bipolar disorder. He was treated with Depakote, a mood-stabilizing medication. At that time, he was twenty-seven or twenty-eight years old. Since 1999, Berry has been hospitalized multiple times at Community North and Wishard Hospitals, usually for a combination of symptoms of bipolar disorder, methamphetamine abuse, and alcohol dependence with withdrawal seizures, including at least one instance of delirium tremens. Delirium tremens, also referred to as DTs, is a severe form of alcohol withdrawal in which a person may experience seizures and hallucinations and become psychotic. Berry has been treated with a variety of medications including lithium, a mood-stabilizing medication; Seroquel, Risperdal, and Zyprexa, antipsychotic medications; Klonopin, an antianxiety medication; and Paxil, an antidepressant.

In 2009, Berry lived with his father, John Berry III ("Father"). On Tuesday, February 3, 2009, Berry left Father's house to go to a "Plainfield party house." Berry drank heavily on Saturday and had a couple drinks on Sunday. On Sunday, he returned to Father's house. Berry had last been treated with psychiatric medications fourteen months earlier.

Early Monday morning, February 9, 2009, Father went to the basement to work out and found Berry sitting on the couch reading the Bible. For about an hour, Berry continued to read the Bible while Father worked out. Afterward, Father and Berry got ready to go to Gary Monday's house, which they were helping to repair. On the way there, they stopped to buy plumbing supplies. When they got to Gary's house, Father parked his truck on the street in front of the house, and they went inside.

Gary's brother, Tony Monday, was also doing work on the house. Tony had tiled the bathroom the previous day and was in the bathroom cleaning it up when Father and Berry arrived. Father and Tony greeted each other, and Tony told Father that he had borrowed his cordless drill and hammer and the tools were in the bathroom. Father told him that was fine. Berry and Tony did not know each other. Father took Berry into a bedroom to install drywall. Father explained the job to Berry and told him that he needed the drill and hammer in the bathroom. Father then went to the living room to make a pot of coffee.

Tony was still in the bathroom cleaning up. Berry entered and told Tony that he was going to kill him. Tony asked him why. Berry told him to "shut up" and repeated that he was going to kill him. Berry hit Tony multiple times in the head with a hammer and also struck Tony's hand when he attempted to protect himself.

Father was in the living room making coffee when he heard somebody say "damn." He thought that maybe Tony had broken a tile. Father heard another sound that made him turn around, and he saw Tony in the hall bleeding profusely from the head. Father sat Tony down and asked him

what happened. Tony told him that Berry had hit him with a hammer. Father realized that the injuries were serious and called 911. Father tried to stop the bleeding by putting direct pressure on Tony's injuries with a roll of paper towels.

As Father was tending to Tony's injuries, he saw Berry walking back and forth in the kitchen, wiping the hammer with a white towel. Father asked Berry, "Did you hit him with the f* **ing hammer?" Berry was staring off into space. He turned and said, "I guess so," in a questioning manner. Father noticed that "[Berry] wasn't mad. He wasn't excited. He just wasn't there." Father told Berry to put the hammer away and go to the garage. Berry went out the back door and walked around to the front of the house. He put the hammer and towel in a chest of drawers that was lying in the bed of Father's truck. Berry came back into the kitchen and told Father that he could not find the garage. Father explained where the garage was (about ten to twelve feet behind the house) and told Berry to go there. Berry complied.

Police and medics arrived at the house. Father told the police that Berry was in the garage. The police went to the garage and found the door locked. They knocked and asked if Berry was inside, and he answered yes. The police asked Berry to open the door, but he did not respond. When the medics arrived to care for Tony, Father came out to the garage and told Berry to open the door and come out. Berry obeyed, and police handcuffed him. Police described Berry as "calm, cool" and said that he provided "no resistance." Police asked Berry where the hammer was, and he told them it was in a drawer in the truck. Police described Berry's speech as clear and understandable. When the police went to a truck parked in back of the house, Berry told the police that the hammer was in the truck parked in front of the house. Police found the hammer wrapped in a towel where Berry told them it would be.

The police questioned Berry about what happened, and he was cooperative. Berry admitted that he hit Tony with a hammer and that he knew he was hitting Tony. When asked why he wrapped the hammer in a towel and put it in the drawer in the truck, Berry stated that Father had told him to. However, some of Berry's answers were "nonsensical." He told one officer that he had been reading the Bible, and that when he arrived at the house, God told him that it was time to go. He stated that he hit Tony because Tony was caught playing with the eagle, and God told him to hit Tony. He told a different officer that Tony was attacked by an eagle.

Berry was taken to Wishard Hospital and was admitted to Midtown Community Mental Health Center for stabilization of psychosis. The treating physician, Dr. Kimberly Mayrose, noted, "Thought processes were disorganized, possible flight of ideas. Can at times give short logical answers. Thought content delusional, grandiose, religious." Dr. Mayrose's admission summary indicates that "[Berry] reported a history of Bipolar Disorder and alcohol dependence, including DT's and seizures. He reported drinking a 5th of alcohol daily, although he drank a few sips Sunday night, February 8, 2009." Dr. Mayrose's Axis I diagnosis of Berry was "Bipolar Disorder, type I, mixed and Alcohol dependence, possible withdrawal (not DT's)." Berry was treated with lithium and Seroquel and was discharged on February 16, 2009. His discharge diagnosis was "Bipolar I Disorder, Mania Stabilizing[]; and Alcohol Dependence."

As a result of Berry's attack, Tony suffered eight lacerations to his head and one on his right hand. Tony underwent surgery to repair his nose, sinuses, eye sockets, and broken jaw. Titanium plates were implanted into his skull to repair his head and facial injuries. Tony has lost vision in one eye and suffers diminished vision in the other. In addition, he can no longer use his dentures due to the injury to his jaw.

On February 20, 2009, the State of Linden charged Berry with attempted murder. He was placed in the jail mental health unit, and his treatment with lithium and Seroquel was continued.

You are a new attorney with the defense firm assigned to represent Berry. Please analyze the likelihood that Berry can be convicted of attempted murder.

ESSAY QUESTION 2½ (15 points)

What difference would it make to your analysis of Question 2 if the Model Penal Code were not followed in your jurisdiction?