

SAMPLE ANSWER TO FINAL EXAM

MULTIPLE CHOICE

1. (A) is incorrect, because Betty might reasonably believe that Shauna was not telling the truth; (B) is incorrect, because the duty to Shauna would arise if there was a substantial and unjustifiable risk that Shauna was being abused, and Betty's failure to alert the authorities was a gross deviation from the standard of a law-abiding person. (C) is incorrect, because knowledge is insufficient to make one an accomplice; there must be a purpose of facilitating the commission of the crime. (D) is correct, because it states the required mens rea of purpose, and her inaction was in disregard of a legal duty she owed to Shauna .

2. (A) is correct. Since the elements of the crime are distinguished (by separate paragraphs, and since they deal with grading of the offense), we are not required to apply the "purpose" standard to all of the material elements. Thus, since it is silent with respect to culpability, we would default to a recklessness standard for this circumstance element. (B) is incorrect for the same reason that is explained in (A); the purpose requirement would not extend to the elements that are distinguished; (C) is incorrect because it applies what is in effect a strict liability standard to this element. Such treatment is found in some criminal codes, but it must be explicitly called for according to the rules of the MPC, and here it is not. (D) is incorrect because (A) is a correct answer.

3. (A) is incorrect because it makes an argument for finding the statute unconstitutionally vague, but it focuses on whether the defendant subjectively understood the scope of criminal liability, rather than identifying whether it is so vague that a reasonable person would be unable to determine what was lawful and what was not. (B) is therefore the correct answer. (C) is incorrect, because many criminal statutes will depend upon, for example, whether the defendant caused apprehension on the part of another person. (D) is incorrect because the statute probably would deter some people from engaging in the behavior.

4. (A) is an incorrect answer; in some cases (like *Atkins*), the defendant is protected from the imposition of the death penalty if his IQ is so low that he can't meaningfully appreciate the nature of the punishment. Thus, the argument might be successful. (B) is the best answer, because it is the least persuasive argument. The evidence we have regarding racial disparity shows none in the rate at which racial minorities are sentenced to death, at least when relevant factors such as prior criminal history, gravity of the offense, etc. are taken into account. The disparity identified in the *Baldus* study had to do with the disparity in the willingness of juries to sentence defendants to death based upon the race of the *victim* (C) is also incorrect, because at least some justices on the U.S. Supreme Court, and others (like governors) who have the power to commute sentences, agree with this statement, and thus it might prove persuasive. (D) is incorrect because it too has proven a persuasive argument in getting rid of the death penalty.

5. (A) is incorrect, since duress only applies to threats arising from a human source; (B) is incorrect, because the MPC does not impose a requirement that the defendant not be at fault in creating the conditions that cause him to invoke the defense of necessity. (C) is incorrect for the same reason. (D) is a correct statement of the MPC rule.

6. (A) is a correct statement; deadly force is only justified if the actor actually believes that it is necessary to prevent death, serious bodily (or rape or kidnapping, which don't seem to apply here). (B) is incorrect; the rule of retreat is imposed if the actor knows he can retreat with complete safety;

(C) is not correct, because the MPC permits the use of deadly force, even if one is the initial aggressor, unless the initial aggression was for the purpose of later using deadly force. (D) is incorrect; that was his initial concern, but circumstances changed once Wesley pulled out the gun.

7. (A) is a correct answer; unless she has the purpose of causing Dennis' death, she cannot be an accomplice to murder; (B) is incorrect; Bob might be guilty only of manslaughter; (C) is incorrect, because there may have been no agreement; even if Patsy intended to encourage Bob to kill Dennis, unless Dennis and Patsy agreed to murder Dennis her words of encouragement would be insufficient; (D) is incorrect, because there is a correct answer.

8. (A) is partially correct, because intention is often something that must be inferred from behavior. (B) is also partially correct, because he doesn't need to do anything additional to commit theft, and thus it would be considered more than a "substantial step" toward committing the crime. (C) is also partially correct, because intoxication may serve to "negative" purpose or knowledge; thus, (D) is the best answer.

9. [NOTE: As given, the exam contained a typographical error in answer (B). It should have said that he could only be convicted of one conspiracy charge. That would have been the correct answer. As it stands, (A) was the least incorrect answer (which all the students chose). But actually (A) is incorrect, because Olivia conspired to commit one crime (robbing the second liquor store) and attempted to commit a second crime (robbing the first liquor store). As amended, answer (B) would have been correct, because a conspiracy with multiple criminal objectives is subject to only one conviction. (C) is incorrect, because they did not abandon the criminal effort voluntarily—it was a result of finding it more difficult to accomplish; (D) is incorrect, because the use or threat of unlawful force is required to assert the defense of duress.

10. (A) is correct, because the mistake about the tag might be considered a mistake of fact rather than one of law; (B) is incorrect, because the MPC is ambiguous with respect to the mental state required of an accomplice for circumstance elements; (C) is incorrect, because the MPC allows an accomplice to be convicted even if the principal is not; (D) is incorrect, because the MPC permits so-called unilateral conspiracy

ESSAY QUESTION 1

The arguments in favor and against "three strikes" laws can be grouped according to the commonly accepted purposes of punishment: (1) retribution; (2) deterrence; (3) incapacitation; and (4) rehabilitation. While authorities differ as to the relative weight to be assigned to each of these purposes, there is general agreement that each has a place in a well-ordered criminal justice system.

1. *Retribution.* Criminals should be punished commensurate with what they deserve based upon what they have done. While some skeptics argue that retribution reflects a more primitive desire for revenge, others counter that there is a moral obligation to punish those who have broken society's rules, and gained an unfair advantage through their criminal conduct. To put it another way, the willingness of the vast majority of citizens to continuing obeying the rules is dependent upon periodic reinforcement of the the belief that "crime doesn't pay"; otherwise, the law-abiding would feel like chumps for resisting the temptation to break the rules themselves. Kant went so far as to say that there is a moral obligation to punish—and punish to the point of death where appropriate, and James Fitzjames Stephen claimed that it is "morally right to hate criminals."

If this principle is applied to "3-strikes" laws, opinion is divided as to whether they are justified. Critics argue that when the third felony is relatively minor in scope (in the *Ewing* case, for

example, the defendant stole some golf clubs), the imposition of life imprisonment is disproportionate, and the punishment doesn't fit the crime. By contrast, defenders point out that repeated criminal activity is a whole greater than the sum of its parts. Just as we carve out special rewards for "three-peats" in positive achievement, those who commit serious crimes not once or twice, but three times—such persons deserve a punishment more severe than would be commensurate with the final offense in isolation.

(2) *Deterrence.* Many commentators emphasize the function of criminal punishment in dissuading individuals from committing crimes. Although there is debate over the extent to which criminals act rationally, higher levels of punishment are likely to reduce crime. With regard to 3-strikes laws, proponents would argue that an offender will be less likely to commit a third felony because of the severity of the punishment he would face. Moreover, proponents would argue that crime in general is likely to be deterred by the prospect of more severe punishment in general. Opponents on the other hand will question the degree to which crimes are committed after a conscious weighing of costs and benefits. Despite Bentham's claim that "everyone calculates," opponents would challenge the assumption that expectations of future punishment are a major factor in criminal behavior. Even Bentham thought that higher levels of punishment were a bad idea if the cost of inflicting them (both to the offender and to the public) exceeded the offsetting reduction in crime. Moreover, to the extent that a "two-time loser" faces life imprisonment for any felony, the cost/benefit calculation might lead the "two-time loser" to commit as many felonies as possible since they all come at the same price.

Incapacitation. Perhaps the biggest appeal of the 3-strikes law is the belief that it will protect the public from career criminals who, if not locked up, would continue to prey upon the public. There is no question that 3-strikes laws will achieve that goal. But in many ways the pursuit of incapacitation as a goal is in direct conflict with the retributive principles that require proportionality between culpability and punishment. The criminals most likely to re-offend are oftentimes the ones who are the most socially disadvantaged, while the lowest risks are often the ones most culpable because of their privilege. While incapacitation might be a welcome side-effect of criminal punishment, it should not be its motivating force.

Another consideration is that most criminals are at greatest risk of reoffending when they are young. For most criminals the onset of middle age leads to a dramatic reduction in criminal propensity. The cost of housing inmates for life is hard to justify strictly from a cost/benefit point of view.

Rehabilitation. Once popular, rehabilitation has fallen out of favor because of doubts as to the effectiveness of rehabilitation strategies. One would hope that the prison system could find ways to make inmates less likely to re-offend once released, but it is hard to identify empirical verification that programs such as education or counseling or skills training make any difference in recidivism rates. In an indirect way a 3-strikes law might motivate the one-time or two-time loser while in prison to get serious about rehabilitation, given the dire consequences of relapse after release.

In short, there are lots of arguments both for and against a 3-strikes law, depending upon one's conception of the purposes of the criminal justice system.

ESSAY QUESTION 2

The facts for this question were drawn from the case of *Berry v. State*, 2011 WL 2893102, Ind.App., July 20, 2011 (NO. 49A04-1008-CR-536). Berry was convicted at the trial court level, but on appeal it was determined that the prosecution failed to overcome the testimony from the experts that established that Berry was insane at the time the acts were committed.

Berry would be convicted if the prosecution establishes that (1) he committed the *actus reus* specified by the statute and (2) he had the minimum culpability (*mens rea*) while committing the act; and (3) he didn't qualify for any affirmative defense. Each will be considered.

1. Actus Reus

Berry has been charged with attempted murder. There are two aspects of this analysis. Since this is an attempt charge, the prosecution would rely on one of the formulations of § 5.01(1)—most likely § 5.01(1)(b), which permits conviction for an attempt when the defendant “does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part.” By hitting Tony in the head with a hammer, Berry appears to be doing something which, without further action on his part, would have caused Tony's death.

2. Mens Rea

The second step in the analysis is assessing Berry's culpability at the time he hit Tony on the head. To be guilty of attempted murder, Berry would have to have struck him with the purpose of causing his death. Based on his previous statements that he was going to kill Tony, the evidence seems strong that he had such a purpose. On the other hand, as will be discussed further below, Berry may argue that he lacked the capacity to form such a purpose, either because of his mental illness or possibly because of intoxication. Thus, the prosecution would still have to prove that, despite his history of mental illness, alcoholism, and his recent drinking, Berry still was capable of having, and did in fact have, a purpose of causing Tony's death.

3. Affirmative Defenses

Berry would argue two principal defenses.

Intoxication. One is that he was suffering from intoxication at the time of the offense. He had drunk heavily on Saturday, and had a “couple drinks” on Sunday. The events are described as occurring “early Monday morning.” If Berry was still suffering the effects of his previous drinking, he might offer a defense based upon intoxication. Alternatively, based upon the doctor's notes he might have been suffering from alcohol withdrawal. Intoxication is a defense if it “negatives” the requisite mental state. (§ 2.08(1)) Berry would have to convince the jury that because of intoxication he lacked the purpose to kill Tony. However, it seems unlikely that his blood alcohol content was sufficiently high to have a significant effect on his mental processing, and the police might testify concerning his (lack of) intoxication at the time he was arrested, shortly after committing the offense. Thus, I would not place much hope in using intoxication as a defense.

Mental disease or defect (MPC § 4.01). The much more plausible defense is insanity, §

4.01. Even if the insanity was a result of lifetime voluntary abuse of alcohol, it is still a defense if the damage done by heavy drinking is permanent as distinguished from transitory.

The MPC permits a defense if (a) as a result of mental disease or defect, the defendant lacks (b) substantial capacity either to (c) “appreciate the criminality [wrongfulness] of his conduct or (d) to conform his conduct to the requirements of law.” Each of these aspects of the defense requires analysis.

(a) *As a result of mental disease or defect.* Berry would have to show that his conduct arose from a mental disease or defect. The doctors who treated him both before and after the offense would likely testify that he suffered from a mental disease or defect. He apparently had a history of bipolar disorder, and he was admitted to the hospital for stabilization of psychosis. Still, the evidence would have to establish that hitting Tony with a hammer resulted from this mental disease or defect. Some of Berry’s behavior seemed bizarre, but some of it appeared quite rational. If the jury concluded that, despite having a mental disease or defect, Berry’s conduct resulted from some other factor, Berry’s defense would fail.

(b) *Lacked substantial capacity.* Related to the previous discussion, Berry would have to show, not a “complete prostration” of his faculties, but at least so much damage that he lacked substantial capacity to function normally. That standard is undefined. We would argue that his behavior demonstrates his lack of capacity to appreciate the wrongfulness of his conduct, but that would still be a jury question. And after all, as one judge puts it, virtually everybody who commits crime is something other than normal. Therefore abnormal behavior by itself is not proof of insanity.

(c) *Appreciate the criminality [wrongfulness] of his conduct.* Here there is a lot of ambiguity. On the one hand, “appreciate” is a stronger verb than simply *knowing* right from wrong. But the question of wrongfulness or criminality does not answer whether the defendant must lack the ability to distinguish right from wrong in the sense of knowing what is legal or illegal, or instead whether the defendant must recognize that what he is doing is morally wrong. By locking himself in the garage and refusing the police request to come out, Berry seems to have recognized that he was doing something illegal. On the other hand, he later cooperated and made no effort to escape. He may have thought his conduct was morally right even though he knew it was illegal. The MPC does not define “wrongfulness” and has an alternative of “criminality,” so it is arguable either way that Berry could (or could not) appreciate the wrongfulness of his conduct.

(d) *Conform his conduct to the requirements of law.* This does not appear to be a case in which Berry knew that what he was doing was wrong, but was unable to control himself. That might be the case for an addict, or some kind of obsessive personality, but here Berry seems to be either legally insane under the first prong of the test, or not. The second (so-called “control prong”) wouldn’t seem to have much application here.

Conclusion

It appears a toss-up as to whether or not Berry would qualify for the insanity defense. Depending upon the relative persuasiveness of the expert witnesses both for the prosecution and the defense, and the jury’s reaction to Berry’s conduct, he might be acquitted by reason of insanity, or convicted.

ESSAY QUESTION 2½

There would be several potential differences if the MPC were not applied to this case.

Intoxication. Although it is doubtful that intoxication would offer much of a defense here, some jurisdictions would reject even the possibility of using intoxication as a defense to anything other than murder.

Insanity. It is likely that if the MPC did not apply, it would be harder for Berry to establish insanity. (In fact, some jurisdictions have gone so far as to replace an acquittal based on insanity with a verdict of “Guilty But Mentally Ill”.) In looking at the four subpoints from the previous question, two in particular would be relevant. First, rejecting the MPC’s “substantial capacity” standard, many jurisdictions require a more complete lack of ability to differentiate right and wrong—perhaps “complete prostration of faculties.” Second, many jurisdictions have returned to the original *M’Naghten* standard of “knowing right from wrong, or something closer to a cognitive test for recognizing the wrongfulness of his conduct. This would prevent Berry from using the defense if he recognized the wrongfulness of his conduct but simply didn’t “appreciate” it. In addition, some jurisdictions would limit “wrongfulness” to knowledge of legal wrong. Nonetheless, even a jurisdiction like Washington that stressed that “wrongful” meant legal wrong, it did permit the “deific decree” exception that recognizes legal insanity if the defendant believed that he had received a direct command from God to engage in the conduct. Since Berry told one of the police officers that “God told him to hit Tony,” this might prove a successful strategy.

Checklist

QUESTION 1

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| <input type="checkbox"/> Overview
<input type="checkbox"/> Four purposes of punishment
<input type="checkbox"/>
<input type="checkbox"/> Retribution
<input type="checkbox"/> Requirement of punishing according to desert
<input type="checkbox"/> Isn't life imprisonment disproportionate ?
<input type="checkbox"/> What about the three-peat argument?
<input type="checkbox"/>
<input type="checkbox"/> Deterrence
<input type="checkbox"/> Do criminals actually "calculate"
<input type="checkbox"/> Some would be deterred
<input type="checkbox"/> Others would hang for a sheep as for a lamb
<input type="checkbox"/> Is the punishment worth it? | <input type="checkbox"/> Incapacitation
<input type="checkbox"/> Most supporters emphasize this
<input type="checkbox"/> But (male) criminals burn out over time
<input type="checkbox"/> Promotes greater disparity of rich v. poor
<input type="checkbox"/>
<input type="checkbox"/> Rehabilitation
<input type="checkbox"/> Least favored approach
<input type="checkbox"/> Would some "losers" be more likely to rehab?
<input type="checkbox"/> What empirical research is reliable?
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/> |
|--|--|

QUESTION 2

- | | |
|---|--|
| <input type="checkbox"/> Overview
<input type="checkbox"/> Actus Reus+Mens Rea – Affirmative Defense
<input type="checkbox"/>
<input type="checkbox"/> Actus Reus
<input type="checkbox"/> Attempt under § 5.01(1)(b)
<input type="checkbox"/> Hitting w/ hammer certainly qualifies
<input type="checkbox"/>
<input type="checkbox"/> Mens Rea
<input type="checkbox"/> Attempt requires purpose of causing death
<input type="checkbox"/> Statement before attack qualifies
<input type="checkbox"/>
<input type="checkbox"/> Would Intoxication negative his mens rea?
<input type="checkbox"/> Evidence is not strong re intoxication
<input type="checkbox"/> Perhaps withdrawal? | <input type="checkbox"/> Insanity Defense
<input type="checkbox"/> (a) <i>As a result of mental disease or defect</i>
<input type="checkbox"/> Some actions appear rational
<input type="checkbox"/> (b) Lacked substantial capacity
<input type="checkbox"/> Difficult to apply that standard here
<input type="checkbox"/> (c) Appreciate vs. cognitive awareness
<input type="checkbox"/> Wrongfulness of conduct
<input type="checkbox"/> Legal wrong v. moral wrong
<input type="checkbox"/> Is it <i>criminality</i> or <i>wrongfulness</i> ?
<input type="checkbox"/> (d) control prong probably not applicable here
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/> |
|---|--|

QUESTION 2½

- | | |
|---|--|
| <input type="checkbox"/> Overview
<input type="checkbox"/> Difference in intoxication
<input type="checkbox"/>
<input type="checkbox"/> Insanity defense
<input type="checkbox"/> No "appreciation" – more cognitive | <input type="checkbox"/> Subst. capacity v. " complete prostration "
<input type="checkbox"/> Definition of "wrongfulness" / criminality
<input type="checkbox"/> "Deific decree"?
<input type="checkbox"/> No control prong difference
<input type="checkbox"/>
<input type="checkbox"/> |
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