

SAMPLE ANSWER TO FINAL EXAM

MULTIPLE CHOICE

1. (A) is incorrect, because one of the purposes of punishment is to incapacitate those who are likely to pose a threat to society. Since this statement is true, it is not the least effective argument. **(B) is the CORRECT** answer, since the statement is wrong. Punishing the former governor with a long sentence will have the effect of deterring OTHER persons similarly situated. (C) is incorrect, because for one who has been in a high position of prominence, incarceration is a significant form of humiliation; (D) is incorrect, because the former governor is likely to be a target and his crime did not involve violence.

2. (A) is incorrect, because it states the standard for duress, and there is no duress in this situation; (B) is potentially correct, but it is a difficult argument to show that there is a "fundamental liberty" connected with the use of marijuana, similar to the right recognized in *Lawrence*; (C) is incorrect, because there is no showing that she has a mental defect; **(D) is CORRECT** because she can argue that there is a lesser of evils associated with her possession of marijuana.

3. (A) is incorrect, because it doesn't matter whether Steven understood the law or not. **(B) is CORRECT**, because a vagueness challenge does not focus on the individual defendant, but on whether there is "fair notice" provided by the statute; (C) is incorrect, because mistakes of law are generally not a basis for defense; (D) is incorrect, because even a law enforcement officer could be in possession of child pornography unrelated to his official duties.

4. (A) is incorrect, because Jim might have caused Sam to be knocked down by initially challenging him. Even if he didn't physically run over him, causing the injury might result in a legal duty to summon help. (B) is incorrect, because it is the standard for duress. There is no showing that Jim was under any legal duress. **(C) is CORRECT**. (D) is incorrect because it does not specify whether Jim had any causal role in

5. **(A) is the CORRECT** answer, because it is the least relevant consideration. IF Dr. Kildare had a legal duty not to turn the ventilator off, then the fact that the nurses did it for him is not relevant to his legal guilt. (B) is incorrect, because the ethical guidelines of the hospital would be relevant to determining his legal duty. Similarly, (C) is incorrect, because whether he had a legal duty or not is a debatable point. (D) is incorrect for the same reason.

6. (A) is incorrect, because the constitution doesn't require mens rea, at least with respect to *some* elements of the crime; (B) is incorrect, because the rule of lenity is not a constitutional doctrine, and besides it is not adopted by the MPC. (C) is incorrect, because it doesn't answer the argument that the statute doesn't require any mens rea. **(D) is therefore the CORRECT** answer.

7. (A) is only partially correct; when the actor believes that something is highly probable, that is the same as knowledge; (B) is only partially correct; reliance in order to be a basis for a mistake of law defense must be *official* reliance; a lawyer doesn't count; therefore **(C) is CORRECT** and (D) is incorrect.

8. (A) is incorrect, because the MPC requires use of force, not lack of consent; (B) is incorrect, because the belief of the victim is not the relevant standard; it is the mens rea of the perpetrator; **(C) is CORRECT** because it accurately states the force standard in the MPC; and (D) is therefore incorrect.

9. (A) is incorrect, because it omits any mens rea requirement; (B) is incorrect, because the statute (or an attempt charge under the statute) requires purpose, and the answer gives only a recklessness standard; **(C) is CORRECT**; (D) is incorrect, because the statute specifically recognizes (as a misdemeanor) an effort to aid the suicide even if the effort falls short.

10. **(A) is correct**, because Nancy solicited Brad to fail to perform a legal duty that he had, which would have resulted in Tom's death. (B) is incorrect, because at this stage there was no agreement. (C) is incorrect; and (D) is incorrect.

11. (A) is incorrect, because it omits any discussion of Brad's mens rea in pointing out the risk; (B) is incorrect, because to be an accomplice to murder, Brad's efforts do not have to be successful; **(C) is CORRECT**, because in the absence of the mens rea of purpose, he can't be convicted of conspiracy, of attempt, or of complicity; (D) is incorrect, for the reasons stated in (B).

12. (A) is incorrect, because although one can't be CONVICTED of multiple inchoate crimes arising from the same conduct, one can be CHARGED with multiple versions. **(B) is CORRECT**, because both could have done everything they believed was necessary for the commission of the crime; (C) is incorrect, because an attempt to cause harm may not result in any actual harm; (D) is incorrect because even if Nancy were not convicted for some reason (insanity, or inability to assist in her own defense), Brad owed a duty based on his promise to render aid.

ESSAY QUESTION 1

There are two major questions to be addressed. The first is whether there is good reason to think that the type or length of punishment positively (or negatively) affects the prospects for rehabilitation. Another way to put this question is, "Does any form of rehabilitation *work*, in the sense that it will reduce recidivism later on?" The second question is whether or not it is *fair* for society to treat people differently based upon their *future* behavior rather than their *past* behavior.

1. *The empirical justification for rehabilitation.* At one time it was believed that efforts to rehabilitate prisoners (through psychological therapy, or vocational training, or drug treatment) could produce important societal benefits by releasing prisoners less likely to reoffend (to become recidivists) compared with simply locking them up. In more recent decades doubt has been cast on whether it is reasonable to think that *any* form of incarceration can be shown reliably to reduce recidivism. It is still an open question. It seems intuitively likely that prison conditions have *some* effect on the likelihood of recidivism, even if it is a variation in the degree to which criminogenic aspects of incarceration (like brutalizing prisoners or giving them incentives to join gangs for self-protection) are reduced, recidivism will decline. However, much of the effect of prison is simply a waiting period whereby once-impulsive youths or young men (and occasionally women) become less likely to commit further crimes. Until we have reliable data on what features of prison life have a measurable effect on recidivism, it is difficult to justify using the prospect for rehabilitation as a factor in sentencing.

2. *Fairness Considerations.* Even if rehabilitation "works" in some sense, it is debatable whether inmates should serve longer or shorter sentences because of perceptions that, after "treatment" they are more or less likely to reoffend. From a utilitarian perspective, it is only a question of whether society benefits or loses by paying to incarcerate someone, and for how long. On the other hand, the non-utilitarian (deontological) perspective typically associated with Immanuel Kant rejects any consideration other than what the criminal deserves based upon his or her behavior. Thus, the fact that a white collar criminal can easily be "rehabilitated," while the poster child of social and familial pathology will require extensive "treatment" before being pronounced "cured," should not lead to a shorter sentence for the former or a longer sentence for the latter.

In summary, I would suggest that Justice Weiner ask hard questions about the evidence for the claimed rehabilitative effect of different types of incarceration, and to insure that whatever effect is given to rehabilitation remains consistent with the other goals of criminal punishment, namely the

retribution that the criminal deserves and the deterrent effect on those similarly tempted.

ESSAY QUESTION 2

Barry

Barry could be charged with a variety of crimes, depending upon the evidence that emerges from further investigation of the case.

Attempted murder, § 210.2(1). The most serious crime Barry could be charged with is attempted murder, § 210.2(1). To prove this crime, the prosecutor would have to prove that Barry intended to cause Daniel's death. Under § 5.01(1)(b), one commits a criminal attempt if one "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." Barry's statement that he wished that Daniel would slit his throat for real—if he was serious and not joking—could be evidence that Barry believed, or desired, that by placing the still-sharp knife in the drawer, Daniel would slit his throat and die. If that were the case, then Barry could be found guilty of attempted murder. Attempted murder is a second degree felony.

Aggravated Assault, § 211.1(2)(a). Even if Barry didn't actually intend to cause Daniel's death, he could still be guilty of aggravated assault if he caused serious bodily injury recklessly under circumstances manifesting extreme indifference to the value of human life. In order to prove recklessness, the prosecutor would have to show that Barry was aware of the risk that his conduct might cause serious bodily harm, and that he consciously took that risk in a way that displayed extreme indifference to the value of human life. This might be the case if Barry didn't actually want (or expect) Daniel to die, but thought that Daniel would be badly frightened or otherwise disabled from playing his part on stage. This crime is a second degree felony.

Aggravated assault, § 211.1(2)(b). Barry could be found guilty of a different form of aggravated assault if he knowingly caused Daniel to suffer bodily injury with a deadly weapon. The knife is a deadly weapon because "in the manner it is used . . . [it] is known to be capable of producing death or serious bodily injury." (MPC § 210.0(4)) Barry wouldn't be guilty of attempted murder if he didn't actually have the purpose of causing Daniel's death. On the other hand, if he *knew*, once the knife was in the drawer, that it was "practically certain" that the knife would result in bodily injury, then he would be guilty of aggravated assault under § 211.1(2)(b). It is a felony of the third degree.

Simple assault, § 211.1(1)(b). Barry would be guilty of simple assault if he negligently caused bodily injury to Daniel with a deadly weapon. Even if Barry had no animus toward Daniel and was simply careless, he acted negligently in putting it in the prop drawer without blunting it if a jury found that his failure to recognize the risk of injury represented a "gross deviation from the standard of a reasonable person in the actor's situation." Simple assault is a misdemeanor.

Barry's Defenses. Barry could argue that his intoxication at the time he purchased the knife would operate as an excuse. I'm assuming for purposes of this discussion that Barry's intoxication at the time he purchased the knife was self-induced. Under MPC § 2.08, evidence of self-induced intoxication may be introduced to negative the claim that he had the mens rea of acting purposely or knowingly as required for attempted murder or aggravated assault under § 211.1(2)(b). On the other hand, with respect to aggravated assault under § 211.1(2)(a) and simple assault, MPC § 2.08, the fact that his intoxication made him unaware of the risk that his conduct might cause bodily injury, or serious bodily injury, is "immaterial." In other words, if a sober person would have recognized the risk, then he is treated as being aware of the risk even though (in fact) he was not.

Arthur

Arthur could not be charged with most of the crimes that Barry could be charged with, unless there was evidence that Arthur had some animus toward Daniel and used Barry to carry out an attack. This seems implausible. Moreover, he cannot be held vicariously liable for Barry's conduct; and unless he actually had the purpose of facilitating or encouraging Barry's conduct he could not be an accomplice under MPC § 2.06. On the other hand, Arthur as the prop manager owed a duty to

Daniel not to cause him harm by failing to make the knife safe. Arthur sent Barry to get a new prop knife, and apparently there was no follow-up to make the knife safe. The fact that the price tag was left on the knife suggests that there was an expectation that someone would take care of it. Ordinarily there is no criminal liability for failing to act; there must be a basis for a legally imposed duty. One way to create a legal duty is by contractual relationship or the voluntary assumption of a duty. Here, by accepting employment as a prop manager Arthur had a duty to Daniel to prevent harm resulting from the knife. If Arthur was negligent in failing to blunt the knife, then he could be charged with simple assault, as discussed above, which is a misdemeanor.

ESSAY QUESTION 2½

The major differences that would obtain in a non-MPC jurisdiction would be as follows:

1. *Different standard for intoxication.* Some jurisdictions do not admit evidence of intoxication unless it results in a "complete prostration" of faculties. That would mean that Barry would be unable to use the intoxication defense unless he met this standard.
2. *Exclusion of intoxication evidence.* Some states bar evidence of intoxication with respect to *all* offenses, or restrict it to first-degree murder.
3. *Different standard for attempt.* Barry's charge of attempted murder might be subject to a higher standard of something like "dangerous proximity" or "last proximate act" rather than the less restrictive standard under the MPC. That might mean that Barry's simply leaving the knife would be insufficient for attempted murder.

Checklist

QUESTION 1

- | | |
|---|--|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Fairness Question |
| <input type="checkbox"/> Empirical Questions about Rehabilitation | <input type="checkbox"/> Can Future Behavior Affect Punishment? |
| <input type="checkbox"/> Initial Optimism re effectiveness | <input type="checkbox"/> Retributive Purposes of Punishment |
| <input type="checkbox"/> Later criticism questioned, " What Works? " | <input type="checkbox"/> Deterrent function of Punishment |
| <input type="checkbox"/> Current Openness to Proven Programs | <input type="checkbox"/> Deontological (Kantian) Considerations |
| <input type="checkbox"/> Continuing Need for Research | <input type="checkbox"/> Utilitarian Considerations |
| <input type="checkbox"/> Reducing Criminogenic Effect of Prison | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |

QUESTION 2

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|---|--|
| <input type="checkbox"/> Charges v. Barry | <input type="checkbox"/> Simple Assault, MPC § 211.1(1)(b) |
| <input type="checkbox"/> Attempted Murder | <input type="checkbox"/> Negligently inflicted w/ deadly weapon |
| <input type="checkbox"/> MPC § 210.2(1) | <input type="checkbox"/> Negligence defined |
| <input type="checkbox"/> Attempt defined per § 5.01(1)(b) | <input type="checkbox"/> |
| <input type="checkbox"/> Requirement of Purpose to Cause Death | <input type="checkbox"/> Defense: Intoxication |
| <input type="checkbox"/> Evidence re Barry's Intent | <input type="checkbox"/> Presumably self-induced |
| <input type="checkbox"/> 2nd degree felony | <input type="checkbox"/> Relevant to Attempted Murder |
| <input type="checkbox"/> | <input type="checkbox"/> Relevant to Aggr Assault under (2)(b) |
| <input type="checkbox"/> Aggravated Assault, § 211.1(2)(a) | <input type="checkbox"/> Not helpful for recklessness |
| <input type="checkbox"/> Minimum culpability: Recklessness | <input type="checkbox"/> Not helpful for negligence |
| <input type="checkbox"/> Consciousness of Risk | <input type="checkbox"/> |
| <input type="checkbox"/> Extreme Indifference to Value of Life | <input type="checkbox"/> Charges v. Arthur |
| <input type="checkbox"/> 2nd degree felony | <input type="checkbox"/> Omission is sufficient b/c of duty |
| <input type="checkbox"/> | <input type="checkbox"/> Simple Assault, MPC § 211.1(1)(b) |
| <input type="checkbox"/> Aggravated Assault, § 211.1(2)(b) | <input type="checkbox"/> Same analysis as for Barry |
| <input type="checkbox"/> Knife is a deadly weapon | <input type="checkbox"/> |
| <input type="checkbox"/> Knowledge that it would cause bodily injury | <input type="checkbox"/> |
| <input type="checkbox"/> 3d degree felony | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |

QUESTION 2½

- | | |
|---|--|
| <input type="checkbox"/> Different standard for intoxication | <input type="checkbox"/> Different standard for Attempt |
| <input type="checkbox"/> Some jurisdictions exclude all evidence | <input type="checkbox"/> "Last proximate act" standard |
| <input type="checkbox"/> Some admit only in murder cases | <input type="checkbox"/> |
| <input type="checkbox"/> Some require "complete prostration" | <input type="checkbox"/> |
| | <input type="checkbox"/> |

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