

SAMPLE ANSWER TO FINAL EXAM

MULTIPLE CHOICE

1.
 - (A) Sorry, falling asleep might be involuntary, but driving when he was sleepy was a voluntary act.
 - (B) is incorrect because negligence is based on the fact that the defendant *should* be aware of the risk;
 - (C) is incorrect because there was no evil that he was avoiding;
 - (D) is incorrect because duress requires a human agent;
 - (E) is therefore the best answer

2.

(A) is only partially correct; Bob committed bank robbery and he conspired to rob the bank, but he can't be convicted of both. (B) is only partially correct; one can only be convicted of one form of an inchoate crime; (C) is therefore the best answer; and (D) is incorrect.

3.

(A) is incorrect; Susan was an accomplice to robbery and therefore she could be convicted of robbery; (B) is incorrect; Susan was an accomplice; (C) is incorrect; the MPC rejects the "natural and probable consequences" doctrine for accomplice liability. (D) is therefore the correct answer.

4.

(A) is incorrect, because rape only requires recklessness; (B) is correct, because rape requires force, threats of force, use of intoxicants, or unconsciousness; (C) is incorrect, because lack of consent is insufficient to establish rape; (D) is incorrect, for the same reasons as (C).

5.

(A) is incorrect, because the *use* of methamphetamine (as distinguished from being addicted) is a voluntary act; (B) is incorrect, for the same reason as (A); (C) is not a strong defense, but it is better than the others; (D) is incorrect, because he is not being charged with a crime done under the influence of involuntary intoxication.

6.

(A) is partially correct. His mistake of fact would negative the mens rea (recklessness). (B) is partially correct; if he made a mistake regarding whether he was still employed (even if it was a mistake regarding employment law) it would be a defense; (C) is another mistake of fact; therefore (D) is the best answer.

7.

(A) is incorrect, because but-for cause is only part of the causation test; (B) is a repetition of the error in (A); (C) is incorrect, because at least in theory the intent could transfer from one to another. (D) is the best answer, because it shows the likely result of the application of the second half of the proximate cause test.

8.

(A) is incorrect, because it only shows that she had *knowledge* of what Daniel was doing. To be guilty of murder she would have to have the purpose of aiding him. (B) is correct, because she had a *duty* to protect Peter, and her failure to do so, if coupled with a desire to achieve the result, would make her an accomplice; (C) is incorrect; one can be an accomplice by doing nothing if one

has a duty to act and fails to do so with the purpose of aiding the perpetrator; (D) is incorrect, because an accomplice can be guilty despite the innocence (or lesser guilt) of the principal.

9.

(A) is incorrect; it doesn't matter what the *agent* thought; it matters what *Mark* thought. (B) is incorrect, because Mark may have committed a substantial step planned to culminate in the commission of the crime; (C) is incorrect, because the MPC permits unilateral conspiracy. (D) is therefore correct.

10.

(A) is correct; (B) is incorrect, because Edward might have reasonably believed that he did pose a real threat; (C) is incorrect, because aggravated assault doesn't require intent; (D) is incorrect, because aggravated assault doesn't require the use of deadly force.

11.

(A) is incorrect, because the culpability standard is one of recklessness. (B) is incorrect for the same reason; (C) is therefore correct; (D) is incorrect.

12.

(A) is incorrect; so long as she was negligent with respect to the result (death), she could be found guilty of negligent homicide. (B) is incorrect for the same reason as (A); (C) is incorrect for the same reason as (A) and (B). Therefore, (D) is the correct answer.

ESSAY QUESTION #1

The Deterrent Effect. The first issue is whether or not the death penalty has a deterrent effect. The flaw in the article is that it doesn't use rigorous methods of data analysis. In order to do an accurate study, one would need to control for variables that influence the murder rate, such as the age of the population, poverty, gun ownership, etc. In studies where these variables have been taken into account, it is claimed that there is a noticeable deterrent effect -- perhaps as high as multiple lives "saved" for every execution. These studies have been challenged on methodological grounds, but the debate is much more sophisticated than the limited methodology in this New York Times study.

On intuitive grounds, some would argue that the death penalty does deter. This might be even more true of crimes other than murder, such as treason or child rape. Others would argue on intuitive grounds that the death penalty has a "brutalizing effect"--seeming to reinforce the idea that it is morally justified to take human life to achieve one's ends, or (to put it another way) sending a message that there are values more important than the preservation of human life. Again, the intuitive arguments have not been displaced by actual empirical data, because even sophisticated regression analyses are subject to methodological criticism.

Retributive Principles. Even if we had a definitive answer to the question of whether or not the death penalty deters murder, there are questions about whether or not the death penalty is morally justified. Some would say that, regardless of the utilitarian benefit, the death penalty is deserved and should be imposed. Others would say the opposite: that no matter what benefit is derived from executing criminals, it is morally wrong to do so. Still others would make the moral calculus dependent (at least in part) on the existence of a deterrent effect.¹ Thus, if it turns out that the death penalty *does* deter crime, then it is not only morally permissible, but morally imperative. On the other hand, some would distinguish the positive action of killing the criminal from the *inaction* of

¹This, for example, is the position of the Catholic Church: where capital punishment is necessary to prevent greater bloodshed, it is morally justified. On the other hand, where "bloodless" means suffice to protect the public, it is morally unjustified.

failing to prevent murder.

Other arguments. In addition to the arguments about deterrence and retribution, there are concerns about several other features of capital punishment. One is that it is imposed disproportionately on racial minorities and the poor. This may reflect higher crime rates by minorities and the poor, but it is still troubling. Another is the risk of error. In Illinois more people were exonerated based on mistakes than were executed. Defenders of capital punishment point to the risk of error in other contexts, such as construction projects or the authorization of deadly force in law enforcement.

Political considerations. Since Justice Hamburg faces a retention vote, it might be relevant to note that, while a very substantial majority of the population favors the death penalty, when the survey asks whether or not "life imprisonment without possibility of parole" would be an acceptable substitute, many people say yes. Thus, the enthusiasm for the death penalty appears in part to be a result of distrust that "life imprisonment" really means "life imprisonment."

ESSAY QUESTION #2

Farish was an accomplice at least to one of Romero's crimes, possibly two and maybe even three, and therefore he could be charged with arson, and possibly an additional count of criminal mischief.²

Arson (Metzger home). The easy case is the arson of the Metzger home. Arson (§ 2.10(1)) is punishable as a second degree felony, A second degree felony carries a minimum penalty of 1 year and a maximum of 20 years imprisonment.

To commit arson, the defendant must "start a fire . . . with the purpose of . . . destroying an occupied structure of another." MPC § 220.1(1)(a). An occupied structure is defined as "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." The Metzger home would certainly be an occupied structure. And certainly Farish had the purpose of starting a fire at the Metzger home. However, it is less clear that he had the purpose of *destroying* the residence. Since it is clear that Farish wanted Romero to start a fire in Metzger's home, it would be reasonable to infer that he had the purpose to destroy it. But that would have to be found as an affirmative fact.

Farish didn't himself burn the Metzger home, but he is an accomplice to Romero's doing so. Under MPC § 2.06(3)(a)(i) Farish is an accomplice because, "with the purpose of promoting or facilitating the commission of [arson], he . . . solicit[ed] another person to commit it." Solicitation is defined in § 5.02(1) as occurring when the actor "requests another person to engage in specific conduct which would constitute the crime." In addition, Farish is an accomplice under MPC § 2.06(3)(ii) because he "aids . . . such other person in planning or committing it." When Farish gave Romero directions, and offered him a car in exchange doing as he asked, that would constitute aid or an offer of aid.

Reckless Burning. It is a third degree felony to start a fire and recklessly endanger lives or property (MPC § 210.1(2)). If F didn't intend to *destroy* the Metzger home, he at least intended to start a fire, and it would be easy to show that he was reckless in risking damage or destruction. On the other hand, the defense might argue that reckless burning applies when a fire spreads from one location to another, not where there is a mistake by the agent as to which property is being burned.

Arson (Bauer). The more difficult question is whether Farish committed one act of arson or two. It is clear that when Romero started a fire in the Bauer home, he committed arson. He "start[ed] a fire . . . with the purpose of . . . destroying an occupied structure of another." (Again, assuming an intent to destroy.) The fact that he thought the home belonged to Metzger would not change the fact that Romero was committing arson. But was Farish an accomplice to *that* crime?

²There is an additional crime in § 220.2, "Causing or Risking Catastrophe." The term "catastrophe" is not defined, but presumably it is limited to threats of widespread damage, such as leakage of toxic chemicals, forest fire, etc.

The prosecutor would argue that Farish had the mens rea for arson, that he started a fire with the purpose of destroying an occupied structure "of another," and the mistaken identity of the occupant is irrelevant. He might claim that the fact that the victim was different would fall under the same principle of "transferred intent" that is found in § 2.03 under causation. On the other hand, the defense would certainly argue that Farish's *mens rea* was limited to the destruction of the Metzger home, and because the MPC doesn't follow the "natural and probable consequences" doctrine to extend liability to an accomplice if there was no purpose of committing foreseeably related crimes, Farish can't be an accomplice unless he had the purpose of destroying the Bauer home--which he did not.

A problem with the "transferred intent" doctrine is that it applies to *results*, not to *conduct*. For example, in the case where A intends to kill B but kills C instead, A is guilty of murdering C under the "transferred intent" doctrine. Under MPC § 2.03(2)(a), the causal element is satisfied if "the actual result differs from that designed . . . only in the respect that a different person or different property is injured . . ." Even the MPC accepts this doctrine. However, in this case there doesn't appear to be any *result* element of arson. It has to do with starting a fire with the purpose of destroying an occupied structure belonging to another. On the other hand, perhaps a court would apply the transferred intent doctrine by analogy where the accomplice aids the principal in committing the crime, but the principal mistakes one victim for another.

Attempt / Solicitation / Conspiracy. One might argue that Farish first solicited Romero to commit arson, and thereby attempted to commit arson, and also conspired to commit arson, and this crime was complete when Romero set off to set fire to what turned out to be the Bauer home; Farish then arguably committed a separate crime when he gave Romero directions to the Metzger home. The problem is that under MPC § 1.07(1)(b), (4)(b) and 5.05(3), there cannot be a conviction for an offense and an attempt, or solicitation, or conspiracy to commit that same offense. Thus, if Farish is not an accomplice to a second count of arson for the Bauer fire, then I don't think he can be convicted for attempting to commit the Metzger fire (or conspiring to commit it or soliciting Romero to commit it).

Criminal mischief (Bauer vehicles). Criminal mischief, § 220.3 a third degree felony, is punishable by 1 to 10 years. (MPC § 6.07) When Romero set fire to the Bauer vehicles, *he* committed criminal mischief. Criminal mischief is committed when one "damages tangible property of another purposely, recklessly, or by negligence in the employment of fire, . . ." It is a third degree felony when the defendant intentionally causes pecuniary loss in excess of \$5,000. Presumably the two vehicles together were worth more than \$5,000. But just as with the burning of the Bauer residence, it is difficult to say that Farish had the purpose of soliciting Romero to destroy the vehicles, as distinguished from the Metzger residence. However, here the doctrine of "transferred intent" could apply, because the damage is a result element, and when "the injury or harm designed or contemplated would have been more serious or more extensive than that caused" (MPC § 2.03(2)(a)), the lesser crime is committed.

But again the defense might argue that Farish's intent was "used up" in the commission of the Metzger arson, and that the previous criminal conduct of Romero is his responsibility, not Farish's.

In conclusion, depending on how the law is interpreted, Farish is probably guilty of one second degree felony, but he might be convicted of an additional third degree felony and possibly an additional second degree felony as well.

ESSAY QUESTION #2½

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

(1) *Conspiracy as a Separate Crime.* In many jurisdictions (including the federal system) Farish could be convicted of a separate crime of conspiracy, since he agreed with Romero that Romero should commit the crime. The conspiracy charge would not merge with the crimes Farish committed by being an accomplice.

(2) *Pinkerton liability for substantive crimes.* Once Farish conspired with Romero to commit

arson, he would be guilty of any crimes committed in the course of the conspiracy that would be natural and probable consequences, or reasonably foreseeable.

(3) *Natural and Probable Extension of Complicity*. Since the setting fire to the Bauer residence and vehicle were natural and probable consequences of the original conspiracy, Farish could be convicted of those additional crimes, plus the conspiracy to commit the Metzger fire and arson itself. Thus, there could be four convictions under a jurisdiction.

Checklist

QUESTION 1

- | | |
|--|--|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Racial discrimination concerns |
| <input type="checkbox"/> Debate about Deterrence | <input type="checkbox"/> Risk of error concerns |
| <input type="checkbox"/> Studies claiming significant deterrent effect | <input type="checkbox"/> Response to risk of error concerns |
| <input type="checkbox"/> Methodology criticized | |
| <input type="checkbox"/> Intuitive arguments for deterrent effect | <input type="checkbox"/> Political realities |
| <input type="checkbox"/> Intuitive arguments against deterrence | <input type="checkbox"/> Most favor |
| <input type="checkbox"/> "Brutalization" argument | <input type="checkbox"/> But what if life imprisonment really meant life imprisonment? |
| | <input type="checkbox"/> |
| <input type="checkbox"/> Weight of retributive arguments | <input type="checkbox"/> |
| <input type="checkbox"/> Retributive arguments for | <input type="checkbox"/> |
| <input type="checkbox"/> Retributive arguments against | <input type="checkbox"/> |
| <input type="checkbox"/> Some are independent of deterrent effect | <input type="checkbox"/> |
| <input type="checkbox"/> State killing vs. failing to prevent killing | |

QUESTION 2

- | | |
|--|--|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Bauer home |
| <input type="checkbox"/> Of how many crimes is F guilty? | <input type="checkbox"/> R committed separate crime, but did F? |
| <input type="checkbox"/> Arson | <input type="checkbox"/> Does the principle of transferred intent apply? |
| <input type="checkbox"/> Defined in § 2.10(1) | <input type="checkbox"/> Is there a result element? |
| <input type="checkbox"/> 2nd degree felony | <input type="checkbox"/> What about attempt, conspiracy, solicitation? |
| <input type="checkbox"/> punishable by 1-20 years | <input type="checkbox"/> Inchoate crimes merge w/ substantive crime |
| <input type="checkbox"/> requires purpose to <i>destroy</i> | |
| | <input type="checkbox"/> Criminal mischief |
| <input type="checkbox"/> Metzger home (the easy case) | <input type="checkbox"/> Elements under § 220.3 |
| <input type="checkbox"/> F was an accomplice | <input type="checkbox"/> Damages tangible property |
| <input type="checkbox"/> Definition of accomplice | <input type="checkbox"/> 3rd degree felony if vehicles are > \$5000 |
| <input type="checkbox"/> Solicitation one way to be accomplice | <input type="checkbox"/> R 's criminal mischief: is F an accomplice? |
| <input type="checkbox"/> Definition of solicitation | <input type="checkbox"/> Result element (damage); Transferred intent? |
| <input type="checkbox"/> Also agreement to aid | <input type="checkbox"/> Lesser crime rather than greater |
| <input type="checkbox"/> Offering car, directions was aid | <input type="checkbox"/> Was intent "used up"? |
| <input type="checkbox"/> F had purpose to have R commit crime | |
| <input type="checkbox"/> Did F want to <i>destroy</i> home? | |
| <input type="checkbox"/> | |

QUESTION 2½

- | | |
|--|---|
| <input type="checkbox"/> Separate conviction for conspiracy | <input type="checkbox"/> "Natural / probable consequences" (complicity) |
| <input type="checkbox"/> Adding to existing convictions | <input type="checkbox"/> Criminal mischief probably foreseeable |
| | <input type="checkbox"/> |
| <input type="checkbox"/> <i>Pinkerton</i> liability for substantive crimes | <input type="checkbox"/> |
| <input type="checkbox"/> Committed in furtherance of conspiracy | <input type="checkbox"/> |

Exam # _____