

FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1. (A) is incorrect, because it doesn't contain any mens rea requirement. (B) is incorrect because it makes Sam vicariously liable. (C) is incorrect because it states the standard for negligence, while the statute requires a minimum of recklessness. Therefore, **(D)** is the **correct** answer.

2. (A) is incorrect, because it imposes only a standard of knowledge, whereas the MPC requires purpose as the basis of accomplice liability; (B) is incorrect, because it fails to establish that there was an agreement between Emily and Linda; **(C)** is **correct**, because Emily had the purpose of facilitating the criminal conduct by Linda, and she aided her in doing so; (D) is incorrect, because there was no agreement between Emily and Linda; (E) is incorrect because there is at least one wrong answer.

3. (A) is incorrect, because consultation with the family wouldn't by itself prevent a charge of negligent homicide; (B) is incorrect, because it doesn't contain any mens rea requirement; (C) is incorrect, because Dr. Brown's conduct is not dependent on whether or not we approve of Mrs. Green's choices. **(D)** is **correct**, because a patient may choose to relieve suffering or forego medical treatment if it does not involve a deliberate effort to end the patient's life.

4. **(A)** is the **correct** answer, because the MPC permits justification even if it is unreasonable, provided that negligent or reckless use of deadly force may expose the defendant to criminal charges that only require negligence or recklessness. (B) is incorrect, because it imposes a higher standard (like the New York approach) to self-defense. (C) is incorrect, because it sets a standard of negligence instead of recklessness. (D) is incorrect, there is correct answer.

5. **(A)** is **correct**, because the MPC permits justification where the actor believes that his conduct is the lesser of evils; (B) is incorrect; many states limit the defense of necessity to harms other than killing, but the MPC does not contain this limitation; (C) is incorrect, because Mike might be guilty of manslaughter or of negligent homicide, but not of murder; (D) is incorrect, because Mike's conduct knowingly caused the death of the passengers.

6. (A) is (partially) correct. (B) is (partially) correct, because Bob's solicitation of Bill is a substantial step strongly corroborative of his intent to commit the crime; (C) is (partially) correct, because a second degree felony does not require an overt act; **(D)** is therefore the **correct** answer, and (E) is incorrect.

7. (A) is incorrect, because luring the victim to the place where the crime is to be committed could be considered a substantial step; **(B)** is **correct**, because intoxication can be used to negate a mens rea of purpose or knowledge; (C) is incorrect, because attempt requires proof of mens rea, and recklessness is insufficient in an attempt case; (D) is incorrect because it focuses on Nancy's state of mind rather than Fred's mens rea.

8. **(A)** is **correct**, because duress only requires that the defendant establish that his conduct is what a person of reasonable firmness would do; (B) is incorrect, because there is no requirement in the MPC of imminent harm as a basis for duress; (C) is incorrect because the requirement of turning oneself in is applied in some jurisdictions to the defense of necessity in the case of prison inmates, but it is not part of the MPC's definition of duress; (D) is incorrect, because prison escape is not a crime for which negligence is sufficient; moreover, there is no evidence that Joe was negligent in placing himself in that position.

9. (A) is a decent argument, and therefore is not the worst; (B) is also a decent argument; (C) is the worst argument (and therefore the **correct** answer), because there is no guarantee that Quincy will not kill during the years he is on death row, and if the alternative is life in prison without parole, it also insures that he will not be able to kill again; (D) is not a certain argument, but it is plausible.

10. (A) is incorrect, because his mistake was one of law, rather than of fact; **(B)** is **correct**, because the MPC doesn't permit a charge of an attempt to commit a substantive crime where the defendant makes a

true mistake regarding illegality, thus constituting true legal impossibility. (C) is incorrect, for the same reason just discussed in (B); and therefore (D) is also an incorrect answer.

QUESTION 1

The German statute is discussed in Ingle, *Law on the Rocks: The Intoxication Defenses are being Eighty-Sixed*, 55 VAND. L. REV. 607 (2002).

Most criminal codes, including the Model Penal Code ("MPC"), do not apply normal mens rea requirements to one who commits a crime while intoxicated. Instead, a kind of legal fiction is employed to allow punishment even though the defendant in fact was unaware of the risk of his behavior. For example, the MPC would allow a conviction for manslaughter if the defendant didn't realize that he was shooting another human being, if he would have been aware of that risk if he had been sober. Glanville Williams criticized this "punishing a man for being drunk." While the MPC permits intoxication as a defense to crimes requiring specific intent (purpose or knowledge), some criminal codes are even more restrictive and permit intoxication as a defense only to reduce the degree of homicide.

The German statute makes explicit what Williams claims we are doing anyway, namely to punish a person for getting drunk. Of course, this is limited to cases where the individual gets drunk and does something antisocial—who would be convicted of crime if we didn't require mens rea). It is hard to tell whether the German statute applies *in lieu of* criminal punishment for the act committed (say, murder or rape) or whether it applies when an acquittal based on intoxication is simply "a possibility"). However, the punishment authorized is five years, or the maximum for the criminal statute that would be applied (except for intoxication), whichever is less. It is thus unclear whether the effect of the statute would be more convictions with less time served, or whether it would simply make explicit what in effect is already the rule.

To some extent the statute also highlights the controversy over whether a person should be punished for the fortuity of what happens as a result of their violation of the law. For example, someone who drives drunk and hits a pedestrian, causing serious injury, can be punished for vehicular assault, while another person who engages in the same behavior (driving drunk) but luckily avoids an injury will receive much lighter punishment. Is that fair? Should punishment depend upon the fortuity of the result? If a person gets drunk and kills or rapes someone, is it fair to impose a much more serious punishment if, once intoxicated, that individual is really no longer able to control his behavior? Again, virtually all criminal codes do this, but some commentators are critical.

QUESTION 2

The facts of this case were drawn from *Spier v. State*, 174 S.W.3d 539, (Mo.App. 2005), which held that Spier was not guilty of kidnapping, but could be charged with interference with custody.

Spier could be held liable either in his own right (for interference with custody) or as an accomplice to kidnapping. Spier's liability would be as an accomplice to Flores. There are two different charges here, and the mens rea requirements are quite different.

Kidnapping (MPC § 212.1). It appears that Flores unlawfully took her children from DFS, and Spier must have either suspected or known that she was doing so. However, whether he had sufficient mens rea to be guilty of kidnapping is doubtful. Under the MPC it is not necessary that Flores actually be guilty (she may have been mentally ill, or is otherwise unconvictable; see MPC § 2.06(7)); it is sufficient that Spier act with the required mens rea and that he or Flores actually did what the statute forbids. An accomplice is liable the

conduct of another if, "with the purpose of promoting or facilitating the commission of the offense, he . . . (ii) aids . . . such other person in . . . committing it . . . or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do." (MPC § 2.06) Kidnapping requires that the defendant "unlawfully confin[ed] another for a substantial period in a place of isolation." Spier helped Flores confine the children in a place of isolation; indeed, it appears that he drove the "getaway" car. Moreover, both because he drove the getaway car, and because he arguably had the status of a parent in this context, he may have had a legal duty to prevent F from continuing to confine them once he knew that F was hiding out from DFS. Because in this context the victims were under the age of 14, "unlawfully" means "without the consent of a parent, guardian or other person responsible for general supervision of his welfare" (§212.1). It seems clear that Spier would have known that the children had been in the custody of the DFS and thus that Flores didn't have consent to take them back. However, the consent of DFS could be considered a circumstance element, and under the MPC there is no definitive standard for what mens rea is required with respect to

In addition, Spier would have had to have one of the four purposes contained in § 212.1(a) through (d). The only purpose that would conceivably apply is § (d), which is "to interfere with the performance of any governmental or political function." Certainly Spier could be said to have had the *effect* of interfering with a governmental function—child welfare—but the statute seems to require that this be a *purpose* of the defendant, and that seems like a stretch. However, if that condition is satisfied, then Spier could be convicted as an accomplice to kidnapping, which is a second degree felony, punishable by up to 10 years in prison. (If the surrender of the children is not considered voluntary, it could be a first degree felony.) Because four children are involved, conceivably each child is a separate kidnapping charge.

Interference with Custody (MPC § 212.4): The offense is committed if the defendant "knowingly or recklessly takes any child under the age of 18 from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so." Since S could be said to have "taken" the children (because he drove the "getaway" car), he could be charged as a principal. Thus, he would only have to be reckless with respect to the fact that he was taking the children away from their lawful custodian. Even if he thought that F had permission to take the children, so long as he was aware of a substantial and unjustifiable risk that F was taking the children away from their lawful custodian, and his doing so was a gross deviation from the conduct of a law-abiding person, he would be reckless.

Alternatively, S could be charged as an accomplice to F's interference with custody. To be guilty as an accomplice, S must have acted with the purpose of aiding F in committing the offense. S actually aided F by driving the car, but it would be more difficult to show that S had the purpose of aiding F in committing the offense. On the other hand, if the removal from lawful custody is considered a result or result element, then S would only have to be reckless with respect to the fact that the state was the lawful custodian.

There is an affirmative defense for one who believes that interference with custody is necessary for the child's welfare, but that hardly seems viable here. If he asserted the affirmative defense he would be admitting that he was trying to remove the children from DFS custody, which would be in conflict with his claim of relative innocence as to F's plans: S would more likely claim that he thought F had some right to see her own children, or was unaware of the fact that she was acting unlawfully (that is, without DFS permission).

The crime is a misdemeanor unless the prosecution could show that S acted with reckless disregard of the likelihood that this conduct would cause serious alarm. Again, the standard for recklessness is whether S was aware of the risk (even if he thought F was acting lawfully). Depending on the circumstances (e.g., perhaps it became obvious that DFS was looking for the children and F was actively trying to avoid them), S might be charged with the felony version of interference.

QUESTION 2½

The primary difference in a non-MPC jurisdiction would be a different approach to complicity; whereas the MPC requires purpose in order to convict a defendant as an accomplice, some jurisdictions might

permit a conviction where the defendant merely has *knowledge* of the use to which his aid is being put. (Posner suggested this for serious crimes.) In addition, at common law (and in some jurisdictions which continue to follow this rule) an accomplice cannot be convicted unless the principal is also guilty. Since in this case there is an enhanced punishment for a non-parent, S might benefit from the rule that the punishment for an accomplice cannot be more serious than that of the principal. Finally, there might be some resolution of what mens rea standard is used for the circumstances elements in a complicity charge.

Checklist

QUESTION 1

- | | |
|---|--|
| <input type="checkbox"/> Punishing a person for being drunk | <input type="checkbox"/> Is statute additive or a substitute for crime? |
| <input type="checkbox"/> American statutes modify mens rea required | <input type="checkbox"/> Would statute increase conviction rate? |
| <input type="checkbox"/> MPC divides general intent/specific intent | <input type="checkbox"/> What about punishing a person for fortuity ? |
| <input type="checkbox"/> Some jx. are more restrictive than MPC | <input type="checkbox"/> Critics: mens rea matters more than results |
| <input type="checkbox"/> Statute would align theory with practice | <input type="checkbox"/> |
| <input type="checkbox"/> | |
| <input type="checkbox"/> | |

QUESTION 2

- | | |
|---|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Interference with custody |
| <input type="checkbox"/> Kidnapping § 212.1 | <input type="checkbox"/> Crime definition |
| <input type="checkbox"/> Accomplice liability explained | <input type="checkbox"/> Did S " take " the children? |
| <input type="checkbox"/> Actus reus : aiding | <input type="checkbox"/> Driving " getaway " car might be "taking" |
| <input type="checkbox"/> S drove the " getaway " car | <input type="checkbox"/> If a principal , recklessness suffices |
| <input type="checkbox"/> S must have the purpose of aiding or facilitating conduct | <input type="checkbox"/> Was S aware of risk DFS = lawful custodian ? |
| <input type="checkbox"/> S's conviction doesn't require F's guilt | <input type="checkbox"/> A gross deviation from law-abiding person? |
| <input type="checkbox"/> | <input type="checkbox"/> S as accomplice to F |
| <input type="checkbox"/> confinement without consent | <input type="checkbox"/> |
| <input type="checkbox"/> If <14 " unlawfully " = "without consent" | <input type="checkbox"/> Actus Reus : S actually aided F |
| <input type="checkbox"/> S helped Flores place children in isolation | <input type="checkbox"/> Mens rea required is purpose for conduct |
| <input type="checkbox"/> What was S's mens rea re lack of consent? | <input type="checkbox"/> Is " lawful custodian " circumst./result element? |
| <input type="checkbox"/> Did S know/suspect F hiding from DFS? | <input type="checkbox"/> Would a different mens rea standard apply? |
| <input type="checkbox"/> DFS consent is a circumstance element, | <input type="checkbox"/> Affirmative defense not applicable |
| <input type="checkbox"/> MPC " deliberately ambiguous " re circum. | <input type="checkbox"/> |
| <input type="checkbox"/> Was S reckless re DFS non-consent? | <input type="checkbox"/> Misdemeanor |
| <input type="checkbox"/> | <input type="checkbox"/> Enhancement for causing " serious alarm " |
| <input type="checkbox"/> S must also have purpose to interfere ; | <input type="checkbox"/> 3d Degree Felony |
| <input type="checkbox"/> S interfered , but was it his <i>purpose</i> ? | <input type="checkbox"/> Did S know enough to be reckless ? |
| <input type="checkbox"/> Kidnapping is a second degree felony | <input type="checkbox"/> Four children = four counts ? |
| <input type="checkbox"/> 10 years in prison. | <input type="checkbox"/> |
| <input type="checkbox"/> Is each child separate kidnapping charge ? | <input type="checkbox"/> |

QUESTION 2½

- | | |
|---|--|
| <input type="checkbox"/> Different standard for complicity | <input type="checkbox"/> Treatment of circumstances |
| <input type="checkbox"/> Knowledge might be sufficient | <input type="checkbox"/> |
| <input type="checkbox"/> S might be convicted only if F guilty | <input type="checkbox"/> |