

PACE UNIVERSITY SCHOOL OF LAW

CRIM-LAW I
PROFESSOR HUMBACH
FINAL EXAMINATION

December 18, 2008
TIME LIMIT: 2 hours.

IN TAKING THIS EXAMINATION, YOU ARE REQUIRED TO COMPLY WITH THE SCHOOL OF LAW RULES AND PROCEDURES FOR FINAL EXAMINATIONS. YOU ARE REMINDED TO PLACE YOUR EXAMINATION NUMBER ON EACH EXAMINATION BOOK AND SIGN OUT WITH THE PROCTOR, SUBMITTING TO HIM OR HER YOUR EXAMINATION BOOK(S) AND THE QUESTIONS AT THE CONCLUSION OF THE EXAMINATION.

DO NOT UNDER ANY CIRCUMSTANCES REVEAL YOUR IDENTITY ON YOUR EXAMINATION PAPERS OTHER THAN BY YOUR EXAMINATION NUMBER. ACTIONS BY A STUDENT TO DEFEAT THE ANONYMITY POLICY IS A MATTER OF ACADEMIC DISHONESTY.

This is a **closed book** examination.

GENERAL INSTRUCTIONS:

This examination consists of 5 questions based on three fact situations. The questions are to be answered by SecureExam or in the Examination Booklets provided by the Registrar's Office. Please **clearly number** your answers to each of the questions (1 to 5). Follow the instructions carefully and answer only what is asked.

Unless the context otherwise requires (such as where the facts are specifically stated to arise in a particular state), base your answers on general principles of criminal law as generally applied in American common law jurisdictions. If you are aware of more than one rule among the jurisdictions, discuss the alternatives. Do not assume the existence of any facts or agreements not set forth in the questions.

Legal arguments are called for, and your grade will be based substantially on the quality of your legal argumentation. Remember, your answer should first make clear where you are going—what you are going to talk about. It should also:

- (1) state the rules, considerations or principles that are relevant to deciding the issues raised by the facts,
- (2) point out the specific features of the factual situations that make the rules, considerations or principles relevant, and
- (3) pull the two together with appropriate conclusions.

Remember, too, to keep your answers **on point**, and answer only the questions asked. In so doing, do not circle around your point. Aim for the bull's eye. Otherwise, you will risk running out of time. *You have about 20 minutes per question, plus about 20 minutes of reading time.*

Important note: If you are using SecureExam and *any part* of your answers is written in a Bluebook or otherwise has been placed in the large brown envelope collected by the proctors, *be sure to write "contains answers" conspicuously on the front of the envelope.* Failure to do so may mean that material in the brown envelope will not be graded.

I.

Jarvis and Redman worked together in a welding shop. They got along fairly well, but it was well-known that Redman is a person with a hot temper and, when he got into “one of his moods,” it paid to be careful. A matter of particular sensitivity was a nasty facial scar that Redman had acquired a couple of years earlier in a biking accident. Redman tended to keep his head tilted so the scar would be less visible, and he became generally irritable whenever somebody (usually from outside the shop) happened to bring it up.

Last week Jarvis and Redman were working together on an iron project and talking about hockey. There were two major teams in the area, and Redman was a strong fan of one of them. Jarvis knew this and taunted Redman mildly about last Thursday’s defeat. While this was happening, Redman jerked his arm slightly causing a bit of molten metal to jump from the weld seam and hit Redman on the wrist, raising a blister—painful but not serious. Redman blamed Jarvis for making him “forget what he was doing,” and he said the burn was Jarvis’ fault. To this, Jarvis laughed and, in the process, reached out and brushed at Redman’s scar with a fingertip saying: “C’mon Reddy, it wasn’t me. You’re just not a very careful guy!”

A blazing rage swept over Redman, who grabbed a bar of $\frac{3}{4}$ ” iron. Shouting “I’ll kill you, you son of a b*tch,” he swung the iron bar wildly back and forth in the general direction of Jarvis. On the third swing the end of the bar hit Jarvis in the temple, knocking him unconscious. He died a short time later of cerebral hemorrhaging.

The state’s statutes on murder are similar to one that we studied in class, which states, simply, that “first-degree” murder means murder with premeditation and “second-degree” means “all other” murder. The state’s statutes also make the traditional distinction between killings with malice (murder) and without malice (manslaughter). There are no local cases directly in point.

Question 1. What homicide offense, if any, is Redman guilty of?

II.

The morning that Gordon Estep left on a business trip to Florida he took his daughter Trisha, age 6, to nursery school, as usual. She was to be picked up later in the day by Eileen Estep, Trisha’s mother (and Gordon’s ex-wife). Eileen was returning that day from a visit to her ailing father in Virginia. The plan was for her to be back in plenty of time to pick up Trisha after nursery school, at 3:00. On the way back from Virginia, however, a tire blew out on Eileen’s car and, not having a usable spare, she had to wait for a service truck and, then, for the repair shop to obtain a proper sized replacement. By the time Eileen got on the road again it was almost 3:00. and she still had a long drive ahead of her.

Seeing that she was not going to be back in time, Eileen telephoned the nursery school and explained the situation. This created an awkward situation inasmuch as the nursery school teacher had an urgent appointment at the end of the day and there was no one at the school who could stay with Trish. However, Mrs. Randolph, mother of one of the other children at the school, said she would take Trish home. Reached on her cell phone, Eileen Estep agreed to this arrangement.

So Trish went to the home of Mrs. Randolph and her little daughter, Carrie. When they got to the Randolph house, the family's two large dogs were barking furiously in the backyard—even more so when they saw Trish get out of the car. Not happy with strangers, the dogs seemed to particularly dislike Trish. After a while the dogs quieted down, and Mrs. Randolph sent Carrie and Trish to play in the basement.

All was well until the Randolph's older son got home and, not knowing there was a guest in the house, let the dogs in from the backyard. The two dogs ran immediately down into the basement where they assailed the terrified Trish, barking and nipping at her clothes. Before Mrs. Randolph and her son could pull them off, they had inflicted two fairly serious bites, requiring a number of stitches.

Mrs. Randolph is now accused of third degree "child abuse," which is defined as causing or failing to prevent physical injury to a child under the age of 10 years." Mrs. Randolph's attorney has moved for dismissal on two grounds: (1) She did not perform any culpable "voluntary act" and (2) with respect to Trish, the factual circumstances do not support charging Mrs. Randolph with a crime of "omission."

Question 2. Should the charges be dismissed on either of these two grounds?

Question 3. Which of the recognized goals of punishment would be served by imprisoning Mrs. Randolph?

III.

In addition to being a tort lawyer, Ronnie St.James is an accomplished amateur chef. He's also a local political activist with one of the major political parties. As part of his cooking hobby, he maintains a page on MySpice, an internet social networking site for amateur and professional chefs

On his MySpice page St.James uploads recipes and, often, pictures of various dishes and ingredients. He thinks the pictures give the page extra eye-appeal. The pictures are typically photographs, usually fairly generic ("potatoes", "ginger"), that he either takes himself or finds on the web. Normally the web pictures are copyrighted as part of the sites on which they are found but, as is also normal, the individual copyrighted pictures generally do not carry copyright notices. In any event, St. James does not get permission to use the web pictures he uploads to his MySpice page, and he honestly believes (erroneously) that pictures lacking a copyright notice are not considered copyrighted.

The "terms of service" or "TOS" of the MySpice website contain a blanket ban on uploading any copyrighted material to the site without permission of the copyright holder. The TOS makes no exception for situations in which the uploading of copyrighted pictures would not violate the copyright law—for example, under the copyright law's so-called "fair use" doctrine. As far as overall form is concerned, the MySpice TOS are typical of those that most web services use--2500 or more words of legalese on a variety of topics. According to MySpice records, when

St. James first signed up to use the MySpice website he clicked a box labeled: "I have read these terms of service and understand that my right to use MySpice is subject to them."

During a recent tough political campaign, St. James apparently did some things as a political activist that greatly annoyed Felser, a candidate for office and a political ally of the prosecutor. St. James is now accused of violating a local version of the Computer Crimes and Abuse Act ("CFFA"), which reads:

Whoever ... knowingly accesses a computer without authorization or exceeds authorized access, and thereby obtains ... information from such a computer ... shall be punished by up to 3 years in jail.

There is no question that St. James "obtains information" from the MySpice computers, including information submitted by persons who post items to his MySpice page. The prosecutor alleges that, by violating a provision of the MySpice TOS (*i.e.*, using copyrighted pictures without getting permission), St. James "knowingly accesses a computer without authorization or exceeds authorized access."

St. James scoffs at this charge, calling it "utterly unfounded." He admits (as is obvious) that he "knowingly" accessed the MySpice computers and doesn't deny that his use of copyrighted pictures without permission may violate the TOS. But, he points out, his actions were not a crime under the CFFA unless he "knew" he did not have "proper authorization" to do what he did. And, he says, he didn't "know" because he had not in fact read the TOS. Nor did he know that pictures without copyright notices could be considered to be copyrighted.

Question 4. . Under a proper interpretation of the CFFA, should the court instruct the jury to convict St. James if he knew he was accessing a MySpice computer, whether or not he "knew" he was violating the TOS (and, therefore, lacked authorization or exceeded authorized access)? [Please note, in *this* question the *sole* question for you is whether knowledge of lack of authorization should be regarded as an element of the crime.]

Question 5. The prosecutor also wants to argue that, even if St. James did not have positive knowledge of the contents of the TOS, there is still enough evidence for the jury to decide (on a willful blindness theory) that St. James "knew" he was acting "without authorization" or exceeding authorized access." Is the prosecutor's argument correct?

<End of examination.>