

PACE UNIVERSITY SCHOOL OF LAW

CRIM-LAW I
PROFESSOR HUMBACH
FINAL EXAMINATION

December 18, 2006
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 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.*

I.

Recent news item:

SUNY GENESEO PROFESSOR RESEARCHING CONTROVERSIAL COCAINE ENERGY DRINK – November 27, 2006

The new high-caffeine energy drink Cocaine has caught the attention of a professor in the State University of New York at Geneseo's School of Business.....

The controversial drink, which hit the U.S. market a few months ago, carries the tagline "the legal alternative" and comes in a red can with a white logo meant to resemble the powder drug. An 8.4-fluid ounce can of the drink contains 280 milligrams of caffeine, compared to 80 milligrams of caffeine in an 8.3-fluid ounce can of Red Bull. It does not contain the drug cocaine. The drink is produced by Redux Beverages, LLC, which

is based in Valley Center, Ca., and registered in Las Vegas.

Cocaine has a cherry, or fireball, taste and contains taurine, an amino acid important in making bile to aid digestion; guarana, a seed from South America that contains caffeine; dextrose; vitamin C; vitamins B-6 and B-12; and inositol. The drink contains 70 calories, and has only the necessary ingredients for the energy kick, which is advertised to last up to five hours. The sugar buzz is derived from the dextrose, a simple sugar that doesn't need to be broken down by the body, and a larger dose of vitamin B-12.

Another item (based on the killing of 92-year old Kathryn Johnson by Atlanta police on 11/21/06):

Acting on a tip from an informer, police executed a "no-knock" warrant on the premises at 425 Palmer Ave at about 10:45 p.m. The only person present in the house was a 92-year old widow, Bessie Hasbrooke. Apparently, Mrs. Hasbrooke believed that her home was being invaded by criminal elements, of which her neighborhood has many. She sat up in bed, grabbed the single-load shotgun that her nephew gave her to keep by her bedside, and waited. When two police officers kicked open the bedroom door, Mrs. Hasbrooke raised the gun and shot off the single round. Fortunately, the two police officers had followed procedure and ducked to either side of the doorway as they kicked the door. Their protective vests stopped the few stray pellets that managed to hit them. They then returned fire striking Mrs. Hasbrooke a number of times and causing injuries that subsequently proved fatal.

Follow-up investigation has revealed no controlled substances on the premises, but police did discover several cans of the new energy drink called "Cocaine®" in the kitchen, apparently belonging to Mrs. Hasbrooke's nephew. The decedent's family, speaking through an attorney, has mentioned the possibility of a "massive lawsuit" seeking damages in the "eight figure" range, especially since some doubt has emerged whether the police were even at the right house. Reportedly, the informer had told police that he had seen cocaine at a house on Palmer Avenue, but it is not clear whether he had said the number was "425" Palmer or "429." With a poor cell phone connection, the numbers "5" and "9" can sound similar and are sometimes confused.

A damage award in the 8-figures range is a serious matter for a small city having a total annual budget of only about \$38,000,000. The City Attorney believes that a successful prosecution emanating from the raid will minimize or eliminate the possibility of municipal liability.

Although the City Attorney has since been informed that “Cocaine®” does not contain chemical cocaine, he nonetheless wants to stay proactive on this, and he has pressed prosecutors to pursue felony charges against the nephew, Kenny Lyons, under the following statute:

A person is guilty of criminal possession of cocaine in the first degree when he knowingly and unlawfully possess one or more preparations or substances containing coca leaves or any salt, compound, derivative, or preparation of coca leaves, or any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances *or any substance which is commonly known as cocaine* or ecgonine, their salts, isomers, and salts of isomers. (Emphasis added.)

1. Discuss the proper interpretation and applicability of this statute.

2. Fearing the court might conceivably decide that this statute plainly applies to anything actually marketed as “cocaine,” the lawyer for Kenny Lyons wants to have a back-up argument ready, just in case. Although Lyons admits he knew that the law prohibits the possession of “real” cocaine, his lawyer wants to maintain that Lyons has a defense because of his mistaken belief that a court would never apply this law to an energy drink. Evaluate this latter contention.

II.

When Berenger’s little boy became listless and showed great pain, he and his wife, Xuan, took the boy to a hospital emergency room. However, being undocumented immigrants, the family did not of course have insurance. Moreover, as Berenger and Xuan answered the questions of the hospital social worker, they quickly began to fear that the family was in serious danger of having their undocumented status discovered. Berenger and Xuan decided not to press for any treatment, at least for the moment, beyond “emergency” palliatives.

The next day at work Berenger discussed his problem with a co-worker who, like Berenger, was from the mountainous interior region of south-east Asia. The co-worker suggested that Berenger take his son to a traditional healer who was right there in his neighborhood and who would not, of course, have any interest in reporting Berenger’s family to the immigration authorities.

When the healer, a “Doctor” Marqué, examined the little boy he realized right away that the boy had a serious form of cancer. He also recognized that the condition could probably be successfully treated by making aggressive use of recently-developed western medical techniques. However, Marqué understood why Berenger and his wife were reluctant to seek out established medical services providers for their child and he even recommended against it. Marqué was convinced that his own traditional herbal preparations would be fully adequate to bring about a cure. In fact, he had in his lifetime seen several cases like the little boy’s (or, at least, he believed they were the same), and had watched them be successfully treated using

herbal techniques. A payment schedule was arranged between Marqué and Berenger, and the program of traditional therapy was begun.

Six months later Berenger's son died of complications of the cancer. Had he been treated by licensed physicians instead of by Marqué, the high probability is that the boy would have survived. The unusual death of the boy made the evening news, exposing Berenger's family to precisely the kind of public attention they had hoped to avoid. Although Berenger, Xuan and their remaining children were quickly deported by ICE, Marqué is still around and is still practicing his traditional techniques.

The prosecutor believes he can make out a case for manslaughter or criminally negligent homicide against Marqué, but what he'd really like to do is "send a message to these charlatans" (his words) by getting Marqué on a charge of depraved-indifference murder.

3. Give your legal opinion whether:
 - a. the facts would support a conviction for manslaughter.
 - b. the facts would support a conviction for criminally negligent homicide.
4. How about depraved indifference homicide?

III.

Maria Santiago is a young corporate lawyer in a large international firm. Last month she was required to travel from the East Coast to San Francisco for a client. She arrived at the departure lounge just as an announcement was being made that her flight was delayed. So Maria sat down and made herself comfortable, resigned to an extra wait. To pass the time she struck up a conversation with the woman sitting next to her, a mother who was traveling with her four-year old child named Billy.

Twenty minutes passed quickly with Maria and Billy's mother talking about such things as where they were going, Maria's job, the frequent delays in air travel, the TSA shoe-removal rules and so on. Maria was thirsty and got up to get a bottle of water at a news kiosk across the concourse. By the time she got back Billy was sleeping, slumped across two seats. A couple of minutes after that, Billy's mother asked if Maria would mind staying with Billy for a moment while she ran over to use the nearby restroom. Maria readily agreed.

Ten more minutes went by, and Billy's mother still hadn't returned. Then came the announcement that Maria's flight was ready to board. Even though Maria knew from experience it would take at least 15 minutes before they could get the flight boarded and close the door, Maria preferred to get on as early as possible, so she'd be sure to get space above her seat for her overnight bag. She was already going to be late getting into San Francisco, and the last thing she wanted was to be forced to check her bag so she'd have to hang around at arrival until her overnight bag came out on the carousel.

Maria looked around and peered as far as she could see up and down the concourse, but there was no sign of Billy's mother. So she just sat and watched the other passengers file onto

the plane, all the while feeling herself getting more and more fidgety. When her own row was called for the second time, she could hardly contain herself. The door to the women's restroom was in sight, a short distance up the concourse, and when it caught Maria's eye she jumped up, almost spontaneously, and ran the 50 or 60 steps over to it. As she pushed open the restroom door she called out "Billy's mother?", realizing that she didn't even know the woman's name. There was, however, no answer. Only two stalls were occupied and Maria, now starting to feel even more desperate, actually knocked on each one of them and satisfied herself that Billy's mother was not in either. Maria quickly turned and ran back out of the restroom to where Billy was still sleeping. She could barely force herself to sit down, but she did, in the seat next to Billy.

By now they were calling "all rows" to get on the plane—the final boarding call. *Gods*, Maria thought. *What am I going to do?* She ran up to the counter and blurted to the gate agent that she needed them to page "Billy's mother." "Billy's mother?" the agent replied quizzically, and then she abruptly told Maria to stand in line and wait her turn. There were already three other people waiting to see the agent.

By the time Maria got up to the counter again, the last of the other passengers had boarded the plane. Quickly Maria summarized the situation to the gate agent, who replied: "All right. I'll make the page." But, she added, "you better go get on that plane right now or it's leaving without you." To Maria this sounded like an order and, oddly, it gave her a slight feeling of relief, as though a difficult choice had just been made for her. After all, one thing was for sure, she couldn't miss this flight. In less than seven hours she was scheduled to meet a big client of her law firm for a crucial working dinner. The client was depending on her, and her firm was counting on her. She couldn't very well say "sorry, couldn't make the flight because I was babysitting." So Maria pointed out to the gate agent where Billy was sleeping and turned toward the door to the plane. "Billy's mother! Billy's mother!" Maria heard as she handed her boarding pass to the checker at the door. "Please go to Gate 16 immediately!" echoed in her ears as she hurried her way down the jetway.

When Billy's mother finally returned, having made a stop at the concourse cocktail salon to help calm her flight nerves, Maria was gone and so was Billy. Although nobody can be sure, Billy's mother thinks that probably the boy's father (from whom she's legally separated) may have somehow followed them to the airport, gotten through security on a photoshopped boarding pass, and taken Billy away in violation of the custody order. At any rate, Billy's father seems to have disappeared, too.

Maria is, needless to say, beside herself. She's about to talk to the one person in her firm who's knowledgeable about criminal law (albeit, white collar criminal law). She wants to know, just in case somebody did something really bad to Billy, could she be criminally responsible on a theory of "omission"? (Do not discuss legal areas we did not cover in class—just the law of omissions.)

5. As to the law of omissions, what should Maria Santiago be told?

<end of examination>