

PACE UNIVERSITY SCHOOL OF LAW

CRIMINAL LAW
PROFESSOR HUMBACH
FINAL EXAMINATION

May 15, 2015
TIME LIMIT: 4 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.

LIMITED OPEN-BOOK EXAM: This is a limited open book exam, meaning that you may have and use your copy of the Dressler casebook (with all its normal underlining, highlighting and notations) but you may not bring along or use any other materials. The casebook is allowed so you will have the Model Penal Code, the only statute you will be asked about as such. However, you are, of course, permitted to use any part of your casebook during the exam.

GENERAL INSTRUCTIONS:

This examination consists of 60 multiple-choice questions to be answered on the Scantron.

- Write your examination number on the “name” line of the Scantron. *Write it NOW.*
- Mark "A" in the “Test Form” box on the right side of the Scantron. *Mark it NOW.*
- Also, write your examination number in the boxes where it says "I.D. Number" on the right side of the Scantron. Use **only** the first 4 columns and *do not skip columns*. Then carefully mark your exam number in the vertically striped columns. You should mark only one number in each of the first four columns. Do it carefully. *This is part of the test.*

Answer each multiple-choice question selecting the *best* answer. Mark your choice on the Scantron with the special pencil provided. *Select only one answer per question.* **If you change an answer, be sure to fully erase your original answer** or the question may be marked *wrong*. You may lose points if you do not mark **darkly** enough or if you write at the top, sides, etc. of the answer sheet.

When you complete the examination, turn in the answers together with this question booklet.

Unless the context otherwise requires (such as where the question specifically says to apply the Model Penal Code), base your answers on general principles and rules of criminal law found in the case law and statutes of American common law jurisdictions. Do not assume the existence of any facts not set forth in the questions. When there are differences among the states (for example, on the meaning of “premeditated” murder), there should be something in the question that makes clear which approach you should use. If in doubt, use the majority rule. In those situations where the Model Penal Code is different from the traditional or “common law” approach, do not use the MPC rule unless the question calls for it (*e.g.*, “[MPC]”).

1 A Singapore police officer visiting the US was arrested for carrying an unlicensed firearm in violation of state law. As a defense, he cited a statute that says: “The following persons may carry firearms without a license: any police officer, whether or not on duty....”. The prosecutor argues that the statute means only police officers employed by the state or a municipality within the state. Consistent with the principle of legality (“no penalty without a law”), the court should:

- a. Accept the prosecutor’s interpretation of the statute.
- b. Dismiss the charges.
- c. Disregard the wording of the statute if doing so would lead to a better legal result.
- d. Determine the legislature’s true intent and follow it, irrespective of what the statute says.

2 Purcell feels totally burned because his ex-girlfriend has “dumped” him. Now she’s a candidate for city council. To get back at her, he’s posted some very racy pictures of her online. The pictures are selfies that she sent Purcell when they were still together. The pictures are now the talk of the campaign. The prosecutor would like to charge Purcell but can’t find a statute directly in point. Purcell’s conduct would probably be punishable as a new common law crime:

- a. In the court’s discretion, even without a statute in point.
- b. Only if the court finds that Purcell’s conduct was injurious to the public.

c. Only if the court finds that Purcell’s conduct was morally wrong and outrageous.

d. None if the above. Modern courts do not create new common law crimes

3 In addition to charging Purcell with a common law crime, the prosecutor in the preceding question hopes he can get the court to interpret the local “peeping Tom” statute to cover this case. However, such an interpretation would be unprecedented, and nothing in the statute or prior judicial interpretations would support it. Purcell’s lawyer could plausibly argue that the interpretation urged by the prosecutor:

- a. Would be impermissible as an unforeseeable judicial enlargement of a law enacted by the legislature.
- b. Would violate Purcell’s due process right to “fair warning.”
- c. Would be outside the court’s jurisdiction to adopt because it effectively creates a new crime (which should be left to the legislature).
- d. All of the above would be plausible arguments for the defense.

4 The city council adopted an ordinance making it a minor criminal offense to wear “baggy low-slung pants, bare midriff tops or otherwise immodest clothing in public places.” Garrett wants to challenge the validity of this ordinance. A plausible ground for doing so would be that it:

- a. Gives law enforcement too little guidance (and too much discretion), which could lead to discriminatory enforcement.
- b. Infringes on the constitutional right to dress any way one pleases.
- c. Gives no warning as to what is forbidden.
- d. Seems on its face to prohibit personal choices that the legislature has no power to regulate.

5 Sidney has been convicted of assault after taking part in an altercation at a school dance. The prosecutor argues that Sidney ought to receive substantial jail time as an example to other students in the school, so they won't be so quick to resort to violence when disagreements occur. The justification for punishment that the prosecutor appears to have in mind is:

- a. Retribution.
- b. General deterrence.
- c. Special deterrence.
- d. Both b. and c. above.
- e. Reformation.

6 Sidney's lawyer in the preceding question argues that Sidney should be spared jail time because (among other things): 1. She has no prior offenses and an otherwise clean record of staying out of trouble, 2. She struck the victim only after the victim maliciously and grievously provoked her, and 3. The circumstances of the event were unique and unlikely to occur again. Which of the justifications for

punishment does the defense lawyer appear to be arguing is *inapplicable* to this case?

- a. General deterrence.
- b. Incapacitation.
- c. Retribution.
- d. Rehabilitation.

7 Randall has just been convicted of possession of cocaine. The prosecutor argues that he should be committed a prison facility that specializes in helping people overcome addictions. The justification for punishment that the prosecutor appears to have in mind is:

- a. Retribution.
- b. Rehabilitation.
- c. General deterrence.
- d. Special deterrence..

8 Which of the following is true?

- a. Over the past half-century or so, US rates of imprisonment have remained relatively steady.
- b. The prison and jail population of the US now is more than 2 million.

- c. The Supreme Court has assumed an active role in reviewing state sentencing to make sure punishments are fair, just and proportionate.
 - d. In spite of the ever-increasing rates of imprisonment, crime rates have continued to rise.
 - e. More than one of the above statements is true.
- 9 During an alcohol-fueled fraternity party, Margot was arrested under a statute that prohibits “appearing drunk in public.” Margot admits she was drunk at the time of her arrest, but she claims that several other partygoers had, as a prank, carried her out to the sidewalk in front of the frat house against her will. On these facts, Margot may have a strong ground for acquittal, namely:
- a. The common law says that every criminal offense must include a voluntary act and the legislature cannot create offenses that do not include such an act.
 - b. Under the U.S. Constitution, every criminal offense must include a voluntary act as a prerequisite to punishment.
 - c. Under usual rules of interpretation, a criminal offense is presumed to include a voluntary act unless otherwise specified by the statute.
 - d. None of the above. On these facts there is no apparent argument that would provide Margot a defense under this statute.
- 10 During a gunfight with police, Durango shot one of the officers. He's being prosecuted for homicide. The undisputed evidence shows

that Durango pointed a gun at the officer and pulled the trigger. At the time that Durango shot, however, he'd already been hit with two bullets in the abdomen and he was, according to expert testimony, in a delirious state, acting automatonistically. The judge should:

- a. Tell the jury to disregard the expert testimony as it has no relevance to the question of guilt.
- b. Instruct to the jury that it may acquit only if it finds that Durango was legally insane at the time he pulled the trigger.
- c. Direct a verdict of not guilty.
- d. Instruct to the jury to acquit if it finds that Durango was acting unconsciously as an automaton at the time he pulled the trigger.

11 The bartender announced closing time, and Kayla said to the group at her table: “Everybody’s invited to my place for a nightcap.” Later on, when Kayla thought her guests had all left, she found a guy she hardly knew slumped in the bathtub. But Kayla was feeling tired (and frankly plastered), so she decided to let him sleep it off. The next morning she found him dead. According to the coroner, he’d died of an overdose but could have been saved with prompt medical attention. Kayla would be guilty of homicide for failing to promptly seek medical help:

- a. Because she had a moral duty to seek help.
- b. If she and the decedent had had sexual relations earlier in the evening.

- c. Because people are generally required to provide for the medical needs of guests in their homes.
- d. None of the above.

12 Arthur Bingham had a serious fall from some scaffolding. He was brought unconscious to Cassmire Hospital where the doctors determined he was in a deep coma. They put him on life support, which was necessary to maintain his breathing and heartbeat. Suppose the doctors in charge of treating Bingham later decide to remove the life-support devices and Bingham died. According to the more recent cases, the removal of the life support:

- a. Would probably constitute criminal homicide even if Bingham was irreversibly brain dead.
- b. Would not necessarily be considered criminal homicide (even if Bingham still had some residual brain activity) if further treatment would be futile.
- c. Would likely be legally justified as an act of mercy.
- d. Would likely be legally justified if the life support devices were needed to treat other patients who had better chances of survival.

13 Suppose, in the preceding question, that Bingham's nephew, Raphael, stood to inherit Bingham's fortune at his death. If Raphael, acting on his own initiative, removed the life support, he should not be considered guilty of criminal homicide:

- a. Because his act of removing the life support would be treated as an omission.

- b. Because, as a family member, he has authority to make the decision whether to remove life support.
- c. If Bingham was already brain dead at the time of removal (under the more modern approach).
- d. None of the above. He *would* be guilty of criminal homicide under the "intended consequences" rule.

14 Emily Hancock is a convenience store clerk charged under a local statute that says: "No person shall knowingly sell tobacco to anyone under age 21." At trial it was undisputed that Emily sold a pack of cigarettes to a teenage girl wearing a high school cheerleader outfit. However, Emily did not have actual positive knowledge that the buyer was under 21 years of age (MPC):

- a. She could still be convicted if she was aware of the high probability that the buyer was under 21 and did not actually believe otherwise.
- b. She should still be convicted even if the jury is persuaded that Emily actually believed the buyer's verbal assurance that she was over 21.
- c. She should still be convicted unless she made reasonable efforts to ascertain the buyer's actual age.
- d. None of the above. Emily could *not* be convicted under the statute.

15 Waiting at an airport baggage carrousel, Waltham Higby spotted a familiar looking suitcase coming round. He thought it was his. Even he noticed that his ID tag was missing, he took the suitcase anyway. He could have quickly opened it right next to the carrousel

(to check if it was his), but it was crowded there and he was in a hurry. Anyway he was sure it was his bag. When he opened the suitcase at home, he saw it was filled with somebody else's clothes. Moments later, two police officers arrived at his door and arrested him for larceny.

- a. Because Higby took property belonging to another, he is technically guilty of larceny.
- b. Higby would not be guilty of larceny as long as he honestly believed that the suitcase was his.
- c. Higby would not be guilty of larceny as long as he honestly *and reasonably* believed the suitcase was his.
- d. Higby could be guilty of larceny based on willful blindness because he deliberately avoided actual knowledge that the bag was not his.

16 Calvin Weston, age 15, is accused of statutory rape. He's charged under a statute that makes it a felony to have sexual relations without the other person's consent and provides that "a person under 16 years of age shall be deemed incapable of giving consent." The charge against Calvin is based on an encounter he had with Ellen Garber, also age 15. Calvin's lawyer wants to offer testimony that Calvin honestly and reasonably believed that Ellen was 16 at the time of the encounter. The prosecutor says it's irrelevant.

- a. In a majority of states the prosecutor would be right.
- b. Mistake of age, even if reasonable, is never a defense in cases such as these.

c. In a majority of states the prosecutor would be wrong because the testimony is relevant to whether Calvin had the necessary mens rea.

d. The testimony would be relevant to mens rea under the usual interpretation of this kind of statute as long as Calvin's erroneous belief was not an unreasonable one.

17 Grant was indicted under a "public welfare" statute that says: "No person shall manufacture or sell incandescent light bulbs rated at more than 40 watts after [a certain date]." Grant sold a quantity of light bulbs in the erroneous belief that they were all 40 watts or less. In fact, a number of them were 50-watt bulbs.

- a. Grant could be convicted only if he knew there was prohibition on selling light bulbs rated above 40 watts.
- b. Grant could be convicted even if he did not actually know that some of the light bulbs were 50-watt bulbs.
- c. Both of the above.
- d. Grant could not be convicted under this statute.

18 Assume that, in interpreting the statute in the preceding question, the court concluded that it was aimed at promoting public welfare rather than punishment. In view of this understanding, the court would probably be:

- a. More inclined to enforce the statute as written, with no mens rea requirement.
- b. More inclined to read a mens rea requirement into the statute.

- c. Less inclined to enforce the statute as written, with no men rea requirement.
- d. Neither more nor less inclined to read a mens rea requirement into the statute

19 Glen Ridge was charged under a law that imposes a fine on “any person who knowingly operates a motor vehicle on which the insurance has expired.” Under the MPC approach:

- a. He should not be convicted if he did not know it was illegal to drive an uninsured motor vehicle.
- b. He should not be permitted to deny knowing that his insurance had expired.
- c. The prosecutor must prove (1) that Glen knowingly operated a motor vehicle and (2) that he knew the insurance on it had expired.
- d. It is enough to sustain a conviction if the prosecutor can prove (1) that Glen operated a motor vehicle knowingly and (2) that his insurance had expired.

20 Gibbs and Patrice agreed to rob a liquor store. During the robbery, the store clerk pulled out a gun and shot Gibbs. Later, Patrice is caught and charged with murder under the felony murder rule.

- a. Patrice cannot be properly convicted of felony murder because only the actual killer can be held.

- b. Under the so-called agency theory, Patrice can properly be convicted of felony murder.
- c. If the clerk *intentionally* killed Gibbs, Patrice cannot properly be convicted of felony murder.
- d. Under the so-called proximate cause theory, Patrice can properly be convicted of felony murder.

21 Webb challenged Eli to fight. During the fight, Eli stabbed Webb and left him lying in the street. Suppose Webb would have died from the wound in about 15 minutes but, while Webb was still alive, Taylor came driving down the street and ran over Webb, killing him instantly. Who was the but-for cause of Webb’s death?

- a. Eli.
- b. howTaylor.
- c. Eli and Taylor.
- d. Eli, Taylor and Webb himself.

22 Suppose in the preceding question that Taylor was in no way criminally negligent or otherwise at fault.

- a. Only Eli’s acts would be considered the cause in fact of Webb’s death.
- b. Only the acts of Eli and Webb would be considered the causes in fact of Webb’s death.

- c. Taylor's acts could still be considered a cause in fact of Webb's death.
- d. Taylor's acts, since they came last, would be considered the sole legal cause in fact of Webb's death.
- 23 Suppose that Webb was seriously but not necessarily fatally wounded in the knife fight with Eli. A passing motorist, Taylor, found Webb bleeding on the street and rushed him to a hospital, exceeding the speed limit and running several red lights (after checking for cross traffic). If Taylor is prosecuted for his traffic violations, his most appropriate defense would be:

- a. Duress.
- b. Necessity.
- c. Defense of another person.
- d. Res gestae.

24 Suppose that Webb was only slightly injured in the knife fight with Eli but a passing motorist, Taylor, found Webb on the street and took him to a hospital "just in case." If Webb dies at the hospital due to a medical error by the treating physician, Eli would probably not be considered the proximate cause of Webb's death if the medical error was the result of:

- a. Ordinary negligence.
- b. Gross negligence.
- c. Either ordinary negligence or gross negligence.

- d. None of the above. Eli would be considered the proximate cause of death because he created the need for medical care in the first place.

25 Frances Gruber made a reckless U-turn on a busy highway and crashed into another car. The other car stopped off the actual roadway. None of its occupants was seriously injured. The driver of the other car got out to check out the damage. In order to get a better look at his dented door and fender, he stepped backward into the highway where he was killed by a passing van. Gruber asserts she was not the proximate cause of the death. Plausible arguments in support of her assertion include:

- a. The victim had reached a position of apparent safety.
- b. The victim's own conduct immediately prior to his death was a voluntary human intervention constituting a superseding cause.
- c. Both of the above.
- d. The victim's conduct immediately prior to his death was a foreseeable responsive act.
- e. All of the above.

Facts for Canning-Lemuel questions. Canning and Lemuel were back behind the barn having an argument about Sally, Lemuel's new girlfriend. Canning taunted Lemuel, saying "You don't know nothin', Lem. Your Sally's been shakin' with Ed Thorp for the past six months!" In response, Lemuel suddenly bashed Canning over the head with a rake, causing his death.

The applicable statutes define first-degree murder as “premeditated” and second degree as “any other kind of murder.” Manslaughter is divided into voluntary and involuntary.

26 Assume that Lemuel acted without any prior reflection or weighing of his act.

- a. Lemuel could not be properly found guilty of first-degree murder in any state.
- b. Lemuel could be properly found guilty of first-degree murder in some states as long as he acted with a specific intent to cause death.
- c. Lemuel could not properly be convicted of murder at all if the jury is persuaded that he did not intend to kill.
- d. Lemuel could not properly be convicted of manslaughter if he *did* intent to kill.

27 Assume that the local courts are careful to observe the distinction between “premeditated” killings and other murders. If the prosecutor wants to try to show that Lemuel committed premeditated murder:

- a. The prosecutor must present evidence that Lemuel planned the homicide substantially in advance and went to the scene intending to kill Canning
- b. The prosecutor may not use evidence of the prior relationship between Lemuel and Canning to show that Lemuel had a motive to kill.

c. It would be relevant for the prosecutor to show that Lemuel made plans to commit the crime in a way that made it harder to determine who did it.

d. The prosecutor must have direct proof (such as a confession) that Lemuel weighed the murder in advance and may not rely on circumstantial evidence.

Facts for Manning-Rollins questions. In the minutes leading up to Manning’s death, he said a number of very insulting and offensive things to Rollins, things that were likely to make a reasonable person extremely angry and lose self-control. Some say that Manning actually punched Rollins in the stomach, but that’s disputed. What’s not disputed is that Rollins, in heat of passion, intentionally killed Manning with a knife.

28 Under the traditional common-law rule, would it be legally important whether Manning had committed a physical assault on Rollins?

- a. Yes. Mere words would not constitute adequate provocation.
- b. No. Mere words can be adequate provocation if they are likely to make a reasonable person extremely very angry and lose self-control.
- c. Yes, because there has to be a physical assault or battery for there to be adequate provocation under the common law rule.
- d. No, because the facts here reveal other grounds for finding adequate provocation under the traditional common law rule.

29 In general under the traditional common law rule, Rollins could properly be found guilty of manslaughter rather than murder as long as the jury is persuaded that he was provoked to inflict the fatal wound:

- a. By extreme assault or battery on Rollins, by a sudden discovery of his wife committing adultery or by a serious abuse of one of his relatives.
- b. By a sudden discovery of his that his longtime girlfriend was cheating on him with Manning.
- c. Both of the above.
- d. Out of genuine heat of passion (and nothing more than that would be necessary).
- e. None of the above. If Rollins killed intentionally, he is guilty of murder, not manslaughter.

30 The traditional common law rule referred to in the previous two questions:

- a. Has not been much questioned and continues to apply in nearly every state (with courts still generally insisting that mere words are not adequate provocation).
- b. Would never apply in cases where the jury is persuaded that the killing was on purpose.
- c. Reflects the idea that impulsive, thoughtless killings are generally more serious and blameworthy.

d. Has been replaced in some states by a less rigid rule that reduces murder to manslaughter when the defendant acted under extreme emotional disturbance.

31 Suppose that, among the insults that Manning hurled at Rollins, Manning repeatedly called him “the son of a drunken dipbag.” Suppose Rollins’s lawyer wants to present evidence that Rollins’s father was in fact an alcoholic, often drunk in public, and was a constant source of shame to the young Rollins. The evidence should be admissible to show:

- a. The gravity of the provoking words used by Manning (*i.e.*, that their sting would be particularly great to a person in Rollins’s situation).
- b. The level of self-control to be expected of a person in Rollins’s situation (*i.e.*, that a person in Rollins’s situation might reasonably have less self-control).
- c. Both of the above.
- d. None of the above. The evidence is not legally relevant and should be excluded.

32 If Rollins were being tried in a state that allows mere words to serve as adequate provocation:

- a. Essentially any words could potentially suffice as adequate as long as the defendant actually acted out of heat of passion.
- b. Any words could potentially suffice as adequate as long as they were likely to cause a reasonable person to lose self-control and act out of passion rather than reason.

- c. The words would still need to be accompanied by one of the kinds of physical provocation traditionally recognized by the common law.
- d. The words would still have to be corroborated by two or more impartial witnesses.

33 While burglarizing an apartment in search of jewelry, Biscuit accidentally knocked over a can of cleaning fluid. It ignited when it came into contact with a frayed electrical cord. A tenant in a neighboring apartment died in the resulting blaze. Under the felony murder doctrine:

- a. Murder is considered to be a felony.
- b. Biscuit can be convicted of murder only if he showed extreme recklessness to human life.
- c. Because murder is a felony, Biscuit cannot be convicted of murder in the absence of evidence showing an intention to kill.
- d. It should be possible to convict Biscuit of murder.

Facts for Sharpless questions. Ed Sharpless was showing his buddy his new pistol, *which he believed was not loaded*. He pointed it at a spot on the opposite wall and pulled the trigger. The gun discharged and the shot hit a woman in the next apartment, on the other side of the wall.

34 The prosecutor argues that the gun was an inherently dangerous device. If the jury agrees, but does not believe that Sharpless was

actually aware of a risk to human life, then it could properly conclude (MPC):

- a. Sharpless must have been reckless in aiming at the wall and pulling the trigger.
- b. Sharpless consciously disregarded the risk.
- c. Sharpless should have been aware of the risk.
- d. Sharpless evinced extreme indifference to human life.

35 Sharpless has been charged with murder, manslaughter and negligent homicide. During the trial, Sharpless's lawyer wants to present evidence that Sharpless was unfamiliar with the type of gun and did not actually know there was a possibility that it might fire. The prosecutor objects, asserting that the evidence is not relevant. Under the MPC mens rea definitions, the evidence should be admitted:

- a. Because it's relevant to show that Sharpless is not guilty of murder.
- b. Because it's relevant to show that Sharpless is not guilty of recklessness.
- c. Both of the above.
- d. None of the above. It should not be admitted because it has no bearing in deciding which level of homicide (if any) Sharpless is guilty of.

36 Suppose Sharpless had previously been convicted of a felony and therefore, for him, possessing a gun was itself a felony under the

state's law. Under the approach to felony murder that considers the dangerousness of felonies in the "abstract," Sharpless would *probably* be considered:

- a. Guilty of felony murder because he killed while committing a felony.
- b. Not guilty of felony murder because his alleged predicate (underlying) felony was not inherently dangerous.
- c. Guilty of felony murder because, whenever an ex-felon kills, it's felony murder.
- d. Not guilty of felony murder because he did not intend to cause death.

37 While being chased through downtown by police, Stan Salton ran into a building and dashed up a stairway to the roof with police officers in hot pursuit. Once on top, Salton grabbed an iron bar and threw it toward an approaching officer. The iron bar missed the officer and went over the edge. It fell to the busy street below, struck a windshield and killed the driver. If the prosecutor cannot persuade the jury that Salton intended to kill the driver:

- a. It would not be proper to convict Salton of any kind of murder except felony murder.
- b. The most serious crime that Salton could have committed (on these facts) would be involuntary manslaughter.
- c. Both of the above.

d. A jury could still properly convict Salton of extreme indifference (malignant heart) murder.

38 While doing some gardening work, Howard pulled a load of rocks up a hilly side street in a small wagon. Howard stumbled and the wagon got away from him. It coasted down the hill and hit a passing motorcyclist, who was fatally injured. If the prosecutor can persuade a jury that Howard's actions constituted ordinary negligence, then under the general rule today:

- a. The jury can properly convict Howard of criminally negligent homicide.
- b. The jury can properly convict Howard of involuntary (reckless) manslaughter.
- c. There would be sufficient proof of malice that Howard could be properly convicted of murder in the second degree.
- d. None of the above.

39 While trying to elude capture after a robbery, Ron Dennis drove at high speed down the wrong side of a divided avenue and ran many red lights. He lost control and killed another driver. He is charged with felony murder based "attempt to escape" as the predicate felony—defined as "evading police by unsafe operation of a motor vehicle posing a risk of serious injury to persons or property." Under the approach to felony murder that considers the dangerousness of felonies in the "abstract," the attempt-to-escape felony:

- a. Cannot serve as a qualifying the underlying predicate felony because of the words "or property" at the end.

- b. Can serve as the predicate felony because it applies to motor vehicle operation that creates a risk of *serious* injury.
- c. Cannot serve as the predicate felony because it is not a traditionally recognized common law felony.
- d. Cannot serve as the predicate felony unless it is listed as a predicate felony in the state's felony murder statute.
- 40 From the prosecutor's standpoint, the primary benefit of using the felony murder rule against Dennis (in the previous question) is that it:
- a. Allows conviction for murder without proof of intent to kill or extreme recklessness.
 - b. Allows the prosecutor to treat every murder as a felony.
 - c. Treats murder as an inherently dangerous felony.
 - d. Generally allows assaults *without* intent to kill to be treated as murder if death accidentally results..
- 41 Despite the advantage to prosecution, the felony murder rule:
- a. Has been abolished in most states.
 - b. Has been criticized on the ground that it leads to punishments that are disproportionate to the defendant's actual culpability.
 - c. Can only be applied to the actual killer and not to accomplices in the underlying predicate felony.
- d. All of the above.
- 42 Tabor is charged with murdering Marisol. He claims he acted in heat of passion. The state's law defines murder simply as "intentionally and unlawfully causing the death of another person." It omits the usual common-law requirement of malice. However, the statute provides an affirmative defense for killings in "heat of passion." Tabor argues that the murder law is invalid because it requires the defendant to prove heat of passion as a defense and it thereby saddles defendants with the burden to *disprove* an essential element of murder (malice).
- a. The state has impermissibly shifted the burden of proof to the defendant.
 - b. Heat of passion and malice have essentially nothing to do with each other, so states can constitutionally make defendants prove heat of passion as an affirmative defense.
 - c. The state cannot remove malice from the definition of murder without impermissibly relieving the prosecutor of the burden of proving all elements of "murder."
 - d. There appears to be nothing unconstitutional in this state's murder statutes.
- 43 Each night going home Dante must walk several dark and dangerous blocks from the bus. After he was mugged, Dante bought a gun. Recently, Dante was approached by two teens, both much taller than he. The teens carried baseball bats, blocked his way, and told him to stand still and "do what we say." Dante responded quickly and shot them both, one fatally. On these facts, Dante should be entitled to acquittal based on self-defense as long as the jury finds that he:

- a. Honestly believed that the use of deadly force was necessary to protect himself from death or serious bodily injury.
- b. Could have reasonably believed that the use of deadly force was probably necessary to protect himself from death or serious bodily injury.
- c. Honestly and reasonably believed that the use of deadly force was necessary to protect himself from death or serious bodily injury.
- d. Honestly and reasonably believed that deadly force was necessary to protect himself from *any* unlawful use of force.

44 In the preceding question, which of the following should be relevant in evaluating the “reasonableness” of Dante’s belief in the need for deadly force?

- a. Dante’s relevant personal physical characteristics such as his diminutive height and that the fact he was 63 years old and not very athletic.
- b. Dante’s prior experiences, such as the fact that he’d previously been mugged by teens in this area.
- c. Both of the above.
- d. None of the above. Dante’s personal characteristics and history should not be taken into account in judging reasonableness.

45 Lacan and Ford were overheard discussing Lacan’s new girlfriend (who was Ford’s ex-wife). Ford attacked Lacan with a knife. Lacan dodged the knife thrust and *coolly* hit Ford over the head with a large jug, causing a fatal injury. Witnesses say that Lacan had initiated the physical encounter by suddenly punching Ford on the jaw (an unlawful act that was likely to lead to an affray). Lacan is accused of murder, and claims self-defense.

- a. Even if the jury concludes that Lacan initiated the encounter as described, he should not be convicted of murder because he killed in order to defend himself.
- b. If the jury concludes that Lacan initiated the encounter as described, he can properly be convicted of murder even if he killed in order to defend himself.
- c. Whether or not Lacan initiated the encounter as described, he cannot properly be convicted of murder because the death occurred in mutual combat.
- d. Whether or not Lacan initiated the encounter as described, he cannot properly be convicted of murder if his purpose was to defend his honor.

46 Suppose in the preceding question that, after Lacan threw the first punch, he backed off from Ford’s knife and said, “Look, buddy. Let’s just calm down. I’m sorry; I don’t want no more trouble.” Ford went after Lacan anyway (and was killed, as already described).

- a. These additional facts should not change the outcome.
- b. These additional facts would tend to help support an acquittal of Lacan on the ground of self-defense.

c. These additional facts would be essentially irrelevant to Lacan's claim of self-defense.

d. Even with these additional facts, the key point remains that Lacan used disproportionate force in self-defense.

47 Hearing shouts from the street below, Claudius looked out his apartment window and saw his friend, Cory, being accosted by three unknown persons. Claudius grabbed a pistol and ran downstairs. When the three attackers saw the pistol, they started to run away. Claudius and Cory chased after them. One of the three ducked into an alley. Claudius followed, gun at the ready. A shot was fired at Claudius from behind a dumpster in the alley and Claudius fired back, fatally wounding the person who'd shot at him (the one who'd ducked down the alley). Claudius is indicted for murder:

a. Claudius does not appear to have a valid defense of self-defense.

b. Because Claudius was putting himself on the line to protect another person, it would not be proper to convict him of murder on these facts.

c. Claudius should not be considered guilty of murder on these facts because there is no evidence of premeditation.

d. On these facts there is no reason why Claudius should not be acquitted of murder by reason of self-defense.

48 Maria entered a contest at her local supermarket. She won coupon good for \$500 of merchandise. She deliberately did not declare the prize on her Federal tax return because she honestly believed it did not count as taxable income. She was wrong,

however, and it is a crime to willfully fail to declare income that is subject to taxation.

a. Maria's honest mistake as to the tax law would be a defense as long as the mistake was reasonable.

b. Maria's honest mistake as to the tax law would be a defense whether or not the mistake was reasonable.

c. The fact that Maria's mistake of law was an honest one is irrelevant since ignorance of the law is never an excuse.

d. In general, modern courts accept ignorance of the law as an excuse as long as the defendant was not trying to evade her legal responsibilities.

49 Willard Lange and his next door-neighbor, Tabb, were not on good terms. Things boiled over one evening and a nasty argument ensued. Tabb warned: "Watch out, Willard. Nobody says that to me and lives." The next day, Lange was in his house when he saw Tabb aiming a rifle at him from inside Tabb's house. The next night, worried that Tabb might get him at any time, Lange shot Tabb from an ambush on a lonely road a mile or so from home. Under the traditional rules of self-defense, a very serious problem for Lange would be:

a. Lange could not have honestly believed that he was at risk of death or serious bodily injury.

b. There's no evidence from which a jury could find that Lange reasonably believed that he was at risk of death or serious bodily injury.

- c. It does not appear that Lange, at the time of the shooting, faced an imminent risk of death or serious bodily injury.
- d. Lange was the initial aggressor.

50 Late one night, Robert Munz was at home when he heard someone trying to break the lock on his front door. Peeking out through the window, he saw a stranger with a wild, angry look in his eyes and carrying a gun. The stranger caught sight of Munz' shadow behind the door and yelled: "I'm going to kill you, you S.O.B.!" and continued trying to break in. Munz grabbed his shotgun, aimed it at the front door. If Munz shoots and kills the stranger:

- a. He will be unable to use the defense-of-habitation defense unless he waits until the stranger has crossed the threshold and entered the house.
- b. The jury should be instructed to consider the defense-of-habitation defense even if Lange shoots through the door while the stranger is still outside.
- c. The jury should not be instructed to consider the defense-of-habitation defense because deadly force cannot be used to defend property.
- d. Munz's only plausible defense would be self-defense and, if he can't make that stick with the jury, he'll probably be convicted of murder.

51 When arrested for disorderly conduct at the end of a night of serious drinking, Sylvia Rykoff physically resisted being put in the patrol car. She was charged with ordinary assault and with "assaulting a peace officer with intent to prevent performance of a public duty." Her lawyer wants to introduce evidence of Rykoff's

extreme intoxication at the time of the alleged offenses. This evidence should be:

- a. Admitted for the purpose of negating the mens rea element of the ordinary assault charge.
- b. Admitted for the purpose of negating the mens rea element of the charge of "assaulting a peace officer with intent to prevent performance of a public duty."
- c. Admitted for the purpose of negating the mens rea element of both charges.
- d. Admitted because extreme intoxication is usually a defense to minor crimes.

52 The idea that a defendant should not be convicted of attempt to commit a crime unless the defendant came very near to committing the crime:

- a. Has never had much acceptance in common law jurisdictions.
- b. Is essentially the policy that is adopted in the Model Penal Code.
- c. Mostly serves to provide law enforcement with a firm basis for intervention so that it can nip criminal activity in the bud.
- d. Tends to maximize the potential perpetrator's incentive to change his mind and give up his criminal purpose as a way to avoid punishment.

53 Laurel works as a private guard employed by a jewelry store. She carries a gun when on the job. A suspected thief came into the store for the apparent purpose of stealing. The law allows Laurel to:

- a. Use force to prevent the theft of the store's property.
- b. Shoot people who are stealing from the store if she reasonably believes it's necessary to protect the store's property.
- c. Both of the above.
- d. None of the above. She's permitted to carry the gun as a deterrent to theft, but she may not use deadly force merely to protect the store's property.

54 During an impromptu high-booze frat party, Larry passed out. Despite some clumsy efforts by his friends (involving burning cigarettes tips and a fork) he couldn't be revived. Josh, who'd also been drinking heavily, said: "He's got to get to a hospital. I'll drive." On the way to the hospital, Josh was pulled over and tested positive for driving under the influence. All agree that it reasonably appeared that Larry needed prompt medical attention. The necessity defense:

- a. Should apply even if there was an adequate alternative to Josh's choice to drive Larry.
- b. Should not apply if the court concludes that Josh's choice to drive under the influence involved the greater harm.
- c. Should apply if as long as Josh honestly believed that his choice to drive Larry involved the lesser harm..

d. Should not apply if it turns out that Larry didn't actually need medical attention.

55 Benny started hanging out with a new gang, and it greatly angered Rafe, his old gang leader. After a couple of months, Benny asked to come back and Rafe said: "Only way that's gonna happen, you gotta prove your loyalty" by killing a member of the rival gang. "If you don't," Rafe added, "we're going to have to kill you." Greatly frightened and seeing only one way out of his predicament, Benny killed a member of the rival gang. Charged with homicide he wants to claim duress. The duress defense may encounter difficulties because:

- a. In some states, the duress defense does not apply to murder.
- b. Benny did not appear to be facing an immediate threat of death or serious bodily injury.
- c. Both of the above.
- d. The proper defense for cases like this would be self-defense and not duress.
- e. All of the above.

56 Derek was hard up for money and decided he'd rob a bank. He found an old ski mask in the basement of his building and wrote a note saying "put the money in the bag and keep quiet – or else." He put these items (plus an unloaded gun) in his car. The next day, on his way to a job interview, Derek was pulled over in a routine traffic stop. The police officer noticed the gun on the car seat and a further search revealed the mask and note:

- a. Derek can properly be convicted of attempted bank robbery under the MPC rule.
- b. Derek can properly be convicted of attempted bank robbery under the “last act” doctrine.
- c. Derek would have little hope of avoiding conviction if the court follows the proximity (or dangerous proximity) doctrine.
- d. All of the above.

57 One hot day Rex drove to a liquor store with his 2-year old in the back seat. He bought a bottle of gin, which he partly consumed on the way home. By the time he got home, he was so out-of-it that he forgot the child in the car. He went in the house to take a nap. If a passerby hadn’t noticed the child in the car, she might have perished from the heat—which would have made Rex guilty of manslaughter. Under these facts:

- a. Rex is guilty of attempted manslaughter.
- b. Rex is not guilty of attempted manslaughter because he lacked intent to kill.
- c. Rex would be guilty of attempted manslaughter under the MPC approach to the law of attempt.
- d. Rex is guilty of attempted negligent homicide.

58 O’Grady was out target shooting in a woods to get ready for the upcoming hunting season. He thought he saw a deer. On impulse, he took a shot and just barely missed, but the “deer” didn’t run away. It

turned out to be a tree stump. A ranger passing that way happened to see all this, noticed how the tree stump resembled a deer. He charged O’Grady with attempted deer poaching (hunting out of season).

- a. O’Grady could properly be convicted under the MPC rule.
- b. O’Grady should have a plausible case for acquittal in states that recognize the defense of legal impossibility.
- c. Both of the above.
- d. O’Grady could *not* properly be convicted under the MPC rule because he acted based on a genuinely erroneous belief.

59 One Saturday night, a group of teenagers was walking home when one of them suggested: “Let’s get some beer.” They worked out a plan: Two of them would distract the clerk at the convenience store while others would grab the beer from the coolers. One of the group, Robby, lagged behind and stayed silent as this plan was discussed. He waited outside the store when the others went in. After the others emerged with the beer, Robby immediately left them and went home. Robby would be guilty as an accomplice if he:

- a. Did nothing more than what is described above, with no other facts added.
- b. Said he’d stay outside and act as a lookout while the others went in the store even though he didn’t really plan to warn the others if somebody came along.

c. Silently decided that he'd warn the others if somebody came along but didn't actually need to because nobody came.

d. All of the above.

60 Eliza Franks operates a roadhouse that serves drinks and simple cuisine. She also has several guest rooms upstairs that she rents out to travelers and others. Eliza knows to a practical certainty (and believes) that some of her guests use the rooms for sexual encounters and, in some cases, to receive or provide sexual services for pay. But as far as she's concerned "that's their business," not hers. Eliza is charged as an accomplice to prostitution-related offenses.

a. Eliza's knowledge and belief that her renters are using the rooms for prostitution-related offenses is enough mens rea to convict.

b. To be guilty, Eliza has to have acted with an intention to promote, further or assist prostitution-related offenses.

c. To be guilty, Eliza has to have had a stake in the prostitution-related offenses.

d. As an ordinary businessperson, Eliza cannot be held criminally responsible for the criminal use that others make of the legitimate services she provides.

<End of examination.>