To: My Criminal Law Students  
Fr: Jeffrey B. Morris  
Dt: January 5, 2010  
Re: Answers for December 2009 final examination

The following are some musings by me about the final examination and some very good (not necessarily the best) answers of students. In most cases, they are included verbatim. In some, I corrected grammatical and other errors and omitted parts that detracted from the strength of the answer. Occasionally I have added a few words to strengthen the answer [those words are bracketed]. I am providing you with the questions separately.

General Comments

Almost everybody would have profited from spending fifteen or twenty minutes just reading the questioning, thinking an outlining their responses. This was not a particularly long or difficult examination. It was disturbing to see some students leave out a question (every question was worth 18 points), especially one of the easy ones. It was also disturbing to see students do poorly because they had misread the question. There were students who did not follow the directions given in the hypothetical. In many cases, answers were not laid out logically. In the law, logical reasoning is central. So is precise writing.

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Part I: Question 1 (This question involved a perpetrator who received a package of drugs from his usual supplier, who was unaware of the percentage of a hallucinogenic agent in the drugs. He was prosecuted for an offense for which the felony was defined as "knowingly and unlawfully possess...")

MORRIS COMMENTS: This was an easy question. All you had to do was to consider the effect of two sections of the Model Penal Code on the application of the statute to the situation of the defendant. Essentially you had to argue whether "knowingly" applied to the weight of the controlled substance. Most of you saw that Section 2.04 of the Code states that the defense of ignorance or mistake would not apply if the defendant was guilty of another offense had the situation been as he supposed, but, in such a case, "the ignorance or mistake of the defendant" would reduce the grade and degree of the offense.

Student 15696: The issue that arises in State v. Odette whether O'Dette knowingly possessed a hallucinogenic drug [that was more than 425 mg].

The Model Penal Code states that for a person to act knowingly, he must be aware of his conduct and be aware with practical certainty of the consequences that my result from that conduct. It does not need to be read into the NY statute that the actor must know of the exact weight of the hallucinogenic drug, only that he knowingly engaged in the conduct of possessing the drug. O'Dette, although she did not know.
how much of the drug she was in possession of, knew that she was in possession of a hallucinogenic drug and knew of the potential consequences of her illegal activity.

O'Dette may attempt to argue that because she was not a [pharmacologist], she didn't know exactly what was in her possession, but she has done previous business with Borukhova and should reasonably expect to be aware of what she had in her possession.

The second issue which arises is whether O'Dette unlawfully possessed the hallucinogenic drug. It can be read into the statute that it may be lawful for a person of a certain profession to lawfully possess a hallucinogenic drug for certain purposes. O'Dette acknowledges that she is not a pharmacologist and has no idea what the exact quantity of the hallucinogenic drug is in his possession. A mitigating factor in this case may have been that O'Dette was a pharmacist. It seems to be presented as a possible excuse. A defendant may be excused from a crime if that excuse made his conduct reasonable. Because he is not a pharmacist, and does not have a valid excuse for his conduct, it can be concluded that his possession of the drug was unlawful.

The third issue which arises is whether the statute is unconstitutionally vague. In order for a statute to be enforced, it must provide clear elements of a crime so that the average person would not be able to understand its meaning and requirements. It must also limit the amount of discretion permitted to law enforcement by providing clear and specific guidelines. When a statute includes the mens rea, Actus Reus, and culpability elements required of a crime, it will typically not be void for vagueness. The New York controlled substance law provides the mens rea element.

If it is proved beyond a reasonable doubt by the prosecution that O'Dette both knowingly and unlawfully possessed a hallucinogenic drug, she should be convicted.

FURTHER MORRIS COMMENTS: Among the points developed by other students was the ostrich defense.

You might want to see People v. Ryan, 82 N.Y.2d 497 (1993) where the New York Court of Appeals dealt with this problem.

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Part I, Question 2 (This case dealt with a shepherdess who read while her sheep illegally grazed in a national forest. The law, which was only available in several law libraries in the state, made a violation “placing or allowing unauthorized livestock to enter or be in the ...forest”.

MORRIS COMMENTS: There were to issues here. The first was whether this was a strict liability statute or whether mens rea should be implied into the statute via the words “placing or allowing”. The second issue was whether the perpetrator (DeBellis) had a mistake of law or a legality defense because the publication of the statute was so limited. Most of you held the statute a strict liability statute. That was probably the “right” answer for, in the absence of information about punishment, it certainly seemed like a modern, “public law” statute. You could, it seemed to me, go either way on the legality/mistake of law issue. On the one hand, the statute had
been published, although it certainly was not accessible to the people of the State of Raful and undoubtedly not to shepherdesses.

*Student 74282:* The issue is whether DeBellis will be convicted on the 2006 and 2007 violations [for having] placed or allowed unauthorized livestock to enter or be in the state forests of Raful.

The statute has no [requirement] of mens rea. It states that the act of placing or allowing unauthorized livestock to enter or be in the forests is enough for conviction under the statute. This is a strict liability crime, where the mens rea is not required and rests on the actor's Actus Reus, or the guilty act. The Actus Reus requires that an individual cannot be found guilty or punished unless his liability is dependent on conducted based on a voluntary act or omission.

Omissions that are legally enforceable as a legally failure to act are: duty of another by relationship status..., duty according to statute, according to contract, duty entered into voluntarily, or a duty of an individual [who] put another in peril. [The duty in this situation was the result of a status relationship.]

DeBellis puts her sheep out to pasture on private ground. However, that ground borders the Elliott National Forest. The facts show that DeBellis did not watch her sheep that she reads a book and relies on sheep dog to round the sheep up. There is no evidence that she tried to keep the sheep from staying out of the forest, which is the event the statute seeks to protect against. As a shepherdess she should know that sheep have a tendency to wander and that they will not stay on the private ground unless fenced in. She should also know that they graze close to the forests that are off limits, so the sheep have the potential to be on the land unauthorized and illegally. Additionally, she should have gotten a permit to graze her sheep, which she never did. Such omission is enough for a court to find that DeBellis satisfies the actus reus required in the statute to convict her for the violations.

DeBellis may argue the defense of mistake of law, that she was not aware of the statute. However, she received two notifications and mistake of law is a defense that is generally not granted, unless under certain circumstances, such as the statute was not posted, or the actor received erroneous information from an official. None of those apply here as the facts state that the printed code of the regulations was available in four law school libraries in the state. That alone may not be enough evidence that the information was available to her, since as a shepherdess, she probably doesn't go into many law school libraries. However, clearly she received notice when she was issued notifications. Also, she may argue that when the sheep were on the grounds illegally, she did not act with purpose or knowledge, or act recklessly or negligently to be convicted of a crime. Prosecution could argue that she did in fact act recklessly or negligently since the sheep were in her care. However, the statute does not require a particular mens rea to negate and therefore a lack of mens rea is not significant for a defense. DeBellis may also argue that there was no harm done to the property, an element essential to a crime. Again, the state appears to call for a strict liability crime and, therefore, proof of harm is not essential for prosecution.

Therefore, a court will likely find that her defenses do not hold and DeBellis violated the statute and can be convicted.
Part I, Question 3 (Sriva, bitterly opposed to nuclear power and believing that the local nuclear power plant will experience a meltdown within seven seconds of being placed back on line, joins protestors who prevent workers from entering the plant. Sriva is arrested for trespassing. There was no meltdown.

MORRIS COMMENTS: This question involved the choice of evils defense. The best way to answer it would have been to employ Section 3.02 of the Model Penal Code and simply apply it to the facts. I thought the question was closer than most of you did and, indeed, in *State v. Warshow*, 138 Vt. 22 (1980) a majority agreed with you, although there was quite a thoughtful dissent. The points, though, to cover whichever way you went, were: (1) that Sriva chose the lesser evil; (2) that he acted to prevent enormous, imminent harm which he believed subjectively, but was not borne out objectively; (3) whether the Code or relevant law defining the offense provided exceptions or defenses dealing with the specific situation; (4) whether there had been a legislative purpose to exclude the justification.

Many of you, attentive to your reading and to class discussion, argued that this was indirect civil disobedience. However, if you look at the facts closely, it actually is direct devil disobedience.

(Student 67526) The defense which Sriva will claim is the lesser of two evils necessity defense. I do not believe that he will be successful in claiming this defense though he can present a somewhat strong argument and would be successful under the MPC approach. MPC Section 3.02 states that in order for the lesser of two evils necessity defense to be valid the choice that actor makes must truly be the less harmful choice from a purely objective standpoint, the code or law defining the offense must not provide an except to the defense dealing with the specific situation, no legislative purpose to exclude the justification claimed can plainly appear, and the actor must not cause the harm himself. In this case, trespassing to save a city from a nuclear catastrophe would clearly be the lesser of two evils rather than allowing the city to be destroyed. There does not appear to be any law that specifically says that this defense cannot be used if a defendant protests in such a way in such a situation, and the defendant did not cause the situation himself since he is not the one making the plant operational.

Furthermore this case is an example of direct civil disobedience which stands in contrast from cases of indirect civil disobedience, such as where a group of protestors protested American involvement in El Salvador by disrupting business at a local IRS office Direct civil disobedience cases, unlike indirect can be susceptible to the necessity defense if they qualify because there is a direct causal link between what the defendants are doing and actually stopping what they want to stop. However, the MPC approach is in fact the minority approach and the majority of jurisdictions go with an approach that includes all the above requirements and also requires that the harm be imminent and that there is no lawful alternative to the action taken by the defendant. In this case it can be argued that the harm of nuclear meltdown was “thought” to be imminent but the protestors had the option to go to their local congressmen or governor and ask for an injunction to stop the plant from being turned on. This may not be the most realistic alternative, but it is still an alternative. Therefore, by adhering to
the majority rule I do not think the protestors could claim a successful necessity approach but they most likely could under the MPC approach.

Part I, Question 4 (This dealt with Montgomery who installed a security system after several robberies and consulting with security experts. Although the system was only supposed to stun someone who attempts to get in through the windows or the doors, diner, a man with a weak heart, attempts a burglary and the electric shock kills him.)

MORRIS COMMENTS: This question was intended to test your knowledge of the use of deadly force to protect property. The answer lay in Model Penal Code 3.06 (3) and (5) and in the Ceballos (spring-gun) case. Assuming you decided (correctly) that Montgomery’s defense would have been unsuccessful, you then had to determine which degree(s) of homicide he could be prosecuted for. I think that that was the appropriate order for the issues to be discussed. However, the following student answer did it the other way.

(Student 21422) This issue here is under what type of murder in the MPC can Montgomery be prosecuted for.

First, we can look at Murder under Section 210.2. This section says that criminal homicide constitutes murder if 1) it is committed purposely or knowingly or 2) if it is committed recklessly manifesting an extreme indifference to the value of a human life or 3) felony murder. If the prosecution attempts to argue this, they will not likely be successful. In order to prove knowingly, the prosecution would have to prove that Montgomery was aware of his conduct and practically certain of the results of that conduct. It cannot be said that Montgomery was practically certain that the security system would actually kill someone. He thought it would only stun them. To this, the prosecution could rebut that under the causation theory, you are liable for all the probable consequences of your actions. But, because this would be a bit extreme, I do not think he can be prosecuted under Murder. Moreover, if he did not meet the knowingly standard, he will not meet the purposely standard. As for Reckless Indifference to human life and felony murder, I do not think those apply here.

Second, we can analyze his actions under MPC 20.3 and 210.4 which are Manslaughter and Negligent Homicide respectively. As for manslaughter, it must be shown that Montgomery acted recklessly or under extreme mental or emotional disturbance. The latter does not apply here so I will move on to the former. In order to act recklessly the MPC Sect. 2.02 (2)© states that the actor must consciously disregard a substantial and unjustifiable risk and this disregard must be a gross deviation from the standard of conduct that a law-aiding person would observe. In this instance, I don’t think the prosecution could be successful in prosecuting Montgomery for manslaughter. The standard is very difficult to meet because the stakes are very high. It does not seem that Montgomery CONSCIOUSLY disregarded a substantial risk of a person with a weak heart dying. It also does not seem that this is a GROSS deviation from the standard conduct of a law abiding person. Any law abiding person would feel the need to install these security measures after being burglarized to total of SIX times
so far. The prosecution will most likely be unsuccessful at prosecuting Montgomery for
manslaughter.

Lastly, and most successful if any, would be the prosecution of Montgomery
under MPC 210.4, Negligent Homicide. To come under Negligent Homicide, it must be
committed negligently. Under MPC section 2.02(2)(d), a person acts negligently when
they SHOULD be aware of a substantial and unjustifiable risk of their conduct and
involves a gross deviation from standard of care. The prosecution would argue that
Montgomery should be punished for FAILURE to be aware of the substantial risk that
such a high voltage of electricity could possibly cause the death of someone. Especially
someone with a weak heart. This may be seen as a deviation of the standard of care
because she had many other alternatives to not being burglarized (security guard etc.).
To this Montgomery can claim the defense of property. She will most likely fail because
under MPC section 3.06 the defense of property is available if the actor believes the
force is IMMEDIATELY necessary. Obviously, she never knew when or if she would
be burglarized and so the immediacy requirement is not met. Also Section 3.06(5) limits
the devices used to protect property to those that are not known to create a substantial
risk of causing death or harm, the device-use must be reasonable and the device must
be customarily used for such purpose. None of these requirements are met. Electric
shocks are known for causing serious bodily harm and/or death; it also doesn't seem
reasonable because, as mentioned above, she had other alternatives; lastly electric
shock is not normally used for your average bar’s security system. Montgomery will
most likely be prosecuted and convicted of Negligent Homicide. Something must also
be said of causation. Montgomery is the proximate cause of the burglar's death
because it could be seen as somewhat foreseeable and you are liable for unintended
consequences of your conduct.

Part II, Question 1 (Prosecution of 18 year old Rubin for consensual sexual relations with
14 year old Barbara)

MORRIS COMMENTS: No one seemed to have any trouble with this problem.
Rubin is clearly guilty of statutory rape. Barbara’s knowledge or the fact that the
relationship is consensual is irrelevant.

(Student 91706): Rubin will be guilty of rape in the third degree under Section 1 of the
Rajul Penal Code. Barbara is under 16 years old, and consequently Rubin will be held
liable for the offense, despite Barbara’s consent. Although it is not stated that Rubin
believed Barbara to be 16 years of age or older, the excuse would likely not be held to
justify the crime. In Regina v. Prince, the court held that even a reasonable mistake
regarding a person’s age will not justify violating a statute that forbids an action
involving someone below a certain age. In Olsen, where a boy engaged in sexual
intercourse with an under-aged girl who he believed to be of legal age, the court held
similarly that the mistake of age defense is not justified. Consequently, the court will
likely hold Rubin liable for third degree rape.
Part II, Question 2 (Rubin tells the infatuated Rosina that he will kill himself if Rosina will not sleep with him. Rosina slept with him. Rubin had no intention of killing himself. The statute for Rape in the first degree defines forcible compulsion as "any threat that would prevent resistance by a person of ordinary resolution. Forcible compulsion can be the use of physical, intellectual, moral, emotional or psychological force, either express or implied."

MORRIS COMMENTS: Some students found first degree rape. Some students found that there had not been a rape. I thought it could be argued either way. On the one hand, the fraud in the inducement generally is not rape. Many students saw the resemblance of this case to that of People v. Evans (the seduction of the innocent Wellesley girl). Others argued that the statute does make emotional or psychological force, express or implied, forcible compulsion. Those who argued the latter, however, would have to have argued as well that a person of ordinary resolution would not have resisted the threat.

((Student 91706) Similar to what took place in Evans where a man pretended to be a psychiatrist performing an experiment, Rubin pretended that he would kill himself in order to have the woman consent. Fraud in the inducement, which involved trickery or manipulation in order to have a woman consent to sex ordinarily does not constitute rape. Similar to what took place in Evans, Rubin tricked Rosina into consenting to sex. Rosina knew what she was consenting to and was aware of what was taking place. Normally, only fraud in the factum will constitute rape, where the victim does not know that intercourse is taking place or believes that she is having sexual intercourse with someone other than the actor, which in this case did not happen. In Boro, where a doctor claimed he could cure a patient's illness if she agreed to have sex with him, the court also held that fraud in the inducement does not constitute rape. Like Boro, Rosina believed she was consenting to sexual intercourse in order to prevent harm, and will likely be held to have given valid consent. Consequently, Rubin will not be held liable for rape.

Part II, Question III (In the dark, Alvin brutally makes love to his own wife, thinking that she is Susanna.)

MORRIS COMMENTS: It is not a crime to think you are acting criminally, when you really are not. That is the answer here. The State of Rafal has defined rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator". However brutally Alvin has accomplished sexual intercourse with his presumably non-consenting wife, it still is not rape in the State of Rafal.

Some of you took the position that New York has taken (and many other states) -- either repealing or striking down the marital exemption --, however, that is not the case in the State of Rafal. It was not an error (it was a plus) to mention the fact that Touro is out-of-step with the modern trend, but it was an error to state that was the law in the State of Rafal.
(Student 67526): Alvin’s rape of his own wife, Rosina, is not illegal under the laws of Raful. The rape law clearly states that rape is an act of sexual intercourse accomplished with a female, NOT the wife or the perpetrator. Therefore, since Rosina is Alvin’s wife, he could not be held responsible for the rape. This marriage exception is a relic that is still embraced by the MPC and obviously also in the laws of Raful and comes from a desire of the legislature to not allow the state to interfere with marriage, endorse married couples to resolve their problems on their own, and an old belief that women are the property of their husbands. This marriage exception is no longer allowed in most jurisdictions.

Part III, Question 1 (This problem dealt with a perpetrator whose car was being driven without a rear license plate. Instead of pulling over, he fled and, while doing so was reckless. He drove up to 90 miles per hour, ran stop signs and a red light. After the police broke off their chase, the perpetrator lost control of his car and hit and killed the drive of another car. The perpetrator is accused of two crimes including felony-murder.)

MORRIS COMMENTS: This was a question that gave most of you a great deal of difficulty. It is hard to discuss this problem without having the actual question directly in front of you. In brief, the central issue was whether the perpetrator (Rentsen) had committed an inherently dangerous felony. What I expected was that you would look carefully at the statute for the predicate felony (“evading the police officer”). The statute made a felony fleeing from a police officer when the pursued vehicle is driven in willful or wanton disregard for the safety of persons or property. In return, “willful or wanton disregard” was defined in another part of the statute as including, but not limited to, “driving while fleeing or attempting to elude a pursuing police officer during which time three or more violations that are assigned a traffic violation point count occur...But to determine the assignment of points, you had to look at still another law, the motor vehicle law. When you looked to the motor vehicle law, you could see that, while it included dangerous driving offenses such as driving above 55 miles per hour, it also contained violations which were not especially dangerous, such as driving an unregistered vehicle.

With all that in front of you, you were supposed to determine whether this was an inherently dangerous felony. To do that, I expected you to at least employ two of the tests American jurisdictions use – the abstract test and the Foreseeability approach, to look at the specific circumstances and determine if the situation made it foreseeable that death would result. (The student answer below employs three). There is no question that under the Foreseeability approach, Rentsen committed an inherently dangerous felony. Under the abstract test, it is a much closer question.

There was still one more issue lurking which was whether the “perp” was still fleeing when he had the accident.

You might want to look at the case from which this was derived: People v. Howard, 34 Cal. 4th 1129 (2005).
(Student 75902): First one must determine whether a felony was committed. Rentisen did commit evading a police officer in willful or wanton disregard for the safety of persons or property. Similar to the Acosta case, driving at 90 mph with his headlights off and running stop signs and a red light show an extreme disregard for human life and he satisfied the three point requirement of the statute. However, the felony must be inherently dangerous. There are three approaches to whether it is inherently dangerous or not. The Phillips test is that if the crime can be committed in a noon-violet way, it is not inherently dangerous. Under Philips, it would be considered an inherently dangerous felony because the felony specifically specifies one must do it with wanton disregard for the safety of others. It also satisfies the Stewart’s “as committed approach, because it was committed in a dangerous way with the foreseeable risk of harm. It would also satisfy the Hines high probability of a human death approach as well. There may be an issue of whether the perpetration of the felony was still going on. He was still in the process of evading the cops when the accident occurred, so it should still apply. However, one may also argue that it occurred after the cops broke it off and began to slow their car down, meaning he already reached a safe haven when they decided to no longer pursue him.”

Part III, Question 2 (Sneed enters estranged wife’s home with an iron bar. There is a fracas and someone dies from a knife wound. Sneed is charged with felony-murder with burglary as the underlying felony. The burglary in turn was based on entry with intent to commit an assault with a deadly weapon).

MORRIS COMMENTS: This was a merger question. It was not a hard question. The question was whether the felony of intent to commit an assault with a deadly weapon is or is not independent of the homicide. It is not independent of the homicide for “assault with a deadly weapon may not be performed in a safer way – the intent of an assault with a deadly weapon is to inflict grievous bodily injury or even death.” That quote was from student 19328). There also was another issue, which was whether the death of the 3d party was in furtherance of the felony. It is.

(Student 75902): Here, there is an issue with the merger doctrine. The merger doctrine says the felony murder rule cannot apply to felonies which are an integral part of [the] homicide. One may say the felony murder rule can apply because it is burglary. However, if one enters a home to steal money and one assaults someone during it, then the felony murder rule can apply. However, if one enters with the intent to commit an assault and it just happens they broke in during it, then the felony murder rule does not apply. Assault with a deadly weapon is an integral part of [the] homicide. Therefore, the felony murder rule would not apply. The purpose o the felony murder rule is to encourage criminals to perform felonies safer, and assault with a deadly weapon can not be performed safer.

Also, it says he had an iron bar, however the stepdaughter was hurt by a knife wound. Therefore, the fact pattern seems to imply someone else must have stabbed her accidentally in the scuffle. This would require one to look at the agency and proximate cause approaches [of in furtherance of the felony]. If the court decided the felony-
murder rule did apply, under the agency theory, the felon is not liable for killings committed by a non-felon. Here, therefore, would not be liable for the step-daughter. However, although many jurisdictions favored the agency approach, an increasing number are now using the proximate cause approach, which is that the felon would be liable if their act is the proximate cause of the act of the on-felon which led to the killing. Going over there in the middle of the night and assaulting his wife should be foreseeable to lead to rescuers acting recklessly/negligently in coming to her rescue and therefore risking that one will get hurt.

Part III, Question 3 (Whether an accomplice who fled soon after the burglary began and was apprehended and left in a police car, could be guilty of felony-murder when his accomplice was killed by a police officer when the co-felon grabbed for the police officer's gun.)

MORRIS COMMENTS: While there were a few issues to play with, the central issue was whether the killing was in furtherance of the felony. I expected discussion of the agency, proximate cause and limited proximate cause approaches. The student in the example I have given here did not get full credit but he found some other issues that were worth discussion.

(Student 85205): Last is whether Schlichtman can be convicted of felony murder while fleeing from a burglary when Sulkina was shot by Officer Lendino. The felony murder statute makes it a felony murder to kill while committing or fleeing from an inherently dangerous felony. Burglary is one such felony enumerated under this provision.

The felony murder doctrine is meant to encourage the careful commission of a crime and prevent unnecessary killings. The main question here is whether Schlichtman could be prosecuted for felony murder when Sulkina was shot by Lendino. It has been determined by case law that a killing, even if accidental, of another by a co-felon implicates all of the co-felons if that killing was committed in furtherance of the crime. However, as discussed in the above paragraph, Canola held that a killing done by a third party, not a co-felon, does not implicate the felons under the felony murder doctrine Schlichtman was not only detained, but his role in the felony was over. Sulkina was hit by Officer Lendino and officers constitute a third party that killed the co-felon. Thus, since the killing was not committed by a felons, Schlichtman cannot be convicted of felony murder.

There is another issue of whether Officer Lendino was authorized to use deadly force against Sulkina in the burglary. In Tennessee v. Garner, a boy was shot dead by an officer because he was trying to run away from the scene. A statute authorized the use of deadly force to stop a fleeing criminal, but the Supreme Court held that use of deadly force cannot be used to stop a fleeing criminal unless that criminal is considered a serious and harmful threat to the public. In this instance, Officer Lendino could argue that Sulkina was a burglar and thus a threat to the public. However, this case is more similar to Durham. In Durham, an officer was making an arrest and confronted with resistance when the arrestee was beating him over the head with an oar; the officer shot the resister. In this instance, the court held that an officer could
use deadly force to overcome by resistance. By Sulkina pulling out a gun the resistance was sufficient to use deadly force because the officer was now in danger of being shot. Therefore, he was justified in shooting Sulkina.