

UNIVERSITY OF MARYLAND
SCHOOL OF LAW**CRIMINAL LAW****3.5 HOURS****Day Division**
Professor: David Gray**Wednesday, December 9, 2009**
9:00 a.m.—12:30 p.m.**Signature:** _____**Exam No.** _____**Print Name:** _____**Submitted Electronically** Yes _____ No _____

This is your final examination in criminal law. It shall count as 100% of your grade, but only 10% of my assessment of your professional potential, and 0% of my opinion of you as a person. While the results of this examination will leave an indelible mark on your record at Maryland, it should have no lasting effect on your soul or self-esteem. It is what it is: an exam, and nothing more.

INSTRUCTIONS:

1. This exam consists of 7 pages, including this one. Please confirm that you have all the pages before you begin.
2. Student conduct during exams is governed by the Student Honor Code. You must complete this exam without aid or assistance from others. It is your responsibility to respect this rule and to avoid any appearance of impropriety. I will regard as a violation of the rules governing this exam accessing or attempting to access the internet or any electronic device during the course of the exam. I likewise will regard as a violation communicating or attempting to communicate with any person other than the proctor during the course of the exam. These prohibitions extend outside the exam room. If you must leave the room during the exam, do not stop to check your messages, e-mail, or chat, and do not make or take phone calls. All use of headphones is prohibited.
3. This is an open book, open note exam. You should have with you a copy of the textbook for the course, including the pages containing the Model Penal Code. You are free to consult any other typed, printed, or written material. You may not consult any electronic sources, including your computer's hard drive, another computer, or any handheld devices during the exam period. If you type your exam, the exam software should ensure compliance, but you are on your honor to respect this constraint regardless.
4. Computers may be used on this exam. If you use a computer, you must use the Exam4 software provided by the Law School in the **Closed Mode**. During the course of the exam, you may not access your computer's hard drive or the internet. You must provide your own computer and must have downloaded a copy of the Fall 2009 version of the Exam4 software to your computer. You should have completed this download, tested the software, and ensured that all is in working order well before the date of this exam.

At the end of the examination, choose the “Submit Electronically” function on the Exam4 software. The software will request your Exam ID (Examination Number). Put the course name on your answer, but do not put your name anywhere on your answer. Submit your answer within the time limits for the examination; no allowance for additional time will be given for equipment failure. After submitting your answer electronically, note on your exam envelope the name of the course, your examination number, check “Submitted Electronically,” and give the envelope and questions to the proctor. Do not put the exam questions in your envelope. The administration will print your Exam4 answers and insert them in your envelope.

Technological Problems: If you experience a technological problem during the examination period, consider the amount of time remaining and decide whether you should continue (or restart) the examination in blue books. No additional time will be provided for technological problems. Responsibility for submitting your answers on time lies entirely with you. The Information Technology (IT) Department will assist in retrieving examination files from your computer, and the Office of Registration & Enrollment will accept an IT-certified copy of an examination file retrieved from your computer as a timely submission as long as there is no evidence of tampering with either your computer or the examination file.

5. If you submit handwritten answers to the examination, put the examination number found on page 1 on each of your blue books. Both the envelope and your answers should contain your examination number, the course name, and the instructor’s name. Do not put your name anywhere on the envelope or on the blue book answers. When writing your exam, please take into consideration the needs of the instructor during the grading process. Write legibly and consider skipping lines, writing on only one side of the page, or other techniques that will make your presentation neat and clear. Upon completion of the examination, put your answers in your envelope and give the envelope and exam questions to the examination proctor. Be sure to enclose all of your answers in the envelope—you will be graded only on what is inside the envelope. Do not put the exam questions in your envelope. You are responsible for ensuring that all of your completed answers and questions are handed in to the examination proctor.
6. This exam is scheduled for 3.5 hours. Submit your examination answers within the announced time for the examination. If you submit your answers late, you likely will be subject to penalty.
7. For each question I have indicated a suggested time commitment. While these are only recommendations, they reflect my assessment of both the amount of time necessary to answer the question and the relative emphasis you should give each question when allocating your time.
8. There are no space limits. You should write as much as you think is necessary to provide a complete and accurate response to each question. Keep in mind that the longest answers are almost never the best answers. Concision, with clarity, is at a premium.
9. The exam is not designed to be redundant. If your analysis leads you to the same concept or issue of law within a question or in separate questions, then you may cross-reference your answers. If you do so, please provide me with specific directions on where to look.

I reiterate my sentiments from our last class: it has been an honor and a joy to be with you and with each of you this semester. I look forward to your success on this exam and in the rest of your careers at Maryland and beyond. Please stay in touch and do not hesitate to call on me if I can be of any assistance.

Question 1: (Recommended time: 2 hours)

MEMORANDUM

To: Fran Tieck, Assistant District Attorney

From: Colm N. Collette-Ted, Senior Assistant District Attorney

RE: Case 12-9-2009, Charging Recommendation

We have just received a preliminary report from the Sheriff's Department describing several incidents that took place at Bertha's Booze-n-Board out on Route 17. Bertha's is licensed to serve alcoholic beverages and also rents two dozen motel rooms, mainly by the hour. The business concept is that the rooms will be used by patrons of the bar to get a few hours' sleep and sober up rather than driving under the influence of alcohol. Bertha and her employees monitor the number of drinks consumed by patrons. If Bertha or her employees decide that a patron is too drunk to drive, she will offer to call a taxi or to arrange space in the motel. If the drunke

n patron refuses both options, Bertha calls law enforcement. These policies and practices have earned Bertha seals of approval from the local Better Business Bureau and Mothers Against Drunk Drivers, and she has several times been the subject of complimentary treatment in the local press.

While some of Bertha's room rentals are in service of this ingenious drunk driving abatement business model, her establishment is known locally by the unfortunate nickname "Bertha's Booze-n-Broads," referring to the fact that rooms are frequently rented for purposes of sex, some legal, some not. In the latter category fall the trades of several local prostitutes and gigolos who regularly use Bertha's rooms for client meetings. Many of these sex workers are frequent patrons of Bertha's bar, where they recruit new clients, meet existing clients for drinks, or just relax. Exchanging sex for money is illegal under the common law of Marvinland, but for some time now those prohibitions have been enforced only against management level participants in the sex trade. In fact, the last arrest of a sex worker or client was over ten years ago. As a consequence, sex workers ply their trade openly but discretely in many localities across the state.

Last Friday was a busy night at Bertha's. The main event was Biff Johnson's bachelor's party. Biff is a local hero of sorts, who was the star of his high school croquet team before earning a full scholarship to play the sport at Coastal State University. Scrub Jones, Biff's longtime sidekick, was in charge of the affair, and arranged with Bertha to rent out a section of the bar for Biff's party along with a few of the hotel rooms. As is her wont, Bertha took the reservation herself and was delighted that the local celebrity would be in her establishment. Bertha and Scrub made arrangements for an open bar tab for the party, food for the guests, and a cake. During this conversation, Scrub asked Bertha if any of "her girls" would be working that night. Bertha told Scrub that she did not have any "girls," but that the bar would be open to its usual clientele, who would, Bertha was sure, "show y'all a good time." Bertha also emphasized to Scrub that everyone who attended the party would be required to show identification and that nobody under the age of 18—which is the age of majority for all purposes under state law—would be allowed in the bar, and that only those over the age of 21 would be permitted to drink alcoholic beverages.

On the night of the party, Scrub, Biff, and twenty of their best friends arrived at Bertha's. Each presented to the doorman a driver's license. Guests whose ID's showed that they were over 21 years old received a bright "Over 21" stamp on their hands. Those over 18 who were not yet 21 received a dark "Over 18" stamp on their hands. Among the group was Biff's younger brother Chip, who, though only 15, used a fake ID representing his age as 18 to enter the bar. Biff, who is very protective of Chip, allowed him to tag along, but put everyone on notice that Chip was not to drink or otherwise "compromise his purity."

At some point in the evening, Jezebel, who has been working as a prostitute for several years, took a shine to Chip and approached him for a chat. Noting the "Over 18" on his hand, she said "Can't party, huh?" Chip acknowledged that he could not drink, whereupon Jezebel asked him whether he might be interested in another kind of party. Chip quickly acknowledged being thrilled with the prospect, and the two went to a room at the motel Jezebel had reserved for the night. Harkening to his sex education classes in high school, Chip made sure to ask Jezebel specifically, though awkwardly, whether she wanted to have sex with him. Jezebel was so charmed and amused she said "Honey, not only do I want to, this one's on the house because you are too cute." That reference to her profession went right by the naïve Chip, who did not know that Jezebel was a professional sex worker. One thing quickly led to another and the two were engaged in sexual intercourse when Biff burst in, finding his brother in flagrante delicto with Jezebel, whom he knew to be a prostitute. Furious that his brother was being defiled by a woman not his wife, Biff jumped into the room and yelled "What are you doing to my baby brother; he's only 15!" Before she could respond, Biff grabbed Jezebel by both arms, and threw her against a wall, causing her to suffer a broken collar bone and concussion. Chip immediately intervened, restrained his brother, and told Biff that Jezebel thought he was at least 18 based on the stamp. Groggy, Jezebel confirmed Chip's account, which mollified Biff somewhat. Jezebel was transported to the hospital where tests revealed that she is infected with the human immunodeficiency virus, or HIV. Jezebel was stunned. While she knew her profession came with high risks of HIV infection, she frequently used condoms and other safer sex protections with clients. She immediately thought of Chip, and asked the attending physician to notify Chip of her HIV status. Upon hearing the unwelcome news, Chip was crushed. Not in a sensitive mood, Biff simply said "Well, what do you expect, you had sex with a prostitute." Chip was shocked again, responding: "Biff, what are you talking about? I didn't know she was a prostitute! I never would have had sex with her if I had known!"

Blissfully unaware of the drama involving Chip and Biff, Scrub was enjoying the party. Scrub has a bit of a drinking problem. If he drinks moderately, Scrub is charming, effusive, and gregarious. Unfortunately, if he drinks too much, Scrub becomes paranoid, belligerent, and violent. After several unfortunate incidents in which he drank too much, became violent, and inflicted serious physical harm on others, Scrub made a personal commitment to control his alcohol consumption and had been flawlessly successful in that effort for nearly two years by the night of the party. After a couple of drinks, Scrub was well inside his safety zone, enjoying himself immensely, but decided to take a break. He asked Bob the Bartender for "iced tea." Unfortunately, the bartender misunderstood the request and gave Scrub a Long Island Iced Tea, which is a beverage that has the appearance and taste of non-alcoholic iced tea but is composed almost entirely of hard alcohol. When the beverage arrived, Scrub reasonably assumed it was just iced tea and drank it without recognizing its true nature. After drinking one "iced tea," Scrub still felt like he should stay away from alcohol, so ordered another, and then another. Midway through the third "iced tea," Scrub became irrationally suspicious that Ted and Fred, two local barflies, were whispering malicious falsehoods to each other concerning Scrub. Furious, Scrub stood up and

screamed “I know you two are talkin’ about me!” He then grabbed a large pewter tankard off the bar and threw it at Ted. Fortunately, it missed Ted. Unfortunately, it hit Bob the Bartender, who was standing a few feet away, in the back of the head, severing his spinal column at his C1 vertebra. That injury rendered Bob paralyzed and unable to breathe on his own. Rescue Rick, a licensed Emergency Medical Technician (EMT), who had just entered the bar after finishing a shift with the rescue squad, saw all of this happen. If he had initiated rescue breathing consistent with his training, Bob would have survived. Unfortunately, Rick decided not to get involved. As a result, Bob died within minutes of respiratory arrest.

Fran, I need your help. Please write to me a memorandum addressing the specific questions below. For purposes of your analysis, you should assume that all relevant events took place within the state of Marvinland. Except where specifically abrogated by statute,¹ the criminal law of Marvinland tracks the common law. You may, however, highlight differences between the common law and the Model Penal Code where doing so assists your analysis or explanation.

- A. Because Jezebel did not demand or take money from Chip, we cannot charge her with an act of prostitution for engaging in sex with him. Are there other charges we can bring? If so, what? Are there any defenses we should prepare to rebut? If so, what and how?
- B. In response to pressure from Chip’s family, the Sheriff arrested Jezebel and other sex workers known to frequent Bertha’s motel on charges of exchanging sex for money. Those defendants are being represented by a famous law professor and activist from Tidewater State School of Law, who has notified our offices that she will be entering an “Alford Plea” on behalf of her clients. Under that plea, her clients will admit the facts alleged, but will argue that the United States Constitution bars conviction. Counsel has notified us that her argument is not based on the First Amendment, but otherwise has kept mum. Do you have any idea what argument she will be making? How can we respond?
- C. Please assume that Bertha is not a sex worker and that she does not fit the legal definition of a “pimp,” “madam,” or other “management level participant in the sex trade.” Over the last three years, we estimate that several hundred acts of sex for money have been perpetrated at her motel. Is there a way to hold her criminally responsible for any of those acts?
- D. Can we charge Scrub in the death of Bob? If so, what is the proper charge? Are there any defenses we should prepare to rebut? If so, what and how?
- E. It seems obvious to me that Rescue Rick can be charged in the death of Bob the Bartender, but when I raised this possibility with you in an earlier conversation, you said we first need to do more legal research. What research do you think we need to do? Why?

¹ One such statute is Marvinland Code, Health-Gen. § 18-601.1, which reads:

§ 18-601.1: Transmission of HIV

Any individual who knowingly engages in intercourse while HIV positive and thereby transmits or attempts to transmit the human immunodeficiency virus to another individual is guilty of a misdemeanor and, upon conviction, shall be subject to a fine not to exceed \$2,500, imprisonment not to exceed 3 years, or both. Any person accused of violating this section shall have an affirmative defense if he or she shows on a preponderance of the evidence that all parties to the act or acts of intercourse actually knew that the defendant was HIV positive.

Question 2: (Recommended time 30 minutes)

. MEMORANDUM

To: Ace Terp

From: Professor Ko G. Tayson

RE: Amendments to the Model Penal Code

As you know, I am a voting member of the American Law Institute. Several years ago, we tasked a working group to recommend changes to the Model Penal Code. That group reported its recommendations earlier this week. I would like your thoughts on one of those proposals, which is to strike Article 1.02(2)(a)-(c), to be replaced with the following:

- (2) The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are:**
- (a) in decisions affecting the sentencing of individual offenders:**
 - (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders;**
 - (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restoration of crime victims and communities, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i); and**
 - (iii) to render sentences no more severe than necessary to achieve the applicable purposes in subsections (a)(i) and (a)(ii);**

Identify some of what you believe to be the most significant proposed changes. Explain to me what is proposed, why you think it is significant, and whether you think I should support, oppose, or offer a counter proposal. I recognize that I am putting you on a very short time line. I do not expect a dissertation. Neither do I want a complete list of all proposed changes. Rather, I want concise and original analysis of what you believe to be the most significant change or changes.

Shorter Answer Questions: (Recommended Time: 45 minutes)

1. Self-defense and necessity fall in one category of affirmative defenses, while duress, intoxication, and insanity fall in another. What are the two categories? Briefly explain the difference(s) between the two categories.
2. If you were the advocate for Michael Gore in his criminal appeal before the Fourth Circuit, docket no. 08-4462 (argued October 30, 2009), and Judge Davis asked you the following question:

“Counsel, doesn’t our decision in United States v. Perrin, 45 F.3d 869 (1995), control in this case?”

What would your response be?
3. True or False: A judge in a common law jurisdiction must dismiss as a matter of law a charge of accessory to manslaughter. Explain.
4. The history of the insanity defense is dominated by two main approaches, the cognitive and the volitional. Briefly explain the differences between the two. What approach does the Model Penal Code endorse?
5. True or False: Ignorance of law never provides an excuse in the common law. Explain.