

SAMPLE ANSWER  
CRIMINAL LAW EXAM

The photocopies in this folder represent some of the best student answers to the essay portion of the examination. However, I do not vouch for the accuracy or soundness of every statement made in every answer.

Different folders contain photocopies of different sets of answers to the same questions. I encourage you to look at more than one set. You will see that there are different, but equally valid, ways of answering an exam question well.

--Professor Kenneth Simons

I  
(65 minutes)

Dan is returning home after a dinner party at which he consumed a large amount of alcohol. He is driving just a few miles per hour over the posted speed limit of 40 miles per hour. Harry, driving very carelessly, does not notice a red light and collides with Dan's car which is proceeding through a green light at the intersection. The result is significant damage to both vehicles but no personal injuries.

Harry and Dan leave their vehicles, expecting to exchange license and insurance information. Before they have done so, Harry discovers that Dan is intoxicated, and Harry becomes enraged, accusing Dan of causing the accident. Shouting, "I could kill you! And I know how to use a gun!," Harry suddenly opens the trunk of his car and reaches in, pulling out a large bag.

In fear, Dan jumps back into his car and flees the scene, accelerating quickly. In his panic, he looks back at Harry, and does not see a pedestrian crossing the street in front of him a short distance from the scene of the first accident. His car strikes and kills the pedestrian. As it turns out, Harry's bag contains his registration, but no gun or other weapon.

**(a) (30 minutes)**

Dan is charged with two crimes:

- (1) "knowingly leaving the scene of an accident," and
- (2) the aggravated crime, "knowingly leaving the scene of an accident with the intention of avoiding legal responsibility for that accident."

Is he likely to be found guilty? Does he have any plausible defenses? Explain whether your answer would differ based on whether Model Penal Code principles or common law principles apply. (In your answers to questions I(a) and I(c), you may consider New York's necessity defense to be a "common law principle.")

**(b) (15 minutes)**

Dan is also charged with homicide. Under the MPC, of what degree of homicide, if any, is he likely to be found guilty?

**(c) (20 minutes)**

Assume the following variation in the facts: As Dan is escaping from the apparent threat, he sees the pedestrian in the path of his car. In a state of fear and panic, he intentionally drives ahead, running over the pedestrian, who dies as a result of the impact. Under the MPC, of what degree of homicide is he likely to be found guilty? Under the common law, would your answer be any different?

**II**

**(25 minutes)**

Please explain whether you agree or disagree with each of the following statements, and why.

**(a) (12.5 minutes)**

Requiring a heightened mens rea for attempt makes little sense if one also believes that completed crimes should be punished more harshly than completed attempts (those attempts in which the actor has done all he believes necessary to bring about the crime).

**(b) (12.5 minutes)**

It is inconsistent for a jurisdiction to abolish the volitional prong of the insanity defense yet continue to recognize provocation as a partial defense to murder.

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1)

Under the MPC, to be charged with "knowingly leaving the scene of an accident", a person must be aware that his leaving the scene is practically certain to follow from his conduct, and also that he is aware that the place he is leaving is the scene of an accident. Dan (D) knew what he was doing because he jumped back into his car in order to retreat to safety, and therefore D knew he was leaving the scene. Further, a jury would likely find that D knew the place he was leaving was the scene of an accident, since he was involved in the accident, and since he got out of the car in the first place to exchange information with Harry (H) the driver of the other car.

To be convicted of the aggravated crime, D must further have the purpose of avoiding legal responsibility for that accident. Purpose is measured, under the MPC, if it is D's conscious object to cause that result. There is no evidence that it was D's conscious object to avoid legal responsibility for the accident. In fact, D first got out of his car with the hope of exchanging insurance information, proving that he was willing to take responsibility for the accident, or at least whatever responsibility was his. Therefore, a jury would likely find D not guilty of the aggravated crime because he lacked the purpose of avoiding legal responsibility.

D will attempt to invoke two defenses. His first defense will be intoxication, namely that his voluntary intoxication negated the mens rea associated with the crime. Under the MPC, intoxication is a defense if it negates the purpose or knowledge of the defendant. To the lesser crime, there is no indication that his intoxication negated his knowledge that he was (a) leaving the scene, or (b) that the scene was in fact the scene of an accident. A jury would find he was consciously aware he was leaving because it was his goal to avoid harm. Further, he was aware it was an accident because he got out of his car to exchange insurance information. Therefore, intoxication will not work as a defense to the lesser crime.

D will next try to invoke a necessity defense. Under the MPC defense of necessity, conduct which the actor believes to be necessary to avoid a harm or evil to himself is justifiable when the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. Further, when the actor is reckless or negligent in bringing about the situation requiring the choice of evils, or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution

for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability. Although D may have been reckless in placing himself in the situation, the crime he is charged with has a "knowledge" mens rea requirement. Therefore, he is not precluded from invoking the defense because he placed himself recklessly in the situation. Although the MPC does not have an imminence requirement, D would still try to argue that he believed he was in imminent danger. H had just yelled "I could kill you! And I know how to use a gun!" Further, H suddenly opened his trunk and reached in, pulling out a large bag. A jury would likely find that, given the threatening language and actions of H, D reasonably feared for his safety and believed H might attempt to kill him. Also, D was alone with H on the road, and a jury would likely find he had no viable alternatives other than jumping in his car and speeding away from the scene. Further, the jury would likely find that the harm of getting killed is much greater than the harm of "knowingly leaving the scene of an accident." Therefore, the jury, under the MPC, would likely find that D was justified in his actions.

Under common law (CL), D is guilty of the lesser crime if he knowingly left the scene of an accident. This is a general intent crime because it is an offense just because the actor possessed a blameworthy state of mind, mainly that he was fleeing the scene of an accident. D will likely be convicted of the lesser crime because he knew what he was doing, mainly that he was fleeing the scene of the accident because he was in fear of his life. Although D would attempt to use intoxication as a defense, voluntary intoxication is no defense for general intent crimes, and thus such a defense here will not work.

Under the CL, the aggravated crime is a specific intent crime. For this crime, D must have knowingly left the scene of the accident, with an intent to avoid legal responsibility for that accident. As explained above while discussing the MPC, it does not appear from the facts that D had the intent on avoiding legal responsibility, illustrated by the fact that he stopped his car after the collision and got out in order to exchange insurance information. If a jury somehow did find D was guilty under the aggravated crime, then evidence of D's intoxication may be admissible, provided that it negated his mens rea, which would mean it negated his intent to avoid legal responsibility.

Again, D will likely invoke the necessity defense to defend against his actions. However, under common law, if the actor was at fault in placing himself in the situation, he will not be allowed the defense. A jury would likely find that D was at fault for getting into the situation where he

needed to choose between the "lesser evils". The jury would likely come to such a conclusion because D was intoxicated at the time. Further, D was traveling over the speed limit while driving. Although he was driving through a green light, the jury would likely find he had recklessly, or at least was criminally negligent, in placing himself in that situation. If the jury did not so find, though, they would then look to see whether D was in imminent danger, that D must have expected his action would be effective in abating the danger he sought to avoid (death), that there was no effective legal way to avert the harm, For the reasons stated above, D would likely be given the necessity defense, but only if the jury found he had not placed himself in the situation, which, ultimately, it is will probably decide he had placed himself in the situation.

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Question #1 Final Word Count = 1111



2)

Under the MPC, an actor can be convicted of murder if he acts purposely or knowingly as to the death. D did not intent do kill the pedestrian, and thus lacked the purpose or knowledge. This is proved because he did not see the pedestrian, and thus didnt even know he was there.

A person can also be convicted of murder, though, if the person acted recklessly but which under the circumstances manifested extreme indifference to the value of human life. Further, intoxication is no defense to EI Murder. The prosecution would attempt to prove first that D's actions were reckless, in that he was aware of a substantial and unjustifiable risk. The prosecution would point to evidence that D had already been in a car accident prior to hitting the pedestrian, and, although that may or may not have been his fault, realized that driving while drunk was an substantial and unjustifiable risk that could have dire consequences. In response, D would argue that he was not aware of such a risk, and this was evidenced by the fact that he was not driving carelessly at the time of the original accident, other than speeding a little, and thus felt he could drive safely even though he was intoxicated. The prosecution would further argue, though, that D's action of looking back at H was reckless. D would argue, though, that he did so in a panic, and was not aware of the pedestrian, or that there was any risk of looking back. In fact, D would argue that he was aware of a greater risk had he not looked back, mainly that H could be following him or shooting at him. It would thus be up to the jury to decide which story to believe. The prosecution, though, would also argue that, even if D was not aware of the substantial and unjustifiable risk or driving drunk and also of turning around while driving, it is something he would have been aware of if he was sober. This will likely be persuasive for the jury, who would probably find him reckless under constructive recklessness. The prosecution, though, would also argue that D's actions manifested extreme indifference for a person's life. Driving while drunk is inherently dangerous because the driver's abilities are affected, and he may not be able to react quick enough. The jury would likely find that D's actions sufficed for EI murder, assuming they also decide D was reckless in his behavior.

Further, drunk driving does not count as one of the listed crimes under the second prong of EI Murder, so D wont be convicted of el Murder under that prong.

If the jury decides D was not guilty of EI Murder, it would likely find him guilty of manslaughter.

Manslaughter under the MPC is committed when the actor acts recklessly. For the reasons discussed above, D appears to have acted at least negligently, but because he was intoxicated, a jury could find that a reasonable sober person would have been aware of such dangers.

D can also be found guilty of manslaughter if his actions, which would otherwise constitute murder, were committed under the influence of extreme emotional disturbance. If the jury found D's actions to constitute murder under normal circumstances, it would then analyze whether D's actions were under the influence of extreme emotional disturbance, from which there is a reasonable explanation or excuse. D would attempt to argue that his actions were the result of extreme fear as a result of his conceived danger to his person. He thought, at the time, that H was going to try to kill him, and thus would argue he could not think clearly as a result. Such circumstances could count as shock under the MPC's objective element of the offense. D would say he had such shock because, in fear, he jumped back into his car and fled. Further, his fear is subjectively illustrated because he looked back to see if H was following him. Therefore, if D was found, under normal circumstances to have committed murder, a jury would likely find that such a homicide was committed under EED, and thus be mitigated to manslaughter.

Lastly, D could be convicted of negligent homicide if his actions were committed negligently, meaning he should have known the substantial and unjustifiable risks. However, such negligence would likely be brought up to recklessness because of his intoxication (constructive recklessness). Therefore, he is likely to be convicted of a higher crime.

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Question #2 Final Word Count = 751



3)

## c) D's liability for homicide if he saw the pedestrian (V)

## MPC

Murder

In this situation, the state will likely charge D with murder. Under the MPC, murder requires a MR of P or K, or R under circumstances manifesting extreme indifference to the value of human life. There is no evidence that D had the conscious object of killing V. The state will argue, however, that he killed him knowingly. They may argue that driving over someone is "practically certain" to cause death. D will argue that death is not practically certain from his actions, b/c V may have had the chance of jumping out of the way, or only rolling over the hood of the car. The state will argue that even if death was not practically certain to follow from the conduct, that D acted recklessly under circumstances manifesting extreme indifference. They will argue that driving over somebody in a car is grossly reckless. D will argue that he may have been R, but that the circumstances do not demonstrate EI. Driving a car has a social value. He will argue that he was at most R. A court will probably not find that D acted with P or K or that the circumstances demonstrated EI, b/c D's conduct had some social value.

Manslaughter

Even if the court does find that D had the MR for murder, he will argue that it should be reduced to manslaughter b/c of an extreme emotional disturbance (EED). Under the MPC, even an intentional killing is mitigated to manslaughter if it is committed under EED. D must actually suffer the disturbance, and there must be a reasonable explanation for it. In this case, a court will probably find that D did suffer from EED, b/c he was in a state of "fear and panic". They will also probably find that there is a reasonable explanation for it, b/c he feared for his own life. A reasonable person in his situation, probably would have panicked as well. Thus, if a court does find that D acted w/ a MR sufficient for murder, it would probably be mitigated to manslaughter.

If the court does not find that D had the MR for murder, he will still likely be liable for manslaughter under the MPC. D may be convicted of manslaughter if his conduct is R towards V's death. A court will find that D had a subjective awareness of death, b/c he knew that he was running over a pedestrian. D will argue that the risk is justifiable. The court will probably also find that the risk is unjustifiable, even in D's situation. Risking the life of another for one's own life may be excusable, but not justifiable. Thus a court will probably find D liable

for manslaughter under the MPC.

### **Common Law (CL)**

#### Murder

Under the CL, D is guilty of murder if he has the intent to cause death, intent to cause serious bodily harm, a depraved heart, or causes death in the commission of a felony. D does not appear to have the intent to cause death or sbh. Assuming that the crimes of fleeing the scene of an accident are not felonies, he is not liable for FM. The state is more likely to charge him w/ murder for killing w/ a depraved heart. Unlike the MPC, depraved heart (DH) does not seem to require a subjective awareness of the risk. Thus, even if D did not know that running over V created a sub risk of death, he could be guilty. A court will probably not find, however, that D had a culpably indifferent or callous attitude, b/c he was fleeing for his life. Also, as noted above, driving has some social value.

#### Voluntary Manslaughter

If the court does find that D had the MR for murder, it can be mitigated down to voluntary manslaughter if he was provoked. Under the traditional categorical approach, D would not get the mitigation. That approach is based on a justification rationale, which does not justify the killing of someone other than the provoker. Under the modern Maher approach, an excuse rationale may be applied. In that case, the mitigation may be available for killing a non-provoker. The matter would go to a jury to determine if the apparent threat of death would cause an ordinary person to act out of passion rather than reason and if a reasonable person would not have cooled off. If the matter did go to a jury, they would probably give him the mitigation.

#### Involuntary Manslaughter

If D does not have the MR for murder, he will be charged w/ IM. At CL, this crime seems to only require gross negligence. The state will point out that knowingly running over a pedestrian creates a risk that a reasonable person would not take. D will again argue that his actions were justifiable, but the court will likely disagree for the same reasons noted above. Since D probably does not have the MR for murder, it is most likely that he will be convicted of IM at the CL.

2)

2a.

I agree with this statement. If completed attempts are punished less harshly than completed crimes, there is no real reason to require a heightened mens rea. When there is a heightened mens rea, two actors can commit the same exact act with the same amount of culpability, and either be guilty of a completed crime, or have no criminal liability at all. This creates an incentive for people to engage in risky behavior, since they will only be punished if the risk actually occurs. We want to deter people from doing such things. Also, two people who commit the same exact act should probably be punished similarly under retributive viewpoints. If completed crimes are punished more than completed attempts, we punish people more for the harm they cause through their actions, but we also punish people for their risky behavior.

On the other hand, a heightened mens rea does make sense for incomplete attempts. If the mens rea for incomplete attempts was the same as for the crimes, we would come across absurd situations where people could get arrested while they were getting into their car because they had completed substantial steps towards committing a negligent act. We want to ensure the free will of our citizens, and as a result, we do not want to have them be criminally liable for incomplete attempts for reckless and negligent acts. This would lead to a huge increase in the amount of criminal violations and prosecutions and would cause a great burden on our courts, prisons, and public defenders. You also cannot punish for thoughts, and if you punished for reckless activities you could conceivably punish someone who was substantially aware of an unjustifiable and substantial risk before he even committed the risk.

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The volitional prong of the test refers to the test of whether the actor could control his actions even though they knew them to be wrong. If one is to abolish the volitional test, then the only remaining test would be the cognitive test - testing to see whether the actor knew right from wrong at the time of the crime. Provocation is a mitigation in which a person is recognized to have acted in a wrong manner, yet be excused for this with a lesser punishment because of the understanding that even rational people lose full control at times under certain circumstances. If a jurisdiction abolishes the volitional test, then it is logically saying that it does not matter whether you can control your conduct or not - what matters is whether what you knew what you were doing is wrong. While it may appear inconsistent to abolish this test because in effect the jurisdiction is saying that it does not matter if you can control your conduct in one situation, yet it does in another - it is consistent if looked at the relative uses of the provocation and insanity defenses. Insanity is a complete defense, while provocation is only a mitigation. While a defendant can be found not guilty by reason of insanity under a volitional prong of the test, a defendant cannot be found not guilty under provocation doctrine but only have their sentence mitigated. Dropping the volitional test is completely consistent with keeping provocation doctrine in that the jurisdiction is in effect saying that while we do not expect people to act reasonably at all times, even at times that they are not expected to act reasonably they are still criminally liable. In addition, as modern psychiatrists have pointed out - it is incredibly difficult to tell when a defendant has acted because they could not control their actions or because they would not control their actions. Under provocation doctrine, through the course of history and through "res ipsa" type inferences we have come to know certain situations under which even rational people can lose rationality. Based on these experiences, provocation is a more reliable indicator of lack of relative fault than a volitional test. Recognizing that people at times cannot control their actions and deserve less punishment is not logically equivocal to giving a complete defense when people cannot control their actions yet know that their actions are wrong. Provocation is also more readily found through discoverable evidence, as opposed to the fundamentally intangible testimony about state of mind that determines the validity of the volitional test.

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Question #5 Final Word Count = 433