

CRIMINAL LAW
SECTION B3

Mid-Term Examination
December 20, 1984

Two & ½ Hours
9:00-11:30



*"I was forced to steal, your Honor. Santa didn't
bring me what I wanted."*

OPEN BOOK

Instructions

The three problems are of unequal weight. Each is worth an amount in grading equal to its suggested time limit. Budget your time accordingly.

Answer all the questions reasonably raised in each problem even though your resolution of a prior issue in the same problem may technically make decision of the other issues immaterial. If you believe that you need more facts than are presented to adequately resolve an issue, indicate specifically what facts you believe you need and why.

Specific citations to cases are welcome but not as a substitute for thinking, i.e. do not use case citations instead of clearly stating the relevant point of law.

I. [60 minutes]

Consider the following facts:

"On March 13, 1982, at approximately 12:30 a.m., William Atkinson (a black man) and William Grady (a white man) were walking westward along Savin Hill Avenue in Dorchester. The [five] defendants . . . were in a brown car driving along the same street in the opposite direction when they came upon Atkinson and Grady near the Motley School. One of the car's occupants shouted, 'Hey nigger, we're going to kill you.' When Grady responded that Atkinson was his friend, someone in the car said, 'We'll kill you too.' The car then turned around and chased the two men along Savin Hill Avenue, its occupants screaming racial epithets and threats. . . . The MBTA train station was some 400 feet away from where the chase began, and Atkinson and Grady ran into it seeking refuge. Grady told the MBTA collector to call the police because they were 'being beat up on.' The two men ran down a flight of steps and onto the platform.

"At that time the only entrance to the station was from Savin Hill Avenue. A set of stairs descended from the entrance to the train platform below, and the platform extended some 330 feet from the foot of the stairs. On the eastern side of the platform were four sets of train tracks (with electrical third rails) bounded by a wall separating the tracks from the Southeast Expressway. On the other side of the platform was the southbound Harvard-Ashmont track, with a third rail. A chain link fence with barbed wire on top separated this track from a parking area.

"The [five defendants] ran out of their car and surrounded the train station. Some or all of them stood at the chain link fence and showered the platform with rocks and bottles while repeating racial slurs and threats. Two of the young men . . . climbed the fence, crossed the track, and reached the platform in pursuit of Atkinson and Grady. Two or three were seen on a bridge on Savin Hill Avenue which overlooked the tracks from which point further threats were hurled. When he saw the youths start to climb the fence, Grady told Atkinson, 'Let's get out of here,' and ran

back up the stairs where he was knocked unconscious by one of the young men Atkinson . . . jumped off the platform and ran southward down the tracks. Some seven minutes after his jump, Atkinson was struck and killed by an MBTA train about 1,750 feet from the end of the platform.

"Some time during the fracas at the station another white man, Mark Darling, climbed over the fence onto the platform. At least some of the young men . . . mistook Darling for Grady and threatened him. He drew a knife and sought to escape by running up the stairs, where he found Grady's unconscious body. He then ran down to the platform, where he was further harassed. Like Atkinson, he sought refuge by jumping into the 'pit' and running down the tracks. He stopped when he reached the end of the platform and hid in a small space he knew to be there."

[Commonwealth v. Joyce, 467 N.E.2d 214 (Mass. 1984)]

You are a law clerk to the famed Boston criminal defense attorney, F. Lee Barely. Barely has undertaken the representation of the five defendants in this case who have all been charged in Massachusetts state court with the murder of William Atkinson, the attempted murder of William Grady, and an assault on Mark Darling. Barely has asked you to tell him whether these charges are likely to stick and whether there are tenable defenses, complete or mitigating, to these charges. What do you tell him?

II. [50 minutes]

Consider the following facts:

"On the evening of August 19, 1981, two men entered a gas station in Milwaukee. One of the men shot and wounded an employee who worked at the gas station, and both men took some money from the station. The men were never apprehended by the police.

"Roosevelt Hutchinson testified that on the evening of the armed robbery, he talked to a man standing across the street from the gas station where the armed robbery occurred. Hutchinson said that the man appeared nervous and kept looking behind him and turning his head from side to side. Hutchinson stated that the man said to himself, 'Hurry up.' Hutchinson also testified that he subsequently

heard two shots and then observed two men fleeing the gas station with a money sack. Hutchinson said something to the man with whom he had previously spoken to the effect that he assumed the man knew what was going on, after which the man replied, 'Shut up.' As the two men ran down the street, the man with whom Hutchinson had spoken ran in the same direction. Hutchinson later identified the man with whom he had spoken as Gerald Collie Ivy, Jr."

[State v. Ivy, 350 N.W.2d 622 (Wis. 1984)]

Due to circumstances beyond your control, you find that you are an Assistant District Attorney in Milwaukee, Wisconsin. You are faced with making some charging decisions as to Mr. Ivy.

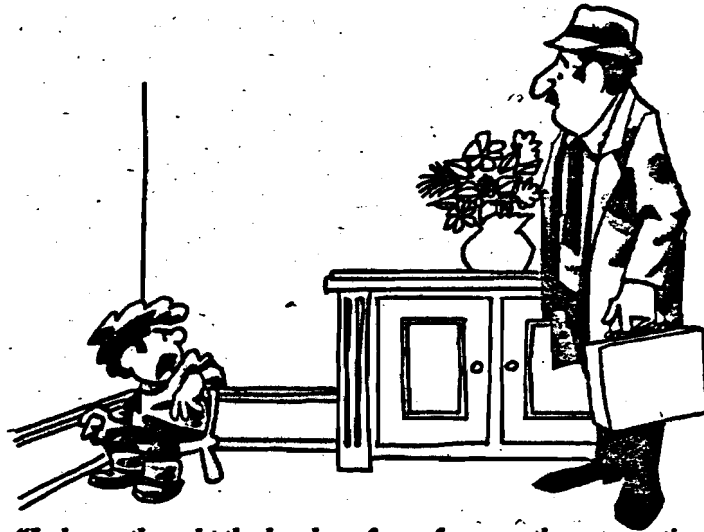
- (1) Do you think you can successfully prosecute Ivy for armed robbery? Why or why not?
- (2) Do you think you can successfully prosecute Ivy for conspiracy to commit armed robbery? Why or why not?
- (3) If Ivy had run away before Hutchinson heard shots and if the armed robbers had not obtained any money, would these two facts make any difference with respect to your decision to charge or not charge Ivy with armed robbery or conspiracy? Why or why not?
- (4) If Hutchinson testified that Ivy "had whiskey on his breath" when he talked to him, and was "drunk enough that he kind of staggered away," would that make any difference in your charging decision? Why or why not?

III. [40 minutes]

The State of Irritation, one of the states in the United States, is considering enactment of a new provision in its Crimes Code, Irritation Crimes Code § 299.9(B)(3)(iii), which would establish the crime of "ethnic intimidation" where an individual "with malicious intention toward the race, color, religion or national origin of another individual or group of individuals, commits an assault." [Cf. Pa. Crimes Code § 2710(a) (1982).] It would, however, be a complete defense to the crime of ethnic intimidation, under proposed Irritation Crimes Code § 299.9(B)(3)(iv), if the "assault is in response to a taunt to the offender based upon his or her race, color, religion, national origin, or occupation of a parent." The crime of ethnic intimidation would be a felony and carry a maximum penalty of three years in prison.

- (1) The State of Irritation already has statutes in its Crimes Code criminalizing the crime of assault. Would it be proper for an Irritation trial judge to sentence a defendant consecutively, for assault and for ethnic intimidation, both offenses arising from the same fact situation? Why or why not.
- (2) Under this statutory scheme, can the Commonwealth place the burden of proof on defendant in making a defense under § 299.9(B)(3)(iv)? Why or why not?
- (3) Do you think the crime of ethnic intimidation, is a penologically desirable offense? Why or why not?

Professor Burkoff



"I always thought the burden of proof was on the prosecution."