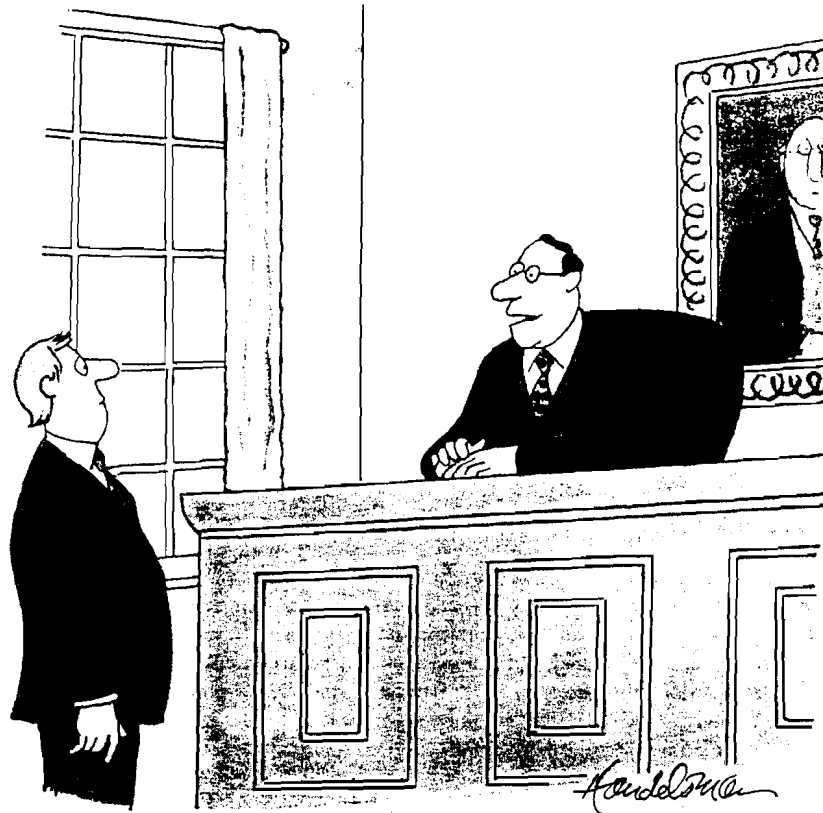


EXAM NO. _____

CRIMINAL LAW
Section A2

Final Examination
December 22, 1998

2 ½ Hours
1:00-3:30



"In the interest of streamlining the judicial process, we'll skip the evidence and go directly to sentencing."

OPEN BOOK
Instructions

The three problems are of unequal weight in grading. Each is worth a point value proportionate to its suggested time. 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 November 11, 1993, at 7:00 p.m., defendant, Jason Goecke, and a friend, Milton Glutz, met at a liquor store in Troy where they purchased beer. From 7:00 p.m. until 8:30 p.m., Goecke and Glutz drank beer as they sat in the parking lot of the liquor store. Goecke consumed approximately seven to nine bottles of beer. When a police cruiser drove into the parking lot, Goecke and Glutz drove off, with Goecke driving, in order to find another place to drink. The two drank beer as they drove around the area, waiting for the police to leave the parking lot.

"Several hours later, at approximately 11:30 p.m., Goecke and Glutz were driving on Wide Track Drive near Cass Road in the city of Pontiac. Wide Track Drive is a main thoroughfare through the city of Pontiac and is a five-lane southbound highway, with four lanes for through traffic and one turn lane. One witness testified that he first noticed Goecke when his car came 'flying' past the witness' car, nearly hitting his van. Goecke's speed was estimated at approximately seventy to eighty miles an hour. According to the testimony, this witness attempted to drive up to Goecke's vehicle to advise him that he almost hit the witness' van and that he should slow down. The witness also testified that Goecke's head was at an odd angle and that he looked to be 'barely conscious.'

Intoxication
Defense

"Goecke's passenger on the night of November 11, 1993, Glutz, also testified at the preliminary examination and indicated that Goecke may have driven through a red stoplight at the intersection just before the intersection of Wide Track Drive and Orchard Lake Road. Glutz testified that Goecke had drunk so much and was driving erratically because he was mad that another driver earlier in the evening had 'given him the finger' and called him a name that cast doubt upon his manhood and virility. Glutz testified that he told Goecke to calm down, but Goecke paid no attention to him.

Provocation?
Voluntary

"As Goecke neared the intersection of Wide Track Drive and Orchard Lake Road, one witness stated that the stoplight was either yellow or red. A second witness testified that the stoplight was yellow. Goecke ran through the stoplight and struck an eastbound vehicle in the intersection. The other motorist was badly injured and went into a coma, subsequently dying on November 12, 1994, of an opportunistic infection he acquired in the hospital.

CAUSATION

"Approximately fifteen to twenty empty beer bottles were observed on the floor of Goecke's car, and Goecke's blood-alcohol level was measured at 0.17 percent. At the scene of the accident, Goecke admitted that he was to blame for the accident, stating:

"I really fucked up. I was going way too fucking fast. I have had to[o] fucking much to drink. . . . I have really fucked up bad this time. I was going way too fast. . . . [I]t was all my fault, I should not have been driving. I know I'm drunk."

1 year and
a Day

Cf. *People v. Goecke*, 579 N.W.2d 868 (Mich. 1998).

You are an Assistant District Attorney in Oakland County, Michigan, the home county of Dr. Jack Kevorkian, and the venue wherein the facts recited above occurred. Fresh from six successive cases in which you have tried to convict Dr. Kevorkian of homicide and have failed, you have now decided to try and convict Jason Goecke of homicide. Discuss your chances of a successful homicide conviction. What tenable defenses to homicide charges does Goecke have? Can you overcome these defenses? How? Can you successfully prosecute Goecke as an accomplice? Why or why not.

II.

(60 minutes)

Monica Slewinsky, a 22 year-old reporter for *In Spittsburgh*, a local newsweekly, decided to do an undercover, exposé investigation of drug use at a local high school, Spittsburgh Central High. Because she looked so much younger than her actual age, Monica posed as a 15 year-old 9th grader, new to the area, and gained admittance to the school. Monica made a number of friends at Spittsburgh Central, becoming especially close to Linda Stripp, another 9th grader, who was really 15 years old. Eventually, Monica came to suspect that Stripp was selling marijuana not only to their fellow students, but also to some of the teachers.

In order to prove that Linda was selling marijuana, Monica surreptitiously taped conversations where she tried to get Linda to agree to sell marijuana to her. But Linda kept refusing to sell her marijuana, no matter how hard Monica tried to persuade her otherwise. Eventually, Linda relented. She sold Monica a baggie of "marijuana" for \$25. (Actually, the baggie contained only oregano. But neither Linda nor Monica realized that. Linda had been tricked by her supplier.) Monica videotaped the entire transaction with a tiny video camera hidden in her Coach handbag.

*Conspiracy
BL → No
u.l. → 15*

Delighted that she now had material for her exposé and also delighted that she now had marijuana (she thought), Monica invited Linda to smoke some of the "marijuana" with her. The two rolled up some cigarettes and sat out behind Spittsburgh High smoking them when two of their teachers, Ken Starrh and Henry Shyde came by. As it happened, Monica had developed a huge crush on Ken, who was 25 years old. The feeling was mutual, but Ken had kept his distance because Monica was his student and he believed that she was only 15 years old. And Linda had long been interested romantically in Henry, who was 26; she had previously sold him marijuana and told him that she was 16 years old and "ready to go out and have a good time," but Henry had declined the invitation. On this occasion, however, the foursome decided to go to Ken's apartment where Monica, Linda, and Henry smoked some more of the oregano/marijuana. Ken did not join them in smoking, he smelled the oregano/marijuana smoke and declined to smoke any, saying: "That smells like pizza, not the kind of dope I'm used to smokin'. Does anyone have a cigar?" No one apparently had a cigar to offer him, but high on oregano, marijuana, life, or whatever, ultimately, Monica had consensual sexual intercourse with Ken, and Linda had consensual sexual intercourse with Henry.

*Mistake
Mistake of fact*

Monica had forgotten to turn off the video camera in her purse during all of this drug and sexual activity and the videotape in the camera was later stolen by a “friend” of Monica’s, Lucianne Sgoldberg, and eventually was turned over to the Spittsburgh Police Department.

(a) *Narcotics offenses*: Monica, Ken and Henry have each been charged with attempted possession of marijuana. Linda has been charged with sale of marijuana and attempted sale of marijuana. Both Monica and Linda have been charged with conspiracy to distribute and to possess marijuana. Discuss the likelihood of their being convicted on each of these charges. If either Monica or Linda is convicted of each charge against her, could she be sentenced consecutively on each of those charges? Conspiracy?

(b) *Sex offenses*: Spennsylvania, the state in which all of this activity occurred, has a statute, Crimes Code § 3122.1, Statutory Sexual Assault, which provides that “a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant.” Ken has been charged with attempted Statutory Sexual Assault; Monica has been charged with being an accomplice to this crime. Henry has been charged with Statutory Sexual Assault; Linda has been charged with being an accomplice to this crime. Discuss the likelihood of their being convicted on these charges.

III.

(30 minutes)

Consider the following comment by English law professor, Andrew Ashworth, discussing the English law relating to criminal culpability for omissions:

“Two contrasting positions may be identified, the ‘conventional view’ and the ‘social responsibility view.’ [T]he ‘conventional view’ . . . maintains that the criminal law should be reluctant to impose liability for omissions except in clear and serious cases. It is accepted that there are many activities in modern society which must, to some extent, be regulated by criminal offences, of which some will properly be offences of omission; it is also accepted that citizens have duties to support the collective good by paying taxes, etc., and that such duties may be reinforced by offences of omission; but the distinctive argument is that our duties towards other individuals should be confined to duties towards those for whom we have voluntarily undertaken some responsibility. Whereas we owe negative duties (*e.g.* not to kill or injure) to all people, it is right that we should owe positive duties (*e.g.* to render assistance, to support) only to a circumscribed group of people with whom there exists a special relationship. When supporters of the conventional view are pressed to justify this limitation, they might tend to argue that there is a moral distinction between act and omissions, maintaining that failure to perform an act with foreseen bad consequences is morally less bad than performing an act with the identical foreseen bad consequences

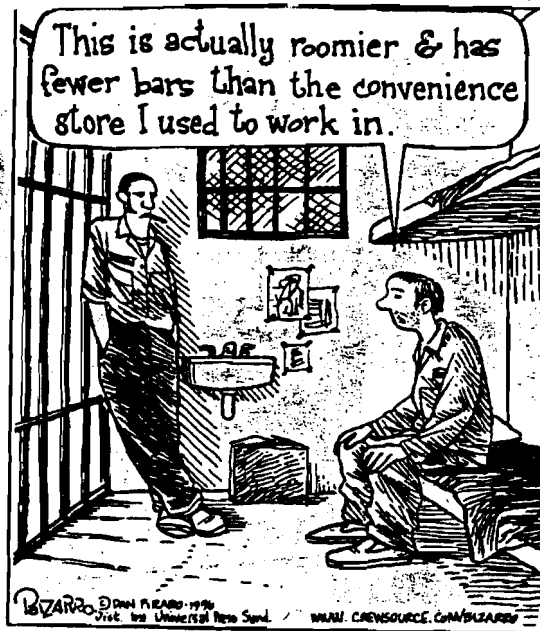
“Adherents to the ‘social responsibility view’ would draw attention to the cooperative elements in social life, and would argue that it may be fair to place citizens

under obligations to render assistance to other individuals in certain situations. This does not commit them to the view that the criminal law should enforce general duties to help all persons at all times. But it leads them to doubt whether the existence of some relationship or voluntary undertaking should be regarded as a precondition of criminal omissions liability. And it may also lead them to attack the argument that there is a general moral distinction between failing to perform an act with foreseen bad consequences and performing an act with identical bad consequences.”

Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 1989 Law. Q. Rev. 424.

(a) Discuss which of these views, if either, is closest to the American model for omissions culpability.

(b) Discuss which of these views *should* be, in your view, the American model for omissions culpability.



Professor Burkoff