

# CRIMINAL LAW--FINAL EXAMINATION

## PROFESSOR SAMMONS FALL, 1992

*Please read these instructions now.*

**PLEASE DO NOT TURN THE PAGE  
UNTIL YOU ARE TOLD TO DO SO.**

1. You have three hours to complete this examination. I will post notices of the time remaining about every thirty minutes until we get near the end and then I will do it more frequently. You must stop completely when I call time.
2. There are three questions. The first two questions are designed to take approximately 50 to 70 minutes each and will each count 40% of the total score. The third question is designed to take approximately 30 to 40 minutes and will count 20% of the total score.
3. You do not need to answer the questions in order, but you do need to clearly label your answers so they can be quickly located in your bluebooks. I strongly recommend that you do the first two questions before the third question.
4. *This is a closed book examination.* You are not permitted to use any materials to assist you in answering the questions on this examination. You should have nothing with you now other than something to write with. I will provide scratch paper. If you have anything else with you, please move it to the hall outside the classroom door. Please do this now.
5. Put your examination number, the name of the course, and the year on your blue books. *Do this before you start writing in them.* Number your blue books in the following manner: 1 of X (total number used), 2 of X, etc.
6. You may use the front and back of pages. *Please double space your answers.* If you forget to double space, and then remember, do not go back and do not apologize, just start double spacing from where you remember to do so.
7. Each question asks you to take a particular role. Do so. This is important! Think back over the mistakes I identified for you in our writing exercises, classroom discussions, and handouts and try to avoid those mistakes. These questions call for the application of substantive knowledge; not just substantive knowledge.

8. *Do not turn in the examination questions. Turn in your blue books with the first blue book on the outside and all other blue books placed within the first blue book.*

9. If you have a difficult time getting started or if you get upset during the examination for any reason, please come see me as soon as it happens.

## QUESTION #1

(40% of Examination Total--Approximately 70 minutes)

*Assume that you are in a jurisdiction that follows the Pennsylvania homicide scheme we have studied in class (i.e., involuntary manslaughter, voluntary manslaughter, second degree murder defined by malice aforethought, first degree murder defined by premeditation and deliberation). There is no death penalty in this jurisdiction. This jurisdiction follows the majority of state in defining each level of mens rea required for each level of homicide including the usual varieties of malice aforethought. You are an assistant district attorney and you have been assigned the task of identifying all potential criminal charges in the following facts that have been presented to you by a resourceful squad of detectives. In addition, you should identify and discuss any issues presented by these charges, you should evaluate each charge based on the issues presented, and you should recommend charges for prosecution and justify your recommendations.*

Polly and Happy were a married couple who enjoyed scuba diving, but did not enjoy each other. On a recent scuba trip they took with friends to explore some ocean caves near an island, Happy resolved to rig Polly's oxygen so that it would shut off while they were in an underwater cave hoping that she would then not be able to reach the surface in time. Polly and Happy started their dive, reached the cave, and began their explorations. Unfortunately, there was something wrong with the oxygen in Happy's supply tank and, while he was breathing deeply, he was not getting a high enough percentage of oxygen. He started feeling faint and becoming disoriented. Polly saw what was happening and tried to get Happy to share her tank with her while she also tried to get him to the surface. Happy, however, temporarily confused by the lack of oxygen, hallucinated that some marine animal was attacking him. He grabbed his small spear gun, fired at it, and, by chance, cut the supply lines on Happy's tank. A few moments later, coming out of his confusion, Happy saw what he had done. Polly was struggling and motioning to him to give her oxygen, but he made no effort to help Polly. Instead, he took a deep breath from his own tank, discarded the tank, and swam to the surface where he told his friends what had happened. He did not, of course, tell them that he did not try to help Polly. Polly's body was found several days later.

Happy and Polly's friends were distressed. They tried to comfort Happy in his well acted grief while they motored back to shore. They all did this with the exception of Shorty. Shorty did not believe Happy's story because he knew from Polly that things were are from happy between Happy and Polly. Polly had told Shorty that she had been unfaithful to Happy on numerous occasions and she thought he might suspect her. She also told Shorty that she feared what Happy might do if he found out.

Happy, she said, was a very violent man who had to have his way.

Shorty, playing amateur police detective, decided to see if he could provoke Happy into confessing what he had done to Polly by taunting him about Polly. He told Happy what Polly had said to him and, in fact, began to taunt him a little about it and even implied that Happy was glad that Polly was gone. Happy knew immediately that Shorty suspected foul play. He also knew that he had to silence him.

Hours later, Happy was sitting with his comforting friends when Shorty came by. Happy called out to Shorty to repeat what he had said in front of the others. Shorty did this--to their amazement-- and Happy, pretending rage, but truly cool and calculating, took out a gun and shot Shorty. (Happy thought that killing someone out of rage for telling you about your spouse's adultery was not a crime. He was convinced that if his friends' believed the charade he would not be prosecuted.) Unfortunately, Happy's shot missed Shorty and hit Vivian who just that moment call around the corner into his line of fire. Vivian died immediately.

## QUESTION #2

(40% of Examination Total Score--Approximately 70 minutes.)

*The following two cases are the primary authority for an issue you have been given to analyze by your senior partner in a criminal defense practice law firm. You may, of course, refer to any other sources of law, but your partner is primarily interested in your analysis of these cases and how we can use them in defending our client.*

*Here are the facts:*

Our client has been charged with a violation of the Narcotics Act for selling a drug listed in the regulations governing the Narcotics Act. She is a young counter salesperson in a fast-food and gasoline store on a highway. One of the popular items sold in this store is a locally produced stimulant containing high doses of caffeine. This stimulant is often sold to truck drivers and other travelers late at night to help them stay awake while driving. Federal and state regulators were suspicious about these stimulants because of the way they are being marketed and their high price. The advertising claims made for the stimulant were often bizarre--claiming longer life, increased sexual potency, clearer thinking on exams, better night vision, and so forth. The stimulant is also surprisingly effective. In fact, it is so effective that Federal Narcotics agents became suspicious that it contained something other than caffeine. Upon investigation it was discovered that this stimulant also contained traces of stimulants that are regulated under the Narcotics Act.

Rather than going after the companies involved in manufacturing the stimulant, however, the feds decided to go after sellers. Their thinking was that reputable sellers should not be selling items that make these kinds of claims when the sellers should know that it is either false advertising or else some kind of drug that is likely regulated. They want to place the responsibility on sellers as a way of keeping this from happening in the future.

One night, two federal investigators entered the fast-food and gasoline store while the defendant was behind the counter. They purchased from her four packets of the stimulants and then arrested her for a violation of the Narcotics Act.

*Tell the partner how the two following cases apply to our client's case; what defenses they may provide for her, if any; what problems they may create for us, and any other points of analysis that you think may be helpful to the partner in assessing the case.*

UNITED STATES v. BALINT  
United States Supreme Court  
258 U.S. 250 (1922)

Mr. Chief Justice TAFT delivered the opinion of the court.

... Defendants in error were indicted for a violation of the Narcotic Act. The indictment charged them with unlawfully selling to another a certain amount of a derivative of opium and a certain amount of a derivative of coca leaves, not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue, contrary to the provisions of §2 of the [Narcotic] Act. The defendants demurred to the indictment on the ground that it failed to charge that they had sold the inhibited drugs knowing them to be such. The statute does not make such knowledge an element of the offense. The District Court sustained the demurrer and quashed the indictment. The correctness of this ruling is the question before us.

While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed

in regard to statutory crimes even where the statutory definition did not in terms include it there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court. It has been objected that punishment of a person for an act in violation of law when ignorant of the facts making it so, is an absence of due process of law. But that objection is considered and overruled in *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 69, 70, in which it was held that in the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*. So, too, in the collection of taxes, the importance to the public of their collection leads the legislature to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends and meeting it at the peril of punishment. Again where one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells.

The question before us, therefore, is one of the construction of the statute and of inference of the intent of Congress. . . .

... It is very evident from a reading of it that the emphasis of [§2 of the Narcotic Act] is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion. We think the demurrer to indictment should have been overruled.

Judgement reversed.

UNITED STATES v. DOTTERWEICH

United States Supreme Court

320 U.S. 277 (1943)

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This was a prosecution begun by two informations, consolidated for trial, charging Buffalo Pharmacal Company, Inc., and Dotterweich, its president and general manager, with violations of the Federal Food, Drug, and Cosmetic Act. The Company, a jobber in drugs, purchased them from their manufacturers and shipped them, repacked under its own label, in interstate commerce. . . . The informations were based on §301 of that Act which prohibits "The introduction or delivery for introduction into interstate commerce of any . . . drug . . . that is adulterated or misbranded." "Any person" violating this provision is, by paragraph (a) of §303 made "guilty of a misdemeanor." Three counts went to the jury—two for shipping misbranded drugs in interstate commerce, and a third, for so shipping an adulterated drug. The jury disagreed as to the corporation and found Dotterweich guilty on all three counts. We start with the finding of the Circuit Court of Appeals that the evidence was adequate to support the verdict of adulteration and misbranding. . . .

. . . The Circuit Court of Appeals, one judge dissenting, reversed the conviction. . . . We then brought the case here, on the Government's petition for certiorari, 318 U.S. 753, because [the Court of Appeals'] construction raised questions of importance in the enforcement of the Food, Drug, and Cosmetic Act. . . .

. . . The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. *United States v. Balint*, 258 U.S. 250. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded (or adulterated), and that the article may be misbranded (or adulterated) without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares. . . ." . . .

The Act is concerned not with the proprietary relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such distribution must be accomplished, and may be furthered, by persons standing in various relations to the incorporeal proprietor. . . .

. . . Hardship there doubtless may be under a statute which thus penalizes the transactions though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place [the burden] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

It would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Our system of criminal justice necessarily depends on "conscience and circumspection in prosecuting officers," *Nash v. United States*, 229 U.S. 373, 378, even when the consequences are far more drastic than they are under the provision of law before us. See *United States v. Balint*, supra (involving the maximum sentence of five years). For present purpose it suffices to say that in what the defense characterized as "a very fair charge" the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict.

Reversed.

Mr. Justice MURPHY, dissenting:

Our prime concern in this case is whether the criminal sanctions of the Federal Food, Drug, and Cosmetic Act of 1938 plainly and unmistakably apply to the respondent in his capacity as a corporate officer. He is charged with violating §301(a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of any adulterated or misbranded drug. There is no evidence in this case of any personal guilt on the part of the

respondent. There is no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation.

It is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who, like the respondent, has no evil intention or consciousness of wrongdoing. It may be proper to charge him with responsibility to the corporation and the stockholders for negligence and mismanagement. But in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge. Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous. Accordingly that which Chief Justice Marshall has called "the tenderness of the law for the rights of individuals" entitles each person, regardless of economic or social status, to an unequivocal warning from the legislature as to whether he is within the class of persons subject to vicarious liability. Congress cannot be deemed to have intended to punish anyone who is not "plainly and unmistakably" within the confines of the statute. . . .

The dangers inherent in any attempt to create liability without express Congressional intention or authorization are illustrated by this case. Without any legislative guides, we are confronted with the problem of determining precisely which officers, employees and agents of a corporation are to be subject to this Act by our fiat. To erect standards of responsibility is a difficult legislative task and the opinion of this Court admits that it is "too treacherous" and a "mischievous futility" for us to engage in such pursuits. But the only alternative is a blind resort to "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries." Yet that situation is precisely what our constitutional system sought to avoid. Reliance on the legislature to define crimes and criminals distinguishes our form of jurisprudence from certain less desirable ones. The legislative power to restrain the liberty and to imperil the good reputation of citizens must not rest upon the variable attitudes and opinions of those charged with the duties of interpreting and enforcing the mandates of the law. I therefore cannot approve the decision of the Court in this case.

## QUESTIONS #3

(20% of Examination Total--Approximately 30 minutes)

A potential client has come to see you after being charged with assault with intent to rape. The client says he was grossly intoxicated and had no idea that the woman was not consenting to his advances.

This is your initial interview with the client. Your normal practice in conducting an initial interview is to focus the first part of the interview on an exhaustive gathering of facts and on establishing a good relationship with the client. After this, you like to tell your clients a little about the criminal law. What you do is to explain to your clients *in very general terms* the law that will govern their case and any potential defenses they might have to the crime or crimes with which they are charge.

*You have just completed the first part of the interview, write out what you would say to this client about the law that applies to his case.*