

CRIMINAL LAW--FINAL EXAMINATION
PROFESSOR SAMMONS FALL, 1995

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 of equal value. You should spend approximately fifty minutes on each question thus leaving thirty minutes for reviewing and editing your answers at the end. You should not be under very much time pressure in this exam.
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.
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. Use additional blue books for scratch paper. If you have anything else with you, please move it to the hall outside the classroom door. Please do this now.
5. You should now have two bluebooks. Put your examination number, the name of the course, and the year on your bluebooks. **Do this before you start writing in them.** Number your bluebooks in the following manner: 1 of X(total number used), 2 of X, etc.
6. You may use the front and back of pages of the bluebooks..
7. Pay attention to what I ask you to do in each question. Remember that most points come not from demonstrating substantive knowledge but from applying it. Think back over the mistakes I identified for you in our writing exercises, classroom discussions, handouts, and conference and try to avoid those mistakes.
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 in order.**
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. One way to get started is to imagine that you are just having a conversation with me on paper.
10. There are seven pages in addition to this cover sheet. Check now to see that you have all seven pages.

Question #1

You are a prosecutor preparing to prosecute a Mr. Villegas who owns Plaza Health Laboratories. He has been charged with four counts of violating the Clean Water Act. All four counts are premised on the allegation that the defendant knowingly discharged pollutants into navigable waters from a "point source," a term of art established and defined by the Act. Two of the four counts are premised on the so-called "knowing endangerment" provisions of the statute that imposes substantially enhanced penalties on polluters who knowingly place others "in imminent danger of death or serious bodily injury."

The defendant is willing to plead guilty to discharging pollutants from a "point source," but will plead not guilty to the charges of knowing endangerment under the Act. The relevant provision of the Act reads as follows:

Any person who knowingly violates section 1311 . . . of this title, . . . and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both.

Here are the facts you now know:

Four months ago there were several discoveries of glass vials containing human blood lying in the sand of the shoreline along the Hudson River. Some of these vials had been broken. Tests reveal that the blood in at least five of the seventy vials found was infected with hepatitis B, an infectious virus that causes inflammation of the liver and can lead to chronic illness, including cancer, or to death. These vials were found in areas visited by school children on field trips.

Recently, a maintenance employee at the Admirals Walk Condominium, an apartment complex on the shore of the Hudson, found a plastic bag full of blood vials wedged into the rocks of the river bulkhead. Police eventually collected at least one hundred vials floating loosely in the river or packed in containers also wedged in the rocks. Five of these vials also contained blood contaminated with hepatitis B.

State investigators traced the vials, by using identification numbers on them, to Plaza Health Laboratories, a facility that tests blood for diseases. The defendant, Mr. Villegas, is the owner of Plaza and he lived in the Admirals Walk Condominium. When questioned, he has admitted to hiding the vials there on an earlier occasion, and expert evidence on tides and currents established that the vials found along the shoreline of the Hudson could also have originated from the Admirals Walk

bulkhead. Based on this information, you decided to charge Mr. Villegas as described above.

Place yourself in the prosecutorial role: *What problems do you see in this prosecution? What facts will you seek to learn to address these problems? What is your assessment of the strength of the case against Mr. Villegas?*

Question #2

You are a prosecutor. You are considering homicide charges against Max Feinberg who owns and operates a cigar store in the skid-row section of Philadelphia. One of the products he sold was Sterno, a jelly like substance composed primarily of methanol and ethanol and designed for cooking and heating purposes. Sterno was manufactured and sold in two types of containers, one for home use and one for industrial use. Before last September, both types contained only 4% methanol and 71% ethanol, or grain alcohol. Methanol is far more toxic if consumed internally. After September, the company changed the composition of the industrial Sterno to 54% methanol. The cans containing the new industrial Sterno were identical to the cans containing the old industrial Sterno except in one crucial aspect: on the lids of the new 54% methanol Sterno were imprinted the words "INDUSTRIAL STERNO. DANGER. POISON. FOR USE ONLY AS A FUEL. NOT FOR CONSUMER USE. FOR INDUSTRIAL USE ONLY. NOT FOR HOME USE." A skull and crossbones were also lithographed on the lid. The carton in which the new Sterno cans were packaged and shipped did not indicate that the contents differ in any respect from the old industrial Sterno.

According to its records, Sterno Corporation sent only one shipment of the new Sterno to the Philadelphia area. This shipment went to Richter Paper Company. The company, in turn, made only one sale and this was to Max Feinberg. The Richter Paper Company did not open the cartons and had no way of knowing that the composition of the industrial Sterno had changed.

Between November 21 and November 28, Max Feinberg sold approximately 400 cans of the new industrial Sterno. Between November 23 and November 30, thirty-one persons died in the skid-row area as a result of methanol poisoning. In most of these cases the source of the methanol was traced to the new industrial Sterno. Again, Feinberg's store was the only retail outlet in Philadelphia who sold this product.

Your investigations show that Feinberg sold the Sterno with the knowledge that at least some of his customers would extract the alcohol for drinking purposes. Witnesses have said that customers purchased the Sterno from him by merely saying "make one" or by holding up fingers indicating how many cans they wanted. On one occasion Feinberg, who referred to Sterno as shoe polish, asked one witness who had purchased the Sterno how he and his wife were making out with their shoe polish. Witnesses have also said that Feinberg asked them to conceal the Sterno under their coats when leaving his store.

You are pondering which homicide offense you will bring against Feinberg and what defenses he might have. Using the usual Pennsylvania statutory scheme of homicide offenses, the one used in the course, tell me which offenses you would consider, what issues you see, if any, for each, and what defenses you anticipate from the defendant. In doing this, please consider as many of the arguments distinguishing the different levels of homicide offenses that we explored in this course as you can. If it is obvious that a certain type of homicide offense does not apply -- for example, voluntary manslaughter -- do not spend time discussing that offense.

This question is from Commonwealth v. Feinberg, 253 A.2d 636 (Pa. 1969)

Question #3

Decina was one of our note cases. It involved a defendant driving alone in his car on March 14, 1955. At around 3:30 p. m., his car suddenly swerved to the left across the center line in the street so that it was completely in the opposite lane traveling forty miles per hour. It then veered sharply to the right, crossing back over the avenue and mounting the curb; it continued thereafter at a speed of sixty miles an hour. A group of six schoolgirls was walking north on the sidewalk of the avenue when defendant's car struck them from behind. Three of the girls, ages six to twelve years old, were dead on arrival at the local hospital. Another died two days later as a result of injuries sustained in the accident.

Prior to the accident, a pedestrian testified that he saw the defendant's hand above his head; another witness saw the defendant's left arm bent over the wheel and his right hand stiffly extended towards the right door.

After striking the schoolgirls, the defendant's car continued on the sidewalk, swerved back onto the avenue, passed under a viaduct, veered again to the right and remounted the curb, striking and breaking a metal lamppost. With defendant now stooped over the steering wheel, and the horn steadily blowing, the car finally came to a stop when it crashed into the brick wall of a grocery store.

At the trial there was testimony by expert witnesses diagnosing the defendant with Jacksonian epilepsy and offering the opinion that defendant had a seizure at the time of the accident. There was also testimony that defendant had knowledge of his susceptibility to such attacks. (Treat these two facts as not in dispute.)

The defendant was convicted of criminal negligence homicide. What follows is the majority opinion in the appeal from the conviction:

[1,2] We turn first to the subject of defendant's cross appeal, namely, that his demurrer should have been sustained, since the *indictment* here does not charge a crime. The indictment states essentially that defendant, *knowing* "that he was subject to epileptic attacks or other disorder rendering him likely to lose consciousness for a considerable period of time", was culpably negligent "in that he *consciously* undertook to and *did operate* his Buick sedan on a public highway" (emphasis supplied) and "while so doing" suffered such an attack which caused said automobile "to travel at a fast and reckless rate of speed, jumping the curb and driving over the sidewalk" causing the death of 4 persons. In our opinion, this clearly states a violation of section 1053-a of the Penal Law. The statute does not require that a defendant must deliberately intend to kill a human being, for that would be murder. Nor does the statute require that he knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, we have said, when his conduct manifests a "disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment." *People v. Angelo*, 246 N.Y. 451, 457, 159 N.E. 394, 396.

[3] Assuming the truth of the indictment, as we must on a demurrer, this defendant knew he was subject to epileptic attacks and seizures that might strike *at any time*. He also knew that a moving motor vehicle uncontrolled on a public highway is a highly dangerous instrumentality capable of unrestrained destruction. With this *knowledge*, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow

from his conscious act, and which in this case did ensue. How can we say as a matter of law that this did not amount to culpable negligence within the meaning of section 1053-a?

To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable for culpable negligence, as the courts below have properly held. *People v. Eckert*, 2 N.Y.2d 126, 157 N.Y.S.2d 551, 138 N.E.2d 794; *People v. Kreis*, 302 N.Y. 894, 100 N.E.2d 179; *Matter of Enos v. Macduff*, 282 App.Div. 116, 121 N.Y.S.2d 647; *State v. Gooze*, 14 N.J.Super. 277, 81 A.2d 811. To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation, see *Jenson v. Fletcher*, 277 App.Div. 454, 101 N.Y.S.2d 75, affirmed 303 N.Y. 639, 101 N.E.2d 759, and there is simply no basis for comparing such cases with the flagrant disregard manifested here.

Please write a dissenting opinion. (NB: *Take your time analyzing the issue before you write. Your dissenting opinion does not need to be long. It does need to be responsive to the majority opinion.*)