

**FINAL EXAM: SUBSTANTIVE CRIMINAL LAW**

**[with answer key included]**

Tuesday, December 17, 2013, 9:00 a.m. Professor: Meredith Ross

**EXAM NO:** \_\_\_\_\_

**LENGTH:** The exam is scheduled to take 2-1/2 hours. However, you may take up to **3 hours** to complete the exam.

**THE EXAM:** This is an open book exam. **Laptop: Open Mode.** It consists of 6 pages, including this cover sheet. Please **return this exam to me when you are finished.**

**COURSE GRADE:**

1. This exam is worth up to 110 raw points. On top of this amount, I will add the raw points from your three on-line exercises (10 raw points each if completed by due date) and the paper assignment (up to 20 raw points) for a total of 150 possible raw points. I will then determine a curved grade based on a 100-point scale.
2. I will next add 0-3 curved points for “professionalism” (class participation, timeliness, small group work). The result will be your “tentative course grade,” which is a numerical grade on a 100-point scale.
3. If this grade is higher than your midterm grade, it will constitute your final course grade.
4. If your midterm grade is higher than the “tentative course grade,” I will average in the midterm grade as 25% of your final course grade.
5. Once I have determined your numerical “final course grade,” I will convert it to a letter grade.

**GRADES:** After I turn in the grade sheet, it will be processed as soon as possible. An alphabetical list of the courses, indicating the date grades were sent electronically to the UW Registrar, will be on the Law School's website at:

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**IMPORTANT:** Remember that not all students take the exam at the same time. **Be careful about discussing the exam in public. Make sure that you do not pass on information about the exam to students who have not taken it.** Intentionally doing so is a violation of the Law School Rules.

**NOTE ON EXAM QUESTIONS:** Unless otherwise specified, all questions arise in the State of Wisconsin and are controlled by Wisconsin statutes and cases. Obviously, they are also controlled by federal constitutional law.

Question 1(a)	_____	TOTAL	_____
Question 1(b)	_____		
Question 1(c)	_____		
Question 2	_____		
Question 3	_____		

### **Question 1 (40 raw points)**

Anthony, Barry, and Curtis share an apartment in “Vista Ridge,” a 32-unit apartment complex. The units are 2-story townhouses with attached garages. Early in December, the roommates are lounging around their apartment, complaining about their lack of funds. “How am I supposed to buy presents for my sister’s kids when I’m broke?” Barry asks rhetorically.

“I’ve got an idea!” Anthony replies. He shows them a notice that had been slipped under the apartment door earlier in the day. It announces that Vista Ridge will hold a holiday party for residents on December 22<sup>nd</sup> in the complex’s athletic center. “Listen,” Anthony points out. “Everyone will be at the party. While they’re gone, we can just break into a few units. Everyone has money or presents lying around at this time of year!” Barry and Curtis agree that this is a great idea. The next day, Barry, who works at a locksmith’s, borrows one of the shop’s standardized keys to use in the burglaries.

On December 21<sup>st</sup>, Anthony watches “A Charlie Brown Christmas” on TV. He’s so moved by the program’s message about the true spirit of Christmas that he decides he can’t go through with the burglary. “I can’t do it,” he tells his roommates, “and you shouldn’t either. It’s wrong.” “Yeah, well, I’m going for it,” responds Barry. “I still gotta get stuff for my nieces and nephews.” “Me too!” says Curtis.

On the evening of December 22<sup>nd</sup>, almost all of Vista Ridge’s residents are at the holiday party, drawn like moths to a flame by the eggnog and smoked salmon.

At 9:00 p.m., Barry and Curtis set out. By prior agreement, each carries a hunting knife to jimmy open any locked desks or cupboards.

At Apt. 1, Barry tries to use his key to open the front door, but he can’t get it open. He tries his knife as well, without success. Just then, Donald, who lives in Apt. 3 and who works with Barry at the locksmith’s, passes by on his way to the holiday party. “Hey, Don,” calls Barry. “Come here for a sec, would you? We’re breaking into this apartment to get some Christmas stuff, but I can’t get the key to work in the lock. I tried my knife, but that didn’t work either. Can you give it a try?” “Sure!” replies Donald. “I always was better with keys than you.” Donald manages to get the door unlocked.

Standing on the front porch, the three men look into the front hall. Donald glances into the den and sees a stack of unwrapped presents, including a baby’s playpen and a variety of toys. All of a sudden Donald is stricken with remorse, remembering how angry he’d been a few weeks earlier when he’d read about the burglary of a warehouse full of “toys for tots.” Donald says, “Well, I’m heading over to the party, guys,” and takes off. “Whatever,” responds Barry. “Look over there, a PlayStation!”

Like reverse Santas, Barry and Curtis throw the toys and other goodies from Apt. 1 into a garbage bag, leave it on the lawn, and head next door. At Apt. 2, however, Barry still can’t get his key to unlock the front door. They decide to see if the garage door is unlocked, which it is.

Barry stands guard outside while Curtis enters the garage. As Curtis moves through the dark garage, he steps on something soft, which snaps as he steps on it. Startled, he shines his flashlight down on the object. To his horror, he realizes that he has just stepped on the windpipe of “Lucky Joe,” a local homeless man, who was sleeping in the unlocked garage. Lucky Joe is dead.

In a panic, Curtis tears out of the garage. Barry, who knows nothing about Lucky Joe, can’t understand why Curtis’s nerve has failed. “He always was yellow,” Barry mutters, as he sneaks through the garage and up the stairs, unwittingly passing Lucky Joe’s body in the dark. In Apt. 2, Barry sees a likely-looking closet in the den and cracks the lock with his knife, revealing the owner’s collection of valuable antique watches.

In the meantime, a Vista Ridge resident has noticed the trash bag out on the lawn of Apt. 1, and mentions it to the complex’s security guards when he gets to the holiday party. The guards head over to Apt. 2 and find Barry just returning into the garage from the apartment’s side door, with the knife in one hand and a fistful of watches in the other. As the guards cuff him, Barry sees the body of Lucky Joe. Shocked, he immediately confesses to all that’s happened.

Barry agrees to plead guilty to two counts of Armed Burglary and testify against Anthony, Curtis, and Donald.

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**You are an Assistant District Attorney.** The DA is feeling pressure to prosecute Anthony, Curtis, and Donald to the max. She would like you to address each defendant’s possible criminal liability for any or all of the following possible offenses. She wants you to be especially clear about your theory of liability for each defendant.

Possible offenses:

- (1) Conspiracy to commit armed burglary
- (2) Attempted armed burglary or armed burglary of Apt. 1
- (3) Attempted armed burglary or armed burglary of Apt. 2
- (4) Lucky Joe’s death

*See Wis. Stat. §§ 939.05, 939.22(10), 939.31, 939.32, 939.72, 940.03, and 943.10(2)(a).*

**Specifically, for each defendant, the DA asks you to address:**

- Which charge(s) would survive a motion to dismiss at trial?
- If more than one offense would survive a motion to dismiss, what combination of allowable potential convictions would maximize the defendant’s potential penalty?

**Question 1(a): Discuss Anthony’s possible criminal liability**

**Question 1(b): Discuss Curtis’s potential criminal liability**

**Question 1(c): Discuss Donald’s potential criminal liability**

## ANSWER KEY TO QUESTION 1

Somewhere in answer, student needs to articulate the standard on motion to dismiss: evidence, if believed, from which a jury could find all elements of crime BRD.

### Question 1(a) (10 raw points): Discuss Anthony's possible criminal liability

**Short answer:** the only crime that would survive a motion to dismiss is conspiracy to commit armed burglary (AB) under **939.31/943.10(2)**, max 15 years.

**Conspiracy to commit AB:** There is evidence that, if believed, would prove BRD that:

1. With *intent to commit AB*, A agreed with B & C to commit all elements of AB:
  - The agreed to intentionally (purposefully) enter homes of Vista Ridge householders: the burglaries were A's idea.
  - Without consent of owners: they knew the owners would be at the holiday party.
  - With intent to steal: they want to take the owners' Christmas presents and other possessions.
  - While armed with a dangerous weapon (jury could find knives to be a dangerous weapon under **939.22(1)** as objects "designed as a weapon and capable producing of death or great bodily harm")

[NOTE: Some students pointed out an ambiguity in the facts about when B&C decided to use knives—if they agreed to carry the knives after A withdrew, than A only committed conspiracy to commit burglary, not AB. I gave credit either way. But I think AB would survive a motion to dismiss].

2. For the *purpose* of committing AB: the three roommates all have a "stake in the venture" (*Falcone*): they want/need Christmas presents for their relatives.
3. One co-conspirator *does an act to effect object* of the conspiracy: B borrows standard key from work to open doors with.

NOTE: Some students asserted that B stole the key from work, so that all three co-conspirators (A,B,C) could be guilty of theft in violation of **943.20(1)(a)**. But the facts state clearly that B "borrows" the keys. The theft statute requires that the actor take property "with the intent to deprive the owner permanently of possession of such property" So what B did was not theft, meaning that A & C could not be convicted of theft.

With regard to A, no other potential crimes (attempted burglary/burglary of Apts. 1 & 2, felony murder) will survive a motion to dismiss. The only possible basis for A's liability for these crimes would be PTAC liability for the acts of B&C under **939.05(2)(c)**, as crimes which are "in pursuance of the intended crime and which under the circumstances" are "natural and probable consequence(s)" of the intended crime. A is not liable because he properly withdrew, telling B&C that it was wrong and he wanted out, in time for them to change their minds as well.

But A's withdrawal does not allow him to escape liability for the substantive crime of conspiracy under **939.31**. Under **939.31**, the agreement itself is the crime, which was completed once B borrowed the keys.

MAXIMUM PENALTY: AB is a Class E felony, with 15 years max. **943.10(2)**. So the max A could face for conspiracy to commit AB under **939.31** would also be 15 years.

**Question 1(b) (20 raw points): Discuss Curtis's potential liability**

**Short answer:** The crimes that would survive a motion to dismiss are conspiracy to commit AB, AB of Apt. 1, AB of Apt. 2, and felony murder. Maximum penalty is 45 years.

**Conspiracy to commit armed burglary** in violation of **939.31/943.10(b)** would survive a motion to dismiss. Analysis is the same as with A, or even stronger:

- Although A suggests the burglaries, C readily agrees.
- It's clear that C agrees (with B) to carry knives.
- Unlike A, C does not withdraw prior to crimes themselves.

**Armed burglary of Apt. 1**, in violation of **943.10(2)(b)** and **939.05**, would survive a motion to dismiss.

- C is guilty of this crime directly: Along with B, he enters Apt. 1 through the front door without consent and while armed, takes objects (proving intent to steal), and puts them out on the lawn.
- It doesn't matter that C never gets to keep the objects: the burglary is complete upon entry with intent to steal.

NOTE: For both Apt. 1 and Apt. 2, some students spent a lot of time discussing liability for attempted AB, even if they ended up deciding to that completed AB would survive a motion to dismiss. This was unnecessary. Note that the question asked for "attempted AB or AB" of each apartment. Remember that an attempted crime is always a LIO of the completed crime. **939.66(4)**. So if the completed crime would survive a motion to dismiss, an attempted crime would as well. But it was really unnecessary to get into it.

**Armed burglary of Apt. 2** violation of **943.10(2)(b)** and **939.05**, would survive a motion to dismiss.

- C commits this crime directly: he enters garage without consent and while armed, and with intent to steal.
- Some students were not sure whether entry into the garage would constitute burglary. But **943.10(1m)(a)** defines burglary as intentional entry into "[a]ny building or dwelling." Clearly, a garage is a building. Once C has entered, the armed burglary is complete. It doesn't matter that he runs off without taking anything.
- In any case, C could be convicted of AB as a PTAC based on B's entry of the house: under **939.05(2)(c)**, he is liable for B's AB, which is the crime they conspired to commit. C did not properly withdraw as required under **939.05(2)(c)**, since he took off without notifying B and it was really too late for B to withdraw as well.

**Felony murder** in violation of **940.03** would survive a motion to dismiss.

- C was committing AB, one of the underlying crimes for felony murder.
- While committing the crime, he caused the death of Lucky Joe by stepping on his windpipe. “Cause” means that his act was a “substantial factor” in Lucky Joe’s death. There is evidence that stepping on Lucky Joe’s windpipe was a substantial factor in the death, since he dies immediately. NOTE: Some students questioned whether Lucky Joe might already be dead, but there is no indication to that effect in the facts. Certainly, this would survive a motion to dismiss.
- The only relationship between AB and the death is a temporal one (*Oimen*)—the death does not have to be a natural and probable consequence of the AB, and no mental state is required for felony murder.

NOTE: Some students talked about other, higher, degrees of homicide. I wasn’t really asking for that. In any case, the facts don’t support intent to kill, criminal recklessness, or even negligence. This was just a very unlucky accident.

**MAXIMUM PENALTIES:**

- Conspiracy to commit AB: Class F, 15 years
- AB of Apt. 1: Class F, 15 years
- Felony murder, with AB of Apt. 2 as underlying offense: 15 years + 15 years = 30 years

However, C cannot be convicted of conspiracy to commit AB and also AB. **939.72(2)**. So State should proceed with AB of Apt. 1 and felony murder/AB of Apt. 2. **Total max is 15 + 30 = 45 years.**

**Question 1(c) (10 raw points): Discuss Donald’s potential liability**

**Short answer:** AB of Apt. 1 would survive a motion to dismiss. Max penalty 15 years.

**Armed burglary of Apt. 1** under **943.10(2)(b)/939.05(2)(b)** would survive a motion to dismiss. D “intentionally aided and abetted” B&C’s AB of Apt. 1, in that:

- He shared their mental state (they told him they intended to burglarize the apt., and that B had a knife).
- He provided objective assistance to them by getting the door open. So even if he took off before he entered the dwelling, he could be liable for their crime based on aiding & abetting liability. It’s possible that a jury could find that he no longer shared their mental state once the door opened, but that’s a credibility question; the evidence is sufficient to survive a motion to dismiss.

NOTE: Some students treated D as a co-conspirator, and thus made them liable for the burglary of Apt. 2 and Lucky Joe’s death. But even if he shared (temporarily) their “intent that a crime be committed,” there is no evidence that he had a stake in the venture, which is required for

conspiracy. Rather, as in *Ochoa*, his participation arose at the scene and his liability is therefore narrower.

NOTE: I originally saw this as an attempt issue—that is, D would be liable for attempted AB as a direct committer, even though he did not complete the crime because he did not cross the entry. Under a *Stewart* “stop film” analysis, a jury could certainly find that he unequivocally intended to commit the crime if the film were stopped when he was unlocking the door. However, my students’ answers convinced me that the *most* serious charge against D would be AB as a PTAC under **939.05(2)(b)**. Given that I changed my own mind on this, I gave credit for well-reasoned answers discussing either AB or attempted AB.

MAXIMUM PENALTY: 15 years for AB of Apt. 1. (if attempted AB, it would have been 7.5 years under **939.32(1)**).

## **Question 2 (30 raw points)**

The Wisconsin legislature, in a stated effort to protect schoolchildren from the dangers posed by intoxicating liquors, has passed a new statute to create an “alcohol free” zone around schools. This [fictional] statute states the following:

### 948.72. Sale of alcoholic beverages in a school zone

(a) Any individual who sells an intoxicating liquor within 1,000 feet of school premises is guilty of a Class H felony, and may be imprisoned not more than six years, or fined not more than \$10,000, or both.

b) As used in sub. (a),

1. "Sells" means to transfer to transfer for financial recompense.
2. "Intoxicating liquor" means any beverage that contains 4% or more alcohol by volume.
3. "School premises" means any public or private school building where instruction in any grade between 1 and 12 is offered. "School premises" includes the grounds, recreation areas, or athletic fields surrounding any school building.

For over 150 years, St. Dominic's of the Fields was an abbey for Catholic priests of the Dominican order. Over the main entrance, which faces Syracuse Street, is a carved stone sign that reads: "Abbey of St. Dominicus, est. 1860." The abbey focused on providing college-level religion classes to seminarians (aspiring priests) aged 18-22.

Last fall, however, St. Dominic's converted to a high school. It now has 500 male students between the ages of 15 and 18. The school's extensive grounds are used as playing fields during student gym classes.

For twenty years, Oliver Goldsmith has owned and operated the Bar None, a tavern on Sycamore Street located 1,500 feet from St. Dominic's Abbey and 500 from the end of the grounds belonging to St. Dominic's. At the Bar None, Goldsmith sells beer, wine, mixed drinks, and soft drinks, along with an array of sandwiches and bar food.

Goldsmith knows that there's a new law out there that has some effect on taverns, though he's a little vague on its content. He talks with an old high school classmate, Andy, now a local assistant district attorney. Andy checks around on Westlaw for the text of the new law. Unfortunately, Andy (who is too vain to wear his reading glasses), misreads the screen and reads the text to say that the law addresses sale of drinks with more than 40%, rather than 4%, alcohol by volume. As a result, he advises Goldsmith that there's a new law that prohibits taverns from selling hard liquor, but not beer or wine, too close to schools.

On March 15<sup>th</sup>, Andy brings several of his fellow ADAs to the Bar None to after work in order to celebrate his 40<sup>th</sup> birthday. They buy a couple of bottles of champagne. One of the party, Marianne, steps outside to smoke a cigarette. As she stands there, Marianne notices the St. Dominic's students out playing soccer. The next day, she mentions what he saw to her boss, the DA. The DA, whose teenage son nearly died of alcohol poisoning a few years ago, decides to make an example of the Bar None, so he charges Goldsmith with violating § 948.72. Due to a possible conflict of interest with the DA's office, the case is assigned to a special prosecutor brought in from the next county.

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**You are Goldsmith's defense attorney.** Goldsmith is adamant that he has done nothing wrong. He explains about asking Andy for advice, and adds, "Anyway, I thought St. Dominic's was a seminary!" Goldsmith asks for your advice about any possible legal defenses he could raise at trial, and how successful they're likely to be.

**How do you advise your client?**

## ANSWER KEY TO QUESTION 2:

On the face of it, Goldsmith meets the elements of the crime: He sold champagne, an intoxicating beverage (at least 4% alcohol by volume) to the party of ADAs within 1,000 feet of the high school (500 feet from the end of the grounds).

Goldsmith has potential “mistake of law” and “mistake of fact” defenses. However, only the “mistake of fact” has a possibility of succeeding—and it will succeed only if I can convince the judge that **948.72**, while framed as a strict liability crime, should be treated as an intentional crime.

### Mistake of law: will not succeed

1. Goldsmith was misadvised by the DA as to the terms of **948.72**. Good news is that “mistake of law,” if it applies, would apply even to a strict liability crime.
2. But Wisconsin law does not generally recognize a mistake as to the scope or meaning of a criminal statute as a defense. **939.43(1)**
3. Narrow exception in *Davis*: Good-faith reliance on advice by public official who is statutorily required to give advice.
4. Was DA statutorily required to give this advice? No evidence of this. He’s Goldsmith’s friend. Might be able to get his advice into evidence, in order to address to this question. But risk is high of bad jury instruction from judge.

Mistake of fact: This defense is only relevant *if* this is not a strict liability crime. On the language of the statute, it is a strict liability crime. Therefore, I would first ask judge to read the word “intentionally” into the statute before the word “sells.”

- Strict liability is disfavored in the criminal law, which emphasizes culpability. *Morrisette*.
- Hence court must go through analysis to determine if an apparent strict liability offense should include a mental state:
  1. Language of statute: doesn’t help us. No mental state listed.
  2. History of statute: we don’t have any.
  3. Purpose of statute: also doesn’t help us. It appears that the legislature viewed this as a “regulatory” offense—creating an alcohol free zone near schools—which is more likely to support strict liability. Furthermore, it’s structured like the “drug-free school zone” sentence enhancer in *Hermann*, which was upheld as a strict liability statute.
  4. Penalty: This helps us a lot. The penalty is 6 years, unlike the 3-year enhancer in *Hermann*. More importantly, the rationale of *Hermann* was that the underlying offense (selling drugs) was already illegal. Here, Goldsmith is engaging in an innocent, legal, licensed activity. *Staples*, although involving a federal statute, made clear that the courts should scrutinize statutes that make persons strictly liable under the criminal code for otherwise legal conduct. And this case shows the problem with strict liability crimes: a 20-year business owner inadvertently violates the statute because, unbeknownst to him, a nearby seminary has become a high school.

5. Practical requirements of law enforcement—i.e. it would be harder for State to prove he knew he was near a school. Doesn't help us. But our point is that the State *should* have to prove it, just as the government had to prove that Morrisette knew he was taking the property of another.

NOTE: As we discussed in class, # 1 and # 5 aren't really useful to this analysis: although the *Hermann* court includes them, they will always favor strict liability.

So *if* judge reads intent into the statute, *then* Goldsmith has a “mistake of fact” defense:

- D must intentionally sell intoxicating liquor within 1,000 feet of a school
- **939.43(1)** says that mistake is a defense if it negates state of mind for crime
- **939.23(3)** says that to act intentionally, D must have knowledge of the facts necessary to make his conduct criminal and that are set forth after “intentionally” in the statute.
- D's defense would be that he didn't know St. Dominic's is a school:
  - still says “abbey” on the door
  - boys 15-18 could look like seminarians [but do seminarians go out to gym class?]
  - and D is long-time resident—would have expected to hear news if it had changed
  - further, D is a licensed alcohol seller, but never got any notice from city that he was now near a high school

NOTE: Most students discussed mistake of law, mistake of fact, and strict liability. But relatively few students really thought through the logical relationships among these defenses (i.e. mistake of fact is a defense *only if* a mental state is required for this crime).

### **Question 3 (40 raw points)**

Humphrey Clinker is 35 years old. He stands about 5'6" tall and weighs 130 pounds soaking wet. Clinker spends nearly all his time at his favorite bar, Kay & Harold's Fallout Shelter, drinking beer and complaining about "them people"--by which he means anyone who is not of Northern European descent.

One night, about 1:30 a.m., Clinker is treating the nearly empty bar with his views on "them people" and how un-American they are. Suddenly, a large burly man dressed in jeans and a flannel shirt, who has been sitting quietly at a barstool in a dim corner, whirls around. "My name is Ruben Rodriguez," he says. "My parents were born in Mexico, but I was born and raised in Milwaukee, and I received a Purple Heart for my service as a Marine in Iraq. So don't you go spouting off about me being un-American! Furthermore, I'm now a police officer, and if you don't shut up, I'm going to arrest you for disorderly conduct!"

"Purple Heart, big deal!" yells Clinker, smacking Rodriguez in the chest with both hands. "That don't mean you're a good American like me! And I sure as hell don't believe you're no cop, so just try to shut me up!"

At this point, Rodriguez gets up from his barstool and walks toward Clinker. According to the bartender, Clinker appears to panic. "O.K., I take it back!" he cries, backing toward the back end of the tavern. As Rodriguez keeps moving toward Clinker, Clinker realizes that the back door is locked. Just as Rodriguez reaches Clinker with his arms outstretched as if to grab him, Clinker pulls a hunting knife from a sheath on his belt loop and brandishes it, shouting "Stay away from me!" As he does so, the knife catches Rodriguez in the wrist and he falls to the floor. Both Clinker and the bartender try to stop Rodriguez's bleeding, but they are unsuccessful. By the time the EMTs arrive, Rodriguez has bled to death.

Clinker is charged with first-degree reckless homicide. At trial, evidence is admitted showing that Rodriguez was in fact an off-duty police officer. Clinker testifies that he was afraid when he saw Rodriguez bearing down on him, and that he acted in self-defense. He testifies that he sometimes alienates people with his views, and that as result a large Hispanic man beat him badly about a year ago, breaking his arm. He says that's why he panicked when Rodriguez headed toward him.

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**You are the trial judge.** At the end of all the evidence, you deny the defendant's motion to dismiss the first-degree reckless homicide charge.

The defense requests a lesser included offense instruction on **perfect self-defense** and an instruction on **second-degree reckless homicide**. Neither side requests an instruction on negligent homicide. **How do you rule on the defense requests?**

**END OF EXAM. HAVE A WONDERFUL BREAK!**

### ANSWER KEY TO QUESTION 3

#### I would deny the instruction on perfect self-defense under 939.48 (20 points)

If granted, self-defense is a privilege and a complete defense to 1<sup>st</sup> reckless homicide. **939.48(1)**.

If he meets the requirements for perfect self-defense, he can invoke it even though he's charged with a reckless crime, as long as (1) jury could believe that he acted intentionally despite his denials; and/or (2) he intentionally threatened the use of force, even if the death was reckless. *Gomaz*.

To get the instruction, D would need to show "some evidence"—that is, evidence, which, if believed, would convince a jury that the State has failed to disprove all the components of self-defense.

To begin with, which section of **939.48** would apply? D unlawfully provoked the attack by smacking V in the chest (battery under **940.19**). So we need to look at **939.48(2)** to see if he can raise a self-defense claim at all. The answer is yes: He regained the privilege by withdrawing from the fight and giving adequate notice to V ("I take it back!" and running away). **939.48(2)(b)**.

NOTE: Unlike many students' answers, I'm not entirely convinced that D reasonably believed that he had exhausted every avenue of escape, which under **939.48(2)(a)** would allow him to use "force intended or likely to cause *death*" [as opposed to "death or great bodily harm"]. The bartender was right there; D could have called for help/backup. That said, there's probably enough evidence to meet his production burden on this. More to the point, this aspect of **939.48(2)(a)** doesn't really matter, because—as noted above—he regained his self-defense privilege by withdrawing/giving notice.

Since D regained the privilege, we must now look at **939.48(1)**, to see if he meets his production burden under that statute. That is, could the jury have a reasonable doubt about whether the State has disproved the following?

- That D **intentionally threatened force** by waving the knife. Yes.
- That D **subjectively** believed that he was preventing an unlawful interference from V. Yes. D says he didn't believe that V was really a cop or that V was going to arrest. That's a credibility issue for the jury to determine. D's actions show that he was scared V would hurt him.
- That D's belief in an unlawful interference was **reasonable**. Yes. This is dicey, but the jury could conclude that as far as D knew, V was just some guy in a bar, rather than an off-duty cop, and not want to be grabbed by him.
- That D **subjectively** believed that the amount of force he used (deadly force) was necessary to prevent imminent death/GBH to himself. Yes. He's small and skinny whereas V was big and strong; he'd offended V with his racist comments; and he'd previously offended a large Hispanic man who broke his arm. Again, D's actions show that he really was afraid.

- That D's belief in imminent death/GBH and need for deadly force was **reasonable**. **No**. All V did was walk toward him in a bar with his arms outstretched, saying that he was going to arrest D. V did not threaten D in any way. I believe that any reasonable jury would find D's response to be an overreaction to the threat posed (*Marshall*).

NOTE: At least half the students would have granted the instruction on perfect self-defense. Of these, the better answers cited *Jones*. I don't think *Jones* is really on point—that case addressed whether the facts, *as the defendant understood them to be*, would support the defense. That is, under a construction of the facts favorable to Jones (i.e. that Price was about to attack Jones's sister), a jury could find that the defendant's belief in imminent death/GBH was reasonable. Here, there's not a dispute about the facts; the only issue is the reasonableness of D's belief in the need for deadly force.

Some other students argued that D did not threaten/use deadly force; therefore, D avoided the requirement of a reasonable belief in "imminent danger of death/GBH" and could be governed by the less stringent rule for non-deadly force in self-defense. I don't really buy this, since waving a knife is certainly more dangerous than, e.g., hitting V with fists (after all, that's why D is using the knife). But it is an ingenious argument.

As noted above, I don't think a jury would find D's belief in imminent danger of death/GBH and the need for deadly force to be objectively reasonable. That said, I gave partial credit for well-analyzed answers even if they granted the instruction.

NOTE: The Castle Doctrine (**939.48(1m)**) does not apply here, because D is a customer, not the owner of the bar.

**I would grant the instruction for 2<sup>nd</sup> degree reckless homicide (20 points)**

Ruling on this motion requires application of the two-part test for LIO:

**Statutory test:** Under 939.66(2), 2<sup>nd</sup> reckless homicide is an LIO of 1<sup>st</sup> reckless homicide as a lesser degree of homicide (Class D as opposed to Class B).

**Evidentiary (*Zenou*) test:**

1. Could a rational jury, in the light most favorable to conviction, convict D of 1<sup>st</sup> reckless homicide? Yes.

NOTE: The question states that the judge has already denied a motion to dismiss 1<sup>st</sup> reckless, which answers this prong of the *Zenou* test. Many students went through the entire analysis for 1<sup>st</sup> reckless. This was unnecessary, and I took a couple of points off for doing it.

- 2&3. Could a rational jury, in the light most favorable to acquittal, acquit D of 1<sup>st</sup> reckless homicide but convict of 2<sup>nd</sup> reckless homicide? Yes.

The difference between 1<sup>st</sup> & 2<sup>nd</sup> reckless homicide is the presence or absence of utter disregard for human life (UDHL). **940.02 & 940.06**. A rational jury could have a reasonable doubt about UDHL, for two reasons.

- First, even though I denied an instruction on perfect self-defense, the facts support *imperfect* self-defense as a negative defense to UDHL, thus requiring an instruction on 2<sup>nd</sup> reckless homicide. *Gomaz. Jones*. I've already noted facts from which jury could find that D genuinely, though wrongly, believed that he was in imminent danger of death/GBH, and that he genuinely, though wrongly, believed that he needed to wave the knife to protect himself. Under the Dickey/Schultz/Fullin analytical approach, this provides a "reason" for his conduct which is inconsistent with UDHL. Under the holistic approach, D showed "some regard" for human life (his own), which was inconsistent with UDHL.

For students who granted an instruction on perfect self-defense, this is an even easier question. *Gomaz* says that if an instruction is granted on perfect self-defense, the court must, if requested, grant an instruction on imperfect self-defense. We know from *Gomaz* and *Jones* that imperfect self-defense is a negative defense to a reckless homicide.

- Second, in addition to the imperfect self-defense claim, D showed "some regard" toward the V, which can negate "utter disregard" under the *Wagner/Balistreri* line of cases. First, he tried to warn V off. Second, he tried to stop V from bleeding after he cut him with the knife. A jury might find that this was "too little, too late" (*Jensen*), but *Burris* (and *Geske*) indicate that he's entitled to a jury decision on this—that is, jury decides whether a showing of some regard before, during, or after the crime negates UDHL.

The court has already ruled that the jury could convict D of 1<sup>st</sup> reckless homicide. Hence, the court has already found that the jury could find the remaining elements of recklessness (recklessly cause the death of another). Thus, it was NOT necessary to analyze those as the third step of the *Zenou* test.