CRIMINAL LAW – MENS REA PRACTICE PROBLEM
MODEL ANSWER

PLEASE NOTE: This answer is provided for TEACHING PURPOSES ONLY. I have absolutely NO EXPECTATION that any of you would provide an answer like this, e.g., in response to an exam question, and you don’t have to give answers like this to get an A (but of course it wouldn’t hurt, either). In other words, use this answer as a learning tool – don’t feel like you should have been able to produce something like this yourself. (If you could, you should be teaching this class, not me.) AND REMEMBER: These are not the only (and not even necessarily the best) answers. Law is about better and worse arguments, not about who’s “right” – that can change on a given day depending on which judge you draw and which jury you manage to pick . . .

I. You are a judge sitting in criminal court. The following statute is enacted in your jurisdiction: “Whoever sells intoxicating liquor to one whom he or she knows to be a police officer and whom he or she should know to be on duty is guilty of a crime.” You are required to interpret this new statute.

1. What are the actus reus elements of the statute?

You can break the actus reus of this statute down in a number of ways. How you do so will depend to some extent on the facts that you’re confronted with in the actual problem you face. Here I’ve broken it down in this manner because of the fact scenario I use below. Faced with a different set of facts – e.g., one that didn’t turn on the defendant’s mental state with respect to the “intoxicating” quality of the beverage sold – you might choose to leave (a) and (b) combined below (i.e., as “sale of intoxicating liquor”). The specific breakdown is less important than your understanding of the significance of the actus reus elements vis a vis how the corresponding mens rea elements are to be interpreted.

(a) Sale [conduct]
(b) of intoxicating liquor [attendant circumstance of the “sale” conduct]
(c) to a police officer [attendant circumstance of the “sale” conduct]
(d) who is on duty at the time [attendant circumstance of the “sale” conduct]

2. What, if any, are the mens rea elements of the statute? Answer this question three ways:

(a) Based on the plain text of the statute.

i. “Sale”: none specified in statute = none
ii. “of intoxicating liquor”: none specified = none
iii. “to a police officer”: statute says “knows to be” = knowledge
iv. “who is on duty at the time”: statute says “should know” = negligence (i.e., criminal negligence = gross negligence)
But what about a situation in which the defendant isn’t even aware that he’s “selling” liquor at all, not in the sense of exchanging money for it, but in a situation in which, e.g., Joe reaches behind the bar while Buzzy’s back is turned, pours himself a drink, and then leaves a couple of dollars on the bar after he drinks it? If there’s no mens rea requirement for the “sale” element, is Buzzy going to be liable in that situation? The answer is . . . no, but not because Buzzy has failed to satisfy the mens rea requirement for the “sale” element. It’s because the conduct underlying the commission of the alleged crime (i.e., the “sale” of the liquor) did not involve a voluntary act on Buzzy’s part, and thus Buzzy cannot be held liable for that reason – he’s failed to satisfy an actus reus requirement, not the mens rea requirement.

(b) Based on the common law presumption against the criminalization of otherwise innocent conduct.

Applying this canon of interpretation is best done by looking at the purpose of the statute as a whole – the evil that it’s trying to prohibit – and then figuring out what that overarching purpose means for the individual actus reus elements which have no mens rea specified and whether a corresponding mens rea is required to ensure that morally innocent conduct isn’t made criminal by the interpretation. Here, it’s pretty clear that the main evil sought to be prohibited by the statute is the distribution of intoxicating liquor to police officers while on duty, presumably because of the adverse effect on their performance. By its plain terms, it seeks to do that by punishing people who sell intoxicating liquor to individuals who the seller knows are police officers and who they should know are on duty at the time. But that doesn’t answer the question about possible mens reas for the other two actus reus elements: “sale” and “intoxicating liquor.”

i. “Sale”: If we are concerned with the “morally innocent,” should there be a mens rea element for the “sale” actus reus element? Thinking, again, in terms of the (moral) evil that the statute is meant to prevent, we can ask the question this way: Do we care from the perspective of that underlying purpose if a defendant intends, or knows, or is reckless, or should know that he’s “selling” intoxicating liquor to an on-duty police officer? Is he any less “bad” a person, from the perspective of the social harm, if, for example, he gives the intoxicating liquor away rather than “selling” it? I think there’s a pretty good argument that we don’t care at all – i.e., that from the perspective of moral fault, someone who “gives” intoxicating liquor away to a known on-duty police officer is just as morally culpable as one who “sells” it to the officer, since the effect on the officer’s performance is going to be the same either way. Thus, I would argue, we don’t care about the defendant’s mental state with respect to whether he/she is “selling” the liquor or not, which would point to no mens rea requirement for this element at all.¹

ii. “of intoxicating liquor”: This would seem to be the crux of the social harm (when combined with the fact that it ends up in the hands of a police officer who’s on duty). It clearly is a social harm if a person causes an on-duty police officer to imbibe intoxicating liquors, but

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would we want to hold a person criminally responsible for doing so if they didn’t have some culpable mental state with regard to the fact that it’s intoxicating liquor that’s being sold? For example, what if an on-duty police officer tells Bartender #1, “Give me a gin and tonic,” and Bartender #1 then mixes the drink, hands it to Bartender #2, and tells him, “This is a club soda – give it to the on-duty police officer at the end of the bar.” Bartender #2 hands the drink to the officer and takes his money in payment. Given the fact that Bartender #2’s conduct is morally innocent (assuming that he had no way of knowing that the drink was anything other than club soda), it would be criminalizing otherwise innocent conduct to hold him criminally responsible for this “sale” of “intoxicating liquor” to an “on-duty police officer.” From this it follows, under this approach to statutory interpretation, that some degree of culpable awareness of the “intoxicating” nature of the drink sold ought to be required before a defendant can be convicted of this crime.

What degree of “culpable awareness” – i.e., mens rea – ought to be required is a separate question: Certainly “knowledge” (and even more clearly “intent” or “purpose” ought to suffice (i.e., where the bartender knew or intended that the drink sold to the on-duty officer was intoxicating)). Perhaps “recklessness” as well – that is, where the bartender was consciously aware that there was a substantial and unjustifiable risk that the drink was intoxicating. But you might even be able to argue for “negligence” (and if you did, in this way, you’d get a boatload of extra credit), by saying, this is really a public safety crime in a certain sense; we want to make bartenders extra careful about who they serve drinks to; they certainly ought to be held responsible for knowing what kind of drink that they’re selling to people; it will encourage bartenders to live up to that duty to sell intoxicating drinks only to those people who ought to be drinking intoxicating drinks if we criminalize their failure to live up to that duty – that is, if we criminalize their decision to sell beverages that they should know there’s a substantial and unjustifiable risk are intoxicating.

Any of these answers, from “knowledge” down through “negligence” are satisfactory for my purposes in asking this question; the key to the correct answer is that you recognize that a failure to impute some mens rea for this element means that otherwise innocent conduct is going to be subject to criminal punishment under the statute.

iii. “to a police officer”: statute says “knows to be” = knowledge; if the statute specifies a mens rea then that’s the one that governs, regardless of any other principles of interpretation

iv. “who is on duty at the time”: statute says “should know” = negligence (i.e., criminal negligence = gross negligence)
(c) Based on the Model Penal Code.

i. “Sale”: none specified in statute. Accordingly, we have to look at MPC § 2.02(1), (3) & (4).

§ 2.02(1) says: Except for those crimes specified to be strict liability (which we know this is not, since it includes two mens rea states within the statute itself, and because it’s designated as a “crime” and not an MPC “violation”), “a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.” In other words, at a bare minimum there has to be a mens rea of negligence for the “sale” element.

§ 2.02(4) says, “When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.” Does this statute “distinguish among the material elements thereof” with respect to their associated mens reas? Clearly the answer is “yes,” because the statute itself by its plain language lists two different mens reas for two elements (“knowledge” for one and “negligence” for another). Therefore § 2.02(4) doesn’t apply here.

§2.02(3) says, “When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.” Thus, the mens rea requirement for the “sale” element is “recklessness.” Why “recklessness” and not “purpose” or “knowledge”? Because § 2.02(3) says that the mens rea requirement is established by “recklessness,” and, if the defendant acts “purposely” or “knowingly,” then under § 2.02(5), those higher mens rea states will also satisfy the “recklessness” requirement.

ii. “of intoxicating liquor”: none specified in statute. Again, we have to look at MPC § 2.02(1), (3) & (4). And, under the identical reasoning to the above, the mens rea is again “recklessness.”

iii. “to a police officer”: statute says “knows to be” = knowledge

iv. “who is on duty at the time”: statute says “should know” = MPC negligence (i.e., criminal negligence = gross negligence)
II. Joe Smith is an undercover vice squad detective. One night he walked into Buzzy’s Bar. His precinct captain had received information that Buzzy was serving minors, and Joe had been instructed to investigate. Buzzy was tending bar that night. He knew Joe well, and knew that he worked undercover as a vice squad detective. Buzzy believed, however, that Joe only worked the day shift, since he had come into his bar at other times during the day and told him that he was on duty. Joe walked up to Buzzy, pushed a dollar bill across the bar, and said, “Give me a Coke.” Buzzy responded, “Joe, you know your money’s no good in here” and pushed the dollar back to him. Buzzy then said, “A Coke? At this hour? Wouldn’t you rather have a beer?” Joe responded, “Yeah, but I can’t tonight.” While Buzzy went to get the Coke, Joe pushed the dollar back across the bar and put it in the till. Buzzy returned and gave Joe the Coke. Joe took one drink and choked. As it happened, the Coke was spiked with rum. Buzzy’s cover for serving underage drinkers was mixing rum in the Coke syrup, allowing minors to “innocently” order a Coke and end up with alcohol. Buzzy had completely forgotten that the Coke was spiked when he served Joe.

Buzzy is now charged with the above crime. Guilty or innocent? What are your arguments?

Answer: Having gone through the above exercise, I hope that this question will be much easier to answer. In general, the first step of your argument is to figure out which of the methods of interpretation is most helpful to your cause (either prosecution or defense) and then argue for it. (Of course, in real life, the statute is already likely to have received a definitive interpretation, including required mens rea states, by an earlier decision.) Then, take the facts as given and show (1) if you’re the prosecution, why each of the elements, including the mens rea elements, are satisfied; or (2) if you’re the defense, why at least one of the elements (again including the mens rea elements, of course) is not satisfied. Here, it appears that Buzzy’s conduct satisfies each of the actus reus elements so I’ll simply discuss the associated mens rea elements, with related arguments.

1. “Sale”
   (a) Of course, if you apply the plain language canon then there is no mens rea requirement and the fact that Buzzy didn’t know he was “selling” is irrelevant.
   (b) Ditto under the “otherwise innocent conduct” canon – and in fact, per the above discussion, who cares if Buzzy knew he was “selling” the liquor if he at least knew that he was distributing liquor to an on-duty officer?
   (c) Under the MPC, Buzzy would have had to be “reckless” with respect to the fact that he was “selling.” Here, arguably, Buzzy was not “consciously aware” of the risk that he was “selling” a drink, since he believed he was giving it away free to Joe.

2. “of intoxicating liquor”
   (a) Again, if you apply the plain language canon then there is no mens rea requirement and the fact that Buzzy’s mental state with respect to the “intoxicating” nature of the drink is irrelevant.
What was Buzzy’s mental state w/ respect to the “intoxicating” nature of the Coke that he served? Since he had “completely forgotten” that he had spiked it earlier, he clearly did not have “purpose” or “knowledge” of that element. Nor, arguably, could he be “reckless” with respect to the element, since having completely forgotten it at the moment of sale, he arguably could not have been consciously aware of a substantial and unjustifiable risk that it was “intoxicating.” But at a bare minimum, he was clearly negligent, since he should have been aware that it was intoxicating, since he spiked it himself, etc. Thus, only if one settles on the negligence mens rea requirement under this canon would Buzzy clearly be guilty of the crime.

MPC: Per the above, this would require a minimum of “recklessness.” For the reasons just described, Buzzy has a pretty good (albeit technical) argument that he was at most negligent, and therefore not guilty of the crime under this canon.

3. “to a police officer”: Here there’s no argument about the mens rea since it’s specified in the statute. Moreover, it’s stated that Buzzy knew Joe was a “detective,” which is a police officer, and so this element is satisfied.

4. “who is on duty at the time”: Again, the mens rea is specified – negligence. Was Buzzy negligent (remember, this is criminal negligence, which means gross negligence – which requires a very very big mistake, one that’s morally culpable in itself)? Perhaps he was: He believed that Joe wasn’t on duty, because on other occasions he had seen Joe during the day and he had said that he was on duty then. That’s a pretty weak basis for being sure that he wasn’t on duty that night. Moreover, he had at least one clue that he was on duty – when he offered Joe a beer, Joe said, “Yeah, but I can’t tonight” – which perhaps should have led a reasonable person to be aware that Joe was on duty and therefore couldn’t drink. This is a close question that could probably go either way.