

QUESTION II
(40 points)

Jean is the fundraising chair for Big State University's ("BSU") Go Green Club. The Go Green Club's Spring Bachelor Auction raked in a whopping \$10,000. Reflecting on the success of the auction and the number of bidders, Jean surmises that BSU may very well be a fertile site for a successful dating or escort service. Jean discusses the idea with her good friend, Francine. Francine agrees that the escort service is a great idea, and the two start to develop a business plan. The ladies decide to offer packages based upon the type of date (casual lunch - \$60, dinner - \$100, etc.), making sure the price includes the cost of the date (meal, concert tickets, etc.), payment to the escort, overhead, and profit. Jean and Francine approach Bob, a second year computer engineering major at BSU and ask him to set-up and maintain a website for their escort service, which they've decided to call Collegedates.com. The ladies don't have cash on hand to pay Bob, so they agree to pay him 15% of the monthly profits. The website Bob sets up links to MoneyMate for payment. The only security-type measure the website employs is a checkbox inquiring whether the user is 18 or older; the "yes" box must be checked before the user can register and access the full website.

With the rising cost of tuition, Jean and Francine have no trouble recruiting guys from BSU and the surrounding colleges to work with the escort service. They explain to the guys that all dates are arranged and paid for online and the guys will be paid once a week. One of the bachelors recruited is Alan "Gator" Weiner. Gator goes on a date arranged by Collegedates.com with Sylvia. After a lovely dinner, Gator asks Sylvia if she would like to come up to his dorm room. Sylvia has had a crush on Gator for the last three years and immediately says yes. The two go up to Gator's dorm room. Once inside, Gator locks his dorm door, as is his usual habit. Sylvia takes a seat at Gator's desk. Gator asks Sylvia how she enjoyed the date. While Sylvia responds, talking about the fancy restaurant and the rich delicious food, Gator drops to his knees in front of Sylvia, places his hands on her calves, and asks Sylvia if she would like a little lagniappe. In response to Sylvia's quizzical look, Gator, a Louisiana native, explains that lagniappe is a little something extra that is often given to customers. Giggling, Sylvia says yes, and Gator proceeds to perform oral sex on Sylvia. Afterward, a blushing Sylvia states that she must be getting back to the dorm before curfew. On her way out, Sylvia pulls out a \$20 and hands it to Gator, explaining that it is a tip. Gator smiles, refuses her money, and tells her that this time was a free sample but he'll take \$20 if she would like some servicing another time.

Sylvia tells some of her girlfriends about the Collegedate.com experience and hints that hunky Gator might even throw in a little extra. As a result, three other BSU students, Brittany, Jennifer, and Ashley all book dates with Gator. After dinner, Brittany, a very direct young lady, tells Gator that she heard he might provide extra services after the date. Gator responds that it depends on the compensation. The two go up to Gator's bedroom, where Brittany tells Gator that she thinks \$20 is a fair price for the same service Sylvia got. Gator performs oral sex on Brittany, who then asks how much it would cost to go all the way. Gator responds that an extra \$50 would get her the full package. Brittany pulls a \$50 out of her purse and places it on Gator's desk. The two then have intercourse. The next day, Sylvia, Jennifer, and Ashley stop by Brittany's dorm room for the details, which she enthusiastically shares with them and Brittany's 17 year old BSU freshman roommate, Sheila. On their dates with Gator, both Jennifer and Ashley request, receive, and pay for "full packages" from Gator after their official Collegedate.com date.

News of Gator's extra services spread, and soon the other guys notice a drop in the number and frequency of their dates. Fosse and Terry ask Gator how he has become so popular. Does he give them roses? Talk extra sweet? What? Gator explains the nature of his extra services and tells Fosse and Terry about how much he charges. Soon, Fosse and Terry offer the services with their dates as well. Sheila, a 17 year old BSU freshman, goes to Collegedates.com, checks "yes" for the 18 and over box, and signs up for a date with Terry. After the date, Terry invites Sheila to his dorm room where he offers her the "extra services." Sheila, a virgin, says she's interested but doesn't want to be caught. Terry assures Sheila that his roommate is out for the weekend and points to the locked door. Sheila's not satisfied, so Terry explains to his neighbor, Bill, that he has a hot chick in the room who really doesn't want to be disturbed and asks Bill if he would keep a look-out. Bill complains that he has a big test coming up. Terry then offers Bill \$20, and Bill, with his calculus book and notes positions himself outside Terry's door. Sheila pays Terry \$70, and the two engage in both oral sex and sexual intercourse. A few people stop by during that time, including Terry's sister. Bill intercepts each person, telling them either that Terry is out or busy writing a major paper. Afterward, Bill assists Sheila in leaving the building undetected by checking the halls as she leaves. Immediately after leaving the boys' dorm, Sheila, who is still a little disheveled, is met unexpectedly by her mom and dad who are on their way to Sheila's dorm with a basket of homemade chocolate chip cookies. Sheila's parents, observing the disheveled clothes and tousled hair take note of their daughter's proximity to the boys' dorm. Sheila's father demands to know whether Sheila has had sexual relations with a boy. Sheila

EXAM CONTINUES NEXT PAGE

tells her dad she's grown and can do what she wants. Later, Sheila's mom discovers the Collegedate.com charge on Sheila's credit card statement, an account Sheila shares with her mom. Sheila's mom confronts her and Sheila admits to a date with Terry. During the discussion, rebellious teen Sheila tells her mom she's grown and reports that Terry gave her "the full service treatment." Assuming that "full service treatment" means some sort of sexual relations, Sheila's parents are outraged and approach the school administration about the prostitution ring on BSU's campus. The parents also approach the district attorney's office, demanding that the Collegedates.com site and service be shut down and that Terry and everyone involved be prosecuted. You are a research attorney in the D.A.'s office. Draft a memo describing who can be charged with what crimes, the strength of those charges, and any possible defenses. All events occurred in the State of Big, which uses the common law. The office paralegal has attached some Big State statutes that you might find useful.¹

STATE OF BIG SELECTED REVISED STATUTES PRESENTED NEXT PAGE

¹ Note that the statutory provisions supplied **do not** constitute a statement as to which crimes, defenses, and associated issues you should evaluate. You may or may not find the supplied provisions useful to your analysis.

SEXUAL OFFENSES

163.305 Definitions.

- (1) "Deviate sexual intercourse" means sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another.
- (2) "Forcible compulsion" means to compel by:
 - (a) Physical force; or
 - (b) A threat, express or implied, that places a person in fear of immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.
- (3) "Mentally defective" means that a person suffers from a mental disease or defect that renders the person incapable of appraising the nature of the conduct of the person.
- (4) "Mentally incapacitated" means that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense.
- (5) "Physically helpless" means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.
- (6) "Sexual contact" means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.
- (7) "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight; emission is not required.

163.315 Incapacity to consent; effect of lack of resistance.

- (1) A person is considered incapable of consenting to a sexual act if the person is:
 - (a) Under 18 years of age;
 - (b) Mentally defective;
 - (c) Mentally incapacitated; or
 - (d) Physically helpless.
- (2) A lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact along with all other relevant evidence.

163.355 Rape in the third degree.

- (1) A person commits the crime of rape in the third degree if the person has sexual intercourse with another person under 16 years of age.
- (2) Rape in the third degree is a Class C felony.

163.365 Rape in the second degree.

- (1) A person who has sexual intercourse with another person commits the crime of rape in the second degree if the other person is under 14 years of age.
- (2) Rape in the second degree is a Class B felony.

163.375 Rape in the first degree.

- (1) A person who has sexual intercourse with another person commits the crime of rape in the first degree if:
 - (a) The victim is subjected to forcible compulsion by the person;
 - (b) The victim is under 12 years of age;
 - (c) The victim is under 16 years of age and is the person's sibling, of the whole or half blood, the person's child or the person's spouse's child; or
 - (d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.
- (2) Rape in the first degree is a Class A felony.

163.385 Sodomy in the third degree.

- (1) A person commits the crime of sodomy in the third degree if the person engages in deviate sexual intercourse with another person under 16 years of age or causes that person to engage in deviate sexual intercourse.
- (2) Sodomy in the third degree is a Class C felony.

163.395 Sodomy in the second degree.

- (1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the second degree if the victim is under 14 years of age.
(2) Sodomy in the second degree is a Class B felony.

163.405 Sodomy in the first degree.

- (1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:
(a) The victim is subjected to forcible compulsion by the actor;
(b) The victim is under 12 years of age;
(c) The victim is under 16 years of age and is the actor's brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor's spouse; or
(d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.
(2) Sodomy in the first degree is a Class A felony.

163.415 Sexual abuse in the third degree.

- (1) A person commits the crime of sexual abuse in the third degree if:
(a) The person engages in sexual contact with another person and:
(A) The victim does not consent to the sexual contact; or
(B) The victim is incapable of consent by reason of being under 18 years of age.
(2) Sexual abuse in the third degree is a Class A misdemeanor.

163.425 Sexual abuse in the second degree.

- (1) A person commits the crime of sexual abuse in the second degree when:
(a) The person subjects another person to sexual intercourse, deviate sexual intercourse or penetration of the vagina, anus or penis with any object other than the penis or mouth of the actor and the victim does not consent thereto;
(b) The person violates BRS 163.415 (1)(a)(B); and
(A) The person is 21 years of age or older; and
(B) At any time before the commission of the offense, the person was the victim's coach.
(2) Sexual abuse in the second degree is a Class C felony.

PROSTITUTION AND RELATED OFFENSES

167.002 Definitions

- (1) "Place of prostitution" means any place where prostitution is practiced.
(2) "Prostitute" means a male or female person who engages in sexual conduct or sexual contact for a fee.
(3) "Prostitution enterprise" means an arrangement whereby two or more prostitutes are organized to conduct prostitution activities.
(4) "Sexual conduct" means sexual intercourse or deviate sexual intercourse.
(5) "Sexual contact" means any touching of the sexual organs or other intimate parts of a person not married to the actor for the purpose of arousing or gratifying the sexual desire of either party.

167.007 Prostitution.

- (1) A person commits the crime of prostitution if:
(a) The person engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee;
or
(b) The person pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.
(2) Prostitution is a Class A misdemeanor.

167.012 Promoting prostitution.

- (1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, the person knowingly:
- (a) Owns, controls, manages, supervises or otherwise maintains a place of prostitution or a prostitution enterprise; or
 - (b) Induces or causes a person to engage in prostitution or to remain in a place of prostitution; or
 - (c) Receives or agrees to receive money or other property, other than as a prostitute being compensated for personally rendered prostitution services, pursuant to an agreement or understanding that the money or other property is derived from a prostitution activity; or
 - (d) Engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution.
- (2) Promoting prostitution is a Class C felony.

167.017 Compelling prostitution.

- (1) A person commits the crime of compelling prostitution if the person knowingly:
- (a) Uses force or intimidation to compel another to engage in prostitution; or
 - (b) Induces or causes a person under 18 years of age to engage in prostitution; or
 - (c) Induces or causes the spouse, child or stepchild of the person to engage in prostitution.
- (2) Compelling prostitution is a Class B felony.

OBSCENITY AND RELATED OFFENSES

167.051 Definitions

- (1) "Child" means a person under 13 years of age.
- (2) "Furnishes" means to sell, give, rent, loan or otherwise provide.
- (3) "Minor" means a person under 18 years of age.
- (4) "Sexual conduct" means:
 - (a) Human masturbation or sexual intercourse;
 - (b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals;
 - (c) Penetration of the vagina or rectum by any object other than as part of a medical diagnosis or as part of a personal hygiene practice; or
 - (d) Touching of the genitals, pubic areas or buttocks of the human male or female or of the breasts of the human female.
- (5) "Sexually explicit material" means material containing visual images of:
 - (a) Human masturbation or sexual intercourse;
 - (b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; or
 - (c) Penetration of the vagina or rectum by any object other than as part of a personal hygiene practice.

167.057 Luring a minor.

- (1) A person commits the crime of luring a minor if the person:
- (a) Furnishes to, or uses with, a minor a visual representation or explicit verbal description or narrative account of sexual conduct; and
 - (b) Furnishes or uses the representation, description or account for the purpose of:
 - (A) Arousing or satisfying the sexual desires of the person or the minor; or
 - (B) Inducing the minor to engage in sexual conduct.
- (2) A person is not liable to prosecution for violating subsection (1) of this section if the person furnishes or uses a representation, description or account of sexual conduct that forms merely an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation.
- (3) Luring a minor is a Class C felony.

HIGH PAPER

Institution Willamette College of Law
Control Code N/A
Extegrity Exam4 > 11.9.23.0

Course / Session F11 Crim Law 01-Crler
Instructor NA
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Answer-to-Question-__2__

To: District Attorney

From: Research Attorney

Date: 12/9/11

RE: BSU "Prostitution Ring" Charges

Question Presented

What charges can be brought against participants in the events surrounding the collegedates.com website? What are the strengths of these charges and what are the possible defenses that might be raised?

Short Answer

Jean, Francine, Gator, Bob, Fose, Terry, and Bill may all be charged with some form of conspiracy, sex abuse in the 3rd degree, prostitution, promoting prostitution, and compelling prostitution. All conspirators may also be charged with prositution. Sylvia, Brittany, Jennifer, Ashley, and Sheila may be charged with prostitution and Brittany may even be charged with luring a minor. The case against the ring leaders (Jean and Francine) will be quite strong, but many of the other conspirators cases may have weaknesses, including failure of proof defenses due to mens rea elements missing and mistake of fact defenses.

Discussion

Conspiracy — to do what

Conspiracy under the common law requires the actus reus of a mutual agreement between two or more people, either express or implied, to engage in prohibited conduct or to accomplish lawful conduct by unlawful means. The conspiracy is complete upon formation of the agreement. The mens rea element requires that the co-conspirators have the intent to conspire and also the intent to engage in the prohibited conduct or cause the prohibited result. Under the common law, knowledge that co-conspirators might be engaging in illegal conduct can also be enough to satisfy the mens rea element. Some circumstances that might evidence that co-conspirators had knowledge is if the actor intended to participate, had a stake in the venture, or if there is no legitimate purpose for the goods or service being provided. Conspiracy does not merge under the common law, so conspiracy can be charged along with all the separate crimes as well. Also under the common law, co-conspirators are liable for all crimes committed by their co-conspirators under the *Pinkerton* doctrine.

In this case, Jean is the first to have formed this conspiracy because she approached Francine to discuss a business plan. While the original plan was only to provide an escort service with no sexual services involved, it is foreseeable that those engaged in this type of business might start engaging in prostitution activities as well. It is well known that this happens and willful blindness to the possibility is not a defense. And since Jean and Francine also clearly have a stake in the venture, they could be held liable for this conspiracy. While they are not benefitting directly from the "extra" tips that their co-conspirers are acquiring, they directly benefit from the increased legitimate business on the website. Thus, Jean and Francine can be charged with conspiracy.

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It is also arguable that Bob is a co-conspirator since he set up the website for the service. The argument is similar to Jean and Francine's, but it may be easier for Bob to argue that he did not

know of the illegality of the venture. Just setting up a website for someone does not demonstrate his intent to participate or even that he had a stake in the venture. But the fact that he receives 15% of the profits does. He indirectly benefits like Jean and Francine from the increased revenue of the extra activities and so it could be argued he is a co-conspirator as well. It is also reasonable to assume that Bob could infer that people would begin to use an "escort service website" as a means to employ sexual activities. So Bob is most likely a co-conspirator.

All the male "escorts" are also co-conspirators. They have all agreed to work for Jean and Francine and each of them voluntarily chose to engage in the "extra" activities themselves. Thus Bob, Fosse, and Terry are also liable for conspiracy.

Bill, as a lookout for for Terry, can also be found as a co-conspirator. Even though he did not know that Terry procured Sheila, he did serve as a principal in the 2nd degree which means that he was at the scene of the crime, but did not participate in its actual commission. He did serve as a lookout and sent people away as asked. He even did so for a fee, so he also indirectly benefited from the venture. However, it is less likely that the charges against Bill will stand. He had no idea that Terry was participating in an escort service and just thought that Terry was engaging in sexual conduct with a girl he took a date. That is not unusual behavior for a person in college and it would be unexpected for Bill to know that he was serving as a lookout for a prostitution deal, or even that Sheila was a minor, since most college students are 18 or older. So Bill's argument as a co-conspirator will be harder to hold up.

It could be argued that Jean also committed the crime of solicitation, but that charge will not stand. First, she did not solicit Francine to do anything illegal at first - simply to set up a "dating or escort" service. Second, solicitation merges with the completed offense under the common law, so even if solicitation was found, it would merge with the other charges brought, including

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co-conspirator / accomplice

the conspiracy charges.

Sexual abuse in the third degree

Sex abuse in the third degree is committed if the person engages in sexual contact with another person and either the victim does not consent, or the victim is incapable of consent by reason of being under 18 years of age. This is a strict liability crime as there is no mens rea attached. It is also reasonable to overcome the presumption against strict liability here because this appears to be similar to a statutory rape statute which generally has no mens rea attachment. It is also only a misdemeanor so the smaller penalty weighs in favor of this being strict liability.

Thus, Terry can be charged under this statute because Sheila was under 18 and he engaged in sexual contact with her. And because of the accomplice liability doctrine of *Pinkerton* under the common law, all the co-conspirators would also be liable for this crime.

Prostitution

Sylvia, Brittany, Jennifer, Ashley, Sheila, and all the male escorts above can be charged with Prostitution. Prostitution is complete if the person engages in or offers or agrees to engage in sexual conduct or sexual contact in return for a fee or the person pays or offers or agrees to pay a fee to engage in sexual conduct or sexual contact.

Some of these arguments will be stronger than others. Brittany, Jennifer, and Ashley the escorts definitely engaged in the activity and satisfy the actus reus of the sexual act and exchange of payment as well as the implied mens rea element of intent (through the word "engages" and "pays, offers, or agrees"). However, Sylvia and Sheila's charges may not hold up as well. First, Sylvia did not actually pay for her services. (She offered) but her payment was not complete because Gator refused to take the money. On the other hand, the fact that she offered to pay

satisfies 167.007 (1)(b) so she will likely be found guilty of prostitution. Sheila, however, is not 18 and cannot consent to sexual acts by statute 163.315. Because she is a minor, she may not be able to be charged as an adult and may have to be tried as a juvenile. However, all the other escorts and ladies can be successfully charged with prostitution.

Promoting Prostitution

Promoting Prostitution requires that a person owns, controls, manages, or supervises a place of prostitution or a prostitution enterprise, induces a person to engage in prostitution or to remain in a place of prostitution, receives or agrees to receive payment for prostitution in some way other than prostituting themselves, or engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution.

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Jean, Francine, Gator, Bob, Fosse, and Terry could all be charged with this crime and even if they do not all satisfy the crime itself, they will be vicariously liable as co-conspirators for those who do. Jean and Francine will be liable because they own and control the website. Again, they may not actually have knowledge of the activities, but as discussed above, it is reasonable that they do and they are benefitting from the profits indirectly, so they can satisfy the knowledge requirement under the common law. Bob's argument is similar to Jean's and Francine's since he maintains the website for a fee (see analysis above). The male escorts can also be found liable under this charge because they induce or cause others to engage in prostitution by offering their "extra" services. Even those who are innocent and have no intent to engage in prostitution may be induced to do so by these offers. Gator is especially liable for this crime since he locked Sylvia in his room when he offered his extra services, thus he caused her to remain in a "place of prostitution," his bedroom. All the male escorts also satisfy the mens rea element, since they have the awareness that prostitution is practically certain to occur if they offer their extra services.

Compelling prostitution

Compelling prostitution is committed if the person knowingly induces or causes a person under 18 years of age to engage in prostitution. Terry might be found liable for this since he engaged in prostitution with Sheila and she is under the age of 18, but this charge will probably not stand because Terry does not know she is 18. She did check the 18 box on the website, so Terry has no reason to believe that she is not 18 or older. This crime is different from the sexual abuse in the 3rd degree as there is a mens rea attachment and it is not strict liability.

Luring a minor

Brittany could potentially be cahrged with luring a minor which is defined as a person furnishes a minor with an explicit verbal description or narrative account of sexual conduct and does this for the purpose of inducing the minor to engage in sexual conduct. Brittany surely induce Sheila, a minor, into going to the website and signing up for the services when she told Sheila about the "extra" services available through the story of her experience. Sheila probably would not have engaged in the conduct had she not heard of Brittany's story. However, this will probably not stand as a valid charge because subsection (2) states that a person is not liable for this crime if the person furnishes the account for some other purpose other than titillation. Since Brittany seems to know Sheila, this is likely just to be a conversation between girl friends and not a purposeful inducement of sexual conduct on Sheila's part.

Possible defenses

The co-conspirators may claim that not all of them had knowledge of what was going on with their co-conspirators. Since knowledge is required (awareness that the conduct or result is virtually certain to occur) this could be a strong argument. However, it will likely be countered by the argument that it is a likely consequence of participating in a dating/escort service that sexual conduct may begin to arise in the participants. So, this defense will probably not stand.

The defense of consent might be raised, but this is extremely weak because consenting to a sexual activity is very different from consenting to prostitution. Without the monetary element, none of these crimes would probably amount to rape, since in most cases, two consensual adults were engaging in the activity and no force was used. However, the payment element makes this a different crime of prostitution or even sexual crimes against a minor. Thus, one cannot consent to prostitution. Consent to prostitution is still prostitution and this defense will not stand.

Terry may raise the defense of mistake. However, this will not stand either. He did not know that Sheila was 18 and mistakenly believed that she was over 18 since she participated in the services and misrepresented her true age. However, the sexual abuse charge is strict liability and mistake is not a defense to strict liability. And since he did not knowingly compel a minor to engage in conduct, the compelling prostitution charge is weak anyway.

Conclusion

Jean, Francine, Gator, Bob, Fosse, Terry, and possibly Bill may be charged with conspiracy and under *Pinkerton* will be liable for the actions of their co-conspirators. Terry will be liable for sexual abuse in the 3rd degree. Brittany, Jennifer, Ashley, and possibly Sylvia and Sheila will be liable for prostitution, along with all the co-conspirators as well. Jean, Francine, Gator, Bob, Fosse, Terry, and possibly Bill will be liable for promoting prostitution. There is also an unlikely chance that Terry will be charged with compelling prostitution and Brittany could be charged with luring a minor, but those will probably not hold up. The defenses are weak at best so most of the charges will probably stand and the co-conspirators and participants will most likely be found guilty of all their charges.