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General Comments on the Practice Examination

I have reviewed your responses to the practice examination, and I have some general comments to offer. While not everything I discuss below applies to each student's answer, I have focused on issues of broad relevance. I begin with some comments on general English grammar and usage, turn to recommendations on the specific style of law school examination answers, and then discuss the substantive legal matters raised by the examination.

Hints on Grammar and Usage

Correct spelling is important. Some of you did not spellcheck your answers. Other of you misspelled the names of folks like Scibby and Sanders. A few of you spelled Scibby's name so inaccurately that you referenced a guy named "Libby," whoever he is.

The word "it's" means "it is." The word "its" is the possessive form of "it." An example: "It's a shame the exam question was only as clever as its professorial author."

Apostrophes: The possessive form of one member of the family Blame is "Blame's." For both of them together, use "Blames.'" For Sanders, use "Sanders's;" do not use "Sander's." Never use an apostrophe to turn a singular noun into a plural, as we see in "The statute's do not make any sense."

Agreement: Subjects should agree with their verbs. "Scibby's loose lips were what forced the Blames into hiding," not "Scibby's loose lips was what …" Similarly, pronouns and nouns referring to the same thing should agree with one another. "The prosecutor must prove their case" demonstrates an error.

"Rationale" is a noun describing a set of beliefs. "Rational" is an adjective referring to a person who acts with reason. Example: "One rationale supporting punishment is the deterrence theory, which posits that as rational agents, citizens will consider the costs and benefits of crime before they act."

In most situations, the use of "whether" implies "or not." In other words, if one writes, "The question presented is whether Scibby has violated Section 100," you convey the exact same meaning as "The question presented is whether or not Scibby has violated Section 100," and you do so with two fewer words.

Suggestions on the Style and Form of Examination Essays

Some students exceeded the page limit, a few by a considerable amount. On a graded exam, such behavior constitutes an unfair attempt to gain advantage over classmates who obey the rules. On an ungraded exercise, it suggests a simple failure to read the instructions. Anyone violating the word limit on the final exam will lose significant credit.

On the other hand, it is rarely sound to end up well under the length limit. I do not advocate adding filler; I merely observe that if the rules allow you to write four pages, a two-page answer will probably omit discussion of many relevant issues and will accordingly earn relatively few points.

Professors often grade many exams in haste. Students benefit when they signal near the start of their answers that they have seriously considered the question presented and intend to provide an organized response. Accordingly, in response to Part One, it would have been sound to begin with a list of the elements of Section 100 along with a very brief discussion about which of those will be easy, difficult, and impossible for the state to prove. The answer would then transition to a discussion of each element, devoting more time to those elements requiring more complex analysis.

Similarly, students benefit when they assist the grader in noticing the students' fine performance. It might be useful, for example, to use subject headings to help the reader know that each element of an offense has been addressed.

Using convoluted abbreviations and shorthand confuses the reader. In Part One, a student could easily abbreviate the relevant statute as "Section 100." There is no need to create something like "KSPL 100," wherein KSPL refers to "Kent State Penal Law." At a minimum, any nonobvious shorthand should be defined, as in "According to Kent State Penal Law ("KSPL") Section 100, …" When referring to one of the Blames, "Blame" is sufficient if the context makes obvious whom one means. In cases of potential ambiguity, use "Mallory" or "Mallory Blame," not "M.B.," "MBlame," or some such creation. It is particularly confusing to use "Sanders" as shorthand for "Frank Blame."[1]

The person who wrote the examination question knows what it says. A student earns no points through lengthy repetition of the facts unless those facts are tied directly to analysis, and such recitation consumes valuable words. Similarly, there is no need to type all of Section 100 into one's answer. Accordingly, one could begin with "The elements of Section 100 are …" without having first written, "Section 100 states as follows" and then included all of subsection (a).

In an exam, words are precious. Avoid needless citations. If one states, "To be guilty of this offense one must be a state employee," one need not follow the sentence with "Section 100(a)." For similar reasons, elaborate discussion of assigned cases wastes space. It is reasonable, albeit not necessary, to write something like, "As in *Yermian*, the state likely will not need to prove that the defendant had knowledge of a jurisdictional element." It is surely excessive to write, "The state must prove all elements beyond a reasonable doubt, as was stated in *In re Winship*, *Mullaney v. Wilbur*, and *Patterson v. New York*." The exam tests whether students have learned law that they can apply to new facts, not whether they have memorized a list of cases and holdings.

[1] I recognize, of course, that no one intentionally used the name of one character to stand for another. Mistakes like these, however, offer yet more incentive to proofread carefully before submitting an answer.

The Substantive Legal Issues Raised by the Practice Question

Part One

Section 100 has five elements that are either attendant circumstances or *actus reus* elements: (1) the defendant must be a state employee, (2) who has learned in his official capacity (3) the identity of an undercover police officer, and the employee must then (4) reveal the identity (5) to an unqualified person. The primary task posed to Part One is to identify and discuss these elements, along with their relevant *mens rea*.

(1) *State employee*. This is an easy one. The chief to staff of the state's lieutenant governor is of course a state employee. Although this is easy, it should not be ignored entirely.

(2) *Official capacity*. This is not much trickier. Scibby states that he received regular reports "while serving as the chief of staff" and that "[o]ne such report" identified Blame as an undercover operative.

(3) *Identity of an undercover police officer*. This is one of the two complicated elements. To be an undercover police officer ("UPO") for purposes of the statute, a person must (a) be a police officer who (b) conceals her identity for (c) purposes of "police business," which is defined as the normal work of a Kent police department or law enforcement agency. Blame clearly concealed her identity,[2] but was she a "police officer"? Did she perform "police business"? These two questions provide good opportunities for Scibby's defense.

First, whatever Blame was up to, we don't know if she was a police officer. A person could be sent to infiltrate a gang (an activity that well might constitute police business) without actually being a cop. A police informant, for example, could help perform police business while not an officer. Without some evidence that the members of the KKODS are considered "police officers" under Kent law, the state cannot win a conviction.

Second, regardless of Blame's potential status as an officer, was she conducting "police business"? Unless her work was that of a Kent "police department" or "law enforcement agency," she was not. The KKODS, ensconced within the Department of Education, likely is not a police department, but it might be a law enforcement agency regardless if its normal work involves catching drug pushers. If its normal work, however, is more educational in nature (*e.g.*, putting on anti-drug skits in Kent schools), then a solitary undercover operation might not convert the Squad into a law enforcement agency for purposes of Section 100. Perhaps "law enforcement agency" is defined elsewhere in Kent law. Scibby's counsel would want to investigate relevant law as well as the details of the Squad's work. For me, this issue is easier for the state to win than the "police officer" question but is not a slam dunk.

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[2] Or did she? At least one student argued that her limited efforts of concealment (she used, after all, her maiden name as a cover) negates this element. The statute, however, requires that she "conceal" her identity, not that she do so well, making this a tough argument for Scibby.

(4) *Reveal.* This element is another tricky one, and it presents two issues: Did Scibby "reveal" Blame's identity, and if so, did he do so "knowingly"?

First, one could argue that Scibby's conversation with Sanders did not "reveal" Blame's secret identity. Such an interpretation, which might allow officials to avoid punishment so long as they used hints instead of direct statements when outing UPOs in Kent, would seem to defeat the statutory purpose. That defeat, however, is not the problem of Scibby, and his counsel would argue that "reveal" means something like "actually make known at that moment," not "set in motion an eventual revelation." The answer depends on a close reading of the Scibby-Sanders dialog, and students should use specific words uttered by Scibby (and their context) when arguing about whether a revelation occurred.

Second, assuming Scibby revealed Blame's identity, did he act knowingly? He might have revealed the identity negligently or even recklessly by dropping hints to a reporter. Such a mental state would not support a conviction because "knowingly" clearly modifies "reveal" in Section 100. Again, the resolution depends on the Scibby-Sanders dialog, as well as upon what Scibby knew at the time (*e.g.*, did he know that Sanders is a good reporter, making it nearly certain that his acts would have the effect of revealing the identity?).

(5) *Not qualified.* This is another relatively easy one. Sanders, a newspaper reporter, is almost surely not qualified to know the identities of UPOs, and Scibby almost surely knew this. Accordingly, it probably is not worth engaging in a detailed discussion of either (a) what *mens rea* applies to this element[3] or (b) whether Scibby could assert a mistake of fact defense with respect to Sanders's potential qualification.

[3] The *mens rea* for this element is most likely "knowingly" because the "not qualified" element appears after "knowingly" in the statute, and no other mental state term appears in between. Also, there is no compelling reason to use a different mental state. One could argue, however, that "knowingly" is an essential modifier solely of "reveal" because although only intentional revelations should be punished, once someone is "knowingly revealing" a UPO's identity, he should be criminally liable even if merely reckless (or maybe merely negligent) about the qualifications of the person to whom he reveals it. Let the revealing state employee take due care, one might propose the law should counsel.

It is almost certainly not true that this element has no *mens rea* requirement at all. Imagine the result. A drug dealer steals a police uniform, infiltrates a police station, and dupes an officer into informing him of a UPO's identity. Absent a *mens rea* requirement for element (5), the tricked officer is guilty of a felony even if his conduct *is not even negligent*. Such an officer perhaps should be fired, but few would support his imprisonment.

In addition, the crux of the crime is *revelation to someone not qualified to know*. Telling someone who *is qualified* is an everyday event at police headquarters. Accordingly, to "knowingly" reveal an identity so as to violate the statute, one expects that one must "know" the things making the revelation a crime: (a) that the identity is that of a UPO (or, perhaps, all the facts necessary to establish that the person is a UPO, even if the actor lacks knowledge of the relevant law), (b) that a revelation is occurring, and (c) that the person learning the information is not qualified. See *Staples* (p. 275) for similar reasoning.

Because the state could probably prove actual knowledge by a top official like Scibby of Sanders's (presumed) lack of qualifications, this question is mostly academic (even more than the rest of the issues raised by the exam). This is even more true of elements (1) and (2); Scibby clearly knew he worked for the state and that he learned Blame's identity in his official capacity, making a discussion of the *mens rea* requirements (if any) of those elements a costly distraction in an examination like this one with a time and length limitation.

To write a top answer to Part One, a student must have identified all the elements of the offense and have addressed in some detail the issues presented by elements (3) and (4). The very best answers noted the two major sub-issues of those two elements, *i.e.*, "police officer" and "police business" for (3), and "did he reveal" and "if so, was it knowingly" for (4).

Common Mistakes

Elements: Many students missed at least one element of the offense. Some combined element (1) (state employee) and element (2) (official capacity), and then addressed only one of them (*e.g.*,[4] "The first element is that Scibby must have been a state employee who learned the information in his official capacity. He clearly received the report mentioning Blame's identity in his official capacity, and the prosecution could prove this easily."). Other students simply ignored one of these elements entirely (*e.g.*, "The first element concerns official capacity"). While not a huge mistake (especially because of our facts),[5] missing one of these elements nonetheless demonstrates a too hasty reading of the statute.

Missing element (3) precluded a student from discussing the complex question of whether Blame was a UPO. The definitions in subsection 100(b) appear in the exam question precisely so element (3) would attract attention and merit discussion, meaning that students who missed it left many points on the table. Element (4), the primary *actus reus* element, also offered many potential points. Discussing this element is essential; the revelation is the crime here, and if Scibby didn't "reveal" Blame's identity, he walks despite what you may think of him. Failure to give due attention to elements (3) and (4) was the primary way students lost points on Part One.

Element (5) ("not qualified") did not cause many problems directly. Indirectly, however, it caused problems for students who wasted significant time and space on discussing the relevant *mens rea*.

Specific Intent: About a third of students asserted that Section 100 defines a "specific intent" crime because it contains the word "knowingly." Pages 187-88 of the casebook provide some support for this position. Regardless of whether one believes Section 100 creates a specific intent offense, the mental state necessary for conviction is almost surely: (1) actual knowledge that one is "revealing" the information at issue, or at a minimum "practical certainty"[6] that a revelation will result from his conduct, combined with (2) knowledge of (or perhaps recklessness with respect to) the recipient of the information being "any person not qualified."

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[4] Language used as examples of answers does not contain actual quotes of students' answers. I have made it up based on what some students wrote.

[5] With different facts, one could easily imagine a defendant who satisfied one of these elements but not the other. For example, a state employee could learn something from a gossip column and then repeat it. Or someone not employed by the state could serve on a state commission and thereby learn sensitive information in her "official capacity." Indeed, the latter case, should it arise, might spur an amendment of the statute to include non-employees with access to secret state information.

[6] Or similar language. The Model Penal Code has not been adopted in Kent, at least as far as the examination question tells us. Accordingly, while the MPC is instructive, students should not assume that its precise definitions apply to words in Section 100.

As a few of you noted, with a specific intent crime (or with most any crime using the word "knowingly" with its ordinary meaning), an honest (that is, actual) mistake of fact will serve as a defense, even if the mistake is unreasonable. *See Oglivie* (p. 188). So far, so good. Students got into trouble when they ventured into tenuous speculation as to how Scibby might have thought Sanders to have been a "qualified" person. With the facts given, such a scenario is highly implausible. Mentioning the possibility, while a bit of a tangent, was not a problem. Considering the matter in depth suggested either a misunderstanding of the facts or a poor ranking of issues deserving discussion. Even more tenuous was any discussion of whether Scibby "had specific intent" concerning elements (1) and (2).

Regardless of whether students referred to "specific intent" or simply to the word "knowingly" when discussing element (4) ("reveal the officer's identity"), it was a mistake to argue that, to be convicted, Scibby must have known that Blame's identity would be revealed to anyone beyond Sanders. Assuming Sanders is "not qualified," as seems quite likely, a knowing revelation by Scibby to Sanders of a UPO's identity is a crime, even if Sanders writes no article. The statute refers to "*any person* not qualified," not "any large group of persons" or "anyone who will spread the word." At issue was whether, based on Scibby's conversation with Sanders, the state can prove that Scibby "knowingly revealed" Blame's identity to Sanders.[7]

Principle of legality, the rule of lenity, strict construction of criminal statutes, etc.: Many students raised these issues, often making arguments along the lines of "To hold that a member of the KKODS is a 'police officer' would violate the principle of legality by defining Scibby's action as a crime after it had occurred." While this might be an interesting argument, it *presumes* that Blame is not a UPO.[8] Such a presumption might prove correct, but a student cannot simply assert it. In other words, one cannot show that Blame is not a UPO by arguing that if she *isn't* a UPO, it would violate legal doctrines to pretend that she is. Accordingly, while there was nothing wrong with dropping a casual mention of these doctrines, the real struggle was in deciding in the first instance whether Blame's work for the KKODS makes her a UPO for purposes of Section 100. The rule of lenity might provide a tie-breaker of sorts ("If it is unclear whether Blame is a 'police officer,' a court should construe the statute narrowly and exclude her from the definition under the rule of lenity."), but, again, a student needs to demonstrate that a tie exists (or at least might exist) before resorting to tie-breaking doctrines.[9]

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[7] Of course, if Blame is not a UPO, then such a revelation would not be criminal under Section 100, but an exam taker would want to discuss the matter all the same.

[8] If she *is* a UPO, there is no problem with a court so declaring.

[9] As I discuss above in note 3, I think *Staples* provides useful guidance as to what *mens rea* would apply to element (3). If it turns out Blame was a UPO, I think the state must prove that Scibby knew the facts necessary to establish this legal conclusion, not the law itself. If, for example, KKODS members have the power to arrest people and to carry state-issued firearms, and "police officer" is defined in Kent law as "a state employee with the power to make arrests and to carry Kent firearms," the state would satisfy the *mens rea* requirement if it could show that Scibby knew what powers KKODS members possessed, regardless of whether he knew of the relevant legal provision. One could argue that "recklessness" should be the test for this element instead of knowledge, in which case for the state to establish element (3), Scibby would merely need to have consciously disregarded the risk that these facts were true (again, assuming Blame was a UPO in the first place). My discussion has delved deeply into the weeds; a great exam answer could easily ignore this issue.

Public Welfare: Some of you suggested that Section 100 defines a "public welfare" offense.[10] It does not. Public welfare offenses generally have token punishments, not the potential ten-year prison sentence (and one-year minimum) set forth in Section 100, which defines a felony. In addition, this crime involves a high moral stigma; citizens are rightly outraged when government officials with access to secret information about the identities of undercover police officers knowingly "out" the undercovers to unqualified persons. For the same reason, I disagree with those students who stated that Section 100 defines a "*malum prohibitum*" offense rather than "*malum in se*." If Scibby knowingly revealed Blame's identity, he did a bad thing regardless of whether Section 100 is on the books. Further, such revelation is the kind of activity (like owning grenades) that would make a reasonable person consider potential liability before acting. After all, chances are such leaks are illegal.[11]

Part Two

This Part required students to apply the general theories of punishment and the aims of the criminal law to specific facts. The key was (1) to discuss the major theories of punishment that we covered in class and (2) to actually apply them to Scibby's case.

Retribution. If one thinks Scibby has committed a serious offense (which this Part asks students to presume), then the Governor's action looks pretty bad from a retributivist perspective. A jury convicted Scibby, and the trial judge imposed a sentence of five years. The Governor has reduced the prison sentence by 100 percent, leaving only a fine and the conviction. Meanwhile, the lives of the Blames have been ruined, and an investigation into drug sales in schools has been scuttled. Neither the Blames nor Mallory's law enforcement colleagues receive vindication from a commuted sentence.

While the conviction is nothing to sneeze at, *all convicted felons* must live with the stigma of conviction, so that burden can hardly be used as evidence that Scibby is receiving more than a token sentence. The best arguments for the Governor here involve the fine and the acupuncture license. These arguments are weak but worth noting.

Utilitarianism/Deterrence. From a utilitarian perspective, the Governor again looks bad. Section 100 presumably exists to deter government officials from leaking sensitive information. Successful deterrence protects the safety of officers and improves the effectiveness of police work. By reducing Scibby's sentence, the Governor has reduced the deterrent effect of the statute. In addition, she has reduced it tremendously with respect to persons who are close to the Governor (or to her Lt. Governor). In addition, the commutation reduces the deterrent effect of laws generally, especially with respect to persons who are close to the Governor. Now that she has commuted Scibby, can another official expect a commutation if caught releasing the tax returns or medical records of a political opponent in violation of Kent law? Promoting disrespect for the law weakens the inclinations of citizens to obey.

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[10] This argument arose in Part One when students suggested that no *mens rea* should be required for one or more elements of the offense.

[11] *See, e.g.*, 14 C.F.R. § 1213.106 ("Preventing release of classified information to the media."); 18 U.S.C. 798 ("Disclosure of classified information").

Special Deterrence. This cuts in favor of the Governor. The odds are minimal that Scibby will again hold a government post, and even smaller that he will leak the identity of another undercover.

Incapacitation. Even more than "special deterrence," this cuts in the Governor's favor. Scibby is unlikely to recidivate regardless of whether he serves prison time. Further, if he already knows the identities of a bunch of agents, he could, in theory at least, recidivate as easily in prison[12] as he could on the outside, were he inclined to do so.

Rehabilitation. Scibby is unlikely to be rehabilitated much in prison or out. Accordingly, this might seem to favor the Governor too. Recall, however, that almost no one believes that prisons provide rehabilitation for inmates (at least not for many of them), and the Governor has not been in the habit of commuting sentences. Reference to this theory in support of her action accordingly seems like a makeweight.

Common Mistakes

Ignoring the facts. Some students provided a rich discussion of penal theory without serious examination of the facts. This is a major tactical error that wrecks many law school exam answers. The job of an exam taker is to answer the question, not to regurgitate everything taught over the semester.

Special deterrence and incapacitation. These are not the same thing, although they are related.

Fighting the facts. Some students argued for the Governor by suggesting that perhaps Scibby is not guilty (*e.g.*, arguing that he could not have known Blame was a "police officer"). As I wrote in my exam advice, "Answer the questions that are asked, not the ones you wish I had asked." Also, if the Governor thinks Scibby has been wrongly convicted, she can pardon him; forcing an innocent man to pay a criminal fine would be unjust.

Public Welfare. Some students argued that because Section 100 is a public welfare offense, a light punishment is justified. On the contrary, the harsh punishment indicates that treating Section 100 as a "public welfare" offense (with the resulting possibility of strict, and perhaps also vicarious, liability) would be a mistake, as I mention above. An offense is not a "public welfare" crime simply because it hurts the public welfare. In theory, every crime should injure public welfare; otherwise, why criminalize the activity? The term refers to "regulatory" crimes as discussed in the casebook at page 260 *et seq.*

Equal Weight. The exam question informed students that Part One and Part Two were of equal weight. Some students devoted comparatively little attention (or, at a minimum, comparatively few words) to Part Two. Perhaps this resulted from poor time management. Or it may have been that Part Two seemed less interesting. Regardless, a question worth half of the exam's total points should generally receive about half of the attention and words devoted to the entire exam.

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[12] Absent, of course, the kind of confinement imposed upon terrorists and spies to prevent them from communicating with their confederates.