

Prof. Ben Trachtenberg
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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 recommendations on the specific style of law school exam answers, and I then discuss the substantive legal matters raised by the examination.¹

Suggestions on the Style and Form of Examination Essays

Read the question, and answer the question asked. Some students did not carefully read the questions. For example, anyone who discussed whether Prince could be convicted of "rape" (as opposed to "attempted rape") was not on the right track. Similarly, in Part Two, I asked how Prince's age would affect the proper determination of his criminal sentence. Students who discussed the proper sentence generally, instead of focusing on the issues presented by Prince's relative youth, answered a different question. Also, statutes were provided at Page 3. Anyone making up his own statutes (or using similar statutes selected from the casebook's appendix) missed pretty much all of Part One.

Elements of offenses. While it normally does not cause substantive problems when one divides an element of an offense into multiple sub-elements, it causes the analysis to become disjointed. For example, for the dangerous driving offense, I think the two *actus reus* elements are (1) driving or using any motor vehicle, (2) in a manner that creates a substantial risk of serious physical injury to another person. As I note in the section discussing this offense, the second element might reasonably be split in two (*i.e.*, (a) "in a manner that creates a substantial risk of serious physical injury" and (b) "to another"). But that's about as far as it goes. If one posits that the crime has five elements (*e.g.*, (1) driving or using, (2) a motor vehicle, (3) in a manner, (4) that creates a substantial risk of serious physical injury, (5) to another person), one must then address each element (*e.g.*, "Prince was definitely driving, which satisfies the first element, and the thing he was driving, the Porsche, is a vehicle, satisfying the second."). If instead the first element is "driving or using any motor vehicle," a student may simply write, "The first element is satisfied because Prince was driving the Porsche, a motor vehicle." In addition, the five-element breakdown presented above requires that one speculate as to whether Prince drove "in a manner"—that is element three. Can one drive a vehicle without doing so "in a manner"? If not, we have a good sign that "in a manner" is not really an element of the offense. Again, finding too many elements is not likely to affect whether one correctly decides if a person can be convicted. It does, however, make one's analysis harder to follow.²

¹ In last year's version of this document, I began with some comments on general English grammar and usage. See last year's midterm response if you are interested; similar issues arose this year.

² Another example is splitting "a person less than seventeen years of age" from Section 300 into "a person" who is "less than seventeen years of age." This won't cause inaccurate results, but it wastes time.

Take a stand. I understand that some of the questions are close ones, and two good answers might reach different conclusions on the same question of law. That said, a good answer should—in most if not all cases—indicate what the writer thinks is correct. In other words, for each offense, you should state whether you think Prince can be convicted. Yes, it may depend on various factors, but don't hide the ball. On a related note, avoid unnecessary hedging. For example, if you think someone clearly did not satisfy one element of an offense, you can say, after reviewing the remaining elements, "Because the prosecution cannot prove the first element, Prince will not be convicted." You need not say, "Because the prosecution cannot prove the first element, Prince probably will not be convicted."

Use all elements. Elements of offenses are all worthy of attention, even if only briefly. It is clear that Prince was "driving" a "motor vehicle," but the clarity of the fact does not vitiate a student's need to mention it.

Make sure he did it before you convict. If a result is an element of the offense, and the result did not occur, then conviction is not possible. For example, under Section 300, at issue is whether Prince's passenger "lewdly expose[d] [her]self ... in public." Did she? If not, then Prince's *mens rea* as to that element is not relevant. I think one can credibly argue that this element is not satisfied. Some answers breezed past this issue, perhaps because it did not present complex legal questions. But interesting factual questions matter too! If the car is not "in public," Prince is not guilty of the offense, no matter how much enticement occurred.

Presumptions and the Model Penal Code. Unless a state has enacted the Model Penal Code or has adopted similar legislation, the Code does not apply there. Absent evidence that Blackstone is an MPC state, one cannot assume that MPC provisions apply to Blackstone's statutes. For example, under the MPC the default *mens rea* is recklessness, but nothing on the exam indicates that Blackstone has such a rule. Similarly, the exam does not state that Blackstone has adopted the MPC rules concerning attempted crimes.

Terms of art. The guilty mind or culpable mental state is "*mens rea*," not "*mens reus*." The criminal act is the "*actus reus*," not the "*actus rea*." I'm not a stickler for obscure Latin terms (despite my own interest in funny old words), but these are ones all criminal law students should learn.

Colloquialism. An exam is not a formal legal pleading, yet it still merits some effort at professionalism. The occasional joke is fine, as is somewhat casual language. One might consider, however, whether referring to Prince's passenger as a "homegirl" or a "strumpet" is a bit much.

The Substantive Legal Issues Raised by the Practice Question

Part One

This Part required students to apply the facts of Prince's case to four statutes. For each statute, a good exam answer identified the elements, stated whether the prosecution could prove the facts necessary for a conviction, and discussed what if any additional information might be needed for an attorney to determine whether Prince is liable.

Grand Larceny. Larceny is a specific intent crime, and the Blackstone statute includes as an element the “intent to deprive another of property or to appropriate the same to himself or to a third person.” The other element is the wrongful taking of property from its owner. Although it is pretty clear that Prince lacked permission to drive the Porsche, making his taking of it wrongful, there is little (or no) evidence of the specific intent necessary for conviction. The fact pattern tells us that Prince “decided to take the car for a spin.” After the “spin,” he presumably intended to return the car, hoping his parents would never know he had driven it. A conviction for this offense is highly unlikely. (Yes, if he were convicted, it would be for Grand Larceny because a “brand new Porsche” is worth well over \$1,000.)

Dangerous Driving. This charge is the one for which a conviction is most likely. The *actus reus* elements of the offense are (1) driving or using any motor vehicle, (2) in a manner that creates a substantial risk of serious physical injury to another person.³ Prince clearly drove a motor vehicle, the Porsche. The issues presented are (a) whether he did so in a manner that created a substantial risk of serious injury (either to his passenger or to others on the road) and (b) if so, what *mens rea* applies to this element of the offense.

To prove the substantial risk, the prosecution could show that Prince was not licensed to drive, that he drove an unfamiliar vehicle at 90 miles per hour, and that he did so while distracted by a semi-nude companion, so distracted that he didn’t notice the nearby police car. Arguments for Prince would be that his teacher said he was ready for the driving test and, perhaps, that driving at 90 miles per hour is not particularly unusual where Prince did so. An attorney might seek additional information about the location, time of day, traffic conditions, weather, etc. I expect the prosecution could demonstrate an objective substantial risk, meaning Prince could avoid liability for this offense only if he does not satisfy the needed *mens rea*.

The statute does not specify the mental state required for conviction. Under the Model Penal Code, the default would be recklessness. Of course Blackstone has not (at least to our knowledge) adopted this MPC provision, but it might nonetheless be relevant or persuasive to a court interpreting the statute, especially if defense counsel analogized the Blackstone statute to the “reckless driving” offenses existing in other states. A *mens rea* of knowledge is not particularly plausible; imagine the prosecution needing to prove in all cases that a dangerous driver *knew* he was dangerous. Such a requirement would also prevent the conviction of voluntarily intoxicated drivers, which the legislature likely would find outrageous.⁴ Accordingly, Prince would probably seek a jury instruction that only recklessness would suffice, and the prosecution might advocate for a requirement of mere negligence. Negligence might be appropriate, depending on how seriously Blackstone grades this offense.⁵ Negligence is fairly easy to prove here. A reasonable person doesn’t think that he can, despite not even having a license,⁶ drive safely at 90 miles per hour on a public street,

³ If desired, the second element could be subdivided into two elements (*i.e.*, “in a manner that creates a substantial risk of serious physical injury” and “to another person”). The result is the same.

⁴ The same logic makes a *mens rea* of intent or purpose even less likely.

⁵ For example, if Blackstone has its own “reckless driving” crime codified separately, and that crime is punished more severely, then imposing a negligence requirement here might best achieve the purpose of the penal code.

⁶ Driving without a license might demonstrate negligence all by itself. Consider the tort doctrine of “negligence *per se*.”

especially while distracted. Under a negligence test, Prince would be held to the standard set by the “reasonable person,” a standard he would fail to meet at his peril. Recklessness, by contrast, is not as easy to prove. Perhaps Prince’s youth and bravado convinced him that he drives very well, making him unconscious of the risk posed by his actions.⁷ Perhaps he was so distracted by his passenger—even while her shirt was on—that he never considered whether he was driving safely. Then again, maybe the prosecution can convince the jury that he knew of the risk and simply didn’t care, just like he knew he wasn’t allowed to drive the Porsche in the first place.⁸

Overall, this one looks bad for Prince. Even with a *mens rea* of recklessness (which is by no means assured), a jury could fairly convict Prince of this crime.

Contributing to the Delinquency of a Child. The elements are that one (1) directs, orders, cajoles, entices, or otherwise causes, (2) a person less than seventeen years of age, (3) to do one of the acts enumerated in the statute. Here, the only relevant enumerated act is “lewdly expose [her]self . . . in public.”⁹ Prince can attack the prosecution’s case with respect to every element of this offense.

First, he will say that he did not “direct” (or any of the other verbs) his passenger to disrobe; she did so of her own will. Although he did speed up at her request, which may have “caused” her to remove her shirt (or could be construed as Prince “enticing” her to do so), Prince can argue pretty convincingly that such causation or enticement is not what the statute implies.¹⁰ Nothing in the facts suggests that Prince knew his passenger had any willingness, much less an intention, to disrobe in the car if “turned on.” He might well have intended to excite her without desiring or expecting that she would remove her shirt forthwith.¹¹ Reasonable people might disagree, but I think this element is quite a stretch for the prosecution.

Second, Prince will argue that although his passenger was under seventeen, he reasonably believed she was older. Chances are this element is one of strict liability, meaning that the prosecution need not establish any *mens rea*, but it is possible that a court would find an unspoken culpability requirement.¹² If Prince’s mistake was reasonable, then he would not

⁷ Note that if the needed *mens rea* is recklessness, then Prince might benefit from an unreasonable mistake of fact defense. In other words, if he believed he was a good driver (or even that he was allowed to drive) because his teacher said he was ready for the test, then he could not have disregarded any risk based on his being a bad driver in general. That said, even a good driver can be dangerously distracted, especially when driving way too quickly.

⁸ Because his parents would not have allowed it *and* he lacked a license.

⁹ There is nothing in the facts to suggest that the passenger (i) consumed alcohol or drugs, (ii) committed a felony, or (iii) was a truant (school is normally closed on Sunday). There is also no discussion of the passenger being “recorded on film, video, or any other medium.”

¹⁰ Recall that not every “but for” cause will satisfy the causation requirement of criminal law.

¹¹ Compare these facts to a rock star whose fans become so thrilled during a concert that they fling underwear onto the stage. Has the rocker “caused” or “enticed” the public removal of clothing for purposes of this crime?

¹² The analogy is to statutory rape laws. Although the MPC proposes a “mistake of age” defense in most such prosecutions, the majority rule denies the defense. Then again, statutory rape is a different offense, and one could argue that the strict liability element for statutory rape (which presents enough problems as it is) should not be applied to other offenses.

be negligent, much less reckless or knowledgeable. If a culpability requirement exists, then Prince's attorney would seek additional information about the passenger's appearance, how she speaks, and anything else that might convince the jury that she came across as at least seventeen. In the end, this element is likely to go against Prince. The same logic extends to the age element of "aggravated" contribution. The girl is younger than fourteen, but Prince didn't think so. If he is guilty of contribution (under a theory that he is strictly liable for the girl being younger than seventeen), then he is guilty of aggravated contribution.¹³

Third, Prince will argue that his passenger's exposure was not "lewd" and that even if lewd it did not occur "in public." The statute does not define "lewdly," nor does it describe what constitutes "public" exposure. With respect to lewdness, Prince could argue that men may expose their chests freely; prohibiting women from doing what men may clearly do without fear of a "lewdness" charge is sexist, perhaps even unconstitutional.¹⁴ In Blackstone, this question could go either way. While such an argument might be plausible with respect to adults, a statute protecting children from predation might reasonably treat boys and girls differently as to what displays are "lewd."¹⁵ With respect to "public," Prince would argue that a speeding car is not visible to the public at large. Then again, Prince was driving on a public street, not in a secluded parking lot or on private property.

I expect that the first element, the third, or both will prevent the prosecution from proving this charge, but a conviction would not be unfathomable. Of course, if he is not guilty of contribution, he cannot be guilty of aggravated contribution.

Note that the exam question states, "You should presume for purposes of this Part that while Prince's age may be relevant at sentencing should he be convicted, it does not provide a defense to any of the charges." Accordingly, any discussion here about the sense in charging one minor for contributing the delinquency of another was wasted effort. The question was designed to spare students from grappling with the possible legislative intent to exempt young offenders from the scope of the statute.¹⁶

Attempted Non-Forcible Rape. The exam did not provide any guidance as to Blackstone's law of attempt, meaning that students needed to consider whether the various legal regimes we have studied (*e.g.*, traditional common law, MPC) would treat Prince differently. As it happens, a conviction is unlikely under any attempt law we have studied. Prince has two

¹³ If, however, the statute is construed to have a *mens rea* (perhaps negligence) for the age element, and Prince's mistake is found to be unreasonable (*i.e.*, the jury believes that a reasonable person would not have thought the girl was at least seventeen), then Prince could in theory avoid liability for the *aggravated* offense if he was reasonable in thinking she was at least fourteen. This potential defense is available only if Blackstone has abandoned the traditional rule that mistakes of fact provide no defense to grading elements.

¹⁴ See, *e.g.*, *People v. Santorelli*, 600 N.E.2d 232 (N.Y. 1992) (holding that N.Y. Penal Law § 245.01, which prohibits the public exposure of "intimate parts" and states that for "a female person [those parts] shall include that portion of the breast which is below the top of the areola," somehow does not apply to topless women in a public park). The majority dodged the Equal Protection argument, and two judges wrote separately, stating that the different treatment of male and female chests violates the Fourteenth Amendment.

¹⁵ If case law indicates that the "lewdness" question is close, Prince's attorney would want additional details concerning the passenger's action. Was her shirt completely off? Did she behave in an especially lascivious way?

¹⁶ Students aware of this issue could have properly raised it in Part Two, by noting that if the crime for which Prince was convicted was contribution to delinquency, his age assumes particular relevance at sentencing.

excellent arguments here: First, the prosecution probably cannot prove that he had the necessary culpable mental state, and second, he probably was not close enough to the consummation of the offense to be guilty of attempt.

For the substantive offense of non-forcible rape, the relevant elements are (1) sexual intercourse (2) with someone less than fifteen years of age. In our class discussion of the *mens rea* for attempt, we learned that a party must act with the intent to achieve the results elements of the crime (or perhaps with the knowledge that the results will be achieved) in order to be guilty of attempt. While we know that Prince found his passenger “attractive,” that he drove quickly at her request, perhaps from a desire to “turn her on,” and that he was distracted by her exposed chest, the facts leave significant doubt as to Prince’s intention to engage in sexual intercourse with her. Perhaps such an intention can reasonably be inferred, perhaps not. Proof beyond a reasonable doubt seems tricky.

In addition, regardless of Prince’s intention, the facts do not suggest that he was at all close to achieving sexual intercourse with his passenger. Indeed, he was speeding along the road, which makes sexual intercourse difficult to accomplish. At common law, Prince’s activities before arrest would nearly surely be considered “mere preparation” under whatever test a court used (*e.g.*, the *res ipsa loquitur* test, “very near to accomplishment,” “physical proximity”). Under the MPC, Prince’s intent must be accompanied by a “substantial step” toward the commission of the crime, one that strongly corroborates the needed mental state (*i.e.*, the purpose to commit non-forcible rape). The candidates for “substantial steps” seem weak. Picking up an attractive passenger? Watching her partially disrobe? Driving fast at her request?

Also, there is an interesting issue concerning the *mens rea* related to the age element of the substantive offense. To be guilty of statutory rape in most jurisdictions, no culpability is required for the victim’s age; that element is said to be one of strict liability.¹⁷ If Blackstone follows the majority rule, it is still unclear whether one must know the victim’s age to be guilty of *attempted* non-forcible rape. See pages 319-21 of the casebook. Despite the interesting policy question presented, this issue did not merit much attention from exam takers (who have limited time) because Prince has far more solid defenses to this attempt charge.

Part Two

This Part required students to apply the general theories of punishment and the aims of the criminal law to specific facts. In particular, the question was how the various rationales for criminal punishment fare when applied to a fifteen-year-old boy who has done what Prince has done.

The two primary rationales—deterrence (justified by appeals to utilitarianism) and retribution (justified by claims of moral desert)—both provide much to discuss. The other rationales we have covered in class—rehabilitation and incapacitation—are perhaps slightly

¹⁷ But not all jurisdictions. And not under the MPC. Compare MPC § 213.3(a), with § 213.1(d).

less interesting when applied to our facts but should not have been ignored entirely. I will cover the four rationales in turn.¹⁸

Deterrence. This factor presents an empirical question: Are juveniles more easily deterred than adults, are the harder to deter, and how can we know? If a fifteen-year-old can be deterred by a relatively light sentence, then utilitarians should support a reduced sentence for Prince. His own need for specific deterrence (*a.k.a.* special deterrence) will be satisfied, and others in his situation (that is, other youths) who hear about his light punishment will be deterred as much as adults who hear of the harsher sentences imposed on criminals of full age. But if Prince and his age cohort are a bunch of “superpredators,” then perhaps only a harsh punishment—as harsh as that imposed on adults, if not harsher—will adequately deter additional criminal conduct by Prince and other youths.¹⁹ One’s take on this depends upon one’s theories concerning juvenile psychology and similar matters. When considering the effect of age on Prince in particular (as opposed to others his age), one might mention his family situation. Although we do not know all the details, we know that Prince lives with his parents, and they care enough about him to come home from vacation to retrieve him from jail and to hire him a lawyer. Someone living with attentive parents might need less deterrence from the state than would another youth who is unsupervised (or Prince himself, after he grows up and moves out).

Retribution. It seems intuitive that youths are less blameworthy when they violate societal norms than are adults to perform the same bad acts. This intuition is embedded in American criminal law, which operates special juvenile courts for young offenders. Almost certainly, Prince is less deserving of punishment than would be an older offender.²⁰ His body and mind are continuing to develop. At a purely physiological level, he has weaker impulse control than would a similarly situated adult. He has less life experience (at least measured in years) to guide his decisions. Accordingly, while he might have violated, say, the statute banning dangerous driving, his violation is less serious than that of an adult because (1) he is relatively bad at judging the risks created by his actions, especially with new activities such as driving, (2) even when he recognizes the existence of risks, he cannot control himself as easily as an adult can, and (3) although the law presumes that persons under its jurisdiction know the content of criminal statutes, this legal fiction is especially incredible when applied to juveniles.²¹

Incapacitation. This issue dovetails with deterrence. If Prince can be deterred from future crime by, say, a fine and some community service, then there is no need to incapacitate him with imprisonment. If, however, he is a likely recidivist, then perhaps prison is justified to protect the community from future incidents of dangerous driving in wrongfully obtained

¹⁸ Good answers need not have been organized in this way. One could have, for example, discussed all the factors justifying a lesser-than-usual punishment, followed by all factors on the other side. So long as the key issues received attention and were presented in a coherent way, the order of discussion was not important.

¹⁹ For a discussion of how a harsh punishment of Prince might *promote* crime rather than deter it, see the section below on rehabilitation.

²⁰ Nothing here is meant to suggest that Prince is not blameworthy at all or that he should not be punished. I argue only that as blameworthiness goes, his is less than that of a similarly acting adult.

²¹ In addition, as is discussed below in the section on rehabilitation, Prince’s prison experience would likely be far worse than that of an average adult inmate. Accordingly, even if he were comparably blameworthy, a shorter sentence (or a suspended sentence) might well be justified.

vehicles containing twelve-year-old runaways. Like the question of how easily juveniles are deterred, the issue of incapacitation presents an empirical question (*i.e.*, do juvenile offenders—and does Prince in particular—need to be incapacitated to keep the rest of us safe?).

Rehabilitation. This often-overlooked concern of the criminal justice system cuts strongly against imprisoning Prince. Prosecutors and judges hardly even bother arguing anymore that prison improves the character of inmates, and the literature on incarcerated juveniles paints a grim picture of our most vulnerable inmates.²² Prisoners have enough problems when they arrive fully grown and fairly savvy. Weak, comparably naïve juvenile inmates suffer tremendously. Accordingly, one cannot easily argue that prison would convert Prince into a law-abiding citizen. Indeed, it might exacerbate any defects in his character, a possibility that should concern anyone advocating imprisonment on the basis of deterrence. Even if Prince receives the maximum sentence, he will return to “the community” in three years. What kind of young man will Blackstone receive from its prison in 2012? If prison would make Prince more dangerous, then any utilitarian benefits of his imprisonment related to special and general deterrence would be reduced, at least somewhat, by his increased dangerousness.

Answers tended to focus on how much prison time (if any) Prince should receive, as well as whether a fine was appropriate. A few answers also discussed potential alternative punishments (*e.g.*, community service), which was especially useful if the answer otherwise advocated light punishment.

Reasonable exam takers could have approached this question in different ways. Beyond decisions about organization, good answers might devote significantly divergent amounts of attention to the various rationales for criminal punishment. A top answer would cover deterrence and retribution at least briefly, and it would at a minimum acknowledge incapacitation and rehabilitation. Beyond that, there were many ways to thoughtfully apply course materials to Prince’s predicament.

²² See, *e.g.*, Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* (Nov. 2007), available at <http://www.nicic.org/Library/022736>; Michele Deitch *et al.*, *From Time Out to Hard Time: Young Children in the Adult Criminal Justice System* (Univ. of Texas 2009), available at <http://www.nicic.org/Library/023876>; see also Editorial, “Raising Children Behind Bars,” *N.Y. Times*, Nov. 20, 2007.