NAILING  THE BAR

Nailing the Baby Bar

HOW TO WRITE ESSAYS FOR THE
CALIFORNIA FIRST-YEAR LAW STUDENT EXAM

WHAT to Say and HOW to Say It!

Tim Tyler Ph.D.
Attorney at Law

NAILING THE BABY BAR

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What to Say and How to Say It

This book is a "How To" guide of practical information needed to succeed on LAW SCHOOL EXAMS and the CALIFORNIA FIRST-YEAR LAW STUDENT EXAM (FYLSX, also known as the "Baby Bar") on **Contracts, UCC [1], Torts** and **Criminal Law**. It is based on **common law and broadly adopted modern views** applicable to exams in every State.

This is a "cook book" approach focused on the mechanics and substance needed to write passing law school essays; **WHAT TO SAY and HOW TO SAY IT.**

EVERYTHING you NEED to SUCCEED is provided without unnecessary baggage.

The central focus of this book is "NAILING" the elements. "NAILING" means to cite the **ELEMENTS OF PROOF** the moving party (movant) must prove at each stage of a legal action. At each stage the "matter at issue" is either a CAUSE OF ACTION or an AFFIRMATIVE DEFENSE that has been raised by the movant. To "nail the elements" you must know what the REQUIRED ELEMENTS OF PROOF are, say what they are, and explain HOW the movant can prove them with the given facts, or else explain WHY they cannot be proven.

Brilliance is not needed nor even enough to succeed in law school, to pass the FYLSX, to pass General Bar Exams, or to be a lawyer. Many attorneys are not brilliant, but they succeeded in law school. And there is nothing as common as brilliant people that have failed law school. **The REASON** is **THEY LEARNED EVERYTHING EXCEPT** the one important thing -- **HOW TO PASS THE EXAMS.**

The first year of law school and the FYLSX focus on three areas of law: **Contracts (including UCC), Torts** and **Crimes**. This book gives you **EVERY important issue, EVERY important rule** and **EVERY important definition** you need with practice questions and **sample answers.**

This book uses a methodical, practical, step-by-step approach to create issue analysis that works. It may seem mechanical, but it produces passing essay answers. This method is called **"NAILING THE ELEMENTS"** (Chapter 10). Whether you are completing the first year of law school, or preparing for a Bar Exam this simple approach will help you succeed.

This book tells you **how to outline** your essay answer (Chapter 3), **how to spot issues** (Chapter 4), **how to avoid wasting time** (Chapter 5) and **budgeting time** on your essay (Chapter 7).

This book gives you **EVERY IMPORTANT DEFINITION** you need to know for the FYLSX essay exams on **Contracts, UCC, Torts and Criminal Law** (Appendix A.) It shows you **EXAMPLES** of good and bad essay approaches, and it give you 20 **PRACTICE QUESTIONS** with **SAMPLE ANSWERS** and **EXPLANATIONS**.

This book deliberately and necessarily omits discussion of many intricate details of the law that are explained in detail in Nailing the Bar's "Simple Outlines". But **EVERYTHING YOU REALLY NEED TO KNOW to prepare for the FYLSX exams on Contracts, UCC, Torts and Criminal Law are in this ONE book.**

[1] This book covers selected sections from UCC Articles 1, 2, 3 and 9 (UCC general principals, sales, negotiable instruments and secured transactions), but California only expressly tests on UCC Articles 1 and 2.

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Your tutor is Tim Tyler, Ph.D., a practicing attorney and author of dozens of manuals designed to give you practical, concise instruction on both black letter law and bright line rules, and how to prepare for and write essay exams. His exam style has been selected by the California Bar Association as an exemplary approach.

The instruction offered through this website covers CONTRACTS, UCC (Articles 1 & 2), TORTS and CRIMES to prepare first-year students for law school exams and to prepare California students for the **California First Year Law Student Exam** which covers those subjects.

The website materials essentially duplicate the materials in two books from **Nailing the Bar:**

- **How to Write Essays for Contracts, UCC, Torts and Crimes Law School and Bar Exams (ABC);** and
- **Nailing the BABY Bar (BB).**

The essential difference between the tutoring offered at this website and the instruction given in those two books is that the website presents 5 uniquely different practice essay questions and gives you an opportunity to get **direct feedback** and **ask questions** about confusing legal issues.

For more information go to ***www.LawTutor.Org***

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Chapter 1: Why Essays are Critical

In law school and on the FYLSX the ability to write a proper essay answer is critical. On your first day of law school look at the person on your left, the person on your right and pick three people in front of you. At the end of the first year of law school two of those six people will be GONE. By the end of law school two more of those six people will be GONE. And in many States only one of those six people can pass the Bar examinations on the first try. **Follow the instructions in this book and it will be you!**

The difference between the ONE student who succeeds and the FIVE students that fail is the ability to write a proper law school essay answer. It is both necessary to succeed in law school and essential to passing the FYLSX.

Being smart is not enough. Everyone in law school is smart. Some of the students in your first-year law school class may seem stupid. Do not be deceived. They could not have all gotten into law school if they were as dumb as they look.

In fact, some of the attractive, sophisticated and eloquent students will be the first to fail. Your grade in law school, and on the Bar exams, depends on only ONE FACTOR. It is not what you look like, or what you talk like. It is what you PUT ON PAPER.

LEARN TO WRITE A PROPER ESSAY and your entire law school experience will be enjoyable, your class standing will improve at every turn and you will pass the Bar upon completion of law school.

FAIL TO ADOPT GOOD ESSAY FORM and your life will be Hell! You will fail law school, you will never become an attorney, and you will owe thousands of dollars in student loans that you cannot escape in bankruptcy. The sooner you learn what to do the better off you will be.

The Grading Key IS the Key. Law school exams and the FYLSX are graded by means of a grading "key". The Grading Key is the guide the professor (or Bar reader) uses so that grades are as consistent as possible.

The Grading Key is a list of the ISSUES you are expected to recognize and address and the RULES of law you are expected to cite.

Certain FACTS are mentioned in the essay question, and the grading key reflects those facts that you should comment on in your ANALYSIS.

Finally, for each issue, you must state a CONCLUSION.

IRAC. This essay structure -- Issue, Rule, Analysis and Conclusion -- is referred to as the IRAC approach to essay writing.

State the Required Issues. The Grading Key has certain REQUIRED ISSUES. If your essay answer lists and analyzes all of the required issues, your essay is usually given a score of 70 points. For each required issue that you skip, your grade is reduced.

It is critical for you to recognize and state the proper area of law raised by the facts.

Generally the required issues are worth about 5 points each. Your essay grade will be reduced (from 70) by 5 points for each required issue that you fail to discuss. Some issues, such as murder and negligence are worth 10 or more points, depending on the question.

How Graders Look at your Essays. In law school essays are generally graded by the professor, and she or he will read your essay more closely to see if you have developed an understanding of the fine points of the black letter law. Since the law school professor looks more carefully at your answer, you may be able to deviate farther from the IRAC approach without suffering a penalty. This is unfortunate because the Bar Exam essays are graded with close adherence to the IRAC approach.

When the grader first picks up your essay answer, she often starts by flipping through it to get a feel for the quality of you answer based on its appearance. If your writing is messy, your issues are not clear and you are disorganized, the grader will not be given a good first impression. Mentally, she will stop thinking "possible 70" and start thinking "probable 60". She will not waste a lot of time on your essay if it is an obvious loser.

The grader will next look at the last page of your answer to see if you ran out of time. If so, the grader may give you a grade of 45 or 50 without even bothering to read your essay at all.

So NEVER "LOOK" like you ran out of time!! ALWAYS have a "conclusion" at the end of your essay to make it appear you finished with adequate time. NEVER say "out of time!" at the end of your essay. NEVER put a big, garbled, frantic, scribbled mess at the end of the essay. NEVER write out an outline of the issues that you didn't have time to discuss. If you do these things you might as well write, "I AM STUPID; PLEASE SHOOT ME."

Aspire to be Adequate on Every Essay Question. If your essay appears to have been completed on time, the grader matches the issues you discuss to the issues on the Grading Key. For each required issue, your rule statement and analysis are assessed for adequacy. If you discussed the required issue, your rule statement and analysis are adequate, and you gave some statement of conclusion, then you get the COVETED "70".

If the grader cannot find where you discussed required issues or rules easily, she will not waste her time looking for them. CLEARLY IDENTIFY THE ISSUES and RULES OF LAW.

Your answer must explain how the stated rule applies to the stated facts of the question. If no facts from the question are mentioned in your answer, the analysis will be deemed conclusionary and inadequate.

Your answer must state and adequately analyze all issues raised by the question. **An excellent analysis of one issue will NOT recover all of the points lost by failing to discuss another required issue.**

Bonus Points. Some essay answers are given bonus points. BONUS POINTS may be given for answers that cite ADDITIONAL RELEVANT ISSUES. Also, bonus points may be given for answers that are exceptionally WELL ORGANIZED and CITE CASES or UCC RULES.

Points lost by failing to discuss required issues will seldom be recovered through bonus points.

Chapter 2: Identify the Area of Law

In the first year of law school three main areas of law are typically taught, **Contracts, Torts and Crimes**. Contracts classes typically discuss two bodies of law **Common Law of Contracts** and the **Uniform Commercial Code**. For the FYLSX and California General Bar Exam (GBX) applicants are only supposed to use **common law and broadly adopted modern rules of law** NOT CALIFORNIA LAW, NOT THE MODEL PENAL CODE, NOT THE RESTATEMENT 2ND. But your law professor may require you to cite those other sources of law.

In a law school exam, it is not necessary to identify the area of law. But on the FYLSX and GBX you must determine THE PROPER AREA OF LAW and TELL THE GRADER because your ability to properly determine the applicable law is an essential part of the examination. So state the applicable area of law as part of your essay answer.

The basic rule for determining the applicable law in a law school exam is to REMEMBER WHICH CLASS YOU ARE IN! Every year there is some clown that shows up for a mid-term or final on the wrong day, at the wrong time, prepared for the wrong examination.

The single most important rule in all law school and Bar Exams is READ THE CALL OF THE QUESTION! Failure to read and respond to the CALL of the question is the one, single most common reason law students fail.

In the excitement of the moment, you might misread the call of the question. So it is critical to remember which class you are in and CAREFULLY READ THE CALL.

In the first year of law school you will never have a "cross-over" question that mixes two areas of law. For example, in law school a CONTRACTS exam will not test you on TORTS. But the FYLSX and GBX may have cross-over questions. NEVER answer the question with the wrong law.

DON'T confuse a Criminal law with Tort law. If the question asks for discussion of "crimes," "prosecution," or "charges," it is a criminal law question. If it asks for the actions a PARTY can bring, it is NOT A CRIMINAL law question because only States prosecute crimes.

PHRASE your answer properly. Remember <u>defendants</u> are only "GUILTY" of crimes. They are LIABLE for torts, not "guilty".

The party charged in a complaint is the DEFENDANT in all three areas of law -- contract, tort and criminal law. But only PLAINTIFFS bring actions based on tort or contract law. In criminal actions the complaint is brought by the PROSECUTION, not a victim or plaintiff.

On balance, it is a good, safe habit to start each essay with an affirmative statement of recognition concerning the area of law that applies to the question, and it never costs you.

Famous Last Words: *"This <u>is</u> the torts final, right?"*

Chapter 3: Outline Your Answer And COUNT THE ISSUES!

The second critical step in answering any essay question, after confirming the area of law, is to read the question and COUNT THE ISSUES to be discussed.

The issue outline is simply a list of the issues you will discuss, in the order you will discuss them. Make it "skeletal" in your own "personal shorthand." Don't waste time writing out detailed issue statements. Jot down **case names** and **special rules** like "Palsgraf" and "Statute of Frauds." Jot down a few facts if you want, but DON'T WASTE TIME writing out every important fact. [2]

CONSIDER which issues you MUST discuss, which you MIGHT discuss and which are "unintended issues" that the grader does not want to hear about. Decide which issues are so minor, marginal, lacking in facts or attenuated that you should not discuss them. Look for specific wording in the question that indicates which issues are "required issues."

RE-READ THE FACTS to be sure you are not missing issues. Don't look so hard for hidden issues that you miss the issues that are obvious. [3]

Rewrite the outline as necessary, eliminating issues, or reordering issues. Usually you should list the issues in the same order they arise in the fact pattern, but there are exceptions. For example, discuss intentional torts before negligence, and discuss murder before manslaughter.

SEPARATE THE ISSUES AND THE PARTIES on Tort and Criminal law essays discussing all rights, liabilities and remedies of each party in succession.

FOLLOW THE CALL. On a one-hour question outlining usually requires between 10 and 15 minutes. HOWEVER, if the call of the question actually lists the issues you are to discuss, then this outline process can (and must) be abbreviated. If the issues are listed for you, discuss all "sub-issues" that seem necessary and obvious but DO NOT DISCUSS ISSUES THAT ARE COMPLETELY IRRELEVANT TO THE CALL.

If the call of the question states the things to discuss, DISCUSS WHAT IT SAYS AND EVERYTHING DIRECTLY RELEVANT. [4]

> If the CALL says "what rights and remedies?" you MUST be sure to discuss the REMEDIES of the parties and not just the causes of action.
>
> If the CALL asks, "What defenses might be raised?" you MUST discuss defenses as full issues.
>
> If the CALL describes A, B and C and then asks about the rights of B against C, DO NOT discuss the rights of A because the CALL only asks about the rights of B.

---

[2] Some people advocate copying all of the important facts from the essay question to the answer outline. That may help some students but to me it just seems a waste of time.

[3] This is a common error. Don't look so hard for fleas you forget to talk about the elephant.

[4] Often you have to be sort of a "mind reader" to figure out what the examiner wants to hear about.

READ SOME OF THE QUESTION, JUMP TO THE CALL, AND THEN READ AGAIN COMPLETELY. To properly outline an essay question,

> FIRST read SOME of the facts, about ONE-THIRD of the fact pattern;
> SECOND jump to the bottom of the question and determine the CALL;
> THEN go back to the beginning and reread ALL of the facts.

As you read the question, draw lines to the margin and place symbols there designating the issues that might need to be discussed. For example, if two people start to commit a crime, the first issues that might be discussed are "S?" for "solicitation" and "C?" for "conspiracy."

FOCUS ON THE AREA OF LAW. In law school you know what the area of law will be. But in the FYLSX you have to figure out what area of law determines the outcome. So if the question is a common law contract question -- write a big "K" at the top of the page with a circle around it to reinforce in your mind that the area of law is common law CONTRACTS. For a UCC question write "UCC". For a tort question put "T" at the top. For crimes questions put "C".

After you have read the question completely LIST AND NUMBER THE ISSUES on the bottom of the question sheet or on a separate piece of paper. Generally you should **list the issues in the order they appear in the question**, because that is usually the order of the Grading Key.

COUNT the issues! You should have between 5 and 12 issues. A question with less than 5 issues is highly suspicious -- you probably missed something big. It is almost impossible for an exam to produce proper results if there are fewer than 5 main issues. Often the issues are the <u>defenses</u> rather than the <u>offenses</u>. <u>Defenses</u> may be issues by themselves that require thorough analysis. The essay usually takes ONE HOUR to complete, and if you don't see enough to keep you busy for the time allotted you are probably missing some issues.

A question with more than 8 major issues is a racehorse exam where you have little time to analyze the issues in depth in a one-hour period. If you have more than 8 major issues, carefully consider whether some of them are "non-issues." A non-issue is something that the grader does not want to hear about. Those are discussed in more detail later.

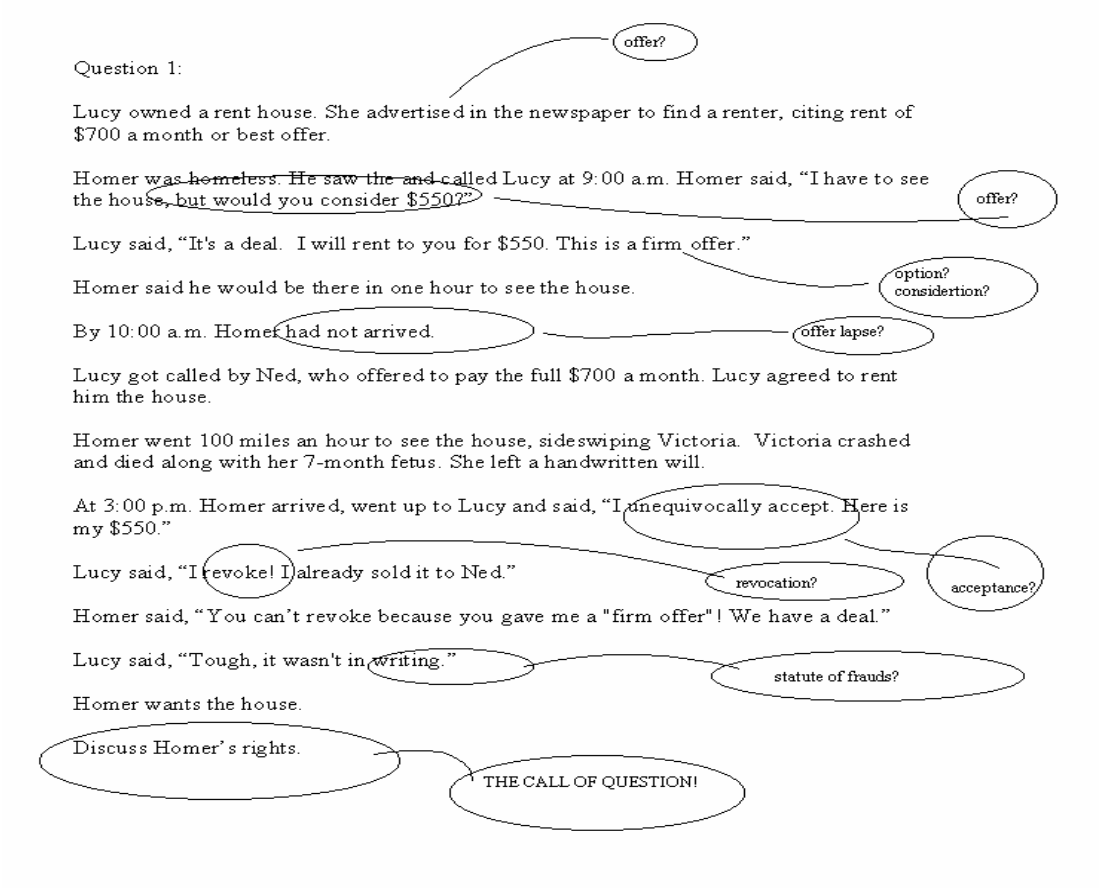
If there are 8 legitimate issues you should plan on spending FIVE MINUTES on each in a one-hour exam. However, some issues demand more time:

> MURDER requires twice as much writing time as other crimes and almost always suggests MANSLAUGHTER as a separate 5-minute issue. Therefore, any death usually takes up 15 minutes of writing time.
>
> NEGLIGENCE and DEFAMATION require twice as much time as other torts.

If there are 12 issues to discuss you will only have 3 or 4 minutes to discuss each, and you will have to move very fast. Consider addressing some minor issues merely as "comments" in passing.

READ THE CALL AGAIN. Before you start writing, READ THE CALL OF THE QUESTION ONE MORE TIME and make sure your outline addresses the call.

Example: The example below shows a question (Question 1) about a contract dispute over the rental of a house and how you might mark up the question as you read it.



Following this mark-up on the question itself, you should create a skeletal outline as shown below:

EXAMPLE QUESTION OUTLINE

Start -- with general CONTRACT statement -- define contract and elements.

1. Choice of law -- UCC (GOODS?) or common law? "house"
2. Does STATUTE OF FRAUDS apply, and is it satisfied? "house" = "land"
3. Was the ADVERTISEMENT an OFFER -- define OFFER.
4. Did H make OFFER at 9:00? "had to see it first".
5. Did L give H a VALID OPTION at 9:00? -- define OPTION, CONSIDERATION. "firm offer"?
6. Did H make valid ACCEPTANCE at 3:00? -- define ACCEPTANCE.
7. LAPSE -- hours late. REVOCATION -- not if offer lapsed.

Your outline should not be much more than shown here. But THINK IT THROUGH! Writing out an extensive outline with every fact, name, date, etc. is a big waste of time. Your outline should just list the ISSUES in the order you will discuss them. The facts are already listed in the question itself, so why repeat them? But THINK HARD about WHAT the facts suggest the issues are the EXAMINER wants you to write about.

Famous Last Words: *"I never outline. It takes too much time."*

Chapter 4: Issue Spotting

Since you lose points for every required issue you fail to discuss, it is CRITICAL TO SPOT all of the issues. BUT DON'T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The examiner wants you to discuss certain required issues. But question writers fall into two basic schools. The first, rational school, simply states the issues to be discussed in the call of the question.

The second, less rational and often sadistic school of question writers uses only hints about the intended issues. Sometimes the "hints" are rather obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

Issue Spotting Hints

CONTRACTS:

Issue Area and Coded Hint:	**Intended Issue:**
FORMATION ISSUES:	
1. Order from Advertisement/Catalogue:	Is the advertisement an offer?
2. Claim of reward, prize, bounty:	Is it a general offer validly accepted?
3. Do something (build, paint, etc.):	Unilateral contract?
4. Silently begin performance:	Acceptance of unilateral offer by performance?
5. Price/quantity inquiry?	Is this an offer?
6. Performance with silence:	Implied contracts?
7. Oral/telephone/verbally/said:	Is Statute of Frauds satisfied?
8. A "year":	Statute of Frauds?
9. Quantities with prices:	Statute of Frauds? UCC?
10. Special made goods:	UCC 2-201?
11. Lost writings:	Statute of Frauds?
12. A promise to pay debt of other:	Statute of Frauds? Main-purpose rule?
13. Accepted later:	Offer lapse?
14. Accepts in an hour/day/week:	Offer lapse?
15. "Ok, but…":	Rejection and counteroffer?
16. If I feel like it, decide to, want, etc.:	Illusory promise? Lack of consideration?
17. Accepted, then changed mind:	Mail box rules
18. Rejected, then changed mind:	Mail box rules
19. Sent offer/acceptance/rejection:	Mail box rules
20. Fax communication:	Sufficient UCC writing?
21. Hobby/enthusiast/fan:	Is he a merchant?
22. Only bought, never sold goods:	Is he a merchant?
23. Revocation before end of performance:	Saving doctrines of unilateral contracts?
24. Acceptance with different terms:	Mirror Image Rule? UCC 2-207?
25. Shipped wrong product:	Acceptance under UCC rule?
26. Building code violations:	Illegality of contract?
27. Illegal contracts:	In Pari Delicto?

28. Mistake/Misunderstanding:	Mutual misunderstanding? Peerless case.
29. Ambiguous offer/acceptance:	Objective theory of intent
30. Young, crazy, drunk:	Infancy? Incompetence?
31. Deceit, concealment:	Rescission?

MODIFICATION ISSUES:

32. Modification - not goods:	Was consideration provided? Pre-existing duty?
33. Modification/later agreement - goods:	UCC modification by consent?
34. Modification with increase in $$$	Statute of Frauds?
35. Modification after assignment:	Effect of UCC 9-318 on secured transactions?

INTERPRETATION OF TERMS:

36. More than one paper:	Integration?
37. Other agreements:	Parol Evidence Rule? Four-Corners?
38. Prior dealings:	Course of dealing? Past practices?
39. Ambiguous words:	Plain meaning?

THIRD-PARTIES/ ASSIGNMENT:

40. Three parties?	Third party beneficiaries? Assignment?
41. Children, students, patients, tenants:	Intended third-party beneficiaries?
42. Funding agreement:	Proper expression of assignment?
43. World famous architect, artist:	Proper delegation subject matter?
44. Personal services, massage:	Proper delegation subject matter?
45. Covenants regarding future assignees:	Standing of assignee per UCC 9-206?

BREACH ISSUES:

46. Performance doubts, insolvency:	Anticipatory Breach?
47. Assurances:	UCC Reasonable Assurances?
48. Unexpected conditions, death:	Impossibility? Impracticality? Mistake?
49. Unexpected difficulties:	Frustration of purpose? Impracticality?
50. Cancellation clauses:	Liquidated damage clauses? Unforeseeable?
51. Seller shipped wrong product:	Buyer's remedies? Cover? Reject? Keep?
52. Failure to act/protect:	Good faith and fair dealing? Duty to act?
53. Multiple shipments:	Divisible UCC contract?
54. Ambiguous grumbling:	Clear Anticipatory Breach or not?

REMEDY ISSUES:

55. "Rights and remedies":	Buyer's/Seller's Remedies?
56. Breaching party partially performs:	Quantum Meruit?
57. Non-breaching party fails to act:	Failure to mitigate damages?
58. Land, works of art, etc.:	Specific performance?
59. Personal Services?	No specific performance?
60. Repairs:	Costs limited to fair market value?
61. Sentimental value:	Objective sentimental valuation?
62. Promise, reasonable reliance:	Estoppel?
63. Shipment of non-conforming goods:	Accommodation? Time to cure?
64. Lost profits?	Consequential damages? Hadley v. Baxendale

DEFENSES:

65. Transfer to an innocent party:	Bone fide purchaser for value?
66. Forced to agree/Unfair:	Adhesion? Unconscionability? Coercion?
67. Young party:	Infancy? Voidable? Ratification?
68. Reliance, Misled:	Estoppel? Detrimental reliance?
69. Illegality:	Defense of illegality?

70. Elderly victim:	Defense of undue influence?
71. Check tendered as "payment in full"	Accord and satisfaction? UCC 3-311?

TORTS:

Issue Area and Coded Hint:	**Intended Issue:**
INTENT:	
72. Apprehensive/concern:	Assault?
73. Touching/contact/ate/drank:	Battery?
74. Intent to touch/scare another:	Transferred intent to plaintiff.
75. Pranks and jokes:	Intent to cause apprehension/touching?
76. Act by child:	Intent? Knowledge with reasonable certainty?
77. Mistaken entry to land:	No defense to Trespass to Land?
AWARENESS/INJURY BY PLAINTIFF:	
78. No apprehension:	No cause of action for Assault?
79. No awareness of confinement:	No cause of action for False Imprisonment?
80. Aware of confinement but stays:	False Imprisonment if wrongful taking of child?
81. No awareness of taking:	No cause of action for Conversion?
82. No humiliation/distress:	No cause of action for IIED?
83. No damage to land:	Cause of action for Trespass to Land?
NEGLIGENCE ISSUES:	
84. Remote plaintiff?	Palsgraf. Did defendant have Duty to plaintiff?
85. Injury despite reasonable actions?	Was there any Breach?
86. Defendant is professional?	What is the standard of care?
87. Defendant failed to act?	Did defendant have a Duty to act?
88. Chain of events lead to injury?	Actual cause without proximate cause?
89. Criminal causes the injury?	Intervening superseding event?
90. Negligent acts of two cause injury?	Both Substantial Factors?
DEFAMATION ISSUES:	
91. Former, retired official, celebrity:	Still Public Figure?
92. Well known/star/performer:	Public figure?
93. Crime victim or unwilling person:	Are they a Public Figure?
94. False statements:	Were statements really Defamatory?
95. Written, oral, videotaped:	Libel or slander?
96. Business dealings, Disease, Morals:	Libel per se?
97. Limited distribution of statements:	Publication?
98. News media:	Statements of public interest?
99. Failed to investigate:	Negligence?
INVASION OF PRIVACY	
100. Commercial use of photo/picture:	Appropriation of likeness?
101. Said/told/revealed:	Defamation/Public disclosure/Interference?
102. False depiction:	False Light?
ABUSE OF PROCESS, MALICIOUS PROSECUTION, INTERFERENCE:	
103. Arrested/sued:	Malicious prosecution/Abuse of process?
AFFIRMATIVE DEFENSES:	
104. Detainment of customer in store:	Shopkeeper's Privilege - reasonable?
105. Pranks and jokes:	No defense to assault/battery?
106. Assumption of risk:	Defense to assault/battery?
107. Silence or acts by plaintiff:	Consent? Implied consent?

108. Negligence by plaintiff:	Contributory/comparative negligence?
109. Forced or protective act:	Necessity? Self-defense? Defense of others?
110. Act taken without intention of harm:	Mistake of fact? Reasonable mistake?

CRIMES:

Issue Area and Coded Hint:	**Intended Issue:**
ISSUES RAISED BY THE PARTIES:	
111. Two or more criminals:	Accomplice liability/solicitation/conspiracy? [It only takes one person to do a robbery. If there are two robbers, they want to you discuss this.]
112. Two act together without agreement:	Implied agreement for conspiracy?
113. Criminal agreement without an action:	No OVERT ACT for conspiracy?
114. One party silent and does not act:	Bystander or accomplice?
115. One party encourages but does not act:	Solicitation, accomplice?
116. Employee, servant steals:	Larceny or embezzlement?
117. Fetus:	Was there a Homicide?
118. Agreement to adultery/sell drugs/duel:	Wharton Rule - No conspiracy?
INTENT ISSUES:	
119. Enter first, decide to steal second:	Lack of intent for burglary?
120. Intent is to take own property:	Lack of intent for larceny?
121. Involuntary action:	Lack of intent for any crime.
122. Did not know it would hurt…:	Awareness of risk? Conscious disregard?
123. Anger, jealousy, blind action:	Adequate provocation?
124. Use of gun, knife:	Intent to cause great bodily injury?
125. Thinks sex partner old enough:	No defense to strict liability crime.
126. Thinks sex partner willing:	No defense, rape is general intent crime.
127. Thinks sex partner was wife:	No defense, rape is general intent crime.
128. No intent to burn particular structure:	Was the fire set with malicious intent?
129. Intent to scare, not hit:	Transferred intent from assault to battery?
130. Missed one and scared/hit another:	Transferred intent from one victim to another?
131. Criminal act while intoxicated:	No intent? Involuntary intoxication?
132. Criminal act while intoxicated:	Enough to negate premeditation? Awareness?
ACTION ISSUES:	
133. Takes own property:	Not larceny if not property of another?
134. Fire, smoke, explosion, cutting torch:	Was it Arson?
135. Entered a building, room, safe:	Was there a Breaking? Was it Burglary?
136. Planned crime:	Sufficient for Attempt?
137. Getting weapon:	Premeditation?
138. Theft of land, title, rights:	False pretenses, not larceny/embezzlement.
139. Sex with wife:	No common law rape of wife?
140. Crossing state, county line:	Kidnapping?
141. Police offer stolen goods:	No Receiving of recovered goods?
142. Delayed death, life supports:	Causality? Common law time rules?
143. Wrongful act without criminal intent:	Recklessness? Accident? Common negligence?
LACK OF ACTION TO PREVENT RESULT:	
144. By parent, caregiver, rescuer:	Affirmative duty to act? SCRAP
145. By child, onlooker:	Affirmative duty to act?
146. By co-criminal:	Withdrawal from conspiracy? Accomplice?
147. Intentional non-action to cause result:	Affirmative duty to act?

LACK OF INJURY/FORGIVENESS BY VICTIM:

148. Victim unaware money taken:	Larceny but not robbery?
149. Victim forgives defendant:	Crime is offense against state, not victim.
150. Victim unconscious, unaware:	Defense to robbery, but not rape or larceny.

AFFIRMATIVE DEFENSES:

151. Child defendant:	Defense of infancy?
152. Mistake:	DEFENSE of Mistake to negate intent?
153. Drunk/drugged:	Defense of intoxication?
154. Escalation of fight:	Change of AGGRESSOR identity?
155. Protection of fighting party:	"Step into shoes" of aggressor?
156. Protection of person/property:	Reasonable force?
157. Thinks sex partner willing:	Consent is defense to rape.
158. "Could not stop self":	Insanity? Necessity? Lack of intent?
159. Did not know it was wrong:	Insanity - M'Naughten Rule?
160. Not really illegal drugs, stolen, crime:	Mistake of Law?

SOME ISSUE SPOTTING EXAMPLES:

Example 1: *"A invited B into his home. While A was called away B found a cutting torch and cracked open A's safe. He looked inside and saw A's credit card. He wrote down the credit card number and later used it to access porn on the internet from the comfort of his home. What is criminal liability of B?"*

Issues: 1) ARSON because he used a cutting torch, burning open a safe that was part of someone else's home. Was the safe part of the dwelling?

2) BURGLARY, not when he went into A's house, because that was consensual, but because he broke ("cracked open") the "safe" which may be an interior room or compartment of a dwelling "A's home" for a theft ("false pretenses"). Was the safe big enough to be burgled? Did he "enter" or just "look" inside? Is false pretenses a felony or larceny sufficient for a burglary charge?

3) FALSE PRETENSES because he unlawfully used A's "credit card number."

NOT trespass to chattels -- CRIMINAL LAW!
NOT larceny -- nothing carried away!

Example 2: *"Al and Bob had an oral contract that Al was to build a house for Bob. Bob agreed to pay Al when he gave him proof that all workmen and suppliers that had lien rights against the job had been properly paid.*

To make his payroll Al entered into a separate agreement with Carl. Carl agreed to advance Al the money to pay his workmen and suppliers each week. Al agreed that when Bob paid him he would reimburse Carl. The agreement said, "The Al-Bob contract is security for this agreement."

Al gave Bob proof his workmen and material suppliers had been paid, but Bob refused to pay Al unless he could prove he paid his ex-wife child support. Bob was adamant.

Al would not give Bob any proof he paid his child support and Bob never paid him. But Al kept building the house and demanded continued funding from Carl.

What are Carl's rights against Bob? Against Al?"

Issues: 1) WHAT LAW? Not sale of goods, but is secured transaction under UCC-9.

2) STATUTE OF FRAUDS. "oral" agreement. "Hints" discussion.

3) ASSIGNMENT? Carl is third party. Assigned rights under Al-Bob contract? Al-Carl contract creates security interest per UCC-9-102.

4) THIRD PARTY BENEFICIARY. Carl is a third party. Not intended.

5) BREACH by Al. Implied condition of Al-Carl contract -- Al will act to get payment from Bob. Al fails to act – breaches implied condition of Al-Carl contract.

6) REMEDY?

Example 3: *"Al ordered 60,000 campaign buttons by telephone from Sellco that said "Al for President." The purchase price was $.10 each, and Sellco said that if Al cancelled the order he would have to forfeit his deposit of $1000. Sellco ordered the buttons to be manufactured by Manco. The next day the Secretary of State told Al he would not be on the ballot because he failed to meet a filing deadline. Al immediately tried to cancel the order, but Sellco refused to accept or return his phone calls. Two weeks later Manco delivered the campaign buttons and billed Sellco. Sellco is demanding an additional $5,000. Al wants his $1000 deposit back. Discuss."*

Issues: 1) WHAT LAW? UCC – contract for sale of movable goods -- buttons.

2) MERCHANTS? Al is not a merchant.

3) NEED FOR WRITING? No. Over $5000, but SPECIAL MADE goods.

4) FRUSTRATION OF PURPOSE. Purpose of contract is political campaign and all parties knew it.

4) LIQUIDATED DAMAGES. Reasonable?.

5) FAILURE TO MITIGATE. Sellco had a duty to cancel the Manco order and did not do so. They lose. Al gets all $1000 back?

Example 4: *"Sam Shooter went to the edge of town where there was a deserted rock quarry 100 feet deep. He liked to shoot his gun there because it was so safe. Unknown to him Wally Wino had fallen into the quarry in a drunken stupor. Wally knew he was in danger, but he went to sleep in an abandoned car at the bottom anyway. Sam intentionally shot at a beer bottle, and the bullet hit the bottle just as he intended. Then the bullet went*

into the quarry like he intended and there it hit Wally in the leg. What actions can Wally bring against Sam, and what are Sam's defenses?"

Issues: 1) BATTERY because the question says "intentionally shot" and "he intended". Even though Sam is not liable because he did not intend to hit Wally, these words suggest that the grader "intends" for you to discuss intent. So do it.

2) NEGLIGENCE. Did Sam have a duty to Wally? Yes, because Sam's acts (shooting) created a danger, and Wally was within the "zone of danger". Did he breach the duty by not being careful? Probably not a breach because Sam went to a "safe" place to shoot. He did not act in a manner below the level of due care. But paddle this issue so you can go on to the other elements. Was Sam the "actual" cause? Yes because Wally would not otherwise have been injured. Was Sam the "proximate cause" of Wally's injury or was Wally's falling in the quarry an intervening cause?

3) CONTRIBUTORY NEGLIGENCE. Clearly Wally helped cause of his injury.

4) COMPARATIVE NEGLIGENCE -- same thing.

5) ASSUMPTION OF THE RISK -- Wally "knew he was in danger."

Example 5: *"Al was so depressed when his significant-other, Bob, moved out on him he drove around town in a total daze. When he saw Bob and Bud walking hand-in-hand, Al burst into tears and drove his car off the edge of the bridge and into the river. Unfortunately Captain Mitch was going under the bridge in his tug boat and he was killed when Al's car fell on him. Al says he blacked out, did not know what he was doing and cannot remember anything. What can Al be charged with (besides a poor choice of men) and what defenses can he raise?"*

Issues: 1) MURDER based on depraved heart theory? Maybe. Isn't it unreasonably dangerous to "drive in a total daze"? Did he have any awareness of and conscious disregard for the unreasonably high risk to human life his acts posed while driving around in a daze? Certainly he was aware that someone could be killed with him driving around like that. What about suicide? Was he trying to kill himself? Is there a transferred intent where one attempts suicide and ends up killing someone else? No easy answer. Not clear if this was suicide or an accident.

2) MANSLAUGHTER (negligent homicide). Very reckless driving in a daze. Al might claim "adequate provocation", but he was already driving around when he saw Bob and Bud. But even if he was unaware and not conscious of the risk his acts posed to others, he can be charged with manslaughter.

3) INSANITY? Maybe Al can claim temporary insanity. If he "did not know what he was doing" and was "in a total daze" then he could not realize "the nature and quality of his acts or that it was wrong."

Famous Last Words: *"That was really easy. I got done early. "*

Chapter 5: Non-Issues, Red Herrings and Splits

It is almost as disastrous to waste time discussing a non-issue as it is to fail to discuss an intended issue. It wastes time and irritates the grader.

Remember, you usually get ZERO POINTS for discussing any issue that is not on the Grading Key. The Bar examiner has little authority to give you points for imagination and inventiveness.

Also remember that while you discuss the non-issue, everyone around you is discussing the intended issues. They are making points and you are being stupid.

How to Recognize Non-Issues.

A non-issue is an issue that is not on the Grading Key. For every issue the grader wants you to discuss there will be one or more specific facts as "signs", "hints" or indicators. The grader does not want to be accused of "hiding the ball", so If you see a "really subtle" issue or an issue that you think "most people" will not recognize, that it is probably because it is an UNINTENDED ISSUE.

Hints. If the grader does not want you to discuss an issue, they may add HINTING WORDS to show that issue is irrelevant.

> **Example:** If the question says there was a "written contract" DO NOT waste time discussing whether the Statute of Frauds is satisfied.
>
> **Example:** If the question says some one was injured by "accident" then DO NOT waste time analyzing intentional torts. If it was an accident there is no basis for discussing an intentional tort.
>
> **Example:** If the question says some one took "reasonable steps" then DO NOT waste time analyzing whether or not they were negligent, because the question tells you they acted reasonably. If they acted reasonably, they could not have been negligent.
>
> **Example:** If a crime is committed by two people but no facts show which one of them first came up with the idea, DO NOT waste time discussing solicitation.

Follow The Call.

Another way the examiner will direct you is by the CALL OF THE QUESTION. If the CALL is "structured" with a list of questions, the examiner is telling you the specific questions you are to address. If the call says discuss Joe's liability in an action by Bob, do NOT discuss criminal law because only the state, and not Bob, could bring a criminal action. Further, do not discuss Bob's liability in an action by Joe, because the call of the question is about Joe's liability.

How Many Issues?

Another indicator is the NUMBER of clearly indicated issues. If you can count 6 to 8 clearly obvious issues to discuss, it is unlikely you are expected to discuss some other hidden and marginal issue. For example, if two criminals commit six to eight clear crimes (including conspiracy) do not waste your valuable time discussing very marginal issues or crimes that MERGE anyway.

Stay mainstream. Discuss only **mainstream law school issues**, not marginal or tangential issues of law. For example, smuggling, drug possession and weapons violations may be crimes, but they are not mainstream subjects in law school. So do not waste time discussing these issues unless it is clearly called for. You may know something about the law from your own personal experience but leave that knowledge at home and only use knowledge you have been taught in law school.

Example of non-issues. Suppose the question states:

> *"Bill and Ted burst through the open doorway of the County Airport Terminal at noon with assault rifles blazing, only to find they had made a big mistake because the airport had been deserted for years and no one was there to rob. ... Discuss the criminal liability of Bill and Ted."*

Here the clearest and most important issue to discuss is ATTEMPTED ROBBERY. But the fact that there are two robbers instead of one implies some discussion of CONSPIRACY or ACCOMPLICE LIABILITY may be intended. This is especially true if Bill later commits an additional crime as Ted stands by.

In your discussion of attempted robbery, you must define LARCENY because it is an element of robbery, and you must define also ROBBERY as the criminal goal of the ATTEMPT. Define attempt, robbery and larceny in one sentence:

> *"Under criminal law ATTEMPTED ROBBERY is a SUBSTANTIAL STEP taken toward committing a ROBBERY, a LARCENY, the trespassory taking of personal property of another with intent to permanently deprive, from a person by force or fear."*

CONSPIRACY would be a second, independent charge against the defendants because it does not merge into the criminal goal. Further, here there must have been some agreement, express or implied, between Bill and Ted because they committed an overt act together when they burst through the doorway. Therefore, conspiracy is an issue to discuss.

Another issue raised here is MISTAKE OF FACT. Although it is not an adequate defense here, the issue is hinted at here by the hinting words "big mistake…deserted for years."

Understanding the distinction between a MISTAKE OF FACT and a MISTAKE OF LAW is critical. It is discussed in Chapter 19.

Another probable issue here is BURGLARY. The facts very deliberately state that the doorway was "open" and the event was at "noon" in an "airport terminal", so common law burglary is impossible. But it may be charged as burglary under the modern view in some Courts because it is a “trespassory entry”.

By emphasizing the openness of the door and the time of day, the question writer may be hinting that a discussion of burglary is called for. On the other hand, some other professors would emphasize the open door and time of day hoping to hint that discussion of burglary is not called for. These vague situations are where law school gets crazy, and you almost have to be a mind-reader to determine what the professor wants.

But SOLICITATION is a non-issue that you should not waste your time discussing. There are absolutely NO FACTS to show there was a solicitation by either party, so it is a waste of your time to speculate about that issue.

Other non-issues here are ASSAULT or ATTEMPTED ASSAULT. Although a criminal assault is an "attempted battery" and the defendants were attempting to rob someone, there is no evidence they attempted battery on anyone. The terminal had been "deserted for years" so the issue is too remote in time and possibility to merit discussion.

Finally, MAJOR NON-ISSUES are ASSAULT WITH A DEADLY WEAPON or WEAPONS VIOLATIONS. Although it is probably illegal to have or use weapons in this manner, that is neither a law school nor a Bar topic. Stick to discussion of common law crimes and law school subjects unless clearly told otherwise.

Red Herrings.

Although the examiner will give you hints about the issues you are intended to discuss, she may also deliberately throw out a few RED HERRINGS to mislead the careless. A RED HERRING is a fact that hints at a totally different AREA OF LAW from the call of the question. The purpose of the Red Herring is to test your ability to focus on the CALL of the question without being distracted to irrelevant issues.

Example of a Red Herring: Suppose the question states:

> *"Tom sold a car to Dick for $1,000, and Dick promised to pay at the end of the month.*
>
> *Dick used the car to rob a bank, and Tom was a witness. The next day, while still fleeing from his crime, he negligently rammed the car into the back of Paula's car. Paula was Tom's casual friend and she died and left Blackacre to Harry, Tom's brother, by an attested will that was only signed by one witness, Tom. When Harry received the inheritance he was married to Wanda but he lived in California, and she had temporarily moved to Nevada to file for a quickie divorce in District Court so she could marry her lover, Tom.*
>
> *Dick didn't pay Tom. What are Tom's remedies?*

Here the call of the question is to discuss Tom's remedies against Dick. The only possible remedies Tom could have are under contract or tort law. Tom cannot "prosecute" Dick for his criminal acts. That might make Tom feel better, but it is not going to put money in his pocket. Here Tom has suffered no torts from Dick. Therefore, his only injury is the result of Dick's failure

to pay $1,000 for the car. That is a contract action, and none of the other facts give Tom any cause of action in tort.

Tom's only cause of action is based on CONTRACT. Everything in the second paragraph is a Red Herring because it has absolutely nothing to do with contract law and would have no relevance to Tom's remedies against Dick.

Avoid Detailed Split Discussions Unless Called For.

A split is a conflict of rules. Some law school professors obsess on them, and some law students get obsessed about learning all of their intricate little nuances. Get a life. This is a waste of time and very distracting. Splits should always be mentioned in your rule statement, but discussion should be limited unless an in-depth analysis is clearly called for.

For example, one might define common law burglary and then state, "Modernly, statutes have extended burglary to all structures and all times of the day." Having stated this, it is a waste of time to let this difference dominate the analysis of the facts. Do not agonize over whether the common law or modern rule applies. Don't try to analyze all possibilities, permutations and combinations. Don't analyze "common law burglary" as one issue and "statutory burglary" as another. It is one issue, but it is important to compare and contrast the common law view with the modern view. Simply analyze whether the elements are supported by the facts and state a conclusion without extensive reference back to the split.

As a second example, States or Courts may differ on the law applied to certain issues. In stating the rule of law, it is important to say, "States are split on this issue," but usually little more needs to be said. AVOID GETTING HUNG UP ON DISCUSSION OF SPLITS.

Where the grader INTENDS for you to analyze a split of law, the question will clearly INDICATE that intent. In that case you should define each of the positions that have been taken, and whether a particular approach is considered the majority or minority view. [5]

Example of a Split Approach. Suppose the question states:

> *Connie Conman, a first-year law student, told Sally Sucker, "I will pay you $1,000 if you will completely paint my house. I don't want just a promise to paint it. You can only accept this offer by actually painting it." Sally immediately started painting. After several days of effort, when she was all done except for one more brush stroke, Connie shouted, "I revoke!" Connie refused to let Sally finish the house with that one last brush stroke and she refuses to pay Sally anything at all. What are Sally's rights and remedies?*

This question clearly calls for a discussion of the quirk in the common law that allowed an offeror to revoke his offer of a unilateral contract after the offeree had begun performance, but before completion of performance. [6] The better approach to this question is as follows:

[5] The concept of "majority" and "minority" is rather illogical. Law is not a matter of majority rule.
[6] Note that the Courts generally abhor unilateral contracts and will find a contract to be bilateral unless the offer expressly and unequivocally indicates, as illustrated here, that ONLY a unilateral contract is intended.

GOOD: *1. REVOCATION OF UNILATERAL OFFER?*

Under contract law a unilateral offer is one that by its own terms can only be accepted by complete performance. The common law allowed the unilateral contract offeror to revoke his offer at any time prior to acceptance by the offeree. This often produced an unjust situation in which an offeror could induce extensive effort by the offeree only to revoke his offer at the last moment.

Modernly courts have devised saving doctrines to stop the offeror of a unilateral contract from revoking his offer after becoming aware that the offeree has begun performance. Courts are split on the exact rationale for these saving doctrines, but the practical application is the same.

The modern rule generally is that the offeror of a unilateral contract is estopped from revoking a unilateral contract offer for a reasonable period of time once they become aware the offeree has begun performance. Under an alternative approach the offeror can revoke the offer but must pay the offeree for the services rendered.

Here Connie was the offeror of a unilateral contract because her offer to "pay $1,000" was conditioned upon the completion of the painting. Sally began performance because she "immediately started painting", and Connie was aware of this because she observed Sally painting.

Therefore, under the modern approaches Sally would be given a reasonable period of time in which to complete performance with the one last brush stroke, and Connie would be estopped from revoking her offer until Sally was given that opportunity.

The following approach goes into much more detail. It is a great answer, but it uses much more time and does not add much more value. Certainly there is no need to go into such details. There is also a good chance that you would get the four approaches confused and muddled anyway:

TOO DETAILED AND OBSESSED WITH THE SPLIT:
1. ISSUE -- Does Sally have a right to a reasonable amount of time to COMPLETE PERFORMANCE OF THE UNILATERAL CONTRACT?

Under the common law a unilateral contract offer is one that by its own terms can only be accepted by complete performance of the contract. But the common law allowed the unilateral contract offeror to revoke his offer at any time prior to acceptance by the offeree. This contradiction produced an unjust situation in which an offeror could induce extensive effort by the offeree only to revoke his offer at the last moment.

Modernly courts have devised four different saving doctrines to stop the offeror of a unilateral contract from revoking his offer after becoming aware that the offeree has begun performance. The facts do not state where these events took place.

Under the Restatement 90 view the offeree converts the unilateral offer into an "option contract" that the offeree cannot revoke when he starts performance. Here Sally started performance when she started painting, so under this view he has an option contract that

Connie cannot revoke, although Sally could abandon the project if she wants under this view.

Many States follow a different approach that holds that the offeree converts the unilateral offer ipso facto into a bilateral contract by beginning performance. Here Sally started performance, so if this State followed this approach it would have created a bilateral contract. In this case Connie could not revoke, and Sally would be obligated to complete performance of the last bush stroke.

Another view is the Estoppel View. In those jurisdictions the offeree is estopped from revoking once the offeree begins performance. Under this view Connie cannot revoke, but Sally is not obligated to perform the last brush stroke.

Under the fourth view, called the Quantum Meruit View, the offeror CAN revoke the offer, but the court will give the offeree Quantum Meruit reimbursement for the reasonable value of service and materials provided by the offeree prior to the revocation. Under this rule Sally would not be allowed to finish painting, and she may be given less than the $1,000 that Connie promised him.

Whether Sally could finish the painting and get the full $1,000 depends on the jurisdiction she is in."

There is nothing wrong with this last answer but it is much longer and more time consuming without adding much additional value.

Chapter 6: A WARNING about Example Answers

You may see "exemplary" answers distributed by the California Bar. These answers can be very misleading and produce unfortunate results.

Some "example" answers are actually very bad answers because they are too long, too complex and took the student too much time to write.

Test this for yourself. Select one of the longer example answers and try to physically copy it in written form in the time allowed. Often this cannot be done. And if you cannot even copy the answer in the time allowed, you certainly could not read, outline, compose and write that same answer in the allotted time.

In fact, this is why many "brilliant" students fail in law school. They learn everything there is to know, attempt to say it all on the exam and run out of time before they can say it all.

Your goal should NOT be to tell everything there is to say about a subject. Your goal SHOULD BE to know everything necessary and to say everything that needs to be said and can be said in the time allotted.

Writing ONE excellent essay answer SHOULD NOT be your goal if it causes you to run out of time on the other questions. RATHER your goal should be to write ONE GOOD essay answer for each essay question asked within the given time limits.

The best answers are those that 1) state all required issues, 2) give correct rules of law for each, 3) give a straightforward analysis, 4) match the stated facts to the elements, and 5) state a simple conclusion, **all within the time allowed**.

The example answers given in this book are deliberately not perfect. They do not cite a lot of case law, and they do not go into a lot of detail. But they are feasible, adequate answers that can be outlined and written within a one-hour timeframe. [7]

***Famous Last Words:** "I got a 90 on the first question, but…"*

[7] Since this book was first published many student's answers using the "nailing the elements" approach advocated here have actually been picked as "exemplary answers" on both the California FYLSX and also on the California General Bar Exam.

Chapter 7: Essay Time Budgeting Mechanics

Doing a proper essay is like doing comedy. Timing is as important as the material.

IT IS ABSOLUTELY ESSENTIAL to keep on schedule while writing essays. You must establish and stick to a time budget. Do not go overtime on one essay thinking you will catch up later on another -- you won't.

YOU MUST HAVE A WATCH OR CLOCK with you. Do not depend on the clock on the wall when taking an exam because it will not be set to the hour at the beginning of the test, it may not be easily visible, and it might stop working. One time I was taking an exam and the clock fell off the wall and smashed on the floor!

Set your watch or clock exactly to the hour (e.g. 9:00 a.m.) When the proctor says, "You may begin," start the clock!

The key to keeping your essay on schedule is to **NUMBER THE ISSUES** on your outline, **COUNT THE ISSUES** and **MARK YOUR OUTLINE** with the time each issue should be finished.

RESERVE 5 MINUTES at the end of each essay to underline issue statements and key words and to check for omissions. Therefore, if you spend 15 minutes outlining, and save 5 minutes at the end, you really have only 40 minutes to write.

> **Example.** Suppose it takes 15 minutes to read the question and create the Question Outline that was created above in Chapter 3. There are 45 minutes left and 7 issues to write about (the beginning "contract statement" is like an issue). If you reserve 5 minutes at the end to underline and check your work, you have to write the 7 issues in 40 minutes. This gives you between 5 and 6 minutes to write about each issue.

FOLLOW THE PLAN -- MARK THE START/FINISH TIMES for each issue on the outline by adding 5 and 6 minutes (alternating) to the outline. Suppose the question in Chapter 3 above was the first essay of the morning, at 9:00 a.m. Marking the times for each issue on the outline, alternating 5 and 6 minute schedules, produces the following schedule:

QUESTION OUTLINE WITH TIME BUDGET

Start

[9:15] Contract statement -- CONTRACT LAW, define contract and elements.

[:20] 1. Choice of law -- UCC (GOODS?) or common law? "house"

[:26] 2. Does STATUTE OF FRAUDS apply, and is it satisfied? "house" = "land"

[:31] 3. Was the ADVERTISEMENT an OFFER -- define OFFER.

[:37] 4. Did H make OFFER at 9:00? "had to see it first".

[:42] 5. Did L give H a VALID OPTION at 9:00? -- define OPTION, CONSIDERATION. "firm offer"?

[:48] 6. Did H make valid ACCEPTANCE at 3:00? -- define ACCEPTANCE, LAPSE -- hours late. REVOCATION -- not if offer lapsed.

STICK TO SCHEDULE. It does absolutely no good to develop a time schedule if it is not followed.

Check the schedule against the clock as you finish each issue of the essay. If you are behind schedule, shorten the analysis of the next issues to get back on schedule. If you are ahead of schedule, give more extensive rule statements, analysis and citation of facts in the remaining issues to use the extra time you have.

PRACTICE CHECKING THE CLOCK at the end of each issue in practice exams. This has to be practiced until it becomes a regular habit.

MODIFY to meet your personal needs AFTER you are proficient in this approach. You can relax your approach and may be able to eliminate the timing from the outline altogether eventually. But start out with a timed approach first to develop a "feel" for how much time to spend on each issue.

> ***Famous Last Words:*** *"I nailed the first one. It was exactly what I studied, and I did a whole blue book on it. But that last one was a real race horse. There just wasn't enough time."*

Chapter 8: Organizing the Answer

STATE THE PARTIES!

NEVER try analyzing two defendants at the same time like this: "Paul v. Tom and Dick"

For contract and tort essays start with a heading that states the parties to the dispute, plaintiff first and defendant second as follows:

Paul v. David

For crime essays say "State v. _____" as follows:

State v. Don

If there are two or more plaintiffs, or two or more defendants, analyze the rights, liabilities and defenses of each pair separately. After you have concluded the issues for the first pair present a new caption for the second plaintiff-defendant pair and discuss the issues that pertain to them:

Peter v. Debbie

Once you state the parties (e.g. Paul v. David) discuss all issues and defenses between those two parties and don't restate these same parties switching their names around backwards.

Usually it is best to discuss the various parties in the order in which they appear in the fact-pattern, but if they have alphabetical names (e.g. Adam, Bob and Charley) you might consider discussing them in that order.

ORGANIZATION BY STRUCTURE OF CALL.

If the call of the question is STRUCTURED, it indicates the organization of the answer, and you must follow that organization EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. What remedies does W have against Y?*
> *b. Can W bring an action against X?*
> *c. What defenses can X raise?"*

Then, discuss your issues within the order of this framework. **For example**, the structured call above may result in the following answer structure:

"a. What remedies does W have against Y?
1. Consequential damages?
2. Restitution?
3. Specific Performance?

b. Can W bring an action against X?
4. Intended Third Party Beneficiary?

c. What defenses can X raise?"
5. Statute of Frauds?
6. Impossibility?

GENERAL ORGANIZATION BY AREA OF LAW.

Generally, except as noted below, if the call of the question is general, such as "Discuss," the organization of issues in your answer should follow the pattern of the question. That means that the first issue suggested should be the first issue discussed, the second issue suggested should be discussed second, and so on.

However, the "issues suggested" depend on the AREA OF LAW, and for each area of law there are certain issues that should be considered and discussed in a specific order.

Organization of a CONTRACT Answer.

If the question involves contract law, and there is no structured call because the CALL just says "discuss", then your answer should be in the following form:

1) Start with an introductory statement that allows you to define a contract. The preface might also list the basic elements of a valid contract, but that is optional.
2) Next consider discussing whether the UCC applies or only common law. If the UCC applies, discuss whether the parties are MERCHANTS.
3) Next is a written contract required by the STATUTE OF FRAUDS or UCC?
4) At this point, determine what type of contract question you have. There are SIX BASIC TYPES OF CONTRACT QUESTIONS, but most questions combine these elements:

   a) FORMATION (Was a contract formed?),
   b) TERMS (What were the terms?),
   c) THIRD PARTIES (Who can enforce?),
   d) BREACH (Who breached first?),
   e) DEFENSES, and (What defenses can be raised?)
   f) REMEDIES (What remedies are available?)

   If the question is a FORMATION or BREACH question your answer should go through all communications between the parties CHRONOLOGICALLY to determine if and when the contract formed and/or when the contract was breached.

   If the TERMS are in dispute, common issues are: Which communication was the OFFER? Which was the ACCEPTANCE? Does the UCC apply? What terms were MATERIAL ALTERATIONS? Are the parties MERCHANTS? Was there an

enforceable MODIFICATION? Was there was a WAIVER of a condition? Or was there an ACCORD AND SATISFACTION?

The question of THIRD PARTIES depends on whether there was communication of a valid ASSIGNMENT, DELEGATION, or if there was a communicated intention at the time of contract formation for benefits to flow to third parties.

Discuss each major DEFENSE as a separate issue. A common issue is whether there was a writing sufficient to satisfy the Statute of Frauds or UCC.

Usually REMEDIES should be discussed from the perspective of the non-breaching party but sometimes you have to discuss the remedy of the BUYER separately from the remedy of the SELLER. If the property is UNIQUE a non-breaching buyer may ask for SPECIFIC PERFORMANCE. Non-breaching parties have a right to LEGAL RESTITUTION to prevent unjust enrichment by the breaching party instead of an award of damages. Breaching parties can plead for EQUITABLE RESTITUTION.

For example if, "Able agreed to paint Baker's house by September 1 for $4,000, and then Able assigned the painting contract to Charley who did not finish the painting until October 1," the structure of the answer would be:

Start with an introductory statement defining "contract."

Baker v. Able

1) Was TIME OF THE ESSENCE? [8]

2) Did Able effectively ASSIGN his rights under the contract? [9]

3) Did Able effectively DELEGATE his duties? Effect on his liability?

4) Was there a BREACH? Major or minor?

5) Baker's REMEDY?

Baker v. Charley

6) Does Baker have standing as a THIRD PARTY BENEFICIARY? [10]

7) Baker's REMEDY?

[8] Nothing indicates discussion of the UCC is called for so that issue is skipped. Further, it is clear this is not a "formation" question either. But tardy performance is a breach, so it is a good idea to discuss whether time was of the essence so you can easily conclude whether the breach is major or minor.

[9] Note that if someone who has a duty to perform "assigns" a contract two issues are raised – assignment and delegation.

[10] The third party beneficiary issue arises from every "delegation" because Baker is an intended third party beneficiary of the Able-Charley delegation contract.

Organization of a TORT Answer.

A tort answer should be structured by each plaintiff versus each defendant, sequentially (e.g. A v. B followed by A v. C and then perhaps D v. B).

1) Discuss INTENTIONAL torts (mnemonic = ABC-FITT) before NEGLIGENCE.
2) Define INTENTIONAL in the first intentional tort issue.
3) Discuss PASSIVE DEFENSES (based on absence of an element of the tort) as part of your analysis of each tort issue itself.
4) Discuss AFFIRMATIVE DEFENSES (such as self-defense) as separate issues following the intentional tort discussion.
5) Discuss NEGLIGENCE in almost every essay unless intent is clearly shown.
6) Discuss the AFFIRMATIVE DEFENSES of CONTRIBUTORY NEGLIGENCE, COMPARATIVE NEGLIGENCE and ASSUMPTION OF RISK following almost every negligence analysis.
7) If DEFAMATION issues are raised you will have to define and discuss negligence briefly in order to apply *Sullivan v. New York Times*, etc.

For example, if "Ted dared Bob to throw at him. Bob threw at Ted, missed and hit Henry," the structure of the answer would be:

> ***Ted v. Bob***
>
> *1) Is Bob liable for TORTIOUS ASSAULT?*
>
> *2) DEFENSE OF CONSENT?*
>
> ***Henry v. Bob***
>
> *3) TORTIOUS BATTERY?*
>
> *4) Bob liable for NEGLIGENCE?*

Introductory Statement for NEGLIGENCE Questions.

For questions that are negligence questions and do not suggest any intentional torts, an introductory statement can be beneficial because it allows you to define "negligence" at the very beginning of the essay and then treat each element of negligence as a separate issue.

> *"The rights and remedies of the plaintiff would be determined by the law of negligence. Negligence is a failure to act as a reasonable person would in the same circumstances. But whether the plaintiff can prevail in a negligence action generally depends on whether she can prove DUTY, BREACH, ACTUAL CAUSE, PROXIMATE CAUSE and DAMAGES."*

Organization of a CRIME Answer.

If the question involves criminal law, your answer should be structured by the "STATE" versus each DEFENDANT. [11] Usually you should start with the FIRST defendant who committed a crime. But you might also start with the defendant that committed MOST crimes. After completing analysis of all crime issues relevant to that defendant, the analysis of the remaining defendants usually is reduced to questions of accomplice liability.

1) Discuss SOLICITATION if there is any urging by one party to cause another to commit an illegal act. Do not discuss if there is no evidence of urging.
2) Discuss CONSPIRACY before discussing the crime that is the goal of the conspiracy (if the crime is "receiving stolen property" or some other crime that requires two defendants you must define and discuss the Wharton Rule.)
3) Focus on INTENT and the CONVERGENCE of criminal intent (mens rea) with criminal acts (actus reus).
4) Discuss PASSIVE DEFENSES (based on absence of an element of the crime) as part of your analysis of each crime issue itself.
5) Discuss AFFIRMATIVE DEFENSES (such as self-defense) as separate issues in most cases.
6) Discuss MURDER after all lessor crimes such as robbery, but before MANSLAUGHTER. Focus on MALICE.
7) Discuss MANSLAUGHTER as an alternative lessor offense that both the prosecution and defense might argue as a fallback position to a murder charge.
8) Discuss the liability of secondary or marginal defendants second, with a focus on ACCOMPLICE and CONSPIRACY LIABILITY.

For example, if "Crazy Fred wanted to rob the bank, so Dick gave him the gun he used," the structure of the answer would usually be:

> ***People v. Fred***
>
> *1) CONSPIRACY?*
>
> *2) ROBBERY?*
>
> *3) DEFENSE OF INSANITY?*
>
> ***People v. Dick***
>
> *4) ACCOMPLICE LIABILITY?*

There is no need to discuss solicitation because there is no evidence of an "urging". The defense of insanity is suggested by the nickname "Crazy Fred". And the "hint" that Dick "helped Bob" knowing he intended to rob the bank makes him an accomplice, an "accessory before the fact".

[11] You could also use "People v. Defendant" instead of "State v. Defendant".

Chapter 9: Stating the Issue

An "issue" is a legal or equitable claim, charge, plea or defense (usually disputed or disputable) that can be settled by a single rule or definition of law that requires proof of a limited number of "legal elements".

Phrase the Issue for an EASY DETERMINATION.

The best phrasing for the issue statement depends on the area of law: Set up your issue as a "straw man" so that you can easily "knock it down" by identifying the elements, showing the facts support the elements, and thereby go on to consider other issues. Avoid phrasing an issue in a way that forces a conclusion that necessarily precludes discussion of other necessary issues.

Issues should be narrow and not so overbroad they turn on more than one rule of law.

Good Issues:

- Offer by Bob on May 1?
- Can Tom be charged with burglary?
- Can Al claim self-defense?
- Nuisance?
- Promissory estoppel?

Overbroad Issues:

- Rights of Bob?
- Valid contract?
- Defenses of Dick?
- Crimes of Paul?

Issues Structured by Call.

If the question has a structured call, reflect that call in your answer with the "issues" organized to support that overall organization.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. What are the rights and remedies of B?*
> *b. What defenses can A raise? "*

Your answer should be structured with the issues like this:

B v. A
a. Rights and Remedies of B
1. (first issue)
2. (second issue)

b. Defenses of A
3. (third issue)
4. (fourth issue)

General Issue Structure.

Number issues with ARABIC numbers. And UNDERLINE the entire issue statement. The issue can either be written out like "Did Bob make an OFFER on May 1?" or they can be abbreviated to a single word like "OFFER?" Writing the main word in UPPER CASE brings it to the reader's attention.

Don't use Roman numerals or letters for issue statements because they waste time.

Use a question mark? The issue should be a disputed or disputable claim so mark it with a question mark (?).

Match Issue Numbers to Your Outline. The numbers on the issues should match the numbers on your outline. That helps prevent you from accidentally skipping an issue you intended to write about.

Examples:

1) *OFFER on 6/1?*
2) *STATUTE OF FRAUDS?*
3) *TORTIOUS ASSAULT?*
4) *BURGLARY?*
5) *CRIMINAL ASSAULT?*
6) *INSANITY defense?*

Phrase Issues for EASY ANSWERS. Phrase issue statements so they are easy to answer! Make the issue a "straw man" with clear elements that you can easily "knock down" by proving the elements.

Contracts Issues. In FORMATION and BREACH issues, always cite the communications CHRONOLOGICALLY, citing the time or date of each communication. For REVOCATION the issue is whether it was an EFFECTIVE revocation. For "firm offers" and MODIFICATION the issue is whether CONSIDERATION is necessary or adequate.

Contract Issue Examples:

1) *Was letter of 6/1 an OFFER?*
2) *Was letter of 7/1 an ACCEPTANCE?*
3) *STATUTE OF FRAUDS require a writing?*
4) *modification supported by CONSIDERATION?*
5) *ANTICIPATORY BREACH?*
6) *Duty to MITIGATE?*
7) *Did Seller have TIME TO CURE?*
8) *DAMAGES?*

Tort Issues. Generally discuss the torts suggested in the fact pattern CHRONOLOGICALLY, often citing the time or date of each tortious act to keep them straight.

Every intentional tort involves an INTENTIONAL ACT so DEFINE that term.

For CONSENT the issue is often whether it was an EFFECTIVE consent.

Tort Issue Examples:

1) *TORTIOUS BATTERY of B?*
2) *CONVERSION of the car?*
3) *TRESPASS to B's Land?*
4) *NEGLIGENCE?*
5) *CONTRIBUTORY NEGLIGENCE?*

Crime Issues. Always consider the issues to be whether defendants can be "charged," NOT whether they are "guilty" so it is easier to state a firm conclusion., unless the CALL specifically asks if they are "guilty". The defendant can almost always be charged with the crime.

If the CALL does specifically ask if the defendants are "guilty" focus your attention on whether critical evidence is missing from the fact patter.

Avoid concluding the defendant is "guilty" of murder, because it blocks you from discussing manslaughter. Just say he can be "charged" with murder, then you can also argue he could be charged with manslaughter as well.

Refer to assault and battery as "criminal assault" and "criminal battery" to make it clear you recognize this is not a tort issue.

Always analyze "assault" as a separate crime and a separate issue from "battery". In other words never consider "assault and battery" as a single issue.

When the issue is a defense, ask if the defendant can "raise" or "claim" the defense, not whether he would be "innocent."

Crime Issue Examples:

1) *Can A be charged with CRIMINAL ASSAULT?*
2) *LARCENY?*
3) *Can A be charged with BURGLARY?*
4) *Can A be charged with ARSON?*
5) *MURDER?*
6) *SELF-DEFENSE?*
7) *VOLUNTARY MANSLAUGHTER?*
8) *Defense of INSANITY?*

Famous Last Words: *"I found him guilty of conversion. What did you get him?"*

Chapter 10: Nailing the Elements – The HEART of the Essay

The heart of every law school or FYLSX essay is the ANALYSIS, and the key to analysis is **NAILING THE ELEMENTS.** This means to

1) State an ISSUE raised,
2) Cite LEGAL AUTHORITY for a rule,
3) State the LEGAL RULE with clear **ELEMENTS** to be proven, and then
4) PROVE that **HERE** EACH and EVERY ELEMENT of the rule can be proven **BECAUSE** a relevant **SUPPORTING FACT** exists in the fact pattern.

A heart of NAILING THE ELEMENTS consists of 2 parts:

1) State the ELEMENTS of the RULE, and
2) NAIL (prove) each ELEMENT of the rule with a QUOTED FACT.

NAILING THE ELEMENTS is the easiest thing to do, and it produces the greatest benefit. Yet some students simply refuse to do it. Those students are usually referred to by other students in the past tense.

Follow This Order:

1) Cite the AUTHORITY.

This is mandatory on a Bar Exam and it is a good habit to start in law school. Show the grader that you know the area of law that applies. This is a good approach to citing a CASE (Palsgraf, Peerless, etc.), a STATUTORY SCHEME (the UCC, etc.), or a LEGAL CONCEPT (Statute of Frauds, etc.). TELL THE GRADER THE LEGAL AUTHORITY your answer is based upon.

To do this, start your answer with the word "Under …" and cite the authority for your rule of law.

Examples:

1) *Under common law …*
2) *Under the Statute of Frauds …*
3) *Under the UCC …*
4) *Under tort law …*
5) *Under Palsgraf …*
6) *Under New York Times v. Sullivan…*

2) State the LEGAL RULE.

Generally you should state together all rules of law that apply to the issue FIRST in ONE SPOT. Do not "dribble" the rule out in bits and pieces here and there in the analysis.

The grader is looking for the RULE to follow the ISSUE. You must put the rule where the grader expects to find it. Follow the IRAC approach -- put the RULE right after the ISSUE.

Until you get familiar with this approach it is very beneficial to underline the rule elements that must be proven. You can stop doing this later after you have made "nailing the elements" a firm habit. But when you are first learning HOW TO WRITE exams, underlining the ELEMENTS in the rule will help you focus on WHAT YOU NEED TO PROVE.

Examples of Legal Rules with Elements Underlined:

1) *Under contract law an OFFER is a manifestation of present contractual intent sufficiently certain as to terms that an objective observer would reasonably believe assent would form a bargain.*
2) *Under the MIRROR IMAGE RULE of common law an acceptance is an unequivocal assent to the terms of an offer.*
3) *Under the Statute of Frauds a contract for sale of LAND must be in WRITING.*
4) *Under tort law NEGLIGENCE is a failure to exercise that degree of care which a reasonably prudent person would use in similar circumstance.*
5) *Under common law a BURGLARY is a breaking and entering of a dwelling in the night with intent to commit a felony or larceny, but modernly the elements of night and dwelling have commonly been eliminated.*

3) NAIL EACH ELEMENT OF THE RULE WITH A FACT. This is the single MOST COMMON REASON PEOPLE FAIL THE BAR.

Remember, IF YOU DO NOT NAIL, YOU WILL FAIL!

You must show that each ELEMENT is PROVEN BECAUSE there is a FACT provided to prove it. "Nail" each element with a fact from the question by using the following form:

"Here [the ELEMENT of law is PROVEN] *BECAUSE* "[some FACT is given]". [12]

Try to Use One "Because" for Each Element. Use the word "because" and give a "quoted fact" for each and every element in the rule. If the rule has four elements, there often should be four "because"s and four "quoted facts".

You can combine two or more elements into a statement and otherwise modify this approach. But this general approach MUST be used. For example, you might write, "Here Dan committed a homicide because he "shot and killed Vick"."

If you follow this "Here … because … "quote"" approach, you will AUTOMATICALLY focus on each element of your rule and to the facts that prove that element.

[12] Avoid saying, "Here…Here…Here…" Instead, say something like, "Here…And…Also…Further…"

4) Give a SIMPLE CONCLUSION.

This is the least common problem area. All students are too quick to cite conclusions. The simplest approach is to state, "Therefore…"

About the only error one can make in citing a conclusion is to be WIMPY or WISHY-WASHY.

> ***WRONG: "****Bob may or may not be charged with burglary."*
>
> ***RIGHT:*** *"Therefore, Bob can be charged with burglary."*

Skeleton of NAILING Approach Structure.

Your essay should have this skeletal form:

Explanation :	Written Structure :
[Numbered, underlined issue statement]	*1.* [ISSUE as word, phrase or easy question]*?*
[Cite Authority]	*Under* [Authority],
[State Rule with each Element underlined.]	[The rule is] Element 1, Element 2, etc.]
[Address each Element by saying "Here…" The Element to be proven is underlined again. Then say **"because"** and quote a Fact to prove the element of the rule.]	*Here* [Element 1, underlined] *is proven/shown to be true* ***because*** ["Fact 1", Quoted].
[Repeat for each additional Element.]	*And* [Element 2, underlined] *is proven/shown to be true* ***because*** ["Fact 2", Quoted]. Etc.
[Give a terse and definite Conclusion]	*Therefore,* [ISSUE is true/false/proven.].

Examples of Proper Analysis:

Example 1: If the question says, "Bob forced the lock on the window and climbed into the house in the moonlight to take the purse. What is his criminal liability?"

Analyze burglary as follows:

> *"STATE v. BOB*
>
> *1. Can Bob be charged with BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony. But modernly a burglary is generally any trespassory entry of any structure with intent to commit any felony or larceny.*

Here there was a breaking into the house because Bob "forced the lock." And Bob entered because he "climbed inside". Further Bob entered a dwelling of another because it was someone else's "house", and it was at night because it was by "moonlight". And Bob entered the house of another with an intent to commit a larceny because he wanted to take a "purse" that was obviously not his.

Therefore, Bob can be charged with burglary."

[Note: The ISSUE is whether he can be "charged", not if he is "guilty". The elements to be proven are underlined in the rule. There are 7 elements analyzed, and each is underlined as it is analyzed. There are only 5 facts quoted, because some facts prove two elements. The word "because" appears 5 times, and that shows solid analysis.]

Example 2: Suppose the question says, "Bob told Jim, 'Shoot Tom.' "

Analyze solicitation as follows:

"STATE v. BOB

1. SOLICITATION?
Under criminal law SOLICITATION is the act of urging another to commit a crime.

Here Bob acted to urge Jim to do something because he said, "Shoot", and the act urged was a crime because it was to "Shoot Tom", a battery.

Therefore, Bob can be charged with solicitation.

[Note: There are only 2 elements to be analyzed. Each is underlined when addressed, and 2 facts are quoted, one for each element. The word "because" appears 2 times.]

Example 3: Suppose the question says, "Bob pointed a gun at Jim and took his watch."

Analyze robbery as follows:

"STATE v. BOB

1. Can Bob be charged with ROBBERY?
Under criminal law ROBBERY is a larceny, the trespassory taking and carrying away of the personal property of another with an intent to permanently deprive, from the person by force or fear.

Here Bob committed a larceny by taking the personal property of another because he "took Jim's watch". Bob intended to permanently deprive because it is implied by the facts. And, the larceny by Bob was from a person because he took the watch "from Jim." And Bob used force or fear to complete the larceny because he used a "gun".

Therefore, Bob can be charged with robbery.

[Note: There are 8 elements to be proven, and each is underlined. Each is addressed, but only 3 facts are quoted. There are no express facts to prove Bob intended to "permanently deprive" but you can simply say it is "implied" by the facts. This is a great and useful "dodge". The word "because" appears 4 times.]

An Example of Bad Form:

Bad essay answers are usually bad for a number of small reasons. Each of the little problems adds up to a big problem. Compare the bad answer below to the correct answers given above.

The question is: "Bob forced the lock on the window and climbed into the house in the moonlight to take the purse. What is his criminal liability?"

BAD ANSWER:

"BURGLARY:

> *The breaking and entering of the dwelling of another in the night with intent to commit a felony or larceny therein.*

Here Bob is guilty of burglary for forcing the lock on the window and climbing into the house in moonlight to take a purse. Bob would argue this is not burglary. There are no facts to show whose house it was. Clearly it was not his house. Therefore, Bob would be guilty of burglary."

This answer is bad for a lot of reasons. Put yourself in the grader's place. Pretend it is late at night and you have already gone through about 80 bad essays. You are tired of seeing bad essays. You are in no mood to cut any slack. Here is how you might feel about this essay:

"Hurumph. Starts with a sentence fragment, and no mention of criminal law, common law, or even that burglary is a crime. No elements underlined. What is she going to prove?

Doesn't mention the difference between common law and the modern rule of burglary, and says Bob is "guilty" in the first sentence without any analysis. Conclusionary.

Underlines "guilty" like that is important. Then restates all the facts for no apparent reason. No hint any element of the rule is proven by any particular fact.

No mention of Bob's intent at entry to the house, and says, "Clearly it was not his house." How does she know whose house it is? She doesn't even know whose purse it was. Doesn't mention a purse is personal property.

Underlines "to take a purse". Why? Someone must have told her to underline things so she is underlining on whim. Maybe she is underlining that because she wants to prove "intent to commit larceny" but no mention of larceny at all.

No proof of taking or intent to permanently deprive. This is a 60."

Chapter 11: Don't Give "Conclusionary" Analysis

The "BAD ANSWER" in the previous chapter is conclusionary. Law students are often told their answer is "conclusionary" but that term is seldom explained. Sometimes the student is told to "use the facts." That also is seldom explained.

A "conclusionary" analysis is one that jumps to a conclusion regarding an issue without any analysis of the facts needed to prove the elements of the legal rule. The conclusion is unsupported by evidence.

The identifying characteristic of a conclusionary analysis is that the word "because" never appears BECAUSE no FACTS are referred to.

Example: Suppose the question says,

> ”Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."
>
> A **CONCLUSIONARY** answer is --
>
> *"1. BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony.*
>
> *Here Bob broke and entered into a house, it wasn't his house and it was at night. He took a purse with intent to steal it. Therefore Bob can be charged with burglary.*

The conclusionary analysis jumps to a conclusion that the issue is proven by reference to the rule without reference to supporting facts.

Here you might argue there is some reference to the facts because the student writes that "Bob broke and entered a house". But there is no reference to a fact that proves he "broke" into the house. The word "because" is missing. The explanation, that "Bob broke" because he "forced the lock" is absent from the answer. The explanation that "Bob entered" a dwelling because he "climbed into the house" is missing.

In an essay there should be one "because" and at least one reference to the facts for every element of every rule. This rule can be relaxed after you have made “nailing the elements” a firm habit, but if there are few or no "because"s at all, and few references to the facts, the essay will become conclusionary and totally unacceptable.

Chapter 12: Don't "Restate Facts"

After law students are admonished to "use the facts" they are then chastised for "restating the facts". How can you "use the facts" without "restating the facts"? What does this mean?

The bad habit of "restating the facts" simply means that the student simply repeats the facts like a parrot without providing any analysis or explanation relating those facts to the elements of the rule that needs to be proven.

The identifying characteristic of an answer that simply restates facts is that the word "because" never appears BECAUSE no ELEMENTS are referred to.

An analysis which "simply restates facts" jumps to a conclusion that the issue is proven by reference to the facts without reference to the legal elements of the rule.

Example: Suppose the question says,

> "Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."
>
> An answer with **UNNECESSARY RESTATING OF FACTS** would be --
>
> *"1. BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony.*
>
> *Here Bob "forced the lock" on the "window" and "climbed into the house" in the "moonlight" to "take the purse," so Bob can be charged with burglary.*

The problem with this answer is that it jumps to a conclusion by simply repeating all the facts, but it does not relate any particular ELEMENT of law to any particular fact.

For example, it says "Bob forced the lock" but it does not explain that fact is important because it proves the element of "breaking". The explanation that Bob's forcing of the lock is important because it is evidence supporting the element of breaking is absent from the answer.

If an answer refers to a lot of "facts" but never uses the word "because" then it is unacceptable.

Follow the Yellow Brick Road.

The simple, mechanical way to improve essay analysis is to remember what Dorothy said when she went down the Yellow Brick Road in the Wizard of Oz -- "BECAUSE, BECAUSE, BECAUSE, BECAUSE, BECAUSE."

If you put one "because" in your analysis for each element in your rule, it will simply force you to cite BOTH FACTS AND ELEMENTS. This approach automatically, methodically, mechanically and simply forces you to write a better essay. It works for law school and it works for the Bar exams.

Chapter 13: Avoid "Paddling"

Many law students use “analysis” composed of alternative arguments from each side of a dispute. This "sing-song" approach is referred to as "paddling" because it is like paddling a canoe, first arguing the position of one party, then switching to argue the position of the other side. This can be effective at times, but it is usually inferior to nailing the elements.

Example of a Paddling Answer: Suppose the question says,

> ”Bob opened the unlocked window and climbed into the house in the moonlight. After he entered he took the purse."
>
> An answer with a "paddling" approach would be --
>
> *"1. BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony.*
>
> *Bob would say he didn't break in. The prosecution would say he did break and enter because he opened the window, broke the "plane" of the window and went in the house.*
>
> *Bob would argue that he didn't have intent to take anything when he went in the house. He would say he formed the intent later. The prosecution would argue that the reason he went into the house in the first place was to take the purse. They would say he had the necessary intent when he entered. The jury could go either way.*
>
> *Bob would argue that he didn't intend to permanently deprive. He might claim he was only going to borrow the purse. The prosecution would argue that he wasn't going to bring it back. There are no facts to show if he was bringing back the purse.*
>
> *Bob would say there are no facts to prove this was the dwelling of another. It is true that there are no facts that say this was not Bob's house, but the prosecution would point out that if this was not Bob's house, why else would he go in through the window and take a purse. They should be able to show it was not Bob's house.*
>
> *Therefore, Bob might be charged with burglary if it can be shown this is not his house.*

This "paddling" approach is not totally worthless, because it does focus on the facts and the elements of the rule. In fact, it is a good approach to follow when there is an element that is only supported by “arguable” facts. In that situation it provides a framework for explaining the strength and weakness of the supporting facts as viewed from each side. But it is simply overdone and often used where it is unnecessary.

And only the interpretation of given FACTS is “arguable”; the LAW IS NEVER ARGUABLE.

Probably the worst thing about this approach is that it gets really irritating to the grader. It is like listening to children bicker.

Chapter 14: Test Taking Mechanics

It is incredible the weird and stupid things law students do at examinations. The following comments cover the simple mechanics of preparing for and writing an exam. These points seem obvious but they are the reasons a lot of people fail law school and Bar exams.

If you work, take three days off for all first-year law school exams! For strange unknown reasons beginning law students are the most overconfident people in the world. Take three full days to study for each first-year law school exam. This is especially true of the first mid-terms. The first-year mid-term exams are the most important exams you will ever take. If you fail one of those first exams, you will be in a hole, on probation and at risk of expulsion for all the rest of your law school experience.

Write at least eight timed exams. That means you should spend at least 8 hours just writing essay answers. You can only physically write for about 4 hours a day, so this means you need to spend about TWO DAYS writing exams, getting your timing down and memorizing what to say.

Learn the mnemonics. If you don't know the mnemonics like COALL, CCCC, etc. you are the creek without a paddle.

Outline your answer and follow your outline! It does you no good to outline an essay answer if you are not going to use it.

Bring decent pens. Whether you handwrite the essay or type it, buy a small box of good, smooth writing black ink pens. DO NOT write an essay exam with colored pens or gummy old ink pens that give you writer's cramp and leak all over. I chided one student for using a crummy pen. He said he liked that pen. He just flunked the Bar for the fourth time.

Bring a Watch or Clock. Bring one or more watches or clocks that you can adjust to the hour so you can time your work. Start it when they say, "begin".

Use paragraphs, and lots of them. The "stream of consciousness" approach to writing does not thrill the grader. I don't think e e cummings was an attorney. Break your answer up into paragraphs of between one and four sentences.

Leave lots of blank space. Leave extra space between paragraphs, at the bottom of the page, and between issues. Leave space so that if you forget to mention an issue you will have room to go back and insert it.

Never switch defendants (or plaintiffs) in mid page. Start a new page.

Never start a new issue at the bottom of a page. Go to the top of the next page to begin a new issue. Don't be afraid to ask for and use a lot of paper.

Typewriter ribbons. Bring plenty of typewriter ribbons if you type.

Do the essays in order. If you are given three essays, do them in the order given. DO NOT think that you will improve your score by doing them out of order. It will NOT improve your score and it can cause a major disaster. **For example**, there can be a problem with the third question. If

everyone but you is doing Question 1 the proctors might find an ambiguity on Question 3 and make a timely announcement. That would save the day for everyone -- but you!

Further, if you are working on the same question as everyone else, you can feel their anxiety and the pace of their work. You can feel when a question is easy or hard. You can feel yourself getting behind on the time.

Print out each page of the essay as it is completed! If you type on a word processor, DO NOT wait to the end of the essay to print it out. If you have a power failure, you will be screwed. Print each page as it is finished!

Do not underline with the typewriter. Most typewriters underline too slowly. Use ALL CAPS to identify words you feel are important and underline them manually with a pen after the page is finished. This gives you a timely chance to review your answer too.

Get some sleep. It is absolutely counter-productive to study all night before the exam.

Don't get wired. It is a bad strategy.

> ***Famous Last Words:*** *"I didn't write any practice essays but I looked at the old exams."*
>
> ***Famous Last Words:*** *" I crammed all night."*
>
> ***Famous Last Words:*** *"I did the third question first. It seemed easier."*

Chapter 15: The California Baby Bar Format

The California First-Year Law Students' Examination (the FYLSX, or "Baby Bar Exam") is required for certain law students upon completion of the first year of law school.

Law students generally must take the FYLSX in the following situations:

1) They have not graduated from a 4-year university (do not have a "bachelor's degree");

2) They are enrolled in a correspondence or "distance learning" law school;

3) They are enrolled in an "unaccredited" law school (a law school that is not accredited by the California Bar Association and not "approved" by the American Bar Association);

4) They have finished the first year of law school with less than a "C" average (less than a 2.0 GPA); OR

5) They have finished the first year of law school and their law school requires them, for any other reason, to take the FYLSX as a requirement for continued study.

The exam is a one-day exam consisting of four essay questions in four hours, one hour per question, in the morning session from 8:00 a.m. to noon., and 100 multiple choice questions on the first-year subjects of **contracts, torts** and **criminal law** in three hours in the afternoon, from 1:00 p.m. to 4 p.m.

For many years the FYLSX exam essay questions have consisted of:

1) A COMMON LAW CONTRACT question,
2) A TORT question,
3) A CRIMES question, and
4) EITHER
    a) CONTRACTS-TORTS CROSSOVER,
    b) PRODUCTS LIABILITY, or
    c) UNIFORM COMMERCIAL CODE (UCC) question (Articles 1 and 2- Sales).

For many years the crimes question always involved a MURDER issue. That pattern was broken recently when one FYLSX exam did not involve a murder.

PRODUCTS LIABILITY situations are also frequently tested on the FYLSX. In contrast they are seldom tested on the California General Bar Exam (GBX). However, that pattern was also broken recently when one GBX exam did have a products liability question.

For UCC questions **every section of Article 2 is important!** So IMMEDIATELY BEFORE taking the FYLSX it is **essential that you review all of the sections in Article 2 of the UCC**. Recently there was a UCC question on the FYLSX that depended entirely on a rather obscure section of Article 2. Students who did not review all sections in Article 2 immediately before that exam were at a severe disadvantage.

On the FYLSX and all other Bar Examinations it is essential to identify the area of law upon which your answer is based. Therefore, it is important to develop a standard practice of **citing the authority** (applicable area of law) in your answer every time.

Likewise, whether you are taking a FYLSX, first-year law school exams, or the GBX it is essential that you count the issues because timing your answer is essential to avoid running out of time. **Do not run out of time!**

The information provided in this book is specifically written for the FYLSX based on **common law, UCC Articles 1-2, and broadly adopted modern rules**. As a result it is equally applicable to all essay questions on **Contracts, UCC/Sales, Torts and Criminal Law** on all law school and Bar Exams in all States.

Chapter 16: Essay Answer Formats – WHAT to Say and HOW to Say It

Before you walk into a law school or FYLSX, you **MUST** be able to recite, verbatim, prepared responses to a wide variety of potential questions. If you don't have prepared responses memorized, you are dead. You will not have enough time to think up a good answer on the spot. You will get "brain lock", run out of time on your essay answers, panic and your goose will be cooked.

You MUST be able to recite, from memory, the definitions and rules of MURDER, NEGLIGENCE, CONTRIBUTORY NEGLIGENCE, OFFER, ACCEPTANCE, and CONSIDERATION without hesitation or mental reservation. You MUST be able to state by memory some of the UCC statute NUMBERS.

Am I kidding? NO.

What if the professor says it is not necessary? Don't believe him. When the other students know it and you don't is he going to forgive you? NO.

Will any of the other students learn all this? YES. Will they tell you? NO, they will act like they don't know any more than you do.

How? You must develop this ability by repetition and practice. You must memorize and be prepared to recite a significant portion of the material presented in the following **Issues and Answers** if you are to succeed in passing your exams in Contracts, Torts and Criminal Law and the FYLSX.

The following chapters provide you with **EVERY ISSUE, AUTHORITY, DEFINITION and RULE** of law you need to be prepared for most questions. You can fake anything else.

Important Stuff. As you read through the following issue and answer formats, you may be overwhelmed with the feeling that, "There ain't no way in Hell I can memorize all of this." This is a natural reaction. But some of the following is more important than the rest, and the important portions will be identified and marked for you like this → **Important!** As for the rest, you should at least be able to fake it.

How to Memorize. The way to memorize the important portions of the following is like memorizing the Gettysburg Address -- read it, recite into a tape recorder, and play it back against the text. Do it naked if you have to. Sing it if you have to. Just do it.

The Text Format Used Here. In the following issue and answer formats, the text you should know and be prepared to produce is presented in *italics*. Additional information, comments and notes are presented in plain text.

Fake the Rest. You can't memorize everything. You can't know everything. You are human. So just listen in class, read a course outline and fake anything that is not in this book. But KNOW the definitions and rules that this book says are **Important!**

Four Ploys to Save You on an Exam:

When you are taking law exams you will invariably find yourself in perplexing and difficult situations. Here are four ploys you can use to get yourself out of a tight spot.

1. **"Actions Imply Intentions."** If no facts expressly state what the parties' intentions were at the time they acted, their actions (or lack thereof) imply their intentions.

   For Example: You are presented with facts that don't expressly say what a defendant's intentions were at some point in time. You can say, "The defendant impliedly did not intend to steal at the time of the breaking because she did not take the TV until the next morning."

2. **"The Courts Have Often Been Split."** If you are presented with an issue that you have either never seen before or else you recall reading something about it but can't remember which way the Courts decided the issue, you can always say, "The Courts have been split on this issue…" It sounds very "lawyer-like" and it is always true. Then you should probably discuss the "balance rule" and "reasonableness" standards presented below.

3. **"The Court Would Balance."** For almost every issue in every area of law there is some sort of "balance test". In these "balance tests" the Court considers the interests of the parties, the plaintiff and defendant, the interests of the Court itself, the interests of third parties, and the public interest. So if you don't know what the law is or what to say consider saying, "The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice." This sounds good, and you can make it up on the spur of the moment.

4. **"Reasonable expectations…reasonable behavior…reasonable person…"** For virtually every issue in every area of law the rule of law is based on what is "reasonable". Sometimes it is "reasonable expectations", sometimes "reasonable behavior", sometimes "reasonably foreseeable", and sometimes "reasonable person". But it is always "reasonable". So if you use the word "reasonable" liberally in describing the rule of law and the considerations of all concerned, you usually cannot go wrong.

   For Example: Putting this all together, suppose you are presented with some dispute that raises an issue that you have never seen before and don't know the law at all. You have to fake it. A good approach is to say, "The Courts have been split on this issue. The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice. The decision would depend on the reasonable expectations of each party in light of the reasonable needs of third parties and the impact on the Court. Here the reasonable expectation of …. And a reasonable person would believe… And it was reasonably foreseeable that… Therefore…"

Chapter 17: Answering Contract and UCC Questions

There are several basic types of contract essay questions. These types are often combined, and some issues can be skipped in some questions that do not call for their discussion. Some people recognize 4 basic contract question formats, but in this book I recognize 6 basic types:

1) **FORMATION QUESTIONS** – Raise issues of whether contract ever formed at all.
   Was there an OFFER?
   ACCEPTANCE?
   Manifestation of INTENT?
   Was the contract for a LEGAL PURPOSE?
   Supported by CONSIDERATION? [Seldom an issue on a UCC question!]
   Between parties with LEGAL CAPACITY?

2) **TERMS DISPUTES** -- What were the terms of the contract?
   Sufficiently CERTAIN that a court can enforce?
   Was there a MODIFICATION supported by consideration?
   Is a term or promised performance a MATERIAL CONDITION?
   Is a given term or promise INCLUDED or EXCLUDED from the agreement?

3) **THIRD PARTY QUESTIONS** -- Who has the right to bring an action?
   Were there THIRD-PARTY BENEFICIARIES?
   Was there a VALID ASSIGNMENT?
   Was there a VALID DELEGATION?

4) **DEFENSE QUESTIONS** – Focus on defense issues.
   Statute of Frauds satisfied?
   Lack of consideration?
   Illegal purpose?
   Rights of underage party?
   Fraud? Duress?

5) **BREACH QUESTIONS** – Focus on the issue of who breached first?
   Anticipatory breach?
   Major or Minor breach?
   Waiver?

6) **REMEDY QUESTIONS** – Raise issues of what each party can recover and how.
   SPECIFIC PERFORMANCE?
   RESTITUTION (quantum meruit concepts)?
   RIGHT TO CURE?
   COVER?
   FAILURE TO MITIGATE?
   ESTOPPEL?
   SAVING DOCTRINES?

What NOT to Discuss.

If the contract question says, "Bob and Joe had a contract," DO NOT discuss whether or not Bob and Joe had a contract. Obviously they had a contract, because the facts just told you they had a contract.

If the question says there was a contract, it is a BREACH or REMEDY question and NOT a FORMATION question. So don't waste time discussing formation non-issues in these situations.

What TO discuss.

On the other hand, if there are a lot of questions back and forth about, "Will you take this?" and "Maybe I would accept that," then it is a FORMATION question that needs discussion of OFFER, ACCEPTANCE and so forth.

If the question says "oral agreement" then the STATUTE OF FRAUDS is a suggested issue. Conversely if the question says there was a "detailed written contract" the PAROL EVIDENCE RULE is suggested. [13]

Simply put, look at the facts presented as clues as to what you are to discuss and what not.

Mnemonics for Contracts Essays:

- **COALL** = The required elements of a valid contract -- Consideration, Offer, Acceptance, Legal capacity, Legal purpose.
- **MYLEG** = Contracts that require a writing -- Marriage, over a Year, Land, Executors of estates, Guarantors of debts. [14]
- **CCCC** = Consequential Damages -- Contemplated at formation, Certain in amount, Caused by breach, Couldn't be avoided.
- **DAM FOIL** = Parol Evidence Rule exceptions -- Duress, Ambiguity, Mistake, Fraud, Oral condition precedent, Illegality, Lack of consideration.

Why are These Important? Remembering these mnemonics helps you keep a mental checklist of things that might be ISSUES to discuss.

What is the application of UCC Article 2? UCC Article 2 governs contracts for the sale of goods.

What is a GOOD? A "good" is anything movable at the time of identification to a contract. [15] What does this mean? It means that if you can MOVE IT when you can IDENTIFY it to the contract. The UCC requires a writing for a sale of goods worth more than $500. [16]

---

[13] The Statute of Frauds and Parol Evidence Rule are like flip sides of a coin. If one is an issue the other cannot be an issue at all.

[14] Modernly UCC 2-201 governs contracts for the sale of goods, not the Statute of Frauds.

[15] Including special made goods, standing crops and timber, unborn animals, and minerals in the ground to be removed by the seller (e.g. oil to be pumped and sold by seller).

[16] This limit is being raised to $5,000 in some States. Other States still are using the $500 limit.

What is NOT A GOOD? Things that are not moveable (e.g. real estate), fungible items (STOCK, MONEY, NOTES, MORTGAGES, CONTRACTS) and intangible rights (PATENTS, COPYRIGHTS) are not goods. This is true even if the "right" is evidenced by a document that can be moved.

What PERSONAL PROPERTY is NOT A GOOD? Personal property is not a good if it is a "right" like copyrights or timber rights.

Law school professors often have questions that involve two dudes selling a car, a boat or a stereo without intending to create a "UCC" question. But these are GOODS because they are MOVEABLE at the time of identification to the contract, so the UCC applies.

What is NOT covered by Article 2 of the UCC? Contracts for services, stocks, bonds, or real property interests do not involve "goods", and are not governed by Article 2.

What is the application of UCC Article 3? UCC Article 3 (negotiable instruments) is not tested on many State Bar exams, but it does have one important section. Under UCC 3-311 an ACCORD AND SATISFACTION will generally be found, subject to certain exceptions, when there is a good faith dispute over a contract and one party tenders and the other accepts a payment designated to be "payment in full."

> **For example:** Bevis says Butthead owes him $100 and Butthead insists he only owes Bevis $50. Butthead sends Bevis a personal check for $50 that says "payment in full". Bevis cashes the check and writes on it "I object and insist you still owe me $50". Bevis is generally going to be bound to an accord and satisfaction and has no right to pursue his claim further. Understand this principal, and you may need to cite 3-311 on your exam.

What should you do on a contract exam? Unless the call is clear, define "goods", determine whether the item is a good, and say whether UCC Article 2 applies. If there are two companies named Buyco and Sellco, it suggests a sale of goods and they are usually, but not always, merchants. Be sure to explain why to the grader.

The Introductory Contract Statement. Contract essays often ask you to discuss the "rights and remedies" of the parties. This produces awkwardness on how to start. In these "right and remedy" situations start your answer with the following opening statement, <u>VERBATIM</u>:

> *"The rights and remedies of the parties here depend on whether or not they had a valid contract. A CONTRACT is a promise or set of promises, the performance of which the law recognizes as a duty and for the breach of which the law will provide a remedy."*
> **[important!]**

Skip or abbreviate this introductory contract statement to match the call of the question.

COMMON CONTRACT AND UCC ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general, such as "discuss the rights and remedies," list the issues as follows:

1. *Does UCC apply?* (**Important!** Always issue #1 if UCC applies, but maybe a "non-issue" otherwise!)

   Under contract law UCC Article 2 controls contracts for the sale of GOODS. Goods are movable things at the time of identification to the contract. [17] *Otherwise only the common law controls.*

   Here the agreement was NOT (is) for a sale of goods, because ….

   Therefore, only the common law (UCC) determines the rights of the parties here.

2. *Are the parties MERCHANTS?* (**Important!** Always issue #2 if UCC applies, but otherwise it is never an issue).

   Under the UCC a MERCHANT is a person who trades in or otherwise holds himself out by occupation or otherwise as knowledgeable about the goods of the contract. Further, a principal that employs an agent that is a merchant is held to be a merchant by implication. [18]

   Here the buyer is (not) a dealer in these goods because … And they are not a merchant by occupation or implication because…Further the seller is (not) a dealer in these goods because… And…Therefore …

3. *Was the communication of* [date] *an OFFER?* (only for a formation question. Watch out for advertisements because they are rarely offers and catalogues are NEVER offers! Skip this altogether if the question says they had an agreement or contract.)

   Under contract law an OFFER is a manifestation of present contractual intent communicated to the offeree such that an objective person would reasonably believe assent would form a bargain. [19] Important!

   If ONLY common law go on to say,

   At common law a communication was only deemed sufficient to constitute an offer if it specified the parties, subject matter, quantity, price, and time of performance.

[17] Be aware, and prepared to say, that special made goods, standing crops, timber, unborn animals and minerals in the land to be removed by the seller are also "goods".

[18] For a person in "business" to be a "merchant" they either have to DEAL in the goods that are the subject of the contract on a regular basis or else they have to be some type of "expert" concerning these goods or employ an "agent" who is an expert in these goods.

[19] The reason a "catalogue" is NEVER an offer is that a catalogue is, by definition, a price list without any specification of quantity.

If UCC say,

The UCC deems a communication sufficient to constitute an offer if it specifies the parties and quantity. The UCC provides "GAP FILLERS" that may be used by the Court to determine any additional terms.

Here the communication was (not) an offer because …

Therefore, the communication was (not) an offer. [20]

4. *Was the offer a MERCHANT'S FIRM OFFER?* (SKIP UNLESS the given facts suggest the offeree may be a merchant and has promised to "leave the offer open" for some period of time)

Under UCC 2-205 an offer by a merchant that promises to "leave the offer open" for a period of time cannot be revoked by the offeror if it is stated in writing, for the period of time stated, or for a reasonable period of time (given the circumstances) if no time period is stated. However, regardless of the period of time stated by the offeror, the offeror can revoke within 3 months if that is less than the time period stated.

If the merchant promises to "leave the offer open" for any period of time, whether more or less than 3 months, that is the "reasonable period of time" in which the offeree can accept the offer even if the offeror could legally revoke the offer sooner.

Here the offer was (not) a merchant's firm offer because…

Therefore this offer could (not) be revoked on …

5. *Was it an offer for a UNILATERAL CONTRACT?* (SKIP UNLESS the given facts make it entirely clear this is an intended issue or the offer is a GENERAL OFFER.)

Under the common law a UNILATERAL CONTRACT OFFER is one that unequivocally indicates acceptance can only be manifested by completion of performance by the offeree. GENERAL OFFERS, reward or bounty offers, are always unilateral contract offers. [21]

Here it is (not) unequivocally clear that the offeree can only accept this offer by completion of performance because….

Therefore this is (not) a unilateral contract offer.

6. *Was the communication (action) of [date] an (implied) ACCEPTANCE?* (SKIP if question says there was an agreement or contract.)

If ONLY common law, say,

Under the common law MIRROR IMAGE RULE an acceptance is an unequivocal assent to an offer. (However, acceptance can be implied by silent performance.) **Important!**

[20] Many law professors use the term "invitation to negotiate" but that has no specific legal meaning. It just means the communication was not legally sufficient to constitute an offer, so that is what you should say.

[21] Do not presume an offer proposes a unilateral contract unless it is a GENERAL OFFER. Otherwise, the offer must be unequivocally clear and if it is not all modern Courts will presume it is a bilateral contract.

If UCC say,

Under UCC 2-206 an acceptance of an offer not otherwise expressly conditioned may be made in any REASONABLE MANNER, including a promise to ship or shipment of either conforming or non-conforming goods. BUT a shipment of NON-CONFORMING goods as an EXPRESS ACCOMMODATION is not an acceptance. Further, UCC 2-207 allows an acceptance containing varying terms to be effective. [22] **Important!**

Here the communication was (not) an acceptance because …

Therefore, a CONTRACT WAS FORMED on [date]. (Or else the communication was a REJECTION AND COUNTER-OFFER on different terms.)

[Note: In a formation question if a contract is formed, it can ONLY be determined by the analysis of the acceptance – that is the only thing that can form a contract.]

7. *Did the VARYING TERMS become part of the contract?* (Only do this if there is a UCC question and the offeree cites a varying term.)

   Under UCC 2-207 varying terms will NOT be included in the contract where the parties are not both merchants. And even if they are both merchants the varying term still does not become part of the contract if the offer expressly limited acceptance and the offeror does not agree to the new term, OR if the varying terms materially alter the contract, OR if the party to be bound objects to the varying terms within a reasonable period of time.

   If the acceptance is expressly conditioned on the varying terms by the offeree, the response is effectively a rejection and counter-offer. Otherwise the varying terms are considered only "proposed modifications".

   Here the parties are (not) both merchants because… And the acceptance cited varying terms because… Further, the varying terms did (not) materially alter the contract because …

   Therefore…

8. *Had the OFFER LAPSED before acceptance was attempted?* (This issue is frequently tested and poorly taught.)

   Under common law an offer LAPSES AND CANNOT BE ACCEPTED unless it is accepted in a reasonable period of time. Oral offers are deemed to lapse at the end of the conversation, and written offers are deemed to lapse within the timeframe implied by the means of dispatch, absent contrary agreement or implication.

   Here the offer was oral (by fax, telegraph, mail, etc.) so it would be deemed to have lapsed when … Therefore the offer did (not) lapse before the offeree attempted to accept it.

[22] Pay attention to the difference between "I will" and "I can". In a UCC situation there is an ACCCEPTANCE if the seller says "it will" or "it would" supply the goods, and a REJECTION AND COUNTER-OFFER if the seller says "it can, but…" or "it could, but…" citing a varying term.

9. *Was the communication of [date] an EFFECTIVE ACCEPTANCE?* (SKIP if question says there was an agreement or contract. This is only a possible issue if there is an "acceptance" by "dispatch" that conflicts with some communication of rejection or revocation.)

   Under the MAILBOX RULES of the common law an acceptance is effective when dispatched, if dispatched in the manner specified in the offer, or by the same or faster means the offer was transmitted where the offer does not specify a means of communication.

   Here the acceptance was (not) effective upon dispatch (receipt) because it was (not) sent by the means specified in the offer (no means was specified in the offer and it was sent at the same or faster means than the offer had been sent).

   [Note: a unilateral contract offer can only be accepted by the requested performance, but NEVER assume the offer is for a unilateral contract offer unless it is unequivocal. Further, modern contract law provides SAVING DOCTRINES as stated below.]

   Therefore …

10. *Was the communication of* [date] *an EFFECTIVE REJECTION?* (SKIP if not applicable.)

    Under the MAILBOX RULES of contract law a rejection is effective upon receipt while an acceptance may be effective upon dispatch. An EXCEPTION is made if the OFFEROR CHANGES POSITION in reliance upon a communication of rejection, not knowing that an acceptance was dispatched prior to receipt of the rejection. In that case the rejection is effective upon receipt regardless of the fact an acceptance was also dispatched.

    Here the rejection was (not) effective because …

    Here the offeror (did not) change position in reliance on the rejection because…

    Therefore …

11. *Was the communication of* [date] *an EFFECTIVE REVOCATION?* (SKIP if not applicable.)

    Under the MAILBOX RULES revocation of a contract offer is usually effective upon receipt by the offeree.

    For an unequivocal unilateral offer also say, as appropriate,

    Under common law a unilateral offer could be revoked at any time, and revocation of GENERAL OFFERS, reward or bounty offers, was effective when published in the same manner the offer was first announced. But modernly SAVING DOCTRINES prevent the revocation of a unilateral contract offer if the offeror is aware the offeree has commenced the requested act for a reasonable period during which the offeree will be allowed to complete acceptance by performance.

    Here the offeror was aware the offeree had commenced the requested act because…

    Here the revocation was (was not) effective because…Therefore …

12. *Was there an IMPLIED-IN-FACT CONTRACT?*

Under contract law an IMPLIED-IN-FACT CONTRACT will be deemed to have existed, even if there is no express agreement between the parties, if one party acts to bestow benefits on the other party reasonably expecting to be compensated, and the other party knowingly accepts those benefits knowing that the other party expects to be compensated.

An implied-in-fact contract is an actual, legal contract. The party that knowingly receives the benefits is liable for a reasonable contract amount to the other party.

Here…because…Therefore…

13. *Is a WRITING needed?*

If ONLY common law governs say, [23]

Under the STATUTE OF FRAUDS certain types of contracts must be written in order to be legally enforced, and one type is a contract for (pick one if it applies here -- MARRIAGE, more than a YEAR, LAND, EXECUTOR of an estate, GUARANTEE of a debt). [24] **Important!**

If UCC say,

Under UCC 2-201, a contract for sale of goods worth $500 or more must evidenced by a writing sufficient to show the existence of a contract and signed by the party against whom the contract is to be enforced. But between merchants a SALES CONFIRMATION by one listing quantity will bind both parties if the receiving party does not object within 10 days. [25] **Important!**

Furthermore, the UCC provides exceptions for SPECIAL MADE GOODS, where there is an ADMISSION by the party to be bound that there had been an agreement, or where there has been PARTIAL PERFORMANCE of the contract (i.e. acceptance of some or all goods or payment).

Under UCC 2-209 contract modifications must be written to be legally enforceable if the contract, as modified, is for over $500. Otherwise modification agreements will be treated as waivers of conditions that can be always be retracted, unless the Court estops retraction to prevent injustice.

Here the contract is within (is outside) the statute because …

And the need for a writing was (not) satisfied because…

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[23] The reason I am saying "ONLY common law" is that even UCC contracts are subject to the common law in some manner, but contracts the UCC does NOT apply to will ONLY be controlled by common law.

[24] The mnemonic is MYLEG. The YEAR means from the date of execution until the earliest date the contract could possibly be completed according to its terms. The main issue when there is a GUARANTOR is the "main purpose rule". The main issue when LAND is concerned is whether the "seller" owns any interest in the land that is being conveyed to the "buyer". Note that modernly the a lease of real property for a year or less requires no writing.

[25] Note that the UCC is being modified and in some States this limit is $5,000 while in others it has still been kept at $500.

Therefore, there was (not) a need for a writing in order for the agreement to be legally enforced as a contract, and the requirement was (not) met because... [26]

[Note: The Statute of Frauds is not an "issue" at all when contracts are written. If contracts are oral, addressing the need for a writing early eliminates the danger of forgetting it later. Some professors demand discussion of the need for a writing toward the end of an answer in a "Defenses" section. But when oral contracts cannot be enforced at LAW the movants are forced to plead EQUITY and that will determine your entire essay structure.

If the Statute of Frauds is an issue, the Parol Evidence Rule cannot be an issue, and vice versa since the first is an issue when contracts are oral and the latter when they are written.]

14. *What were the CONTRACT TERMS?*

If an acceptance forms a contract, for common law say,

Under common law enforceable contracts generally must indicate PARTIES, PRICE, SUBJECT MATTER, TIME OF PERFORMANCE and QUANTITY. Most express terms and promises are considered to be EXPRESS MATERIAL CONDITIONS, except for TIME of performance, buyer SATISFACTION, and promises NOT TO ASSIGN the contract which are generally considered mere "covenants".

If an acceptance forms a contract, for UCC say,

Under the UCC a contract is enforceable if the QUANTITY and PARTIES are specified. Other terms will be provided by the GAP FILLER provisions of the UCC. All express terms and promises are treated as material terms under the PERFECT TENDER RULE.

Here the PARTIES to the contract were…, the QUANTITY was…, the PRICE was …, SUBJECT MATTER was.. , and TIME OF PERFORMANCE was …

Therefore, the contract was (not) specified enough to be enforceable.

15. *Was TIMELY PERFORMANCE a MATERIAL CONDITION?* (This is frequently tested and poorly taught. This is never a UCC issue because under the Perfect Tender Rule tardy performance is always a breach.)

Under contract law the parties may agree at the time of contract execution that timely performance (by the party to first perform contract services) is a MATERIAL CONDITION. Then the condition is called an EXPRESS CONDITION, and typically the contract says, "Time is of the essence".

But material conditions may also be or implied when the parties knew at the time of execution that tardy performance would deny the non-performing party the BENEFIT OF THE

[26] While "defenses" are often saved for the end of the essay, this one is so important it is best to address it early in the essay when you have plenty of time. If you wait to the end of the essay before you address this issue and run out of time it may be fatal to your law school career.

BARGAIN, the benefit expected when they entered into the agreement. In that case the condition is called an IMPLIED MATERIAL CONDITION.

Here the parties did (not) agree that "time was of the essence". And tardy performance would (not) deny the non-breaching party the benefit of the bargain because…

Therefore…

[Note: The INTENT of the parties at the time of execution is the court's only concern, NOT the actual EFFECT of tardy execution. If the contract concerns the performance of services that are frequently delayed by weather, transportation delays or other factors beyond the control of the parties the Court will generally assume timely performance was NOT a material condition unless the terms of the contract expressly say it is.]

16. *Was Buyer SATISFACTION a MATERIAL CONDITION?* (This is frequently tested and poorly taught.)

Under contract law reasonably satisfactory performance by the parties is ALWAYS AN IMPLIED MATERIAL CONDITON of every contract. However, the parties may agree that buyer SATISFACTION is a MATERIAL CONDITION so buyers who are not actually satisfied have no legal duty to pay.

But if the terms of the agreement do not expressly and unequivocally state that the parties intended for personal satisfaction to be a material condition, the Court will generally hold that a promise of "satisfaction" was merely a "covenant" to perform in a manner that would be satisfactory to a "reasonable person" and NOT a material condition UNLESS the service to be performed was one that is highly subject to personal tastes.

Here the parties did (not) expressly agree that "satisfaction" was a material condition. And the service to be performed was not one that is highly subject to personal tastes. **[Or else, *"But the service to be performed was one that is highly subject to personal tastes."*]**

Therefore…

[Note: The types of services that are highly subject to personal tastes are things such as portrait photographs and artistic renderings. Otherwise, a Court is generally going to interpret a promise of "satisfaction" to mean a promise (covenant) to perform in a manner satisfactory to a reasonable person, absent express, unequivocal language to the contrary in the contract.]

17. *Does the PAROL EVIDENCE RULE bar evidence of other covenants and terms?* (This is only an issue if there is a detailed written contract. This and the Statute of Frauds can almost never both be issues in the same fact pattern because usually the contract can only be either written or oral, not both at the same time.)

Under the PAROL EVIDENCE RULE evidence of PRIOR or CONTEMPORANEOUS agreements may not be introduced to VARY or CONTRADICT the terms of a FULLY INTEGRATED WRITING unless it is to show evidence of **[DAM FOIL]** *Duress, Ambiguity,*

Mistake, Fraud, Oral condition precedent, Illegality, or Lack of consideration. [27] *The Court may determine the "completeness" of a written contract by examining the comprehensiveness of its contents.*

Here …because…Therefore…

18. *Can LACK OF INTENT be raised as a defense?*

Under the OBJECTIVE MAN RULE, there is sufficient INTENT to enter into a contract if an objective observer listening to the parties would have reasonably concluded from their communications that assent would form a bargain.

Here an objective observer would (not) have thought the party to be bound intended to form a contract because…Therefore…

19. *Is LACK OF CONSIDERATION a defense?* (This is almost never a worthwhile issue in a UCC answer except for a modification scenario because the original contract always involves an exchange of goods for money so how can there be a lack of consideration at that point?)

Under contract law every valid contract, and any modification of a contract, must be supported by CONSIDERATION, a BARGAINED FOR exchange posing sufficient LEGAL DETRIMENT that the law will enforce the agreement. [28] **Important!**

For UCC modification say,

> *However, under the UCC a contract supported by legal consideration may be MODIFIED without additional consideration."*

Here the promised act was (not) bargained for because…

And there was (not) any legal detriment to the promisee because he had (did not have) a PRE-EXISTING DUTY to…

Further [party] was (not) totally denied the benefit of the bargain because…

Therefore, the contract did (not) fail for lack of consideration.

> **[Note: This is never a UCC issue as to the original contract because it is always a trade of money for goods (that is what makes it a UCC situation). So it can only be an**

[27] 90% of law students have no idea what an "oral condition precedent" is, and it is the most tested of all of these possibilities. It is an oral agreement that a contract party does not have to perform a stated contractual duty UNLESS the condition holds. It is like an oral agreement that you don't have to pay your student loans if you don't pass the Bar Exam.

[28] Consideration is an "exchange" or "quid pro quo" so any promise of a gift, or even an exchange between parties of promises to bestow gifts on each other, is not valid, legal consideration. The vast majority of Courts hold that "past acts" and "moral obligation" are NOT valid consideration. A promise exchanged for a promise is always considered adequate consideration, as long as each promise is not merely to do something that the other party already had a legal duty to perform. But if a party's promise is "illusory" or "empty" the contract is void from the beginning for "lack of consideration". And otherwise if a party fails to perform the promised duty so completely that the other party gets no benefit at all, that is a major breach and again the contract may be said to have failed for "lack of consideration".

issue in a "UCC question" when there is a modification of the original contract, and then no consideration is required so it is a marginal issue then, also.]

20. *Was the need for a WRITING SATISFIED?* (This second visit to the Statute of Frauds is only necessary if you did not settle the issue completely at the beginning of the essay OR there has been a contract modification.)

    As discussed above, this contract would have to be supported by a signed writing under the STATUTE OF FRAUDS (or UCC 2-201) sufficient to show the existence and required terms of the contract.

    For UCC modification say,

    > *Under UCC 2-209 contract modifications do not require consideration, but if a contract as modified would have to be supported by a sufficient writing under UCC 2-201, and the modification is not supported by a writing, it is not enforceable at law. However, the modification may be viewed by the Court as a WAIVER OF CONDITION that the waiving party has a legal right to retract, but the Court may estop the retraction of the waiver of condition to prevent injustice.*

    Here there was (not) a sufficient writing to enforce the contract (or modification) because… Therefore …

21. *Was the contract UNCONSCIONABLE?* (Never discuss this unless the given facts make it very, very clear it is an intended issue.)

    Under contract law an unconscionable contract will not be enforceable because there is NO REASONABLE FINDING OF INTENT to enter into such a contract. An ADHESION CONTRACT is a "take it or leave it" contract that a party is forced to agree to, and it will often be found unenforceable.

    Here the contract appears to be unconscionable because …Therefore …

22. *Is DURESS a defense?*

    Under contract law only good faith agreements are enforceable. No contract agreement induced by illegal threats is valid. Likewise, agreements induced by deliberate acts to create threats of economic harm are not enforceable. [29]

    Here the contract may be argued to be unconscionable (or the result of duress) because…

    Therefore …

[29] You are unlikely to ever see a question that suggests threats of physical harm because the answer is too easy. But remember that a contract creates legal duties to perform so a threat to breach a contract is an illegal threat. Any agreement that results is the result of "economic duress" and is unenforceable.

23. Is FRAUD (or DECEIT) a defense?

Under contract law a contract induced through deliberate CONCEALMENT of material facts by a party with a duty to reveal the facts, or by a party deliberately concealing and/or MISREPRESENTING material facts is unenforceable if it can be shown the party seeking to void the contract would never have agreed to the bargain but for the concealment and/or misrepresentation. [30]

Here there was (not) fraud because …Therefore …

24. Is INCAPACITY a defense?

Under contract law a contract cannot be enforced AGAINST one who lacks capacity. EXCEPTIONS are contracts for provision of NECESSITIES of life and where the incapacitated party attains capacity (becomes sane or an adult) and either AFFIRMS or FAILS TO REPUDIATE the contract. [31]

Here the party seeking to avoid the contract was a MINOR (or ADJUDICATED INSANE perhaps) at the time the contract was executed because… And (But) the contract was not (was) for necessities of life because… [32] *And (But) the party to be bound did (not) ratify the contract because…* [33]

Therefore, this contract could (not) be enforced.

25. Is ILLEGALITY a defense?

Under contract law, a contract generally cannot be enforced by a party who knowingly entered into it for an illegal purpose. If the parties are equally guilty, IN PARI DELICTO, the court will generally not intervene. However, if one party is less guilty, the court has discretion to order restitution in equity.

Here … because …Therefore …

26. Is IMPOSSIBILITY a defense?

Under contract law a material condition of every contract is that performance of contract duties must be objectively possible to perform. The inability of a contract party to perform is irrelevant, as long as performance, in general, is possible. But if performance becomes impossible because of events beyond the control of the parties the contract becomes void. [34]
Here … because …Therefore …

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[30] Fraud based on misrepresentation is easy to claim but hard to prove because the movant has the burden of proving the other party intended to defraud them at the time of contract. But fraud based on concealment is much easier to prove because the movant usually only has to prove that the other party knew the facts, had a duty to reveal the facts, and did not reveal the facts.

[31] Note that a contract with an incapacitated party is VALID but possibly unenforceable against that party.

[32] Necessities of life means food, shelter, clothing, medical care, etc. NOT legal representation.

[33] If a previously incapacitated party continues to enjoy the benefits of a contract after the incapacity is removed they may be deemed to have "impliedly ratified" the contract.

[34] A MATERIAL CONDITION of every contract is that performance is not required if it is impossible. Impossibility does not have to be "unforeseeable". It just has to result from events beyond the parties' control.

27. Is COMMERCIAL IMPRACTICABILITY a defense?

A Court (a judge, in equity) has the authority to declare a contract void if performance by a party would be so financially burdensome, because of events beyond the control of the parties, that it would cause an injustice. Here…because…Therefore…

28. Is FRUSTRATION OF PURPOSE a defense?

Under contract law, if the parties enter into a contract knowing that the failure of some condition beyond their control will deny one of the parties the benefit of the bargain, that condition is an implied material condition of the contract, the failure of which excuses both parties from the agreement .[35] *Here … because …Therefore …*

29. Is MUTUAL MISTAKE a defense?

Under PEERLESS when both parties enter into a contract because of a misunderstanding as to a material fact, there is no "meeting of the minds" and the contract is void from the beginning. [36] *Here … because … Therefore …*

30. Is UNILATERAL MISTAKE a defense?

Under contract law, when one party enters into a contract because of a misunderstanding as to a material fact the majority view is that the parties are legally bound to the contract unless the other party knew or should have known of the mistake, and in that case the contract is voidable by the mistaken party. Under a minority view the contract is legally voidable by the mistaken party in any event if they 1) discover the mistake quickly before the other party substantially relies on the contract, 2) give prompt notice of the mistake, and 3) reimburse the other party for any expenses caused by the mistake. [37] *Here…because…Therefore….*

31. *Was there an ANTICIPATORY BREACH?* (If there is also a WAIVER of the breach, discuss both issues together.)

Under contract law an anticipatory breach (or anticipatory repudiation) is a CLEAR STATEMENT OR INDICATION that a party WILL NOT PERFORM future contractual duties when they become due. This is a major breach as to those duties, the non-breaching party is EXCUSED from performance of all remaining contractual duties, and the future duties of the breaching party are ACCELERATED to the present.

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[35] This is a second example of failure of an IMPLIED MATERIAL CONDITION. The famous case was the renting of an apartment to see the procession of the newly crowned king. When the king became ill the rental contract was without purpose. Lack of foreseeability was not necessary. All that is needed is that both parties know the purpose of the party seeking to void the contract, and that that party had no control over the failure of the condition.

[36] A mutual mistake means that BOTH parties shared a misunderstanding of facts that were material to the purpose and effect of the contract, and in that case the contract is void from the beginning. For example, if A agrees to sell a painting to B, and both think the painting is by Picasso, then the contract will be void from the beginning if the painting is not by Picasso.

[37] Under the majority view a mistaken party that breaches will be legally liable for "expectation" and "reliance" damages of the other party unless they can obtain equitable relief. But under the minority view (based on the California case of *Elsinore v. Kastorff*) the mistaken party can legally rescind and is only liable for the "reliance" damages.

If a party has a REASONABLE BASIS to believe the other party may not perform future contractual duties, the party may demand REASONABLE ASSURANCES and REFUSE TO PERFORM until they are provided. Reasonable assurances generally means a financial guarantee or payment into escrow.

If reasonable assurances are properly demanded and not provided, the failure to respond constitutes an anticipatory breach.

Here there was (not) an anticipatory breach because the party said "…." and that (did not) make it clear they were not going to perform. That did (not) form a reasonable basis for (the other party) to demand reasonable assurances because… Therefore…

32. *WAIVER of the breach?* (Discuss if anticipatory breach is ignored by non-breaching party.)

Under contract law if a non-breaching party lets the breaching party continue performance after a major breach it WAIVES THE BREACH. [38] *The waiver cannot be revoked, and the non-breaching party is forever ESTOPPED from citing the breach as major and can only cite it as a minor breach. Here … because …Therefore…*

33. *Was there a BREACH OF IMPLIED COVENANT?*

An IMPLIED MATERIAL CONDITION of every contract is that the parties must act in good faith and are bound by an IMPLIED COVENANT that they will act as reasonably necessary to help the other parties enjoy the benefits of the contract and that they will not act in any way to prevent that from occurring.

A breach of GOOD FAITH or acting in "bad faith" means either deceit, concealment or fraud at the time of execution or else the breach of an implied covenant. The mere breach of an express contract promise, even if done deliberately, is not a breach of good faith.

Here … Therefore…

34. *BREACH? MAJOR OR MINOR?* (Realize the first party to breach a contract is the breaching party and after that the other party is the non-breaching party no matter what they do later.)

For COMMON LAW say,

Under contract law a BREACH is a failure to perform a contractual duty when it becomes due. A MAJOR BREACH is either an act which deprives the other party of the BENEFIT OF THE BARGAIN or the violation of an EXPRESS OR IMPLIED MATERIAL CONDITION by a party, regardless of its effect on the other party. A major breach EXCUSES the non-breaching party from all further performance of contractual duties and ACCELERATES the future contractual duties of the breaching party to the present so the non-breaching party can seek IMMEDIATE PAYMENT OF DAMAGES.

[38] Technically this is an "election" and not a "waiver" but everyone calls it a "waiver of breach".

For UCC say,

Under the PERFECT TENDER RULE of the UCC any shipment of non-conforming goods is a breach of contract. There is no distinction between "major" and "minor" breaches.

For UCC DIVISIBLE CONTRACT SITUATION say,

Under the UCC a breach with respect to any shipment of goods under a DIVISIBLE CONTRACT does not constitute a breach of the entire contract. A DIVISIBLE contract is one under which goods are to be delivered in separate shipments which can each be evaluated separately under the contract.

Here … because …Therefore…

35. *EFFECT OF BREACH ON A DIVISIBLE CONTRACT?*

Under the UCC a breach with respect to any shipment of goods under a DIVISIBLE CONTRACT does not constitute a breach of the entire contract. A DIVISIBLE contract is one under which goods are to be delivered in separate shipments which can each be evaluated separately under the contract.

Here there was a divisible UCC contract because…Therefore…

36. *WAIVER of condition?*

Under contract law if a party performs a contractual duty that is subject to a condition precedent at a time the condition fails to hold, the party WAIVES THE CONDITION. But after a condition has been waived the waiving party has a legal right to retract the waiver. [39] *Nevertheless, a Court of EQUITY may estop the retraction based on considerations of equitable estoppel.* (UCC 2-209 adopts this same concept when oral contract modifications fail to meet the requirements of UCC 2-201. See "Is a Writing Needed?" above.)

Here … because …Therefore.

37. *Was there an ACCORD AND SATISFACTION?*

Under contract law an ACCORD AND SATISFACTION is binding on both parties if there is an agreement by the parties to settle a reasonable and good faith claim by one party that the other party has breached the original contract. [40]

Here a claim of breach was raised in good faith because … And it was reasonable because… And there was an agreement in settlement because…Therefore…

[39] For example, Bevis and Butthead have a labor contract that says Bevis will pay Butthead's wages on Fridays. Bevis' does not have any duty to pay Butthead unless it is Friday. But one week Bevis pays Butthead on Thursday. That "waives the condition" for that week. But Bevis does not have to pay Butthead every Thursday after that because he can "retract the waiver".

[40] Further, under UCC 3-311 acceptance or cashing a "check" marked "satisfaction in full" or something similar generally discharges all liability. There are exceptions, but this UCC provision reflects the common law view.

38. *Is the plaintiff an INTENDED THIRD-PARTY BENEFICIARY?*

Under contract law an INTENDED THIRD-PARTY BENEFICIARY is a party that can seek damages for breach of a contract between two other parties because the contract was INTENDED to benefit them.

An INCIDENTAL beneficiary, one that was not intended to benefit from a contract between others, has no ability to enforce the contract or seek damages.

Contracts can only be enforced by VESTED, INTENDED third-party beneficiaries that are DONEES, intended to benefit as a GIFT, or CREDITORS, intended to benefit by EXTINGUISHING A DEBT.

At common law vesting was a more demanding requirement than it is modernly. Under the modern view VESTING occurs if the beneficiary becomes aware of and relies on the existence of the contract.

Here ___ was (not) an intended third-party beneficiary because… And he (did not) become vested because…

Therefore …

39. *STANDING based on a VALID ASSIGNMENT?* [41]

Under contract law an ASSIGNEE can seek damages for breach of a contract from the contract promisor if the assignee was EXPRESSLY ASSIGNED the rights of an original promisee, the ASSIGNOR, by EXPRESSION OF CLEAR INTENT.

An assignment BECOMES EFFECTIVE when the assignee gives the promisor NOTICE of the specific rights assigned. When the assignment becomes effective the promisor is liable only to the assignee and the rights of the original promisee/assignor are EXTINGUISHED.

If the assignment was in exchange for CONSIDERATION given by the assignee to the promisee/assignor, the assignment is IRREVOCABLE, and it creates a legal contract between the assignee and the promisee/assignor. That contract creates implied warranties 1) that the rights assigned exist, 2) that the promisee/assignor has the authority to assign them, and 3) all documents provided are bone fide. The assignee may seek legal damages from the assignor for a breach of warranty.

If the assignment was GRATUITOUS it is REVOCABLE until the assignment is made 1) in writing, 2) a token chose is delivered, or 3) detrimental reliance makes revocation inequitable. A gratuitous assignment creates no implied warranties and can only be enforced in equity.

Here … because …Therefore …

[41] If a question says a party that has a current duty to perform (e.g. to build a house) "assigned the contract" to another party that is going to perform the promised duties, then both an ASSIGMENT of rights and a DELEGATION of duties are implied. These should be discussed as two separate issues.

[Note: Assignment, delegation and other third-party questions require that you identify the parties and explain all of the rights and liabilities each party has against the other parties. That usually takes so much time that there is little time left for anything else.]

40. *VALID DELEGATION of performance?*

Under contract law the duty to perform under a contract may be DELEGATED to a DELEGATEE by an original promisor/delegator. However, the promisor/delegator remains primarily liable to the original promisee for performance of the contract. The delegation becomes EFFECTIVE when the delegatee agrees to perform the duties of the promisor/delegator.

If the delegatee accepts the delegation in exchange for CONSIDERATION, a legal contract is created between the promisor/delegator and the delegatee, and the original promisee is an intended third-party beneficiary of that contract. As an intended third-party beneficiary the promisee has standing to pursue legal actions against both the promisor/delegator and the delegatee.

If the delegatee GRATUITOUSLY accepts the delegation the delegatee has no legal liability to the original promisee and the promisee can only enforce the delegation agreement in equity by showing detrimental reliance.

Here … because …Therefore …

41. *Effect of ASSIGNMENT on CLAIMS AND DEFENSES?*

Under contract law a promisor may generally assert any claim or defense against the assignee that could have been asserted against the promisee/assignor. [42]

Here…because…Therefore…

42. *Effect of MODIFICATION AFTER ASSIGNMENT?*

MODIFICATION of a contract after it has been assigned is generally effective against the assignee if 1) the contract has not yet been fully performed, and 2) the modification is made in good faith and in accordance with reasonable commercial standards. The assignee acquires CORRESPONDING RIGHTS under the modified (or substituted) contract. [43]

[42] The provisions of UCC Article 9 expressly control this and establish various exceptions. But that Article is NOT TESTED on all Bar exams. So the rule statement above should be sufficient unless your State tests on Article 9.
[43] This is also a UCC Article 9 issue that is note expressly tested on all State Bar exams, but the issue could still arise.

43. COMMON LAW REMEDY of the NON-BREACHING PARTY? [44]

Under common law the non-breaching party has a right to COMPENSATORY DAMAGES calculated as the sum of 1) RELIANCE DAMAGES, out-of-pocket expenses the non-breaching party paid before the breach in reliance on the contract, 2) EXPECTATION DAMAGES, the expected benefits of the contract lost because of the breach, 3) INCIDENTAL DAMAGES, out-of-pocket expenses the non-breaching party paid because of the breach (e.g. storage costs) and 4) CONSEQUENTIAL DAMAGES, lost profits on collateral contracts that failed because of the breach. **[Note: Don't go into all of this in detail about the measure of damages unless the given facts give you the sort of detailed monetary loss information you need.]**

Non-breaching parties must prove their damages with substantial CERTAINTY, that they were CAUSED by the breach, and COULD NOT HAVE BEEN AVOIDED. This is sometimes called the DUTY TO MITIGATE damages.

If the breaching party has SUBSTANTIALLY PERFORMED, the non-breaching party is still obligated under the contract with an OFFSET for damages against the contract price. But if the breaching party is in MAJOR BREACH the non-breaching party is freed from all obligations under the contract and has a right to an award of all damages caused.

A non-breaching buyer of unique property such as land or services can also ask for an order of SPECIFIC PERFORMANCE to obtain title, possession or performance. There is no "right" to specific performance. It is an equitable remedy at the judge's discretion. Specific performance cannot be used to force performance of personal services by an individual because it violates the 13th Amendment, but an organization (e.g. corporation) may be ordered by the Court to perform unique services. … Here…because…Therefore…

44. CONSEQUENTIAL DAMAGES?

Under HADLEY V. BAXENDALE, a party to a contract may recover CONSEQUENTIAL DAMAGES such as LOST PROFITS expected from collateral contracts that fail because the contract was breached only if it can be shown the damages were **[CCCC]** *1) CONTEMPLATED (foreseen) by both parties at the time of contract, 2) CERTAIN (measurable) as to dollar value, 3) CLEARLY CAUSED by (resulting from) the breach and 4) the loss COULDN'T BE AVOIDED. … Here…because…Therefore…*

45. *COMMON LAW REMEDY of the BREACHING PARTY?*

Under common law a breaching party that has SUBSTANTIALLY PERFORMED has a right to recover the CONTRACT PRICE LESS AN OFFSET for damages caused by the breach. The remedy of a party in MAJOR BREACH is to seek RESTITUTION for AMOUNTS PAID and BENEFITS CONFERRED to the extent they exceed the damages of the non-breaching party, to prevent UNJUST ENRICHMENT. … Here…because…Therefore…

[44] It is usually best to discuss remedies from the aspect of the non-breaching party. Your explanation must be tailored to fit the particular facts. In the usual case there is substantial performance and the non-breaching party only has a right to an offset. If there is a major breach the non-breaching party has no obligation to pay anything except restitution to the extent they have benefited from partial performance.

46. *UCC REMEDY of the NON-BREACHING BUYER?*

Under the PERFECT TENDER RULE of the UCC a non-breaching buyer can either ACCEPT or REJECT non-conforming goods. Also they can REPUDIATE the contract and COVER, or they can AFFIRM the contract and DEMAND CONFORMING GOODS. The measure of damages is the excess, if any, of market or cover price over the contract price. If the goods are unique non-breaching buyers can ask for an order of SPECIFIC PERFORMANCE to obtain title and possession. There is no "right" to specific performance.

Here … because… Therefore…

47. *UCC REMEDY of the NON-BREACHING SELLER?*

Under the UCC a non-breaching seller can sell rejected but conforming goods at a PUBLIC OR PRIVATE SALVAGE SALE (with NOTICE TO BREACHING BUYER) and demand the excess, if any, of the CONTRACT PRICE over the SALVAGE SALE price.

Alternatively, in a LOST-VOLUME SITUATION where sellers cannot effectively sell the same goods to someone else, they can demand the BENEFIT OF THE BARGAIN of their "lost profits" – the excess, if any, of the CONTRACT PRICE over their cost of acquiring the goods.

And if the goods have been special made or for some other reason can not be sold elsewhere the non-breaching seller can "sue on the contract price" to get a judgment for that amount.

Here … because …Therefore…

48. *UCC REMEDY of the BREACHING SELLER?*

Under the UCC a breaching seller that GIVES NOTICE of an intent to cure has an absolute right to cure the breach WITHIN THE CONTRACT PERIOD, and also has a right to REASONABLE EXTRA TIME in which to cure beyond the contract period if non-conforming goods have been shipped with a reasonable belief they would satisfy the needs of the buyer.

Here … because…Therefore…

49. *Is the LIQUIDATED DAMAGES clause enforceable?*

LIQUIDATED DAMAGES CLAUSES specify that the sole remedy of the non-breaching party is a specified amount of money damages. These clauses are only enforceable if 1) DAMAGES arising from a breach were UNCERTAIN at the TIME OF CONTRACT, 2) the specified amount was REASONABLE at the time of contract, and 3) enforcement after a breach will provide a REASONABLE REMEDY for the non-breaching party.

Liquidated damages clauses in contracts for UNIQUE PROPERTY are generally UNENFORCEABLE because money damages are inadequate and SPECIFIC PERFORMANCE is appropriate.[45] *… Here … because …Therefore …*

[45] This is frequently tested and poorly taught. Liquidated damages will almost NEVER be a reasonable remedy for a non-breaching buyer if the contract is for unique property. But they are often enforceable against breaching buyers.

50. *Was there an IMPLIED-IN-LAW CONTRACT?*

An IMPLIED-IN-LAW CONTRACT is an equitable theory or "cause of action" which gives the Court discretion to provide an equitable remedy when there is no valid, legally enforceable contract if the moving party has acted to convey benefits to the responding party with a reasonable expectation of being compensated in return.

The Court may either award the amount necessary to prevent an unjust enrichment to the respondent, or the amount necessary to prevent frustration of the reasonable expectations of the movant.

Here…because…Therefore…

[Note: This argument should only be raised when no contract is otherwise enforceable at law. Perhaps there was a contract that violated the Statute of Frauds, there was a major breach, or the respondent lacked legal capacity. This equitable theory requires that the movant reasonably expected to be paid for services rendered.]

51. *Can PROMISSORY ESTOPPEL be pled?*

PROMISSORY ESTOPPEL is an equitable theory or "cause of action" which gives the Court discretion to provide an equitable remedy when there is no valid, legally enforceable contract or other legal cause of action but the moving party has acted in reasonable reliance on a promise by the respondent, the respondent intended to induce the movant to rely on the promise, and justice demands that the promise be enforced to some degree.

The Court may either enforce the promise or award the amount necessary to prevent an unjust enrichment to the respondent, or the amount necessary to prevent frustration of the reasonable expectations of the movant.

Here…because…Therefore…

[Note: This argument should only be raised when the movant seeks to enforce an express promise by the respondent and there is no basis for a tort action for fraud or deceit. Often the promise is a gift promise or an assurance the respondent will not assert some legal defense or institute some legal action.]

52. Can DETRIMENTAL RELIANCE be pled?

DETRIMENTAL RELIANCE is an equitable theory or "cause of action" which gives the Court discretion to provide an equitable remedy when there is no valid, legally enforceable contract or other legal cause of action, but the moving party has acted in reasonable reliance on EITHER deliberately false representations of fact by the respondent OR deliberately misleading behavior of the respondent done with intent to induce reliance by the movant, and justice demands that the promise be enforced to some degree.

The Court may award the amount necessary to prevent an unjust enrichment to the respondent, or the amount necessary to prevent frustration of the reasonable expectations of the movant.

Here…because…Therefore…

[Note: This argument should only be raised when there is no "promise" at all, and no other basis to claim either implied-in-law contract or promissory estoppel. The key element here is that the respondent must act (or refrain from acting) with deliberate intent to cause the movant to rely on either false statements of fact or else misleading behavior.]

53. *Is EQUITABLE RESTITUTION appropriate?*

EQUITABLE RESTITUTION is a remedy awarded by a Court of EQUITY when the parties have no adequate legal remedy. The purpose may be to compensate for injuries suffered, prevent unjust enrichment, prevent frustration of reasonable expectations, or restore the status quo.

Here … because …Therefore …

[Note: This issue should only be raised when the contract is not otherwise enforceable at law and a money judgment or other remedy is necessary to prevent injustice. Equitable restitution is a remedy (what the Court does), not an "equitable theory" or "cause of action" that justifies the remedy (why the Court does it).]

54. *Is SPECIFIC PERFORMANCE appropriate?*

SPECIFIC PERFORMANCE is an equitable remedy. It is an order of the Court directing parties to deliver possession and title to unique property. A business organization (not an individual) may also be ordered to provide unique services. This may arise out of an action base on a legally enforceable contract or out of an action based on an equitable theory (equitable cause of action). In either case, there is no "right" to specific performance but the Court (judge) has discretion to order it if award of a money judgment would not be an adequate remedy, perhaps because the property (or services) in dispute are unique.

Here … because …Therefore …

Note: The above issue statements provide almost every important issue, definition, rule and term that you will ever see on a CONTRACTS examination in law school or Bar exam. If you know the above issues and responses you have everything you really need. However, for Bar exams you should also briefly review the remaining UCC sections.

Practice Question 17-1

Lucy owned a rent house. She advertised it in the newspaper citing rent of $700 a month.

Homer saw the ad and called Lucy at 9:00 a.m. Homer said, "I saw your ad and accept your offer! I will be right there to pay you. I have to see the house, but would you consider $550?"

Lucy said, "It's a deal. I will rent to you for $550. This is a firm offer." Homer said he would be there in one hour to see the house.

Homer went 100 miles an hour to see the house, sideswiping Victoria. Victoria crashed and died along with her 7-month fetus.

At 3:00 p.m. Homer arrived, five hours late, ran up to Lucy and said, "I unequivocally accept. Here is my $550."

Lucy said, "I have decided not to rent to you."

Discuss the rights of Homer and Lucy's defenses.

Practice Question 17-2

Al had bought a lot of clothes over the years. One day he called tailor Bob and asked him to custom make him a tuxedo to wear to the wedding of his daughter Carla the next Sunday.

Bob told Al that he could not make a tuxedo so fast and suggested instead that Al buy a ready-made tuxedo that he had in stock in exactly Al's size. Al agreed and said he would be in to pick it up later that week. Price was not discussed.

Bob sent Al a note several days later stating, "This is to confirm your order to purchase the tuxedo. The price is normally $750, but for you the price is only $519.95."

Al was shocked at the price, but it was too late for him to get a tuxedo anywhere else on such short notice. He felt he had been taken advantage of, but there was nothing he could do.

Al came in and tried the tuxedo on the day before the wedding and it did not fit. Bob assured him not to worry. He would take it in. Al nodded.

Bob took in the pants and sent Al a note that said, "I took in the pants and it should fit you like a glove. With alterations the price is now $750.

Al was furious.

Carla's wedding was suddenly called off. Al never called Bob and never went to get the tuxedo. Bob was furious.

Does Bob have a right to be paid for the tuxedo? What are Al's defenses?

Practice Question 17-3

Groucho entered into a contract with new car dealer Harpo to buy a new Dodge for his brother Chico on his birthday. The agreed sales price was $25,000. Harpo promised the new car would be delivered by Chico's birthday within two weeks. Chico was ecstatic. Groucho made a down payment of $2,000 and promised to pay an additional amount of $23,000 plus interest for the car over a five-year period.

Harpo made a deal with another dealer, Swifty. Swifty agreed to deliver a Dodge of the type specified on time for Chico's birthday in exchange for an immediate payment of $20,000.

Swifty became insolvent, its inventory was seized and it did not deliver the Dodge.

Harpo blames Swifty.

Chico was upset he didn't get the car he expected.

What are the rights, remedies and defenses of Groucho, Harpo, Chico and Swifty?

Practice Question 17-4

When Al was in high school he wrote and copyrighted a rap song called "Dumb and Dead." He submitted his song to talent agent Tom. On January 1, two days before his seventeenth birthday, he and Tom reached a valid oral agreement that Tom could have exclusive recording rights until Al was 18 years old. Tom was to receive 25 percent of "sales."

Tom sent Al a signed, written "sales confirmation" of their agreement that gave all of the details of the agreement. The memo pointed out that records are "goods" under the UCC. After this Al performed completely under the terms of the agreement.

Tom pitched Al's song to Deccra Records telling them Al was 19 years old, an adult. Following negotiations by Tom, Deccra and Al signed a written agreement on March 1 that Al would receive 50 percent of gross record sales over the next three years. Deccra was aware that Tom would receive a portion of this money under his contract with Al.

Before Deccra paid anything it discovered Al was only 17. A Deccra executive secretly met with Al and told him the company would not stand by its first agreement, and an alternative agreement was proposed that would benefit both parties. Al agreed on April 1 to a new arrangement under which he got 40 percent of gross record sales, Deccra got 60 percent and Tom was cut completely out.

The song went straight to the top of the charts and Deccra's sales were $1.6 million in the next year. Of this amount Deccra paid Al $640,000, 40 percent of gross sales. Deccra's distribution expenses were $360,000, and it made profits of $600,000. Tom got nothing.

Tom got a lawyer and sued both Al and Deccra.

Al also went to a lawyer. Six months after becoming an adult on his eighteenth birthday he sued Deccra claiming he was a minor when the contract was signed. He demanded return of all remaining revenues, $960,000.

1) Was the contract of January 1 unenforceable by Tom because it was oral?
2) Was the contract of January 1 enforceable against Tom by Al?
3) Was the contract of March 1 enforceable by Al against Deccra?
4) Was the contract of April 1 enforceable by Deccra against Al?
5) If the contract of April 1 is legally unenforceable by Deccra, what equitable argument might it make?

Practice Question 17-5

Homeowner Homer orally agreed with builder Bill that he would pay Bill $100,000 to have a custom built home erected on the land that Homer already owned. They agreed the home was to be done before the winter rains set in.

When Bill was half done building, he discovered he had terminal cancer and would only live a few weeks.

Bill told Homer his medical expenses were so high he needed $30,000 more in order to hire a helper or it would be impossible for him to finish the home in time. Homer offered to pay Bill the extra $30,000 this would take because he was tired of living in a tent.

In reasonable reliance on Homer's promise, Bill hired his friend, Fred, and paid Fred wages of $30,000.

The home was all done except for the painting when Bill died. Fred split.

Homer demanded that Bill's widow, Wanda, as executor of Bill's estate, finish the house. She said it was impossible.

Wanda demanded payment of $130,000, but Homer was mad and refused to pay anything.

Homer paid painter Paul $10,000 to finish the painting of the home.

Discuss the rights and defenses of Homer and Wanda against each other.

Practice Question 17-6

Dottie's father Fester called her one day and told her he had suffered a stroke. He was paralyzed from the scalp down. He asked her to come live with him and take care of him. He told her that if, and only if, she took care of him for the rest of his life he would leave her his entire estate in his will, including his house. He emphasized that Dottie could only accept his offer by doing what he asked, and that she could not accept by merely promising to take care of him.

Dottie sold her home at a $50,000 loss and moved across the country to take care of Fester for the rest of his life. She gave up her $250,000 per year practice as a brain surgeon nursed Fester 24 hours a day, seven days a week. Similar care in a nursing home would have cost $40,000 per year.

After ten years Fester suddenly said, "I revoke! Get out of my house." Dottie sadly moved into a homeless shelter.

A month later Fester died leaving his estate, consisting of the house and 1 million shares of Microsoft, to TV evangelist, Reverend Melvin Huckster, and his Society for the Prevention of Cat Teasing.

Discuss:

1) Dottie's remedies at law relative to the stock?
2) Dottie's remedies at law relative to the house?
3) Her remedies for enforcement at equity?
4) Her remedies in alternative to enforcement?

Practice Question 17-7

Sellco sent Buyco a catalogue offering widgets at $6 with a 90-day warranty.

On 6/2/99 Buyco wrote Sellco and said, “We hereby accept your catalogue offer and order 10,000 yellow widgets for delivery by 6/8/99 with the standard 90-day warranty.”

On 6/3/99, Sellco called Buyco and said that they could provide the widgets, but without any warranty. Buyco verbally agreed.

On 6/4/99 Sellco sent a written message to Buyco saying, “This is to confirm your order of 10,000 widgets with no warranty.” Buyco never responded to this message or signed anything that agreed to waive the warranty.

On 6/8/99 Sellco shipped 10,000 blue widgets by mistake.

On 6/9/99 Buyco rejected the blue widgets and sent a letter saying, “You sent us the wrong product, you jerks. We had to buy from another supplier, and they cost us $5. You owe us $50,000."

What are the rights and remedies of the parties?

Chapter 18: Answering Tort Questions

There are 5 basic types of tort essay questions; issues can be skipped if the question does not call for their discussion.

1. **INTENTIONAL TORTS AND NEGLIGENCE** – Intentional torts are deliberate ACTS causing CONFINEMENT, FEAR, OFFENSE or other harm and negligence is a NEGLIGENT act causing harm. If both intentional torts and negligence are suggested by the facts, address the INTENTIONAL TORTS first and the possible defenses. Then address NEGLIGENCE second with the possible defenses to that cause of action.
2. **PRODUCTS LIABILITY –** Anyone who releases an UNREASONABLY DANGEROUS product into the stream of commerce may be held liable for any personal injury, property damage or other economic losses caused, but the extent of liability depends on the legal theory proven by the plaintiff.
3. **DEFAMATION AND INVASION OF PRIVACY** –Defamation is a false assertion causing damage to REPUTATION. Invasion of Privacy can be any of four theories for unreasonable acts causing EMBARRASSMENT or INCONVENIENCE.
4. **NUISANCE** – Nuisance is an unreasonable interference with the plaintiff's ability to enjoy and use private LAND or else to enjoy the use of PUBLIC resources.
5. **MISCELLANEOUS MALICIOUS TORTS -- MALICIOUS PROSECUTION / ABUSE OF PROCESS, INTERFERENCE WITH CONTRACT / INJURIOUS FALSEHOOD, DECEIT, TRADE SLANDER** -- Watch out for these. They are often too simple for an entire essay answer so they may be mixed in with intentional torts, negligence or other issues.

Mnemonics for Tort Essays:

- **ABC-FITT** = The intentional torts – Assault, Battery, Conversion, False imprisonment, Intentional infliction of emotional distress, Trespass to land and Trespass to chattels.
- **DARN COPS** = The intentional tort DEFENSES. Discipline, Authority of law, Recapture, Necessity, Consent, Others (defense of), Property (defense of), Self (defense of).
- **SCRAP** = DUTY can be based on Statute, Contract, Relationship, Assumption, and Peril caused (both a TORT and a CRIMES factor).
- **CLUB** = Slander per se – Crime, Loathsome disease, Unchaste behavior, Business practices
- **LAID** = Invasion of Privacy – false Light, Appropriation of likeness, Intrusion into privacy, public Disclosure of private facts.

Recommended Tort Essay Answer Strategies:

1. Discuss INTENTIONAL TORTS first and NEGLIGENCE second.
2. Always DEFINE "INTENTIONAL" in the discussion of the first intentional tort.
3. Discuss both intentional torts and negligence UNLESS it is CLEAR there was **NO INTENTIONAL ACT** done to cause the tortious event that caused the injury.
4. For ASSAULT and BATTERY be clear you are talking TORT and not CRIMINAL law.
5. BATTERY suggests an issue of ASSAULT and possibly INTENTIONAL INFLICTION.
6. FALSE IMPRISONMENT suggests an issue of INTENTIONAL INFLICTION.
7. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS is only for BYSTANDERS.
8. CONVERSION suggests TRESPASS TO CHATTELS.

9. DEFAMATION suggests NEGLIGENCE; separate analysis is often needed.
10. DEFAMATION and PRIVACY INVASION may be in the same question, but often not.
11. MALICIOUS PROSECUTION may suggest FALSE IMPRISONMENT.
12. ABUSE OF PROCESS often suggests a DEFAMATION issue.
13. Discuss the AFFIRMATIVE DEFENSES as separate issues.
14. For NEGLIGENCE, always discuss CONTRIBUTORY and COMPARATIVE NEGLIGENCE. Also maybe ASSUMPTION OF THE RISK.

COMMON TORT ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1. *ASSAULT?* [46]

   Under tort law ASSAULT is an intentional act done to cause and that does cause reasonable apprehension of a battery, a harmful or offensive touching of the person. **Important!**

   [Every "intentional tort" has the element of INTENTIONAL ACT! Always DEFINE "intentional act" in the definition of the FIRST intentional tort issue as follows:]

   An INTENTIONAL ACT is one done for the purpose of causing or with knowledge with reasonable certainty that it will cause the result that produces injury. **Important!**

   [ALWAYS state this in your discussion of the first intentional tort. For TORTS an act is intentional if it is done for the PURPOSE of producing a RESULT, or if the actors knows that result will almost certainly occur! But the result does not necessarily have to be injury. All that matters is that the result CAUSES injury.]

   Here … because…

   Therefore, the defendant may be liable for tortious assault.

2. *BATTERY?*

   Under tort law BATTERY is an intentional act to cause and does cause a touching of the person of the plaintiff resulting in harm or offense to the plaintiff. [47] **Important!**

   Here … because…

   Therefore the defendant may be liable for battery.

[46] Note that for "assault" and "battery" you can either call them "tortious assault" or "tortious battery" in the issue statement or else you can say "Under tort law…" in the rule. But somewhere you MUST make it clear you are talking about a tort and not a crime.

[47] Note that the "intent" of the defendant must be to cause a touching, and the touching must cause harm or offense, but the intent of the defendant does not necessarily have to be to cause harm or offense.

3. *CONVERSION?*

   *Under tort law CONVERSION is an intentional act to cause and that does cause interference with the chattel of the plaintiff resulting in substantial deprivation of possession. The proscribed legal remedy is forced purchase by the defendant, but the plaintiff may "waive the tort" and seek restitution instead***. Important!**

   Here … because… Therefore the defendant may be liable for conversion.

4. *FALSE IMPRISONMENT?*

   Under tort law FALSE IMPRISONMENT is an intentional act to cause and that does cause the plaintiff to be confined to a defined area without any reasonably apparent means of reasonable exit. [48] *Plaintiffs must actually know they are confined, but do not have to know the confinement is illegal.* [49] **Important!**

   Here … because… Therefore the defendant may be liable for false imprisonment.

5. *INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?*

   Under tort law IIED is an intentional, outrageous act by the defendant which causes the plaintiff severe emotional distress. **Important!**

   [Note: Here "intent" may be shown by EITHER the intentional commission of an outrageous act, regardless of intent, or by almost any act for the purpose of causing emotional distress. Any act is "outrageous" per se if the actual intent is to cause severe emotional distress. And a lack of intent to cause emotional distress is not a defense if the act itself is outrageous. But in any case the plaintiff must almost always present evidence to show they suffered extreme emotional distress (The sort of distress that requires medical or psychiatric care. Not just embarrassment or anger).]

   Here … because… Therefore the defendant may be liable for intentional infliction.

6. *TRESPASS TO LAND?*

   Under tort law TRESPASS TO LAND is an intentional act by the defendant causing an unauthorized entry onto, over, or under the land of the plaintiff. The defendant is liable for nominal damages and all actual damages caused by the entry.

   Here … because…

   Therefore the defendant may be liable for trespass to land.

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[48] A "reasonable person test" determines whether the confinement is without a "reasonably apparent means of reasonable exit."

[49] For example it is false imprisonment to illegally conceal a child away from its lawful guardian even though the child agrees to be concealed. The child lacks legal capacity to "consent" to being taken. And it is false imprisonment to keep a prisoner in jail after the scheduled (legal) release date, even though the prisoner is unaware they have a right to leave the jail. But it is NOT false imprisonment to keep a plaintiff illegally confined if the plaintiff is asleep, comatose, etc. and unaware of their situation.

7. *TRESPASS TO CHATTELS?*

Under tort law TRESPASS TO CHATTEL is an intentional act by the defendant causing unauthorized interference with or damage to the chattel of the plaintiff. The defendant is liable for actual damages measured as the lost rental value of the chattel, the rental costs for temporary replacement of the chattel, and the repair costs to repair the chattel, but usually not more than the actual cash value of the chattel.

Here … because… Therefore the defendant may be liable for trespass to chattels.

8. *TRANSFERRED INTENT?*

Under the tort doctrine of TRANSFERRED INTENT, a defendant who commits an intentional tort towards anybody generally becomes liable for every injury inflicted on everybody, even if the injury caused or the person caused injury is not the original intent. **Important!**

An exception is that Courts generally will not find IIED based on transferred intent, and Courts may find only negligence and not an intentional tort by transferred intent if the original intent of the defendant was not malicious. [50]

Here … because… Therefore the defendant may be liable for trespass to chattels.

9. *DAMAGES for TORTS?*

Every defendant that commits any tort is liable for all actual damages actually and proximately caused. Damages consist of SPECIAL DAMAGES, compensation for monetary losses, and GENERAL DAMAGES, compensation for pain, suffering, anxiety, emotional distress, inconvenience, etc. Defendants who commit intentional torts, including gross negligence (deliberate breach of duty) and recklessness (deliberate creation of unreasonable risks) may also be liable for PUNITIVE DAMAGES if the Court finds they acted with FRAUD, OPPRESSION or MALICE, an evil or wrongful intent to cause harm. Defendants who commit accidentally negligent torts are not liable for punitive damages. Tort plaintiffs have a right to "waive the tort" and demand RESTITUTION instead of compensation for damages.

10. *DEFENSE of DISCIPLINE?*

Under tort law a person with recognized authority (schoolteacher, bus driver, airplane pilot, policeman, parent, etc.) *is privileged to act reasonably given the circumstances in a manner that otherwise might constitute a battery or false imprisonment.* [51]

Here…because…Therefore…

[50] For example, Bevis and Butthead deliberately trespass onto Boomer's land to go hunting. Then Bevis accidentally shoots Butthead. Most Courts would not allow Butthead to claim battery by transferred intent merely because the "intentional trespass" against Boomer caused an injury to Butthead. Butthead may be required to claim negligence.
[51] EVERY defense requires REASONABLE acts. Your defense argument should stress "reasonable" throughout.

11. DEFENSE of AUTHORITY OF LAW (PREVENTION OF CRIME)?

Under tort law a person is privileged to act reasonably to prevent or stop a FELONY or DISTURBANCE OF THE PEACE from being committed in their presence. Police may arrest for misdemeanors committed in their presence and for felonies otherwise if based upon reasonable suspicion. [52]

Here…because…Therefore…

12. DEFENSE of RECAPTURE?

Under tort law a person has a qualified privilege to use reasonable force to RECAPTURE their own chattel if 1) they have asked for and have been refused return of the chattel, and 2) they are in fresh pursuit of wrongfully taken chattel, or 3) they lost possession of the chattel through no fault of their own.

Here…because…Therefore….

13. DEFENSE of NECESSITY? [53]

Under tort law a person is privileged to act reasonably as NECESSARY to protect their own safety, the safety of others, and the safety of property. For defense of property to be "reasonable" the value of the property being protected must exceed the damages caused by the efforts to protect it. Reasonable acts done to protect the property of others is a PUBLIC NECESSITY and absolutely privileged. Reasonable acts done to protect the defendant's own property are a PRIVATE NECESSITY and only a qualified privilege. The defendant remains liable for actual damages to the plaintiff.

Here…because…Therefore…

14. DEFENSE of CONSENT?

Under tort law FULLY INFORMED CONSENT from a person with legal capacity is a defense to most intentional torts, but is not a defense to a battery that causes foreseeable great bodily injury.

Here…because…Therefore….

[52] It is sometimes said that people who are not "police" have no right to stop or prevent "disturbances of the peace". This odd argument is contrary to common sense and experience. While the law does not encourage private parties to act they are police officers, it also does not punish people who act as reasonably necessary to protect innocent victims, prevent trespassing, theft and vandalism, and quell violent disturbances, even if the crimes being prevented are not technically felonies. If nothing else, these acts are defense of others, public necessity, and defense of property anyway.
[53] The defense of necessity is simply a combination of self-defense, defense of others and defense of property, but it more often is used only when property is being protected.

15. DEFENSE of OTHERS?

Under tort law a person is privileged to act reasonably as necessary to defend others who are NOT AGGRESSORS from harm. Aggressors are people who have unreasonably created or increased dangers to others. Courts are split when a defendant unknowingly acts to defend an AGGRESSOR. Under one view the defendant STEPS INTO THE SHOES of the aggressor and has no privilege because the aggressor could not claim self-defense. In other Courts the defendant is privileged to defend the aggressor in a fracas if they act with a REASONABLE BELIEF they are acting to defend an innocent victim of aggression.

Here…because…Therefore….

16. DEFENSE of PROPERTY? [54]

Under tort law defendants are privileged to use reasonable force to protect their property or the property of others. The use of deadly force to protect property is never reasonable or legal.

State something like the following if there is a suspected theft of goods or services:

Under the SHOPKEEPER'S PRIVILEGE a defendant may use reasonable force to detain a plaintiff for a reasonable period of time to investigate a reasonable suspicion that the plaintiff has stolen goods or services from the defendant.

State something like the following if there was a tortious injury to the defendant:

To protect litigation rights defendants may use reasonable force to as necessary to detain plaintiffs for a reasonable period of time to investigate events that have caused them damages. [55]

Here…because…Therefore…

17. SELF-DEFENSE?

Under tort law a person who is NOT AN AGGRESSOR may act reasonably if NECESSARY to protect their own safety. Modernly the person can "hold her ground" and has is no duty to retreat in most jurisdictions. Aggressors are people who have unreasonably created or increased dangers to others.

Here…because…Therefore….

18. DEFENSE of INFANCY, INSANITY or INCOMPETENCE?

INFANCY, INSANITY and INCOMPETENCE are not defenses for intentional torts.

[Watch for intentional torts by children or insane people! It is a criminal defense but not a tort defense because tort law is to compensate plaintiffs, not punish defendants.]

[54] This is effectively the same issue as "Defense of Necessity". "Defense of Property" more often is the stated issue when "deadly force" is a factor. "Defense of Necessity" is more often used when "public necessity" is suggested. And every property owner has a legal right to PREVENT TRESPASS TO THEIR LAND OR CHATTEL!

[55] When this is tested 90% of law students fail to grasp the obvious. Litigation rights are personal property.

19. NEGLIGENCE?

Under tort law NEGLIGENCE is a failure to exercise that degree of care that a reasonably prudent person would use in the same situation. To prevail the plaintiff must usually prove DUTY, BREACH, ACTUAL and PROXIMATE CAUSATION and DAMAGES. **Important!**

[Note: If negligence is just one of several issues in the question, the analysis of negligence elements can be contained within the issue of negligence.

If a question involves nothing but the cause of action for negligence, CONSIDER MAKING THE ABOVE AN INTRODUCTORY STATEMENT and then treat each of the elements (Duty, Breach, etc.) as a separate "issue".]

20. STRICT LIABILITY in NEGLIGENCE?

Under tort law a defendant that engages in any of three activities is STRICTLY LIABLE to any person who is actually and proximately caused injury. These three activities are: 1) keeping a KNOWN, DANGEROUS ANIMAL, 2) keeping an EXOTIC ANIMAL of a type that is not commonly domesticated, or 3) engaging in ULTRA-HAZARDOUS ACTIVITIES that are unusual, pose extreme risks to others, and are usually subject to strict safety regulations. [56]

If a defendant engages in these activities duty is presumed, and if anyone is caused injured as a result breach is presumed as well. Here…because…Therefore…

[Note: Product liability also can pose strict liability, but that is better addressed as part of a product liability analysis, not a "strict liability in negligence" analysis.]

21. DUTY?

Under tort law the general rule is that a person has no duty to act to defend others from harm. [57] *A DUTY to act to protect others from harm ONLY arises under five scenarios:* **[SCRAP]** *STATUTE, CONTRACT, RELATIONSHIP, ASSUMPTION or where PERIL to the plaintiff is caused by the defendant.* [58] **Important! Important in criminal law as well.**

[Go from here to either discussing negligence per se, duty based on peril or perhaps duty based on relationship, premises liability, etc. as appropriate.]

[56] Ultra-hazardous activities are things that average people simply never do. It is often just a matter of scale.
[57] Any statement that there is a "general duty to act reasonably to protect others from harm" is poppy-cock. There is NO GENERAL DUTY to act to protect others from harm.
[58] NOTE: Courts tend to limit liability to only those defendants owed the duty. There are three exceptions - when duties are based on PERIL, when the RESCUER DOCTRINE applies, or in the case of NIED.

22. NEGLIGENCE PER SE? [59]

Under tort law a DUTY may be created by a STATUTE (or rule), and violation of the statute is a BREACH of duty making the defendant NEGLIGENT PER SE if the purpose of the statute was 1) to protect the CLASS OF PEOPLE to which the plaintiff belongs by 2) preventing the TYPE OF INJURY that the plaintiff suffered. [60]

Here…because…Therefore….

23. DUTY BASED ON PERIL? [61]

Under tort law defendants that create reasonably foreseeable dangers to others have a DUTY based on PERIL to act reasonably to protect others from those dangers.

In PALSGRAF, CARDOZO argued that defendants who fail to act reasonably to protect others from the perils they have created should only be liable to plaintiffs who were actually in the ZONE OF DANGER at the time of their breach. The Zone of Danger is the area where the acts of the defendant created reasonably foreseeable dangers to others.

ANDREWS argued that defendants who fail to act reasonably to protect others from the perils they have created had always been liable to RESCUERS under the RESCUER DOCTRINE, whether they were in the Zone of Danger or not, (because "peril invites rescue") and the same principal should be applied to all plaintiffs actually and proximately caused injury by the defendants' breach of duty. [62] **Important!**

Here the ZONE OF DANGER was…because… [63] **[Note: See footnote 57!]**

24. DUTY BASED ON PREMISES LIABILITY? [64]

Under tort law OCCUPIERS OF LAND have a duty to both those who come onto the land and to those off the land. This is a form of duty based on RELATIONSHIP.

Under the common law occupiers of land had no duty to UNKNOWN TRESPASSERS.

The occupiers had a duty to warn and protect KNOWN TRESPASSERS and LICENSEES from known, hidden dangers and artificial conditions. Licensees are people allowed onto the land but not for the occupiers' benefit.

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[59] If a "statute" is mentioned in the question discuss NEGLIGENCE PER SE first before discussing duty based on PERIL. Usually the facts will not support a negligence per se finding – because it makes the answer too simple for an entire hour of examination.

[60] You may see a "rule" that is not a "statute" as when an employee works for a firm with a "safety rule." The employee ASSUMES the duty of obeying the rule by working at the job. And once assumed, the effect of the rule is the same as a statutory requirement.

[61] Duty is probably the most difficult element of negligence to prove and understand.

[62] I have read and re-read what Cardozo and Andrews said and I believe this is an accurate interpretation.

[63] It simplifies your answer if you define the ZONE OF DANGER and analyze just where it was in the situation presented. Was anyone in it? If there is nobody in the zone of danger there is no duty.

[64] Duty based on premises liability, a form of RELATIONSHIP DUTY, is the THIRD MAJOR basis after discussing negligence per se (duty based on STATUTE) and duty based on PERIL.

The occupiers had a duty to reasonably inspect the land and warn and protect INVITEES from known, hidden dangers and artificial conditions. Invitees are people invited or allowed onto the land for the occupiers' benefit.

Finally the occupiers of land had a duty to conduct and control activities on the land with due care to prevent injury to PEOPLE OFF THE LAND.

Modernly these rigid rules by classification have often been modified by both statute and Court decision to create a balancing test under which occupiers of land have a duty of due care to ALL PEOPLE to act as reasonable people would in inspecting, maintaining and using their property so that it does not pose known dangers to others.

Here…because….Therefore.

25. *ATTRACTIVE NUISANCE DOCTRINE?*

Under the ATTRACTIVE NUISANCE DOCTRINE an OCCUPIER OF LAND who knows that children have or may in the future trespassed onto her land has a strict duty to inspect for and eliminate any condition posing dangers the children might not fully appreciate because of their young age.

This is a duty based on RELATIONSHIP which poses almost strict liability. The only defense the landowner may raise is assumption of the risk.

Here…because….Therefore.

26. *LIABILITY BASED ON RESCUER DOCTRINE / FIREMAN'S RULE?*

Under the RESCUER DOCTRINE defendants may be liable to rescuers who are injured attempting to rescue people injured or placed in peril because of a breach of duty, even if the duty was not originally owed to either the rescuers themselves or those being rescued. This is an exception to the general rule that defendants are liable to those owed a duty.

But under the FIREMAN'S RULE defendants are generally not liable to professional rescue workers because they have ASSUMED THE RISKS associated with their professions.

Here…because….Therefore.

27. *BREACH of duty?*

Under tort law BREACH means that the defendant did not exercise the DEGREE OF CARE a reasonable person would use in the same circumstances.

In assessing "reasonableness" the STANDARD OF CARE that would be applied to the defendant is…

[Note: Normally little if anything has to be said about the STANDARD OF CARE. But, if the defendant is a CHILD engaged in childlike activities, the standard is the level of care a child of that age and experience would normally use. A child engaged in adult activities

is held to an adult standard. And if the defendant is (or represents self to be) a highly trained PROFESSIONAL, a higher standard of care applies. Also, the standard of MEDICAL CARE is the standard in the community or the nation (split opinions). But if the defendant is MENTALLY RETARDED, insane or ignorant, the standard of care is NOT LOWERED below that set for the average member of the community.]

Here there was a BREACH because a reasonable person in the same circumstances would have … [65]

28. *BREACH based on RES IPSA LOQUITUR?*

Under the doctrine of RES IPSA LOQUITUR an INFERENCE OF BREACH exists if 1) negligence by someone is implied by the facts, 2) the defendant had control of the event or instrument that caused injury, and 3) the plaintiff had no control over the event or instrument causing injury. [66]

Here negligence by someone is implied because… and the defendant had control over the event (or cause of injury) because… and the plaintiff had no control over the event (or cause of injury) because…

Therefore, BREACH could be inferred based on RES IPSA LOQUITUR.

29. *BREACH BASED ON NEGLIGENT ENTRUSTMENT?*

Under tort law defendants who NEGLIGENTLY ENTRUST third parties with resources or authority are directly liable for injuries actually and proximately caused as a result. [67]

Here…because…Therefore.

30. *RESPONDEAT SUPERIOR?*

Under the doctrine of RESPONDEAT SUPERIOR an employer, master or principal is vicariously liable for all torts committed by an employee, servant or agent, respectively, if the tort is committed within the scope of the employment or agency relationship. [68] *Respondeat superior does not apply to independent contractors.*

Here…because…Therefore.

[65] Often the best explanation of "breach" is simply to describe what MORE a "reasonable person" would have done that the defendant did not do.
[66] Turn to res ipsa loquitur when the plaintiff is the helpless victim of injury by UNKNOWN CAUSES.
[67] Typically the tested issue is whether a reasonable person would have entrusted the party causing injury.
[68] Typically the tested issue is whether the tort was committed within the scope of the relationship.

31. VICARIOUS LIABILITY for JOINT ENTERPRISE?

Under tort law each member of a JOINT ENTERPRISE is vicariously liable for all torts committed by other members within the scope of the enterprise relationship. A joint enterprise is one in which two or more parties agree to work together for mutual benefit and each shares equal rights of control over assets and activities. [69]

Here…because…Therefore.

32. LIABILITY for acts of an INDEPENDENT CONTRACTOR?

Under tort law prople who hire INDEPENDENT CONTRACTORS to perform duties that are not "non-delegable" by law are NOT vicariously liable for torts committed by the contractors and can only be directly liable because of negligent selection or negligent entrustment of the contractors. An independent contractor is a person selected to provide labor services without close and regular supervision [e.g. gardeners, housekeepers, house painters and babysitters that are not employed on an exclusive and continuous basis.] [70]

Here…because…Therefore.

33. The ACTUAL CAUSE or a SUBSTANTIAL FACTOR causing injury?

Under tort law the defendant is the ACTUAL CAUSE of injury if the plaintiff would not have been injured BUT FOR the acts of the defendant. [71]

If two or more defendants acted negligently, the plaintiff would not have been injured if neither had acted, and the plaintiff cannot reasonably prove she would not have been injured but for the acts of each alone, then each defendant is a SUBSTANTIAL FACTOR causing injury. [72] ***Important!***

Here the defendant was the ACTUAL cause of injury (or else a SUBSTANTIAL FACTOR) because …but for…

34. PROXIMATE CAUSE? [73]

Under tort law PROXIMATE CAUSE means that the injury suffered by the plaintiff was so DIRECT, NATURAL and FORESEEABLE, so close in time and place, resulting from a CHAIN OF CAUSATION begun by the defendant's acts, unbroken by UNFORESEEABLE INTERVENING EVENTS that the law will impose liability for the result. ***Important!***

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[69] Typically the tested issue is whether the parties had equal rights of control over assets and activities.
[70] The tested issues are whether the person causing injury is an employee or independent contractor, whether they were selected negligently or negligently entrusted by the defendant, and whether the duties were "non-delegable".
[71] Actual cause is the easiest element of negligence to prove and understand.
[72] It is not necessary to define SUBSTANTIAL FACTOR unless you are presented with the odd fact pattern where it is necessary because the plaintiff cannot prove she would not have been injured but for the acts of each defendant alone.
[73] Proximate causation often mystifies law students, but using the rule presented here for "unforeseeable intervening events" makes it substantially easier.

Generally if two or more events are actual causes of the plaintiff's injury, the last event will be an UNFORESEEABLE INTERVENING EVENT cutting off the liability of all defendants who acted earlier. However, it is a matter of settled law that negligent acts by others are FORESEEABLE so they can never be intervening events. Acts of nature [e.g. tornados] *and criminal or intentionally tortious acts by third parties* [e.g. thefts, batteries] *are presumed to be UNFORESEEABLE and will terminate defendants' liability unless extrinsic evidence shows defendants were aware the subsequent events were likely to occur.* [74] ***Important!***

Here there was (no) PROXIMATE CAUSATION because…

35. *EGG SHELL PLAINTIFF?*

Under the EGG-SHELL PLAINTIFF concept, defendants are liable for all damages they actually cause plaintiffs, even if the plaintiffs , through no fault of their own, have pre-existing conditions that make them especially vulnerable to injury. The doctrine of the law is that "defendants must take plaintiffs as they find them." [75]

Here…because…Therefore…

36. *CONTRIBUTORY or COMPARATIVE NEGLIGENCE?*

Under tort law CONTRIBUTORY NEGLIGENCE completely bars plaintiffs from recovery in some States if any negligence by the plaintiffs helped cause their own injury.

This often produces harsh results and these jurisdictions may use the LAST CLEAR CHANCE DOCTRINE to allow negligent plaintiffs to recover anyway if the defendants had the last clear opportunity to avoid the accident. For the same reason these States may also use the AVOIDABLE INJURY DOCTRINE to allocate the injuries between the parties if negligence by plaintiffs contributed to their injuries even if it did not help cause the accident, itself.

Other States use the COMPARATIVE NEGLIGENCE approach which does not bar the negligent plaintiff from recovery but reduces the plaintiff's recovery to reflect the degree of fault shared by the plaintiff. However, some States do bar plaintiffs from recovery if they are over half to blame for causing an accident.

Here … because…

37. *ASSUMPTION OF THE RISK?*

Under tort law ASSUMPTION OF THE RISK is a complete bar to recovery for negligence if 1) plaintiffs deliberately put themselves at risk 2) with full awareness of the risks and 3) a conscious acceptance of the risks. Here … because…

[Note: This is the only possible affirmative defense to a proven claim of Strict Liability or Attractive Nuisance Doctrine.]

[74] This is one of the most powerful decision making tools for both tort and crime analysis. Learn this one!
[75] This only applies to "conditions" over which the plaintiff had no control and did not unreasonably create themselves. Plaintiffs that are vulnerable to injury because of their own negligence are not "egg-shell" plaintiffs.

38. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (NIED)? [76]

Under tort law, a BYSTANDER to an event may bring an action for NEGLIGENT INFLICTION if they suffer severe emotional distress and there is a nexus between the negligent act and the injury based on a PROXIMITY IN TIME, PLACE and RELATIONSHIP. In some jurisdictions a physical manifestation of emotional distress must be shown. [77]

Here … because… Therefore…

39. PRODUCTS LIABILITY?

Under tort law anyone who RELEASES an UNREASONABLY DANGEROUS product into the STREAM OF COMMERCE is liable for PERSONAL INJURY or PROPERTY DAMAGE CAUSED. A product is UNREASONABLY DANGEROUS if the dangers it poses outweigh its utility given the commercial practicality for making it safer, without destroying its utility.

Liability may be established based on any of four theories: 1) BREACH OF EXPRESS WARRANTY, 2) BREACH OF IMPLIED WARRANTY, 3) NEGLIGENCE or 4) STRICT LIABILITY IN TORT. [78]

Under a BREACH OF EXPRESS WARRANTY theory the plaintiff must show the defendant sold goods with express representations (express warranty) which made them unreasonably dangerous, and that it was the actual and proximate cause of injury to the plaintiff.

Further, under a BREACH OF IMPLIED WARRANTY theory the plaintiff must show the defendant sold goods by representing they were safe for ordinary use or knowing the buyer's specific intended use (implied warranty), the goods were unreasonably dangerous for that use, and that it was the actual and proximate cause of injury to the plaintiff.

Under a NEGLIGENCE theory the defendant has a duty not to place unreasonably dangerous goods into the stream of commerce. The plaintiff must be a foreseeable plaintiff proximately caused injury by the negligent acts of the defendant.

And, under a STRICT LIABILITY theory the plaintiff must show the seller was a COMMERCIAL SUPPLIER, the product was unreasonably dangerous at the time it left the defendant's control, and the defendant is only liable for non-economic damages.

Here… because… Therefore …

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[76] Do not discuss NIED unless the plaintiff is a BYSTANDER who only witnesses or hears about some accident that injures another person. If the plaintiff is actually, physically involved in an event they have an action for NEGLIGENCE and can recover for their "emotional distress" as special damages.

[77] NOTE: This is an exceptional situation when Courts may extend liability to one who was not directly owed a duty.

[78] Because there are four theories of product liability, each with their own elements, essay questions often have two plaintiffs and two defendants. That produces four relationships and you are expected to compare and contrast how each product liability theory would benefit or fail to benefit each plaintiff or defendant.

40. DEFAMATION? [79]

Under tort law DEFAMATION is a FALSE statement of material fact PUBLISHED to others about the plaintiff CAUSING DAMAGE to REPUTATION. Defamation may be SLANDER, an oral statement, or LIBEL, a written statement. **Important!**

But many false statements are PRIVILEGED where the defendant speaks to defend a private interest, group interest or the public interest and does so without malice and in a reasonable manner calculated to defend that interest without unnecessarily harming the plaintiff. [80]

Injury to reputation will be presumed where there is LIBEL or SLANDER PER SE. SLANDER PER SE is found where the false statement alleges CRIMINAL behavior, LOATHSOME disease, UNCHASTE behavior or improper BUSINESS practices. **[CLUB] Important!**

Under NEW YORK TIMES and its progeny, a PUBLIC FIGURE PLAINTIFF must prove ACTUAL MALICE, that the false statement was made with knowledge or reckless disregard of its falseness, in order to recover in a defamation action. A PUBLIC FIGURE is a person who has acted to put themselves in the public spotlight. Further, where a matter of PUBLIC CONCERN is at issue, or where the plaintiff seeks punitive damages, the plaintiff must at least prove NEGLIGENCE. **Important!**

Here the statement was FALSE because … The defendant would dispute this because …

And the statement was NOT PRIVILEGED because (either no valid interest being protected, statement no made reasonably, or malicious intent)…Further, the statement was PUBLISHED because…Also the statement was ABOUT the plaintiff because … And the statement at issue was DAMAGING to reputation because… [81]

Therefore, the plaintiff would be able to establish a prima facie case of defamation.

[Now go through the CASE LAW AFFIRMATIVE DEFENSES as part of the defamation analysis.]

HOWEVER, the defendant would argue that the plaintiff is a PUBLIC FIGURE because… [82] *… Therefore, the plaintiff would have to show ACTUAL MALICE because …*

FURTHER, the defendant would argue that the subject was a PUBLIC MATTER because … Therefore, the plaintiff would have to prove NEGLIGENCE because …

Therefore…

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[79] Generally a defamation question takes an entire hour to answer so it seldom is combined with other issues except that it always involves the issue of "negligence" to some degree, and may suggest invasion of privacy. It is usually a mistake to discuss both defamation and false light concerning the same statement because if it is a statement that would damage one's reputation the issue is clearly defamation, not false light. If the statement does not damage the plaintiff's reputation but only causes embarrassment otherwise, it is not defamation and can only be false light.

[80] This is frequently tested and poorly taught. If a person has a good, valid reason to speak out, and is not motivated by malice, the statement is privileged even if the thing said turns out to be wrong later!

[81] Incorrect statements may not always damage reputations when compared to the actual truth.

[82] Any person who runs for political office, leads a cause, strives to become a celebrity, or places themselves in front of the television cameras and radio microphones becomes a PUBLIC FIGURE.

41. FALSE LIGHT?

Under tort law FALSE LIGHT is the tort of publishing a false portrayal of a person in a manner that would cause them embarrassment or inconvenience. [83]

Here…because…Therefore…

42. APPROPRIATION of likeness?

Under tort law APPROPRIATION is the tort of unauthorized use of the likeness of another person for personal gain in a manner that implies endorsement of a product or cause. [84]
Here…because…Therefore…

43. INTRUSION into the plaintiff's solitude?

Under tort law INTRUSION is the tort of unreasonable intrusion into the peace and solitude of another person. [85]

Here…because…Therefore…

44. PUBLIC DISCLOSURE OF PRIVATE FACTS?

Under tort law PUBLIC DISCLOSURE is the tort of unreasonably disclosing private facts that a reasonable person would find embarrassing. [86]

…Here…because…

HOWEVER, the defendant would DEFEND on the ground the facts revealed were PUBLIC FACTS. **[This is the main issue in these cases].**

45. PRIVATE NUISANCE?

Under tort law PRIVATE NUISANCE is an unreasonable interference with a person's use and enjoyment of their own land. In the MAJORITY view COMING TO THE NUISANCE is a consideration for the court and NOT A COMPLETE BAR to bringing a nuisance action.

Here B's use of her OWN LAND was INTERFERED WITH by A because…, and the interference was UNREASONABLE because…Therefore …

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[83] The best example of false light is false praise or false statements of fact that ridicule and embarrass but are not literally damaging to reputation -- like publishing articles saying Paris Hilton is a virgin.
[84] This is usually for business purposes, but it could also be for some other purpose like political advantage. Typically this gives rise to situations where the defendant has reaped a profit without really costing the plaintiff much. In that case the plaintiff "waives the tort" and seeks RESTITUTION, meaning that the plaintiff asks to be awarded the profits of the defendants instead of the injuries they have actually suffered.
[85] Here, as in so many legal issues, the key element AND YOUR WHOLE FOCUS OF ARGUMENT should be on the "unreasonableness" of the defendant's actions.
[86] Here, again, the key element is the "unreasonableness" of the defendant's actions. This sort of issue often involves private matters like past employment history and medical problems.

46. PUBLIC NUISANCE?

Under tort law PUBLIC NUISANCE is an unreasonable interference with a person's use and enjoyment of public resources. [87] *To have standing the plaintiff must show particular injury, greater than that suffered by the general public. …Here…because…*

HOWEVER, the defendant would DEFEND on the ground that the plaintiff has suffered no greater injury than the general public. **[This is the main defense issue in these cases]**

Therefore …

47. MALICIOUS PROSECUTION?

Under tort law a person is liable for MALICIOUS PROSECUTION if they have instituted or continued a criminal prosecution of another person out of malice and the action was terminated based on its merits because there was no probable cause.

Here there was no probable cause because… Therefore …

48. ABUSE OF PROCESS?

Under tort law a person is liable for ABUSE OF PROCESS if they have brought a civil or criminal action against another person without a legitimate basis out of malice or for an improper purpose. [88]

Here the defendant acted out of malice because… Therefore …

49. ILLEGAL INTERFERENCE? [Paraphrase as necessary] [89]

Under tort law a person is liable for unreasonably and illegally interfering with another person's known or apparent business relationships.

Here the defendant's acts caused unreasonable interference because… Therefore …

50. DECEIT (or FRAUD or MISREPRESENTATION)?

Under tort law a person is liable for 1) making a FALSE STATEMENT OF MATERIAL FACT 2) KNOWING it was false 3) with INTENT TO DECEIVE, 4) that was REASONABLY RELIED upon by the plaintiff, and thereby 5) CAUSING the plaintiff INJURY.

Here there was FALSE STATEMENT of MATERIAL FACT because… And the statement was made by the defendant with KNOWLEDGE it was false because…Further the defendant had

[87] This concerns all public "resources" including use of public resources and basic rights such as being able to go in public without fear of harm. If a district attorney could bring an action, then a private party can bring an action, given that they meet the STANDING requirement of suffering a greater injury than the "average" member of the public.
[88] Malicious prosecution only concerns criminal actions that are prosecuted without probable cause. Abuse of process in contrast concerns both civil actions and criminal actions instituted for a wrongful purpose.
[89] This may be called "interference with contract", "trade slander", "interference with prospective economic advantage" or "injurious falsehood". Let's use football terminology and call it "illegal interference".

an INTENT TO DECEIVE because… Also the plaintiff REASONABLY RELIED because… And the plaintiff was INJURED because… Therefore …

51. NONDISCLOSURE (CONCEALMENT)?

Under tort law a prima facie case of NONDISCLOSURE (or CONCEALMENT) requires showing 1) a DUTY to disclose material facts, 2) BREACH of that duty, 3) REASONABLE RELIANCE by the plaintiff on facts as they appeared to be, and 4) INJURY CAUSED by the nondisclosure.

Here the defendant had a DUTY to disclose because…And the defendant BREACHED that duty because they did not disclose…Further, this was a MATERIAL FACT because…And the plaintiff REASONABLY RELIED on appearances because…This nondisclosure INJURED the plaintiff because…Therefore…

52. TORT RESTITUTION ?

Under tort law plaintiffs have a legal right to "waive the tort" and instead of seeking an award of damages based on the injury they have actually suffered they may demand LEGAL RESTITUTION, an award of a money judgment measured by the amount the defendants have wrongfully benefited as a result of their tortious acts. The purpose of this is to PREVENT UNJUST ENRICHMENT by tortfeasors. [90]

Here…because…Therefore …

Note: The above issue statements provide virtually every important issue, definition, rule and term that you will ever see on a TORTS examination in law school or on a Bar Exam. If you know the above issues and responses you have everything you really need.

[90] This is one of the more poorly tested concepts of tort law and it would be wise to get Nailing the Bar's **Simple Remedies Outline** early in your legal studies instead of waiting until you are completely confused about this area of law.

Practice Question 18-8

Clark Kent, star reporter for the Daily Planet was approached by panhandler Bill Gates and asked for a quarter. As a prank, Kent (who was secretly Superman) lifted and very gently flew Gates hundreds of feet up to the top of the World Tribune building and left Gates there on a ledge.

Kent hovered over the World Tribune building and never touched the surface of the building.

During the flight Gates was apprehensive he might fall, but Kent had a strong grip.

Gates was embarrassed and the crowd below taunted him for hours as the fire department tried to devise a means of rescue. Gates was humiliated.

As he stood on the ledge Gates accidentally knocked a decorative panel loose. It fell to the ground and injured fireman Frank.

Suddenly Gates discovered that there was an unlocked window next to him all the time. He opened the window and escaped immediately.

Discuss Kent's liability to Gates, the World Tribune and fireman Frank.

Practice Question 18-9

Tom bought some firecrackers in Rural County, where they were legal. He took them into the National Forest where federal law prohibited the possession and use of fireworks. The federal law was enacted to reduce the threat of forest fires and injury on national lands.

In the National Forest Tom waded to a gravel bar in the middle of Big River, and there he carefully lit and threw the firecrackers into the air above the river. Occasionally one would fail to explode and it would fall harmlessly into the water. There was no one else around, and there was nothing on the gravel bar that could burn.

Little Dick was playing a half-mile upstream from Tom, throwing sticks into Big River. He was three years old. His mother warned him to stay back from the edge of the river because it was dangerous. Dick disobeyed his mother and recklessly pushed a rotted tree into the river and it swirled away in the water. No one was hurt.

Half a mile downstream from Tom, Paula was one of five people on the bridge above Big River fishing for trout. Paula was outside the National Forest boundaries. She had ignored a sign that said "No Fishing From Bridge." Fishing from the bridge was prohibited for traffic safety, but she was well off the roadway and there were very few cars this time of year. Paula was sitting carelessly on the edge of the bridge, but it was a nice day, the water was only six feet below her, and she knew how to swim.

Tom threw another firecracker into the air and it did not explode. Instead it fell onto the log that Dick had pushed into the river upstream.

The log swept down the river for half a mile before the firecracker exploded just as the log swept under the bridge.

Paula was startled and fell into the river.

Other people that had been fishing rushed off the bridge and down the river bank to rescue Paula as she laughingly climbed up the bank.

Harry had been fishing too, but instead of going to help Paula, he stayed on the bridge and took two dollars out of Paula's purse. No one saw Harry take the money and the crime was never solved. Paula was hurt and upset.

Under what theories can Paula seek to recover from Tom and Dick and what defenses would they raise?

Practice Question 18-10

The Macho-X99 chainsaw is a light-duty chainsaw designed for trees no bigger than 18". In the owner's manual said in big red letters, "WARNING -- NEVER TRY TO CUT DOWN A TREE BIGGER THAN 18" OR THIS SAW MIGHT CATCH FIRE." There were no warnings on the saw itself.

Tom went into Sam's Bargain Center. Sam told him, "This is the best chainsaw on the market. The Macho-X99 will cut trees up to 36" in diameter." Tom bought the Macho-X99 chainsaw.

Dick went into Sam's Bargain Center and said he didn't know much about chainsaws but needed one that could cut a tree about 24" in diameter. Sam told him, "I am an expert when it comes to chainsaws. I recommend this Macho-X99." Dick bought the Macho-X99 chainsaw.

Moe went into Sam's Bargain Center and bought the Macho-X99 chainsaw without any discussion.

Sam, Tom and Dick never read the owner's manual and were unaware of the potential fire danger. When Tom and Dick tried to cut down trees bigger than 18" the saws burst into flames and burned them.

Moe saw the warning in the owner's manual and tried to return the saw. Sam refused to give Moe his money back. Moe was disgusted and threw the saw in the garbage “Dumpster”.

Harry saw Moe's old saw in the garbage and took it. There was no owner's manual, but the saw was just like brand new. When he first used the saw it burst into flames and burned him.

Discuss all the theories under which Tom, Dick and Harry would seek to recover from Sam. Under which theories can they NOT recover?

Practice Question 18-11

Barbara, the famous TV news lady, was assigned to do a story on former governor, Pat Wilson, to find out why Wilson had become almost a recluse in the years since he left office.

Barbara interviewed Wilson at his home. Wilson's speech was slurred, his eyes were bloodshot and he was unsteady. Barbara asked him about his health, and he declined to comment. Barbara knew Wilson had once been an alcoholic, and she suspected he had begun drinking heavily again. But she did not ask him about this because she knew he would deny it.

On TV Barbara accurately described Wilson's slurred speech, bloodshot eyes and unsteady gait. Then she stated, "It appears that someone we once knew and respected has gone back to his old ways." She did not state who the "someone" was, and she did not explain what she meant by "his old ways."

Because of the news broadcast, rumors rapidly spread that Wilson had again developed a drinking habit. Wilson's approval in polls fell dramatically, and he was passed over for the post of State Republican Chair, but he had little chance of being selected for that post.

Wilson demanded a retraction and apology, but Barbara refuses.

Discuss potential action by Wilson.

Practice Question 18-12

The National Inkwire focused on sensational articles about celebrities, complete with candid pictures taken during private moments. Actress Ellen D. Generate was pursued relentlessly.

One time The National Inkwire reported that Ellen was secretly a generous philanthropist. In fact, Ellen was a tightwad. As a result of the Inkwire article, Ellen was besieged by requests for donations, and it was professionally impossible for her to turn them all down.

Then the Inkwire photographer, Dick took pictures of Ellen sunbathing topless on her sailboat. At the time the photo was taken Ellen was anchored four miles from land in international waters, and she had her friend Anne posted as a lookout to warn of any approaching boats or airplanes. The way Dick got the photo was by using a remote controlled, miniature submarine with a powerful telephoto lens.

Ellen was so embarrassed by the nude photo that she remained secluded in her home for weeks.

Ellen decided to sue the Inkwire, so she went to the grocery store and bought a copy of the issue with her photo to show her lawyer. Unfortunately Dick was following her and he took a picture of Ellen buying the Inkwire. Then Inkwire put the picture of Ellen on billboards nationwide with a caption that said "Ellen D. Generate buys Inkwire!"

Before Ellen could file suit the Inkwire ran an interview with Ellen's old boyfriend from college. He said that even though Ellen was now a strong and vocal anti-abortion advocate, she had an abortion herself in college. This was a true fact that Ellen had told her ex-boyfriend in strictest confidence. This disclosure embarrassed Ellen and made her look like a hypocrite.

Discuss the possible actions Ellen might bring against the Inkwire and their defenses.

Practice Question 18-13

Ken was a politician from Los Angeles. He moved to Sacramento and purchased a spacious home on the Sacramento River. He felt he got a great deal because he only paid $400,000 and a similar home in Los Angeles would have cost him three times that amount.

Ken realized his home was directly in the flight path of the airplanes taking off and landing from the County airport, and the realtor had prominently disclosed this fact on the sales documents. But Ken didn't think the noise was so bad because from his backyard he just loved to hear little birds singing along the public river parkway.

Four years later Ken lost the election and he wanted to move back to Los Angeles. When he had the house appraised, it was worth $500,000. Ken was furious because his home value had only increased 25 percent in value while most real estate had gone up 50 percent.

Ken blamed the County. In the four years he owned the home the number of flights at the airport increased ten percent. This increased traffic was from increased military use in response to the crisis in Romaria. Ken could not enjoy his yard as much as before, and the little birds on the public river parkway didn't seem to sing as much as they used to.

What actions might Ken bring against the County, what defenses might be raised, and what remedies are appropriate?

Practice Question 18-14

Star approached Buck, the owner of JavaManiac, with a business proposal. Star knew where there was a retail space for lease that would be a great place for a JavaManiac franchise. Buck told Star that she would be granted a JavaManiac license if the location was acceptable. Based on this Star described the location in detail and gave Buck its address. Buck said he would have someone "check it out."

Buck had no intention of giving Star a franchise. He just wanted her to reveal the location. Based on Star's description it sounded perfect for a JavaManiac outlet, and Buck wanted to take the space himself.

Buck went to the location suggested by Star and saw that it was perfect for JavaManiac. He then contacted the owner, Jack. Jack said he already had tentatively promised the lease to someone named Star. Buck said, "I know Star," and held his hand in the air with his thumb out to indicate that Star had a drinking problem. Then Buck looked at Jack very sincerely and said, "I probably shouldn't say this, but I feel I have a duty to tell you that you don't want to lease to someone like Star."

Buck reported to Star that the location was unacceptable because it was too small to meet the secret JavaManiac minimum guidelines.

Star was very dejected and withdrew her offer to lease the space. Jack was relieved.

Three months later Star happened upon the grand opening of the next new JavaManiac franchise at the very location he had suggested. Standing in front were Buck and Jack shaking hands. Star was furious and accused Buck of cheating her. Buck rolled his eyes at Jack and said, "See what I mean?"

Then Buck sued Star for slander per se for accusing him of questionable business practices. Star won the suit when the jury found her statements had been true.

What are Star's possible actions against Buck? (Do not discuss intentional infliction, defamation or false light.)

Chapter 19: Answering Criminal Law Questions

Preliminary Considerations and Specific Rules:

1. Almost all crimes require a MENS REA, evil intent, and ACTUS REUS, evil act. The exceptions are the "strict liability" crimes of statutory rape, traffic offenses, and regulatory offenses. Those only require a criminal act and criminal intent is not required.

2. There must usually be COINCIDENCE, meaning that the criminal ACT must be done at the SAME TIME there is criminal INTENT. An exception is that under the "relation back doctrine" a larceny may be found when a subsequently formed intent to steal is "related back" to a prior act of taking.

3. Criminal law essay questions are identified by the CALL which will ask about what acts the defendant may be "prosecuted" for, for which "charges" may be brought, for which he may be "guilty", etc.

4. The most common crimes tested are SOLICITATION, CONSPIRACY, ASSAULT, BATTERY, BURGLARY, LARCENY, ROBBERY, MURDER, and MANSLAUGHTER.

5. There are some unusual crimes to remember (uttering, mayhem, compounding, etc.) but they are less likely to appear, and will be given less weight in grading.

6. If a question gives you a statute – read it very carefully because it determines the answer.

7. Your focus should usually be on WHAT CHARGES CAN BE PROSECUTED and WHAT DEFENSES CAN BE RAISED and not on whether the defendant is "guilty".

8. Some crimes are "lesser included offenses" of other more serious crimes. Defendants can be CHARGED with both the more serious crime and the lesser included offenses. If the defendant is CONVICTED of the more serious crime, the LESSER INCLUDED OFFENSES MERGE into that crime and the defendant cannot be separately convicted of the lessor included offenses. [91]

9. On the FYLSX there will ALMOST ALWAYS BE A MURDER ISSUE.

10. If the CALL asks whether the defendants are "guilty" consider they may already have been "found guilty" by a jury and you are being asked whether the given facts (your only "evidence)" is sufficient to prove every required LEGAL ELEMENT beyond a reasonable doubt.

[91] For example every robbery includes a larceny, an assault and often a battery. The defendant can be CHARGED with four crimes: robbery, larceny, assault, and battery. But if the defendant is convicted of the robbery the other charges "merge" into that one crime.

Answer Structure: Where there two or more defendants, consider the crimes of each defendant separately as follows:

PEOPLE V. TOM
1. ISSUE –
2. ISSUE –

PEOPLE V. DICK
1. ISSUE –
2. ISSUE –

Mnemonics for Crimes Essays:

1. CRIMES = **"That SCAB-RAT, ROB BERGER, ATTEMPTED to MURDER a MAN"**
a) **SCAB** – OFTEN SUBTLE OR HIDDEN ISSUES.
   i) Solicitation
   ii) Conspiracy
   iii) Assault
   iv) Battery
b) **RAT --** MORE OBVIOUS ISSUES.
   i) Rape
   ii) Arson (watch for smoke, fire, explosives, cutting torches)
   iii) Theft (larceny, embezzlement, false pretenses)
c) **ROB --** ROBBERY
d) **BERGER** -- BURGLARY -- (mnemonic = BEDONI)
e) **ATTEMPT --**ATTEMPTED CRIMES requiring a substantial step.
f) **MURDER --**
g) MANSLAUGHTER

2. CRIMINAL DEFENSES = **"BABY MICE DRIVE PANDAS TO DRINK"**
a) **BABY**
   i) Infancy
b) **MICE**
   i) Mistake
   ii) Insanity
   iii) Consent
   iv) Entrapment
c) **DRIVE**
   i) Duress
d) **PANDAS**
   i) Prevention of crime
   ii) Authority of law
   iii) Necessity
   iv) Defense of
      (1) Another or
      (2) Self
e) **DRINK** -- intoxication

CRIMINAL LAW ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1) *SOLICITATION to commit* [crime]*?*

Under CRIMINAL LAW a SOLICITATION is the crime of urging another person to commit a crime. [92] *The crime of SOLICITATION is complete as soon as the urging takes place, whether the person urged commits the crime urged or not. But if the urged crime is committed the SOLICITATION MERGES into the criminal result and the person committing the solicitation becomes an ACCESSORY BEFORE THE FACT and VICARIOUSLY LIABLE for the crime based on accomplice theory.* [93]

Here A urged B to commit the crime of … because…Therefore, the defendant can be charged with solicitation to commit [crime].

2) *CONSPIRACY to commit* [crime or other illegal goal]*?* [94]

Under COMMON LAW the crime of CONSPIRACY was an agreement between two or more people to work toward an illegal goal. MODERNLY an OVERT ACT in furtherance of the conspiracy goal is often required in many Courts.

Further, under the PINKERTON RULE, a member of a conspiracy is VICARIOUSLY LIABLE for the criminal acts of co-conspirators done WITHIN THE SCOPE of the conspiracy goal. This means crimes that were 1) foreseeable and 2) in furtherance of the conspiracy goal.

Even if the illegal goal of the conspiracy is attained, the CONSPIRACY DOES NOT MERGE into the criminal result, so each member can be convicted of both conspiracy and the other crimes committed during and within the scope of the conspiracy.

[State the next paragraph if the conspiracy is to commit a crime that necessarily requires more than two people. Receiving stolen property is one of those crimes.]

And under the WHARTON RULE a conspiracy requires the participation of more people than the minimum number necessary to commit the criminal act.

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[92] Note that the act urged must be a crime for which the person urged would be prosecuted. If Bevis urges 3-year old Butthead to steal some whisky for him it is not solicitation because Butthead is too young to form criminal attempt. In this odd situation the crime of Bevis is attempted larceny not solicitation.

[93] For example: Bevis urges Butthead to rob a bank. If Butthead doesn't rob the bank Bevis can only be charged with solicitation. But if Butthead does rob the bank at Bevis' urging, Bevis can charged with BOTH solicitation and robbery. He would be VICARIOUSLY LIABLE for the robbery as an ACCOMPLICE (an ACCESSORY BEFORE THE FACT) based on accomplice theory. He cannot be convicted of both solicitation AND robbery because the solicitation is the reason he can be charged with the robbery. The solicitation would MERGE into the robbery as a lesser included offense.

[94] Conspiracy is always a major issue if there are two or more defendants. It creates VICARIOUS LIABILITY for each conspiracy member based on conspiracy theory. If members of a conspiracy takes an active part in pursuing the criminal goal they become ACCOMPLICES and are VICARIOUSLY LIABLE based on BOTH conspiracy theory AND accomplice theory. The DEFENSE OF WITHDRAWAL is frequently tested.

[State the next paragraph if a defendant joins a conspiracy in progress.]

If a defendant joins a conspiracy in progress most Courts hold they are not liable for previous crimes of the co-conspirators unless the joining defendant seeks to profit from those prior crimes.

[State the next sentence when crimes are committed after the conspiracy ends.]

A conspiracy ends when the conspiracy goal is ATTAINED or ABANDONED, and vicarious liability will no longer attach based on conspiracy theory. But it may still attach based on accomplice theory.

Here two or more parties, A and B, agreed to work toward an illegal goal because …And there was an OVERT ACT in furtherance of the conspiracy when ….

Therefore, the defendant can be charged with conspiracy to commit [crime].

3) *CRIMINAL ASSAULT?*

Under CRIMINAL LAW an ASSAULT is the crime of acting with the intention of causing a battery or else to cause apprehension of a battery. The victim of the attempted battery does not have to be aware of the danger. [95] **Important!**

Here the defendant attempted to cause a battery (or apprehension of a battery) because …

Therefore…

4) *Can the defendant be charged with CRIMINAL BATTERY?*

Under CRIMINAL LAW a BATTERY is the crime of acting with the intention of causing a touching of a victim's person and causing a harmful or offensive touching . [96] **Important!**

[Every criminal battery includes a criminal assault as a lesser included offense because an attempted battery is a criminal assault. The assault merges into the larger crime.]

Here the defendant deliberately acted to cause a touching because…And it caused a harmful (or offensive) touching because…Therefore…

5) *RAPE?*

Under common law RAPE was an intentional act to have sexual intercourse with a female without consent causing actual penetration, no matter how slight. At common law it was held to be legally impossible for a husband to rape a wife because consent to sexual intercourse

[95] Criminal assault is very different from tort assault because for a tort assault the plaintiff must actually be caused apprehension.
[96] Criminal battery is essentially identical to tort battery.

was implied by marriage. MODERNLY, the crime of rape has been broadly extended to include any non-consensual sexual act involving penetration, regardless of the relative sexes and marital relationship between the defendant and the victim. [97]

Here there was an intentional act of sexual intercourse because…And the victim did not consent to have sexual intercourse because [98]*…*

Therefore the defendant can be charged with rape.

6) *ARSON?* **[Any explosion, smoke or flame raises the issue!!]**

Under common law ARSON was the malicious burning of the dwelling of another. MODERNLY arson is extended by statute to the burning of other structures. Malice for arson means that the burning must be done with wrongful intent. [99]

Here there was a burning because…And there was a malicious intent to burn because … Therefore, the defendant can be charged with arson.

7) *LARCENY?*

Under common law LARCENY was the trespassory taking and carrying away of the personal property of another with intent to permanently deprive. Where the possession was gained by misrepresentation it was called LARCENY BY TRICK. MODERNLY larceny is generally codified as "THEFT". **Important!** *GRAND LARCENY, a felony, and PETTY LARCENY, a misdemeanor, are statutory crimes based on the value of property stolen.*

[Only state the next paragraph if there is a theft from a master or employer.]

Theft of property from a master or employer by a manager or high-level employee was generally embezzlement and not a larceny, unless the defendant got possession by misrepresentation, a larceny by trick. But theft of the same property by a servant or low-level employee was generally larceny, not embezzlement, unless the defendant took possession from a third party before deciding to steal it, and in that case it was embezzlement.

[Only state the next paragraph if there is "lost" property at issue.]

Under the RELATION BACK DOCTRINE some common law courts held that a theft of "lost" property by a person who initially intended to return it to the lawful owner was a larceny because a later decision to steal RELATED BACK to make the original taking unlawful. But

[97] Statutory rape is the crime of an adult having sexual intercourse with a minor, and it is generally defined as a "strict liability" offense. This means that no "criminal intent" is required, and a "mistake of fact", no matter how reasonable, is generally no defense.

[98] Rape is rarely tested on law school or bar exams. When it is, the main issue is generally whether or not the victim gave valid, fully-informed consent to have sexual intercourse.

[99] Malice for arson requires wrongful intent, meaning that the defendant started the fire intending or knowing that someone would be harmed. But to be "malicious" the burning does not have to be "illegal." Further an "illegal" burning without any intent to harm anyone (for example in violation of zoning ordinances) is not sufficiently "malicious" to support a charge of arson.

other courts held this was embezzlement on the theory the original taking formed a "constructive trust."

Here there was a trespassory taking of the personal property of another because…And it was done with intent to permanently deprive because…

Therefore …

8) *Can FALSE PRETENSES be charged?*

Under common law FALSE PRETENSES was a MISREPRESENTATION of FACT to obtain TITLE to the property of another with intent to permanently deprive. [100] *MODERNLY false pretenses is generally codified as "THEFT".* **Important!**

Here there was intentional misrepresentation of fact to obtain title to property of another because…And there was an intent to permanently deprive because …

Therefore …

9) *EMBEZZLEMENT?*

Under common law EMBEZZLEMENT was the crime of TRESPASSORY CONVERSION of the property of another by one entrusted with lawful possession with intent to permanently deprive or else causing substantial risk of loss. MODERNLY embezzlement is generally codified as "THEFT". **Important!**

[Only state the next paragraph if there is a theft from a master or employer.]

Theft of property from a master or employer by a manager or high-level employee was generally embezzlement and not a larceny, unless the defendant got possession by misrepresentation, a larceny by trick. But theft of the same property by a servant or low-level employee was generally larceny, not embezzlement, unless the defendant took possession from a third party before deciding to steal it, and in that case it was embezzlement.

[Only state the next paragraph if the stolen property was on a common carrier.]

Further, the COMMON CARRIER DOCTRINE held that a common carrier such as a taxicab, bus or ship is entrusted with possession of passenger's property, including lost property, so a theft of passenger property by an employee of a common carrier was more often held to be EMBEZZLEMENT than larceny, even if the property was "lost".

[Only state the next paragraph if "lost" property was stolen.]

When "lost" property was stolen by a defendant who first intended to return it to the lawful owner, many courts found EMBEZZLEMENT on the theory the property was held in a

[100] False pretenses involves a purchase that transfers "ownership" of property while larceny and embezzlement only involve taking "possession" without any sort of purchase transaction. A purchase with a stolen credit card is the crime of false pretenses; a purse snatching is a larceny.

"constructive trust". But other courts applied the RELATION BACK DOCTRINE and held it was a larceny because the decision to steal RELATED BACK to make the original taking unlawful.

Here there was a trespassory conversion of the property of another with intent to permanently deprive or cause substantial risk of loss because …And the defendant was entrusted with possession (or would be deemed to have lawful possession) of the property because…

Therefore, the defendant could (not) be charged with embezzlement.

10) *Can the defendant be charged with ROBBERY?*

Under CRIMINAL LAW a ROBBERY is a larceny, defined above (or define larceny here if it was not defined earlier), from a person by use of force or fear to overcome the will of the victim to resist. [101] **Important!**

Here there was a larceny from the person because…And the defendant used force (or fear) to overcome the will of the victim to resist because…Therefore…

11) *BURGLARY?*

Under COMMON LAW a BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony. The entry of a structure within the CURTILAGE of the dwelling also constituted a burglary. **Important!** *A physical breaking was generally required, but a CONSTRUCTIVE BREAKING would be found if entry was the result of TRICK, VIOLENT THREATS, or CONSPIRACY.*

MODERNLY burglary has been extended by statute to all times of the day and all types of structures. Intent to commit a larceny is generally still sufficient to support a burglary charge, even if the larceny is no longer a felony. Further, the "breaking" element will generally be satisfied if there is a TRESPASSORY ENTRY, an entry without consent, express or implied. [102]

Here there was a breaking and entry (or trespassory entry) into a structure of another because…But it was not a dwelling because it was…And the intent at the time of entry was to commit a felony (or larceny) because…

Therefore the defendant could not be charged with common law BURGLARY but could be charged modernly.

[More than any other crime you need to compare and contrast the common law burglary against the modern view and state whether the defendant could be charged under both or only modernly.]

[101] It is critical that the "force or fear" must be used to overcome the will of the robbery victim!

[102] Some States have statutes that make any entry into any structure with intent to commit a felony "once inside" a "burglary". This is not common law, not broadly adopted modern law, and not the law to use on Bar exams!

12) *RECEIVING STOLEN PROPERTY?*

Under CRIMINAL LAW RECEIVING STOLEN PROPERTY is the crime of taking possession or control over stolen personal property while knowing it has been stolen from the lawful possessor. The defendant that receives the stolen property and the defendant that provides (delivers) the stolen property are both liable, even though the crime is called "receiving"..

Under the WHARTON RULE there can be no crime of CONSPIRACY TO RECEIVE STOLEN PROPERTY unless there are at least three defendants in agreement. [103]

[Only state the following if the subject property was placed into the possession of the defendants with the tacit consent of the lawful owner or the police.]

The crime of receiving stolen property is a legal impossibility if the property was in the possession of the defendants with the CONSENT of the lawful OWNER or the POLICE as part of a "sting" operation. In that case the crime is ATTEMPTED RECEIPT OF STOLEN PROPERTY.

Here…because…Therefore…

13) *ATTEMPTED (name the crime attempted)?*

Under CRIMINAL LAW an ATTEMPTED (crime attempted) is the act of taking a SUBSTANTIAL STEP taken toward committing (that intended crime). **Important!**

[Only state the following sentence if the facts suggest an issue of LEGAL IMPOSSIBILITY.]

For an attempted crime to be committed, it must be legally possible for the crime to have been completed at the moment of the first substantial step.

Here there was a substantial step toward commission of the crime of (name the crime) because …And the defendant intended to commit that crime because…

Therefore ATTEMPTED (crime) can be charged.

[There are particular rules for some "attempted" crimes:

- **For any attempted crime to be committed it must be legally possible to commit the intended crime at the instant of the first substantial step.**
- **There can be NO ATTEMPTED SOLICITATION because any "attempt" completes the crime.**
- **At common law there was NO ATTEMPTED ASSAULT because assault by definition is an attempt.**
- **And at common law there was NO ATTEMPTED BATTERY because that is the crime of assault.**

[103] This is a topic for discussion virtually every time there is a "receiving stolen property" issue.

- **There can be NO ATTEMPTED BURGLARY unless the defendants approach a structure with intent to enter and commit some other crime and fail to enter at all.**
- **EVERY BURGLARY OR ATTEMPTED BURGLARY makes the defendant automatically liable for a SECOND ATTEMPT CRIME because it is a substantial step toward commission of the second crime the defendant intends to commit after breaking in.** [104]
- **There can be NO RECEIVING STOLEN PROPERTY and can only be a crime of ATTEMPTED RECEIPT if the subject property was conveyed to the receiving defendant with consent of the lawful owner (or the police).**
- **The crime of ATTEMPTED MURDER requires INTENT TO KILL and no other form of malice for murder will suffice. So there can be NO ATTEMPTED DEPRAVED HEART MURDER and NO ATTEMPTED FELONY MURDER.**
- **There can be NO ATTEMPTED MANSLAUGHTER because the crime is an alternative to a murder charge that requires a completed homicide.]**

14) *MURDER?*

Under CRIMINAL LAW a MURDER is an unlawful HOMICIDE, the killing of one human being by another, with MALICE aforethought. [105] *MALICE for murder may be 1) an EXPRESS intent to kill, or IMPLIED by 2) intent to commit GREAT BODILY INJURY, 3) intent to commit an INHERENTLY DANGEROUS FELONY, the FELONY MURDER RULE, or 4) deliberate creation of EXTREME RISKS to human life or deliberate breach of a pre-existing duty to protect others from extreme risks with AWARENESS of and CONSCIOUS DISREGARD for the risks, the DEPRAVED HEART MURDER rule.* **Important!**

Under COMMON LAW there were NO DEGREES of murder but MODERNLY first degree murder is generally codified as a 1) willful, deliberate and premeditated homicide or one 2) done by enumerated means, [106] *or 3) caused by commission of an enumerated felony.* [107] **Important!**

[Only state the following if it is not clear a "living human being" was killed.]

At common law and modernly, a "human being" is a person who was born alive and was not yet dead. [108]

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[104] For example, Bevis goes to Butthead's house intending to break in and steal his TV. He has taken a substantial step toward commission of both crimes just going there and can be charged with attempted burglary and attempted larceny.
[105] All homicides you see on law exams are "unlawful" even if they are "excused" by an affirmative defense.
[106] Some commonly tested "enumerated means" are torture, poison and explosives.
[107] Generally the first-degree murder statutes enumerate the same felonies that qualify for the felony-murder rule (rape, robbery, burglary and arson) but that is coincidental. Do not say that first degree murder automatically includes all of the same felonies that apply to the "felony-murder rule" because that is up to the various legislatures.
[108] If the facts say a "fetus" is killed or a baby was "born dead" or "dead at birth" there has NOT been a homicide. A "baby born dead" is not a homicide at common law or under modern rules. State laws that make killing a fetus a murder ("fetal murder" statutes) do not make fetuses "human beings". Rather they make killing a "human being or a fetus" a murder. Only about half the States have such statutes, and they vary greatly. There are NO "fetal manslaughter" statutes.

[Only state the following if a death occurs long after the act being blamed.]

The common law held that there was NO HOMICIDE if the victim died more than a year and a day after the act blamed for the death. Modernly this has been broadly extended by statute.

[State the following if the death results from suicide.]

A suicide is not a homicide. But a death by suicide constitutes a homicide when it is actually and proximately caused by the acts of the defendant.

[State the following if more than one person was an actual cause of death.]

The prosecution must prove the defendant was the ACTUAL AND PROXIMATE CAUSE of death, and if more than one act was an actual cause of death, the last, unforeseeable, intentional act generally is the only legal cause of death and it terminates the criminal liability flowing from all prior acts. [109] *Generally negligence by others is presumed to be foreseeable and criminal acts and intentional torts by third parties are presumed to be unforeseeable absent special knowledge.* [110]

[Only state the following if a death occurs during or after the commission of an inherently dangerous felony (rape, robbery, burglary or arson).]

Under the FELONY MURDER RULE, a homicide caused by the commission of an inherently dangerous felony can be prosecuted as a murder if it is the result of acts done within the RES GESTAE of the underlying felony AND results from the INHERENT DANGERS of that type of felony. [111] *The RES GESTAE is the sequence of events beginning with the first substantial step to commit the felony and ending when the defendants leave the scene of the crime and reach a place of relative safety.*

[Only state the following if a death occurs after a break-in to a structure when the defendant's sole purpose for breaking into the structure was to attack the victim.]

A murder prosecution cannot be based on the felony murder rule if the death occurred during a burglary that was committed solely for the purpose of attacking the victim because that is not one of the "inherent dangers" of burglary. [112]

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[109] For example, OJ poisons his wife, intending to kill her, but just before she would have died anyway a crazed fan, Stalker, sneaks into her hospital room and strangles her. Stalker is the proximate (legal) cause of her death, not OJ, and his act cuts off OJ's criminal liability for murder. OJ can only be charged with attempted murder.

[110] This rule has application to all crimes, and also to all torts. But it is most useful when analyzing negligence in tort questions and murder in crime questions.

[111] At common law the "inherently dangerous felonies" were rape, robbery, burglary, arson, mayhem and sodomy. Modernly the felony-murder rule only applies with virtual certainty to deaths from rape, robbery, burglary and arson. Kidnapping was not one of the inherently dangerous felonies at common law and is not always an "inherently dangerous felony" for application of the felony-murder rule modernly. Kidnapping may be found to be inherently dangerous in some cases because of the particular facts. Some courts have even found drunk driving to be inherently dangerous in some cases. But there again, that was only because of the peculiar facts of the particular case.

[112] For example, Bevis breaks into Butthead's house to beat up Butthead. Butthead dies. Bevis has committed burglary (modernly at least) because he has "broken" and "entered" the dwelling with intent to commit a felony. And Butthead has been killed as a result. But the felony-murder rule does not apply if the sole purpose of the "burglary" was to attack Butthead because that is not one of the "inherent dangers of burglary" that led to the creation of the felony-murder rule in the first place.

Here there was an unlawful HOMICIDE because the victim was a human being and he was killed by the acts of another human being, the defendant. And there was malice aforethought because…

Therefore the defendant can (not) be charged with murder.

[Once you determine murder can be charged you should almost always discuss the degree of murder that is indicated by the facts as follows.]

Here the murder would (not) be in the FIRST DEGREE because…

15) *MITIGATING FACTORS?* (Always discuss if defendant kills while mentally impaired.)

Under CRIMINAL LAW, MITIGATING FACTORS may be weighed by the jury in determining whether or not a defendant killed with sufficient premeditation to support a finding of first-degree murder or whether the defendant acted with malice aforethought at all for a finding of murder. They may cause the jury to find only manslaughter and not murder.

Here there were mitigating factors because the defendant was (intoxicated, mentally incapacitated, etc.)… Therefore the jury may find that…

16) *VOLUNTARY MANSLAUGHTER?* (SKIP if the defendant clearly DID NOT intend to kill.)

Under CRIMINAL LAW, VOLUNTARY MANSLAUGHTER is an INTENTIONAL, unlawful homicide, the killing of one human being by another, without malice aforethought because of ADEQUATE PROVOCATION. **Important!**

ADEQUATE PROVOCATION is provocation sufficient to raise a reasonable person to a murderous rage, which did raise the defendant to such a rage, and which was the actual cause of the homicide. **Important!**

But ADEQUATE PROVOCATION CANNOT BE FOUND if the defendant had enough time before the killing that a reasonable person would have COOLED DOWN and no longer would have been in a murderous rage.

Here there was a homicide because… And, adequate provocation might be found because…

Therefore…

17) *INVOLUNTARY MANSLAUGHTER?* (SKIP if the defendant clearly DID intend to kill.)

Under CRIMINAL LAW, INVOLUNTARY MANSLAUGHTER is an UNINTENDED homicide, the killing of one human being by another, as a result of CRIMINAL NEGLIGENCE (a.k.a. "negligent homicide"), *RECKLESSNESS* (a.k.a. "reckless homicide"), *or during the*

commission of a MALUM IN SE crime insufficient for a charge of murder (a.k.a. "misdemeanor manslaughter"). **Important!**

CRIMINAL NEGLIGENCE is a deliberate breach of a pre-existing duty to protect others from extreme risks and RECKLESSNESS is a deliberate creation of extreme risks to others.

A MALUM IN SE crime is one that involves moral turpitude. [113]

Here there was a homicide because the victim was a human being, and they were killed by the act of the defendant, another human being.

[The following applies if the death was caused by RECKLESSNESS (or CRIMINAL NEGLIGENCE).]

And the defendant deliberately created extreme risks (or *deliberately breached a duty to protect others from extreme risks*) *because…… But the defendant might not have been fully aware of the risks because…* [114]

Therefore the defendant may be charged with involuntary manslaughter.

18) REDLINE RULE?

Under the REDLINE RULE a co-felon in most States cannot be charged with murder under the FELONY MURDER RULE simply because a co-felon was killed by a victim, bystander or the police during the commission of a crime. [115]

Here the rule would apply because …

19) KIDNAPPING?

Under criminal law KIDNAPPING is the crime of unlawfully taking or confining people against their will. At common law the victim had to be taken out of the country or across a state line. Modernly this requirement has been dropped.

Kidnapping is not one of the "inherently dangerous felonies" for the Felony Murder Rule but modernly is often an "enumerated felony" for first-degree murder.

Here…Therefore…

[113] NOT a regulatory violation like a minor traffic offense! Avoid the term "misdemeanor manslaughter" because a "malum in se" crime upon which the charge can be based may be either a felony or a misdemeanor.
[114] Involuntary manslaughter is often found when defendants have diminished capacity because of intoxication, youth, low intelligence, etc. because the defendant's awareness of the dangers cannot be proven with certainty.
[115] NOTE: The only States that have not adopted the Redline Rule are apparently California and Massachusetts. But broadly adopted rules are to be cited on California Bar exams, so the Redline Rule should be cited, even though California does not actually follow this rule.

20) MISPRISION? (NEVER DISCUSS this unless the given facts make it entirely clear it is an intended issue for discussion because this has not been a crime for about 200 years!)

Under old common law MISPRISION was the crime of knowingly failing to report felonies by others to the police. Modernly there is no general duty to report crimes by others, and the crime of misprision no longer exists generally.

Here…Therefore…

21) COMPOUNDING? (This is a real crime so discuss this instead of misprision.)

Under criminal law COMPOUNDING is the crime of taking money or something of value in exchange for a promise to not report crimes committed by others.

Here…Therefore…

22) ACCOMPLICE LIABILITY?

Under criminal law ACCOMPLICE LIABILITY is vicarious criminal liability for criminal acts of co-criminals that directly and naturally result (foreseeable acts) from the defendant's own criminal acts. Many Courts do not recognize Withdrawal as a defense to accomplice liability.

Here…Therefore…

23) DEFENSE of INFANCY? **[Children and youthful defendants!]**

Under the COMMON LAW there was a CONCLUSIVE PRESUMPTION that a child under the age of seven was unable to form CRIMINAL INTENT. There was a REBUTTABLE PRESUMPTION that a child between 7 and 14 could not form criminal intent, and that a child over the age of 14 could form criminal intent. Modernly similar rules have been adopted by statute.

Here the defendant may claim he was too young to form criminal intent because …

Therefore…

24) DEFENSE of MISTAKE OF FACT? [116] **[A frequently tested issue.]**

Under CRIMINAL LAW a MISTAKE OF FACT is a complete defense if it negates implied criminal intent. For GENERAL INTENT crimes only a REASONABLE mistake can negate criminal intent. For SPECIFIC INTENT crimes ANY MISTAKE OF FACT may negate criminal intent whether reasonable or not. Battery, rape, arson, involuntary

[116] This is a passive defense but sometimes you might want to analyze it as a separate issue.

manslaughter and murders that are not willful and deliberate or based on the felony murder rule are general intent crimes. All other crimes are SPECIFIC INTENT crimes.

A REASONABLE MISTAKE OF FACT is one that a reasonable person would have made in the same situation. VOLUNTARY INTOXICATION never makes an otherwise unreasonable mistake reasonable.

A MISTAKE OF FACT is no defense to a charge of ATTEMPT if criminal intent is proven and the mistake merely prevented an otherwise criminal act.

Here the defendant's mistake of fact does (not) negate implied criminal intent because…

Therefore…

25) DEFENSE of LEGAL IMPOSSIBILITY? [117]

Under CRIMINAL LAW, LEGAL IMPOSSIBILITY means that an attempted act is not an attempted crime, even if there was criminal intent, when the attempted crime is a legal impossibility at the time of the first substantial step.

Here the crime charged was a legal impossibility because…

Therefore…

26) DEFENSE of MISTAKE OF LAW?

Under CRIMINAL LAW, A MISTAKE OF LAW about the legality of an act does not alter the legality of the act. If the defendant commits a criminal act believing it is legal, it is still an illegal act. Likewise, if the defendant commits a legal act believing it is illegal, it is still a legal act. [118]

Here the defendant's act was legal (illegal) at the time it was committed because…

Therefore…

27) DEFENSE of FACTUAL IMPOSSIBILITY?

Under CRIMINAL LAW, FACTUAL IMPOSSIBILITY is a defense that the act actually done by the defendant was NOT A SUBSTANTIAL STEP toward commission of any crime, despite criminal intent, because the act taken could never produce a criminal result. [119]

Here the defendant's act was legal (illegal) at the time it was committed because…Therefore…

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[117] There are very few scenarios where this issue arises. One is a scenario where the defendant attempts to murder a victim, but the victim died from other causes BEFORE the defendant acted. Another is a scenario where the defendant attempts to steal something, but it is not the property of "another" WHEN HE ACTS because the defendant already owns it or else because the lawful owner has discarded (abandoned) it.

[118] For example, Bevis forces his wife Buffy to have sexual intercourse with him because he believes that is his legal right. He can be charged with rape and his mistaken notions as to the law are no defense.

[119] For example, Bevis attempts to murder Butthead by sticking pins in a voodoo doll named "Butthead".

28) DEFENSE of WITHDRAWAL? **[A commonly tested issue.]**

Under CRIMINAL LAW, WITHDRAWAL is a defense that defendants who were members of a CONSPIRACY (or perhaps are accomplices like those who have urged a crime to be committed) are not liable for crimes committed by co-criminals AFTER they have 1) given the co-criminals NOTICE that they are abandoning the criminal enterprise and 2) have TRIED TO STOP the co-criminals from continuing pursuit of the criminal goal. [120]

Here the defendants did (not) give NOTICE they were abandoning the criminal goal (e.g. conspiracy goal) because… And they did (not) TRY TO STOP the co-criminals from continuing because…Therefore.

29) DEFENSE of INSANITY?

Under CRIMINAL LAW insanity is a defense if it negates criminal intent. The insanity defense is now prescribed by statute in almost all jurisdictions. Under the COMMON LAW M'NAUGHTEN RULE insanity was a defense if a disease of the mind at the time of the act prevented the defendant from knowing the nature and quality of his act, or that they were wrong. Under the IRRESISTIBLE IMPULSE RULE insanity is a defense if the defendant knows it is wrong but cannot stop herself. [121] **Important!**

Here the defendant would argue that …Therefore…

30) DEFENSE of CONSENT?

Under CRIMINAL LAW consent is a defense to some crimes. [e.g. rape, larceny, battery – consent to a touching] *The consent must be informed, voluntary and given by one with legal capacity. Further, consent is not a legal defense to an act that deliberately causes great bodily harm.*

Here… because…Therefore…

31) DEFENSE of ENTRAPMENT?

Under CRIMINAL LAW entrapment is a defense if criminal intent was the product of improper police behavior. Courts are split on the application of the entrapment defense, and under the majority view entrapment is no defense if the defendant was predisposed to commit the crime. Under another minority view entrapment is a defense if police conduct was outrageous and instigated the crime, even though the defendant was predisposed.

Here… because…Therefore…

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[120] This defense varies widely among Courts. Some Courts hold that it is a valid defense only to vicarious liability for subsequent crimes and others hold it is a valid defense to the crime of "conspiracy" itself. Some Courts may allow it as a defense to vicarious liability based on conspiracy theory only, and not as a defense to accomplice liability.

[121] The M'Naughten Rule is common law and the Irresistible Impulse Rule is broadly adopted enough to mention it. Other ideas are not broadly adopted and discussing them is a waste of time on a Bar exam.

32) DEFENSE of DURESS?

Under CRIMINAL LAW a defense may be raised to crimes, EXCEPT MURDER, that the criminal act was the result of DURESS.

Here… because…Therefore…

33) DEFENSE of NECESSITY?

Under CRIMINAL LAW a defense of NECESSITY may be raised to certain crimes.

[This defense is really nothing more than self-defense, defense of others, or defense of property. And it is probably best addressed under one of those categories in a criminal law answer. The term defense of 'necessity' more often has tort connotations, especially when it is a 'public' necessity.]

34) PREVENTION OF CRIME (AUTHORITY OF LAW)?

Under CRIMINAL LAW a defendant is privileged to act as reasonably necessary to PREVENT FELONIES or a DISTURBANCE OF THE PEACE being committed in their presence.

[This is only a defense if the acts are reasonably necessary to prevent or stop serious crimes or disturbances of the peace. It is no defense if the defendant acts AFTER THE CRIME IF OVER, except in the rare fact pattern when a fleeing felon (like a known serial-killer) is shot by police while fleeing because it is the only way to protect future victims from future crimes by the same felon.]

Here … because…Therefore…

35) SELF-DEFENSE? **[A commonly tested issue.]**

Under CRIMINAL LAW defendants who are NOT AGGRESSORS may act reasonably as NECESSARY to protect their own safety. Modernly defendants can "hold their ground" and have is no duty to retreat in most jurisdictions. Aggressors are people who have unreasonably created or increased dangers to others. **Important!**

Here…because…Therefore…

36) DEFENSE of OTHERS? **[A commonly tested issue.]**

Under CRIMINAL LAW defendants are privileged to act reasonably as necessary to defend others who are NOT AGGRESSORS from harm. Aggressors are people who have unreasonably created or increased dangers to others. Courts are split when a defendant unknowingly acts to defend an AGGRESSOR. Under one view the defendant STEPS INTO THE SHOES of the aggressor and has no privilege because the aggressor could not claim self-

defense. In other Courts the defendant is privileged to defend the aggressor in a fracas if they act with a REASONABLE BELIEF they are acting to defend an innocent victim of aggression.

[It is generally NOT reasonable (and not privileged) to shoot fleeing criminals. The only time it is justified by "defense of others" is if the criminal poses a clear danger to the public safety and there is no other feasible way to stop the criminal from escaping. This is often tested.

The use of unreasonable force in self-defense, defense of others or defense of property results in an "imperfect" defense claim. Where there is an "imperfect" defense claim, the jury may consider the motivations of the defendant as a MITIGATING FACTOR.]

Here … because…Therefore…

37) DEFENSE of PROPERTY? [A commonly tested issue.]

Under CRIMINAL LAW a defendant is privileged to use reasonable force to protect his own property or the property of others from harm. It is never reasonable to use deadly force to merely protect property.

[Note: This is never a defense for the use of deadly force. A defendant has no right to shoot thieves who are running away. But this "imperfect" defense will be a MITIGATING FACTOR for a jury to consider.]

Here … because…Therefore…

Note: The above issue statements provide virtually every important issue, definition, rule and term that you will ever see on a CRIMES examination in law school or on the FYLSX or Bar Exams. If you know the above issues and responses you have everything you really need.

Practice Question 19-15

Tom and Dick burst into the 7-11 store in Sacramento through the open door with their guns drawn at midnight. They wanted to rob the store the first night it opened.

"Stick 'em up," yelled Tom.

Unfortunately, the store was empty because they made a big mistake. No one was there. There was no merchandise. The store wasn't going to open until the next week.

They were so mad they ripped the security camera off the wall and threw it in the river.

The next morning Tom and Dick saw themselves on the Dumb Crook Show on TV. The store security camera had filmed them trying to rob the empty store. They were afraid they would be caught. So to escape Tom drove real fast to San Francisco with Dick as his passenger.

On the freeway going 75 mph, Tom was distracted and accidentally bumped Victoria's car. She was only going 70 mph, the posted limit. She spun out of control and crashed. She survived, but went into labor, and her full-term, viable baby was born dead.

Tom then got off the freeway and drove down the crowded city surface streets of San Francisco at 80 mph. Dick was silent. The posted limit was 25 miles per hour. The car ran over homeless person Victor. He died instantly.

Discuss the possible charges against Tom and Dick.

Practice Question 19-16

Huey and Louie agreed to kidnap Frank's daughter, Millie, and hold her for ransom. Frank was an old movie star with lots of money.

Huey knew that Louie was a convicted rapist, so he said, "Louie! I want you to swear that you won't touch this girl. Because we are just in this for the ransom. Nothing else. And if you do anything bad to her, that is going to hurt our chances to get the ransom. So, do you swear?"

Louie said, "Huey, I swear on a stack of bibles I won't touch the dame."

So Huey and Louie kidnapped Millie and held her for ransom in a rundown motel.

Huey went to the store for smokes and when he came back he discovered Louie had sex with Millie by telling her he would let her go in exchange. He was furious and afraid. He said, "Louie, I quit. I ain't having nothing to do with this no more!"

Huey left and went to a bar where he got very drunk. That night Millie became so despondent over allowing Louie to have intercourse with her she hung herself in the bathroom of the motel room while Louie was snoring in the bed.

Police discovered where Louie was and surrounded the motel room the next morning. Louie vowed not to be taken alive and was gunned down by the cops.

Huey woke up at noon. Unaware of what happened to Millie and Louie, he decided to turn himself in. So he went to the police that morning and told them everything he knew in an effort to help rescue Millie.

What crimes can Huey be charged with?

Practice Question 19-17

Tom and his lover Dick made frequent trips to Mexico. Dick was getting a little impotent, so on one trip they bought some Viagra with the intent of smuggling it into the United States. They thought this was a felony, but they were wrong. It was not a crime.

Officer Oscar tried to pull them over solely because they looked gay, and Oscar hated gays. He intended to harass them. If he was lucky, he thought, maybe he could beat them up. Oscar had some issues to resolve, but he did not have probable cause to stop the car.

Tom was afraid. He felt Oscar must somehow know he was smuggling Viagra. He thought he would be strip searched, and he had an overwhelming phobia of body cavity searches. He thought he would be put in prison and treated very badly.

Tom was scared to death and could not bring himself to stop the car. He knew it was wrong, but he could not help himself. He was in a daze.

Tom continued to drive carefully at 55 mph and Oscar continued to follow him. Oscar was furious. Then Oscar shot at the car several times and Dick was killed.

Tom is charged with the murder of Dick.

Discuss Tom's liability for murder and lessor included offenses, and his applicable defenses.

Practice Question 19-18

Jim was sweet on Sue, a cute little red-haired girl in his Senior class, but she was more interested in a big, dumb, old football player named Chester.

Jim thought that Sue would dump Chester for him if he was a hero. So Jim set fire to the wastepaper basket in old-lady Smith's classroom during the class break intending to report it and be a hero. He didn't intend any harm to the building, and he honestly believed the fire would not hurt the school at all. Unfortunately, the fire slightly singed the wall, and some other boys poured water on it before Jim could report it.

In the confusion Sue dropped her wallet. Jim picked it up and hid it. He planned on giving it back to her that night. Then she would see he is a hero, and she would have to go to homecoming with him.

Jim called Sue's house several times that night to tell her he had her wallet. But Sue's mother kept saying she was out with Chester. Jim did not tell Sue's mother about the wallet.

This went on all night and Jim got so depressed he went to the river, pocketed Sue's money and threw Sue's wallet as far out into the current as he could throw.

The next day Chester came up to Jim in first period and asked him a favor. Chester said the football team had to assemble for a yearbook picture, so Chester asked Jim to buy him two homecoming tickets in fifth period for Sue and him to go to the dance. Jim intended to do Chester a favor and took his $10.

Jim got mad and decided he would just keep Chester's money. Then after second period Chester offered Jim $20 more so Sue and he could have their pictures taken at the dance. Jim agreed and took the money with every intention of stealing it.

Jim used all of Chester's money to buy cigarettes and Playboy magazines.

Discuss Jim's crimes.

Practice Question 19-19

Yang rode his bicycle down Rodeo Drive looking for a victim. He saw a "Hot Tomato" ready to cross the street, and as he coasted past her he deftly lifted her wallet right out of her purse without her knowing.

At the next street he snatched another purse when an "Old Lady" wasn't even looking. But she was holding tight and fell over into the street. As she hit the pavement she lost her grip and Yang rode away with another prize.

Yang was having a good day.

At the next corner Yang reached out to snag another purse. But at the last second as he reached out he realized the "Young Chick" was not carrying a purse.

Disappointed, Yang called it a day. He decided to score some dope with his earnings. Seeing a dude near an alley, he entered into some negotiations. The dude said he could sell him a baggy of "grass" for $10. Yang agreed and handed over $10. Suddenly cops came out of nowhere and jumped on them before Yang got possession. It turned out the "grass" really was grass -- lawn clippings from the dude's back yard.

What crimes can Yang be charged with and what defenses might be raised?

Practice Question 19-20

Karen was furious because her lover Billy ran off with Mary. Karen decided to kill Mary and looked for some dynamite to blow Mary straight to Hell.

Karen went to a "Dynamite R Us Store", but the owner Marvin refused to sell her any dynamite. Karen pulled a gun and demanded quality service like it said on the sign in the window. Marvin said, "Yes, Ma'am!" and handed over 12 sticks of dynamite. Karen was happy with the service. But as she was putting away the gun, it accidentally went off and shot Marvin between the eyes. Karen felt real bad about it.

As Karen approached Mary's mobile home she was stopped by Ruby. Ruby gave her a hard look. Ruby "dissed" her. Ruby challenged her to a spelling bee and criticized her choice of attire. That was all more than Karen could take, because she always had a short fuse. So she smoked Ruby above the ear with a round from the '38.

Karen proceeded to put the dynamite under Mary's double-wide "Jerry Springer" brand mobile home. She realized that the blast would probably kill Billy too, and she felt real bad about it. Billy was the reason she was acting out, her love for him and all. But the way she figured, a girl's got to do what a girl's got to do. So she washed that man right out of her hair.

That night the blast killed both Mary and Billy.

Discuss the potential first degree murder charges Karen might face along with lesser included offenses and her potential defenses.

Chapter 20: Conclusion

Brilliant law students often fail to grasp that the essay grader has to grade a lot of essays in a short time. The grader just wants you to spot and state the ISSUES.

Then, for each issue the grader wants you to correctly state the AREA of law and give a good statement of the RULE that would apply to settle that particular issue.

Then for each rule, the grader wants you to identify the ELEMENTS of the rule that are supported (or not supported) by the given FACTS.

By citing FACTS, you prove the ELEMENTS. By nailing the ELEMENTS you prove the RULE. And by proving the RULE you prove the ISSUE.

When the issue is proven, just state a CONCLUSION and move on.

You MUST be prepared to recite, verbatim, certain rules of law. You MUST cite certain cases like *Palsgraf* and *New York Times v. Sullivan.* You do not have to memorize everything in this book, but you must be prepared to recite concise definitions and rules for some contract, tort and criminal law concepts without hesitation. During the exam is not the time or place to begin composing a statement explaining complex legal concepts.

You don't have to be brilliant to succeed in law school or pass the Baby Bar Exam (FYLSX). The key to success is the use of the **"Here"/"because"** word combination along with some **memorization** and plenty of **timed practices**. PRACTICING essay writing is critical so you do not run out of time.

Appendix A gives an **ALPHABETICAL LISTING** and explanation of just about **EVERY definition and rule you need to know** to succeed your first year law school classes and pass the FYLSX. In the rule definitions the required elements that should be the focus of your analysis are underlined for emphasis.

However, you should also read through the remaining provisions of the UCC because it is always possible the Bar Examiners will chose some obscure provision that is seldom taught or tested in law schools.[122]

Appendix B gives **SAMPLE ANSWERS** to the practice questions presented above. The word "because" appears repeatedly in the sample answers. The word "Here" addresses each ELEMENT to be proven, and the word "because" nails that element with a given FACT. That is the approach you need to learn.

Nailing the elements is the key to success in law school and on the FYLSX, and YOU WILL SUCCEED if you follow the approach presented in this book.

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[122] They did exactly that on the June 2005 FYLSX where an entire question was based on UCC 2-702, which is generally considered an obscure provision.

Appendix A: Rules and Definitions for Contracts, UCC, Torts and Crimes

1. **ABUSE OF PROCESS (TORTS):** Abuse of process is the tort of bringing or instituting a civil or criminal action against the plaintiff without legitimate basis out of malice or for an improper purpose. (see MALICIOUS PROSECUTION.)

2. **ACCEPTANCE (CONTRACTS-COMMON LAW):** Under the common law MIRROR IMAGE RULE an acceptance is an unequivocal assent to an offer, communicated to the offeror and it can be implied by silent commencement of performance known to the offeror. A response that is equivocal or contains varying terms is a REJECTION AND COUNTER-OFFER and not an effective acceptance. An offer must be accepted within a reasonable period. (see OFFER, LAPSE.)

3. **ACCEPTANCE (CONTRACTS-UCC):** Under UCC 2-206 an acceptance of an offer not other wise conditioned may be made in any REASONABLE MANNER, including a promise to ship or shipment of either conforming or non-conforming goods, but a shipment of NON-CONFORMING goods as an EXPRESS ACCOMMODATION is not an acceptance. UCC 2-207 allows an acceptance containing varying terms to be effective.

4. **ACCOMPLICE (CRIMES):** An accomplice is a person who urges the commission of a crime or knowingly helps others plan, execute, profit from or escape capture after a crime. At common law accomplices were classified as accessories before the fact, principals, and accessories after the fact. (see ACCOMPLICE LIABILITY.)

5. **ACCOMPLICE LIABILITY (CRIMES):** Accomplice liability is a form of vicarious criminal liability for criminal acts of co-criminals that directly and naturally result (foreseeable acts) from the defendant's own criminal acts. Many Courts do not recognize Withdrawal as a defense to accomplice liability. (see ACCOMPLICE, CONSPIRACY, CONSPIRACY LIABILITY, WITHDRAWAL.)

6. **ACCORD AND SATISFACTION (CONTRACTS/UCC 3-311):** An ACCORD AND SATISFACTION is a binding agreement settling a reasonable, good faith dispute over the terms and/or performance of a contract. Further, under UCC 3-311 the good faith tender and acceptance of an instrument as "full satisfaction" of any claim that is unliquidated or the subject of a bona fide dispute is generally binding, subject to certain statutory limitations and exceptions.

7. **ACTUAL CAUSE (TORTS/CRIMES):** An act is an actual cause of injury if injury would not have occurred but for that act. Actual causation is referred to as "sine qua non."

8. **ACTUAL MALICE (TORTS):** For DEFAMATION a false statement is made with actual malice if it is made with knowledge the statement is false or with reckless disregard for whether it is false or not. (see RECKLESS, DEFAMATION.)

9. **ADHESION CONTRACT (CONTRACTS):** An adhesion contract is a "take it or leave it" offer that courts will not enforce if there is a lack of reasonable contractual intent on the part of the offeree. (see UNCONSCIONABLE CONTRACT.)

10. **AFFIRMATIVE DEFENSES (TORTS/CRIMES):** Affirmative defenses are claims by criminal or tort defendants that even if the opposing parties (prosecutors or plaintiffs) can prove each required element of their causes of action (e.g. that the defendant committed battery) they were privileged by law to commit the acts complained of anyway (e.g. that they acted in self-defense). Affirmative defenses can only be raised by the defendant after the opposing parties have completed presentation of

their case-in-chief. The burden is on the defendants to prove each required element of affirmative defenses. (see PASSIVE DEFENSES.)

11. **AGGRESSOR (CRIMES):** The initial aggressor in a fracas is the person who attacks a victim or otherwise starts a fracas. Once a fracas has begun the role of aggressor will switch to any party who unnecessarily escalates the level of violence or unreasonably continues the violence after the other party has attempted to withdraw and escape.

12. **ANTICIPATORY BREACH (CONTRACTS):** An anticipatory breach is a clear statement of intent by a party to a contract, prior to the time performance is due, that they will not perform when performance is due. An anticipatory breach is a MAJOR breach (see BREACH) that excuses the non-breaching party from performance and accelerates the breaching party's duty of performance to the immediate unless the non-breaching party WAIVES the breach by letting the breaching party continue performance. (compare to REASONABLE ASSURANCES.)

13. **APPROPRIATION OF LIKENESS (TORTS):** Appropriation of likeness is the tort of unauthorized use of the name or likeness of a person in a manner that implies endorsement of a product or support of a cause. It does not include the publication of names and photographs in news articles and matters of legitimate public interest. Plaintiffs are often awarded LEGAL RESTITUTION to prevent unjust enrichment by the defendant rather than the plaintiff's DAMAGES. (see INVASION OF PRIVACY.)

14. **ARSON (CRIMES):** Arson is the common law felony of maliciously burning the dwelling of another. Modernly arson has been extended to the malicious burning of almost any structure. Malice for arson requires an act with a wrongful intent to cause a burning, but it is a GENERAL INTENT crime, meaning that MISTAKE OF FACT is not a defense unless it is a reasonable mistake.

15. **ASSAULT (CRIMES):** Assault is the crime of intentionally acting to cause a battery or cause apprehension of a battery. The victim does not have to be apprehensive. Assault is a SPECIFIC INTENT crime. (see SPECIFIC INTENT.)

16. **ASSAULT (TORTS):** Assault is the tort of intentionally acting to cause the plaintiff reasonable apprehension of a battery. The plaintiff must be apprehensive.

17. **ASSIGNMENT (CONTRACTS):** An assignment is the transfer of contractual rights from the promisee/assignor to the assignee based on a clear statement of intent by the promisee. The assignment becomes effective when the promisor is given notice of the assignment. Once the assignment is effective the promisor has a duty to deliver the benefits of the contract (pay) directly to the assignee and the rights of the original promisee/assignor are extinguished. The promisee/assignor has secondary liability to the assignee if the assignment is in exchange for consideration. (see DELEGATION.)

18. **ASSUMPTION OF THE RISK (TORTS):** Assumption of the risk is a defense to negligence that acts as a complete bar to recovery if plaintiffs 1) put themselves at risk, 2) with full awareness of the risks, and 3) consciously accepted the risks.

19. **ATTEMPT (CRIMES):** A criminal attempt is a substantial step taken with the specific intent of committing a criminal act. Attempt is a SPECIFIC INTENT crime, meaning that there can be no crime of ATTEMPT unless there was an act taken with the specific intent of committing some other specific crime. Therefore, there can be no "attempted attempt", "attempted second degree murder" or "attempted manslaughter." Further, ASSAULT is specifically defined as an "attempted battery" so "attempted battery" is simply not a correct term under the common law.

20. **AUTHORITY OF LAW (PREVENTION OF CRIME) (TORTS/CRIMES):** Authority of law is the defense that any person has a right to act reasonably, including to perform an arrest, to prevent a felony or disturbance of the peace being committed in their presence, and that police may arrest to prevent misdemeanors in their presence or based on reasonable suspicion of felonies. (Defense to charges of assault, battery and false imprisonment.).

21. **AVOIDABLE INJURY (TORTS):** Under the Avoidable Injury doctrine some Courts in jurisdictions that recognized CONTRIBUTORY NEGLIGENCE (which see) as a complete bar to recovery often held that if a plaintiff's negligence did not help cause an accident and only contributed to the degree of injury, the Court would consider the plaintiff's acts in allocating damages but would not consider it a total bar to recovery.

22. **BATTERY (CRIMES):** Battery is the crime of intentionally acting to cause a harmful or offensive touching of a victim. Battery is a GENERAL INTENT crime. (see GENERAL INTENT.)

23. **BATTERY (TORTS):** Battery is the tort of intentionally acting to cause a harmful or offensive touching of the plaintiff or his person.

24. **BREACH (CONTRACTS):** A contract breach is a failure to perform a contractual duty that is currently due to be performed. It can be MAJOR or MINOR. A MAJOR breach is one that substantially deprives the non-breaching party of the EXPECTED BENEFIT OF THE BARGAIN (which see). A major breach excuses the non-breaching party from all contractual duties and waives conditions on other contractual duties of the breaching party accelerating them to become present duties. A breach is MINOR if the breaching party has SUBSTANTIALLY PERFORMED (which see). A minor breach entitles the non-breaching party to compensation in the form of damages, but it does not excuse the non-breaching party from performance or accelerate performance by the breaching party.

25. **BREACH (TORTS):** A breach in negligence is a failure by defendant with an existing duty to meet the applicable STANDARD OF CARE by acting as a reasonable person like the defendant would normally use in the same circumstance. (see STANDARD OF CARE, RES IPSA LOQUITUR.)

26. **BREACH OF EXPRESS WARRANTY (TORTS):** Breach of express warranty is a products liability theory when 1) a defendant releases unreasonably dangerous goods into the stream of commerce 2) while falsely stating the goods are suitable for a specific use and 3) the recipient of the goods reasonably relies on the statements, resulting in 4) injury to the plaintiff. The defendant is liable for all injury, property damage and other harm that is actually caused, subject to general considerations of foreseeability and proximate causation.

27. **BREACH OF IMPLIED WARRANTY (TORTS):** Breach of implied warranty is a products liability theory when 1) a defendant releases unreasonably dangerous goods into the stream of commerce 2) while impliedly representing the goods to be safe for ordinary use or else for the recipient's stated, intended use and 3) the recipient of the goods reasonably relies on the defendants statements because of the defendant's stated or implied expertise regarding the suitable use of the goods, resulting in 4) injury to the plaintiff. The defendant is liable for all injury, property damage and other harm that is actually caused, subject to general considerations of foreseeability and proximate causation.

28. **BURGLARY (CRIMES):** At common law burglary was the felony of breaking and entering the dwelling of another in the night with an intent to commit a FELONY. At common law a CONSTRUCTIVE BREAKING was found when entry was made by trick, threat of violence or through the help of a conspirator. The entry of a structure near a dwelling constituted a burglary if it was within the CURTILAGE of the dwelling. Modernly burglary has generally been extended to any trespassory entry of almost any structure at any time of day or night with intent to commit a felony or larceny. A trespassory entry is any entry made without consent, express or implied. Courts are split as

to whether there is a trespassory entry when the defendant has express or implied consent to enter the structure for other purposes, and some State statutes classify any entry with intent to commit a felony or larceny as a burglary (see CONSTRUCTIVE BREAKING, CURTILAGE, LARCENY.)

29. **CASE-IN-CHIEF (CONTRACTS/TORTS/CRIMES):** The "case-in-chief" is the evidence and legal argument presented to the finder of fact (judge or jury) by the initial moving parties in a legal action (prosecutors and plaintiffs bringing actions in court). The initial moving parties have the burden of presenting admissible evidence to prove each and every required legal element of their stated causes of action (e.g. that the defendant committed battery). While the moving parties are presenting their case-in-chief the only defense arguments allowed are PASSIVE DEFENSES that the evidence presented by the moving parties is insufficient. And at that time the defense can only present evidence through cross-examination of the movant's witnesses. After the moving parties have presented their case-in-chief they "rest" and the defendants are given an opportunity to present their "defense case-in-chief". That is the only time the defendant can claim and present additional evidence to support AFFIRMATIVE DEFENSES (e.g. that they acted in self-defense).

30. **CAUSATION, ACTUAL (TORTS/CRIMES):** See ACTUAL CAUSE.

31. **CAUSATION, PROXIMATE (TORTS/CRIMES):** see PROXIMATE CAUSE.

32. **CAUSE OF ACTION (CONTRACTS/TORTS/CRIMES):** A cause of action is a complaint cited by a moving party bringing an action in court against a defendant (e.g. allegations of breach of contract, murder, negligence, etc.).

33. **COMING TO THE NUISANCE (TORTS):** If plaintiffs in actions for nuisance have "come to the nuisance" by physically moving to the location where a condition already exists, a MINORITY of Courts find them totally barred from recovering damages. Under the MAJORITY view coming to the nuisance is only considered a factor in determining damages and is not a total bar to recovering damages. (see PRIVATE NUISANCE.)

34. **COMPARATIVE NEGLIGENCE (TORTS):** In the MAJORITY of States plaintiffs in negligence actions will have damage awards proportionately reduced by the amount of their own COMPARATIVE NEGLIGENCE. Some States completely bar plaintiffs from recovery if they cause over 50 percent of their own injury. Some States also bar plaintiffs from recovery against any defendant less at fault than the plaintiffs.

35. **COMPOUNDING (CRIMES):** Compounding is the crime of taking money or something of value from criminals in exchange for agreeing to not report their crimes to the police.

36. **CONCEALMENT (TORTS):** Concealment is the tort of 1) INTENTIONALLY CONCEALING FACTS with 2) an INTENT TO DECEIVE when there is 3) a DUTY to reveal the facts, and the 4) plaintiff REASONABLY RELIES on the facts as they appear and 5) is caused DAMAGES. The difference between CONCEALMENT and FRAUD is only that the latter requires an intentional misrepresentation while the former requires an intentional breach of the duty to disclose material facts. (see **FRAUD** as alternative theory.)

37. **CONDITION CONCURRENT (CONTRACTS):** A CONDITION CONCURRENT is a condition that must be satisfied at the same time a contractual duty to perform ripens. This is rare and effectively means both parties to a contract must perform contractual duties at the same time and neither has any duty to perform unless the other party simultaneously tenders performance. (see CONDITION PRECEDENT, CONDITION SUBSEQUENT).

38. **CONDITION PRECEDENT (CONTRACTS):** A CONDITION PRECEDENT is a condition that must be satisfied before a contractual duty to perform ripens. This is very common and means that there is no contractual to perform until the condition is satisfied. (see CONDITION CONCURRENT, CONDITION SUBSEQUENT). **[Note: This term has a different meaning in real property law.]**

39. **CONDITION SUBSEQUENT (CONTRACTS):** A CONDITION SUBSEQUENT is a condition that must be satisfied while a contractual duty to perform exists, and if the condition fails the ripened duty to perform is excused. (see CONDITION CONCURRENT, CONDITION PRECEDENT). **[Note: This term has a different meaning in real property law.]**

40. **CONSENT (TORTS):** Consent is a defense to most intentional torts if there is informed, voluntary consent by a person with legal capacity. Consent is not a valid defense to an act intended to cause serious bodily injury and often is not a defense to injury suffered from "mutual combat".

41. **CONSENT (CRIMES):** Consent is a defense to some crimes [rape, larceny, battery – consent to a touching] if there is informed, voluntary consent by a person with legal capacity. Consent is never a defense to murder, an act intended to cause serious bodily injury or crimes such as dueling.

42. **CONSEQUENTIAL DAMAGES (CONTRACTS):** Under *Hadley v. Baxendale* damages for lost profits expected from collateral contracts that fail because a contract is breached will only be awarded, absent express contract provisions otherwise, if the damages 1) were CONTEMPLATED by (known to) the breaching party at the time the contract was executed, 2) can be measured with CERTAINTY, 3) were CLEARLY CAUSED by the breach and 4) COULD NOT BE AVOIDED by the non-breaching party.

43. **CONSIDERATION (CONTRACTS):** Under contract law consideration is a bargained for exchange of value posing sufficient legal detriment that the law will enforce an agreement. Separate consideration is required to support a modification of an existing contract except under the UCC where no additional consideration is required to support contract modification.

44. **CONSPIRACY (CRIMES):** A conspiracy is the crime of agreement between two or more people to work toward an illegal goal. Agreement may be express or implied by acts. Modernly an overt act in furtherance of the conspiracy goal is often required. The WHARTON RULE (which see) requires more participants than are necessary to accomplish the illegal goal (no conspiracy for RECEIVING STOLEN PROPERTY, sale of illegal drugs, etc. unless three or more defendants participate.) Conspiracy does not merge with the illegal goal allowing conviction for conspiracy as a separate crime. (see ACCOMPLICE LIABILITY, MERGER, WITHDRAWAL.)

45. **CONSPIRACY LIABILITY (CRIMES):** Under the *Pinkerton Rule* each member of a conspiracy is vicariously liable for the criminal acts of co-conspirators within the scope (foreseeable and in furtherance) of the conspiracy agreement. Each member of the conspiracy may be charged with all crimes committed by other conspirators if they occur after they join the conspiracy, before the conspiracy ends, and before the defendant WITHDRAWS. A defendant that joins a conspiracy in progress is generally not liable for prior crimes committed by co-conspirators unless the defendant has sought to profit from those prior crimes. Most Courts recognize WITHDRAWAL as a defense against liability for crimes of co-conspirators after the withdrawal is effective, and some Courts recognize withdrawal as a defense to the charge of conspiracy itself. (see ACCOMPLICE, ACCOMPLICE LIABILITY, CONSPIRACY, WITHDRAWAL.)

46. **CONSTRUCTIVE BREAKING (CRIMES):** Under the common law a "breaking" for BURGLARY was deemed to have occurred if the defendants made entry by trick, threats of violence or the help of a co-conspirator. Modernly a sufficient "breaking" is deemed to have occurred if the defendants make a TRESPASSORY ENTRY to a structure. A trespassory entry is one without consent, express or implied. (see BURGLARY).

47. **CONSTRUCTIVE CONDITIONS (CONTRACTS):** CONSTRUCTIVE CONDITIONS are implied conditions that must be satisfied before contractual duties ripen. They are implied by the nature of a contract and the express covenants within it. If a contract party promises to perform duties in exchange for payment by the other party, the duty to pay is subject to an implied CONSTRUCTIVE CONDITION PRECEDENT that the duty to pay does not ripen until the other party has completed performance. (see CONDITION PRECEDENT).

48. **CONTRACT (CONTRACTS):** A contract is a promise or set of promises, the performance of which the law recognizes as a duty and for the breach of which the law will provide a remedy.

49. **CONTRIBUTORY NEGLIGENCE (TORTS):** In a MINORITY of States plaintiffs in negligence actions are completely barred from any recovery if their own CONTRIBUTORY NEGLIGENCE caused any part of their injury. But many States following this approach will not bar plaintiffs from recovery if the defendant had the LAST CLEAR CHANCE (which see) to avoid the accident. And under the AVOIDABLE INJURY DOCTRINE (which see) some Courts have allocated damages on comparative negligence principals when the plaintiffs' negligence did not cause the accident but only caused their injuries to be more severe.

50. **CONVERSION (TORTS):** Conversion is the tort of substantial interference with personal property (chattel) causing deprivation of possession. The remedy and measure of damages for conversion is the forced sale of the chattel to the defendant.

51. **CRIMINAL NEGLIGENCE (CRIMES):** Criminal negligence is a deliberate breach of a pre-existing duty to act causing extreme risks to others. For example, a parent deliberately failing to feed an infant. "Deliberateness" of the breach distinguishes criminal negligence (also called "gross" negligence) from "ordinary" negligence. (Compare to RECKLESS, RECKLESS HOMICIDE. INVOLUNTARY MANSLAUGHTER.)

52. **CURTILAGE (CRIMES):** The curtilage is the area sufficiently close to a dwelling that a breaking and entry of any structure within the curtilage constituted a burglary under the common law. (see BURGLARY.)

53. **DAMAGES (TORTS):** Under tort law "damages" means a monetary award to a plaintiff that is generally, but not always, measured by the injury suffered by the plaintiff. Damages may be special (measured by out of pocket expenses) or general (to compensate for pain, suffering.) Damages may also be claimed for interference with possessory rights in the case of trespass to land and conversion. If a prima facie case is proven, damages are presumed for the torts of ASSAULT, BATTERY, CONVERSION, FALSE IMPRISONMENT, TRESPASS TO LAND and LIBEL PER SE. Damages must be proven in some manner for the torts of INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, TRESPASS TO CHATTELS, NEGLIGENCE, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, SLANDER, and LIBEL PER QUOD. (which see.) An award of PUNITIVE damages is intended to punish and deter further misconduct by the defendant is not strictly measured by the actual injury to the plaintiff. LEGAL RESTITUTION may be awarded to prevent unjust enrichment by the defendant rather than DAMAGES suffered by the plaintiff.

54. **DECEIT (CONTRACTS):** Deceit is a defense to enforcement of a contract which is also called FRAUD (which see.)

55. **DECEIT (TORTS):** Deceit is a tort also called FRAUD (which see.)

56. **DEFAMATION (TORTS):** A defamation is an unprivileged, false statement of material fact about the plaintiff published to another person causing damage to her reputation. Statements made in a reasonable manner, without malice to defend a legitimate personal, group, or public interest are PRIVILEGED. An oral defamation is SLANDER and a written defamation is LIBEL. If the defamatory statement involves INNUENDO, depends on interpretation (COLLOQUIUM) or requires the listener to know extrinsic facts (INDUCEMENT) it is defamation PER QUOD. If the false statement is clearly defamatory on its face as to the plaintiff and 1) about criminal acts, 2) about loathsome disease, 3) about unchaste behavior, 4) about business practices of the plaintiff (CLUB), or 5) LIBEL (written or otherwise permanently recorded), it is defamation PER SE (CLUB). General damages can be awarded without proving special damages only in the case of a defamation per se. Under *New York Times v. Sullivan* a public figure plaintiff must prove the defendant acted with actual malice because they acted with knowledge or with reckless disregard of the falsity of their statements. Further, negligence or actual malice must be proven if the false statements concern a matter of legitimate public interest. (see ACTUAL MALICE, LIBEL, PUBLIC FIGURE, RECKLESS, SLANDER.)

57. **DEFENSE of AUTHORITY OF LAW (TORTS/CRIMES):** See AUTHORITY OF LAW.

58. **DEFENSE of COMPARATIVE NEGLIGENCE (TORTS):** See COMPARATIVE NEGLIGENCE.

59. **DEFENSE of CONSENT (TORTS/CRIMES):** See CONSENT.

60. **DEFENSE of CONTRIBUTORY NEGLIGENCE (TORTS):** See CONTRIBUTORY NEGLIGENCE.

61. **DEFENSE of DISCIPLINE (TORTS):** See DISCIPLINE.

62. **DEFENSE of DURESS (CONTRACTS/CRIMES):** See DURESS.

63. **DEFENSE of ENTRAPMENT (CRIMES):** See ENTRAPMENT.

64. **DEFENSE of INFANCY, INSANITY AND INCOMPETENCE (TORTS):** See INFANCY, INSANITY AND INCOMPETENCE.

65. **DEFENSE of INFANCY (CRIMES):** See INFANCY

66. **DEFENSE of INSANITY (CRIMES):** See INSANITY.

67. **DEFENSE of MISTAKE OF FACT (CRIMES):** See MISTAKE OF FACT.

68. **DEFENSE of MISTAKE OF LAW (CRIMES):** See MISTAKE OF LAW.

69. **DEFENSE OF MISTAKE (CONTRACTS)**: See either MUTUAL MISTAKE or UNILATERAL MISTAKE.

70. **DEFENSE of NECESSITY (TORTS):** See NECESSITY.

71. **DEFENSE of OTHERS (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect the safety of others. Jurisdictions are split when a defendant mistakenly acts to protect an aggressor in a fight. Under the STEPS-INTO-THE-SHOES view the defendant steps into the shoes of the aggressor and is not privileged to act to defend the aggressor in a fracas. Under the REASONABLE APPEARANCES view the defendant is privileged to act based on reasonable appearances, even if he acts to protect the aggressor in a fracas mistakenly believing he is aiding the victim of aggression. (See AGGRESSOR.)

72. **DEFENSE of PREVENTION OF CRIME (TORTS/CRIMES):** See AUTHORITY OF LAW

73. **DEFENSE of PROPERTY (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect his own property or the property of others. But deadly force can never be used to protect property because it is NOT reasonable. Defense of property is never a defense to murder, but a MISTAKE OF FACT may be a reasonable alternative. (see NECESSITY, MISTAKE OF FACT.)

74. **DEFENSE of RECAPTURE (TORTS):** See RECAPTURE OF CHATTELS.

75. **DEFENSE of SELF-DEFENSE (TORTS/CRIMES):** See SELF-DEFENSE.

76. **DELEGATION (CONTRACTS):** A delegation is a transfer of contractual duties from the promisor/delegator to a delegatee based on a clear statement of intent by the delegator and acceptance of the duty by the delegatee. The promisor/delegator retains primary liability to the promisee. If the delegatee accepts contractual duties in exchange for consideration, a contract between the promisor and delegatee forms, and the promisee is an intended third-party beneficiary of that contract with standing to enforce it at law against both parties. If the delegatee gratuitously accepts contractual duties the promisee can only enforce the promisor-delegatee agreement at equity based on an argument of detrimental reliance. The delegation of a contract is void if the contract requires the unique personal services or attributes of the original party, the delegator. (see ASSIGNMENT, THIRD-PARTY BENEFICIARY.)

77. **DEPRAVED HEART MURDER (CRIMES):** Depraved Heart Theory is a form of malice aforethought for murder where the defendant 1) deliberately created extreme risks to human life OR deliberately breached a pre-existing duty to protect others from extreme risks with 2) awareness of the risks and 3) a conscious disregard for the risks.

78. **DISCIPLINE (TORTS):** A person of recognized authority (schoolteacher, bus driver, airplane pilot, policeman, parent, etc.) is privileged to act reasonably to control others (Defense to intentional torts of battery and false imprisonment.)

79. **DIVISIBLE CONTRACT (CONTRACTS):** Under the UCC a divisible contract is one that schedules more than one shipment of goods in a manner that payment can be made for individual shipments. Any shipment of non-conforming goods can be rejected, but a breach as to any shipment does not constitute a breach of the entire contract and does not allow the buyer to repudiate the entire contract with respect to future scheduled shipments.

80. **DURESS (CONTRACTS):** Contracts are always unenforceable against parties that enter into the agreements because of threats of physical harm, and they are generally unenforceable against parties who enter into the agreements because of threats of economic harm that were deliberately created by the party seeking to enforce the contract.

81. **DURESS (CRIMES):** A claim of duress is a defense to any crime except murder if the criminal act was done without criminal intent as the result of duress.

82. **DUTY (TORTS):** Generally a person has NO DUTY to act to protect others. But a DUTY may be established by STATUTE, CONTRACT, RELATIONSHIP, ASSUMPTION or creation of PERIL **[SCRAP]**. Violation of a duty created by STATUTE usually gives rise to a claim of NEGLIGENCE PER SE. The duties of occupiers of land are governed by the principles of PREMISES LIABILITY, a form of duty based on RELATIONSHIP. And any person who creates PERIL to others has a duty as discussed by Cardozo and Andrews in PALSGRAF. (See NEGLIGENCE PER SE, PREMISES LIABILITY, PALSGRAF.)

83. **EMBEZZLEMENT (CRIMES):** Embezzlement is the crime of intentional trespassory conversion of personal property of another by one entrusted with lawful possession. Modernly defined by statute as THEFT. (see ROBBERY, LARCENY, FALSE PRETENSES.)

84. **ENTRAPMENT (CRIMES):** Entrapment is a defense claim that the defendant's criminal intent was the product of improper police behavior. Jurisdictions are split. Under the MAJORITY VIEW entrapment is not a valid defense if the defendant was predisposed to commit the crime charged. Under a MINORITY view entrapment is a valid defense if outrageous police conduct instigated the crime.

85. **EQUITABLE RESTITUTION (CONTRACTS/TORTS):** Equitable restitution is a money judgment or other remedy awarded by a Court of EQUITY when the parties have no adequate legal remedies. The purpose may be to compensate parties for injuries, restore the status quo, prevent frustration of reasonable expectations or prevent unjust enrichment

86. **ESTOPPEL (CONTRACTS):** Estoppel means that a party may be equitably barred from making a legal claim if they previously made an opposite or contradicting claim intending to induce reliance by the opposing party, and the opposing party did change position in reliance on that earlier representation. (see PROMISSORY ESTOPPEL.)

87. **EXPECTED BENEFIT OF THE BARGAIN (CONTRACTS):** The expected benefit of the bargain is the advantage or benefit that a party reasonably expects to derive from entering into a contract. (see BREACH).

88. **EXPRESS MATERIAL CONDITIONS (CONTRACTS):** An EXPRESS MATERIAL CONDITION is a condition that the parties to a contract expressly agreed upon, and the failure of which completely excuses a party from performance, subject to equitable considerations. (see MATERIAL CONDITIONS).

89. **FACTUAL IMPOSSIBILITY (CRIMES):** An act is not a "substantial step" sufficient to charge an attempted crime, regardless of criminal intent, if the act done could never result in a criminal result under any reasonable circumstance (e.g. it is not a crime to stick pins in a voodoo doll even if the defendant sincerely believes it will work). (see MISTAKE OF FACT, LEGAL IMPOSSIBILITY and MISTAKE OF LAW.)

90. **FALSE IMPRISONMENT (TORTS):** False imprisonment is the tort of intentionally acting to cause the plaintiff to be confined to an enclosed area with no reasonably apparent means of reasonable escape. The plaintiff must be aware of the confinement.

91. **FALSE LIGHT (TORTS):** False light is the tort publishing a false portrayal of the plaintiff causing inconvenience or embarrassment. Damages are generally measured by the injury to the plaintiff. The distinction between False Light and Defamation is that in the former case the false portrayal may not cause damage to reputation while in the later case false statements of fact cause injury to reputation and standing. (see INVASION OF PRIVACY.)

92. **FALSE PRETENSES (CRIMES):** False pretenses is the crime of obtaining title to the property of another with an intent to permanently deprive by means of intentionally misrepresenting facts. Modernly defined by statute as THEFT. (see ROBBERY, EMBEZZLEMENT, LARCENY.)

93. **FELONY (CRIMES):** A felony is a crime for which the maximum possible penalty could exceed one year in prison. Under the common law the recognized felonies were murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem and burglary **[MR & MRS LAMB]**.

94. **FELONY MURDER RULE (CRIMES):** The Felony Murder Rule holds that the intent to commit an inherently dangerous felony is sufficient malice aforethought that any unlawful homicide that occurs as a result may be charged as a MURDER. Under the REDLINE RULE many states hold that the killing of a criminal accomplice by any party other than another criminal accomplice is not chargeable as murder under the Felony Murder Rule. For the Felony Murder Rule to apply a death must result from acts done within the RES GESTAE of the inherently dangerous felony, the sequence of events beginning with the first substantial step toward commission and ending when the defendants have left the scene of the crime and reached a place of relative safety. (see MURDER, REDLINE RULE.)

95. **FRAUD (CONTRACTS):** Fraud is a complete defense to enforcement of a contract when 1) a party seeking to enforce the contract MISREPRESENTED material facts with 2) an INTENT to DECEIVE, 3) the party seeking to void the contract REASONABLY RELIED on the misrepresented facts, and 4) the party seeking to void the contract WOULD NOT HAVE ENTERED THE CONTRACT if they had known the true facts. (Also called DECEIT; see NONDISCLOSURE as an alternative theory. For CRIMES see FALSE PRETENSES.)

96. **FRAUD (TORTS):** Fraud is the tort of 1) FALSELY STATING or MISREPRESENTING material facts with 2) an INTENT TO DECEIVE, causing 3) REASONABLE RELIANCE by the plaintiff 4) resulting in INJURY to the plaintiff. (Also called DECEIT; See CONCEALMENT as alternative theory.)

97. **FRUSTRATION OF PURPOSE (CONTRACTS):** If a party enters into a contract knowing the specific benefit the other party seeks to gain from entering into the agreement, the continued feasibility of attaining that benefit is an IMPLIED MATERIAL CONDITION of the contract. If subsequent events beyond the control of the parties render that benefit impossible to attain, frustration of purpose causes failure of that implied material condition and the contract becomes unenforceable. (see IMPLIED MATERIAL CONDITION).

98. **GENERAL INTENT (CRIMES):** Crimes are divided into two groups, GENERAL INTENT and SPECIFIC INTENT. The general intent crimes are BATTERY, RAPE, ARSON, INVOLUNTARY MANSLAUGHTER and MURDERS other than those based solely on intent to kill. All others are specific intent crimes. General intent crimes (e.g. arson) require the prosecution to prove defendants intentionally committed criminal acts that caused criminal results, but the prosecution does not have to prove the defendants intended to cause the criminal results that actually occurred. Specific intent crimes (e.g. attempted crimes) require the prosecution to prove defendants acted with intent to cause criminal results, but the prosecution does not have to prove that the criminal results that actually occurred (if any) were what the defendants intended to do. VOLUNTARY INTOXICATION is never a defense to a general intent crime, and for MISTAKE OF FACT to be a defense, it must be a reasonable mistake. (See VOLUNTARY INTOXICATION, MISTAKE OF FACT, SPECIFIC INTENT.)

99. **GOODS (CONTRACTS):** Under the UCC goods are anything movable at the time of identification to the contract, including specially manufactured goods, unborn animals, growing crops and minerals to be removed from the land by the seller. “Goods” does not include personal property rights like copyrights, patents, stocks, bonds, or currency.

100. **GROSS NEGLIGENCE: (TORTS/CRIMES):** Gross negligence is the deliberate breach of a pre-existing duty. If it causes others to be exposed to extreme risks resulting in harm it may be called criminal negligence.

101. **HOMICIDE (CRIMES):** Homicide is the killing of a human being by another human being. A human being is generally a person that has been born alive and has not yet died.

102. **ILLEGAL CONTRACT (CONTRACTS):** The court will not generally enforce a contract for a party that knowingly entered into the contract for an illegal purpose because it would impugn the

integrity of the court. However, if the party seeking enforcement was not equally guilty (not IN PARI DELICTO, which see) then the court may order restitution.

103. **IMPLIED-IN-FACT CONTRACT (CONTRACTS):** If a party acts to bestow benefits on another party reasonably expecting to be paid and the other party knowingly accepts those benefits an implied-in-fact contract forms which is enforceable at law.

104. **IMPLIED-IN-LAW CONTRACT (CONTRACTS):** If a party acts to bestow benefits on another party reasonably expecting to be paid a Court of equity may hold that an implied-in-law contract has formed in order to prevent unjust enrichment to the defendant, prevent unjust detriment to the plaintiff or to protect the public interest.

105. **IMPLIED MATERIAL CONDITION (CONTRACTS):** A MATERIAL CONDITION implied by the nature of the contract. (see MATERIAL CONDITIONS).

106. **IMPOSSIBILITY (CONTRACTS):** A court will generally find there has been a failure of an IMPLIED MATERIAL CONDITION that excuses the parties from performance if performance is impossible (not just expensive or difficult) because of events that were beyond the control of the party in default. (see IMPLIED MATERIAL CONDITION).

107. **INCAPACITY (CONTRACTS):** A contract generally cannot be enforced at law against a party who lacked contractual capacity at the time of execution. If the incapacity later ends the contract will become enforceable if the party to be bound expressly RATIFIES (affirms) the contract or otherwise impliedly ratifies it by FAILING TO REPUDIATE it within a reasonable time period (often set by statute). For example, a minor may repudiate a contract at any time before reaching adulthood. If the contract is not repudiated within a reasonable time after attaining adulthood, the contract is impliedly ratified. A contract otherwise unenforceable at law based on lack of capacity may often be enforced at equity if it is for provision of necessities of life. For example, a contract for food, shelter or clothing may be enforceable against a minor at equity. (see RATIFICATION, REPUDIATION.)

108. **INFANCY (CRIMES):** Under the common law there was a CONCLUSIVE PRESUMPTION that a child under seven years of age could not form criminal intent, a REBUTTABLE PRESUMPTION that a child between seven and fourteen could not form criminal intent, and that a child over fourteen was able to form criminal intent.

109. **INFANCY, INSANITY AND INCOMPETENCE (TORTS):** There is NO DEFENSE of infancy, insanity or incompetence in TORT!

110. **IN PARI DELICTO (CONTRACTS):** A court will not enforce an illegal contract or provide any restitution if the party seeking restitution is equally guilty (in pari delicto) compared to the party from whom restitution is sought.

111. **INSANITY (CRIMES):** Under the M'NAUGHTEN RULE it is a complete defense if a defendant suffered from a disease of the mind such that at the time of the crime he was unable to know the nature and quality of his acts (didn't know what he was doing) or else that they were wrong (didn't know he was doing a wrongful thing.) Subsequently, under the IRRESISTIBLE IMPULSE RULE the insanity defense was extended to those that knew what they were doing, and that it was wrong, but could not control themselves.

112. **INTENT TO KILL (CRIMES):** Intent to kill means acting or planning to act in a way purposefully calculated to kill a human being. Only two crimes require the prosecution to prove a defendant acted with intent to kill – ATTEMPTED MURDER and VOLUNTARY MANSLAUGHTER. No other crimes require proof of intent to kill.

113. **INTENTIONAL ACT (TORTS/CRIMES):** An intentional act is one done for the purpose or with knowledge with reasonable certainty that a result will occur. For a GENERAL INTENT crime the prosecution must prove the defendant intended to commit a criminal act but does not have to prove that a criminal result was intended. For a SPECIFIC INTENT crime the prosecution must prove the defendant acted intending to produce a criminal result. (see GENERAL INTENT, SPECIFIC INTENT.)

114. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (TORTS):** Intentional Infliction of Emotional Distress is an intentional, outrageous act which causes the plaintiff severe emotional distress beyond mere embarrassment and humiliation.

115. **INTERFERENCE (TORTS):** Interference is the tort of unreasonably interfering with the known business relationships of the plaintiff causing injury. This may be called interference with a "CONTRACT" where the defendant knows the plaintiff has an existing contract, or it may otherwise be called interference with "PROSPECTIVE ECONOMIC RELATIONSHIPS".

116. **INTOXICATION DEFENSE (CRIMES):** Intoxication is a claim that a defendant was too intoxicated to act with criminal intent. Involuntary intoxication can ALWAYS be raised as a criminal defense. Voluntary intoxication can only be raised as a defense to SPECIFIC INTENT crimes as an argument the defendant did not intend to cause a criminal result. But voluntary intoxication cannot be raised as a defense to GENERAL INTENT crimes where intent to cause a criminal result is not an element the prosecution must prove. (See SPECIFIC INTENT, GENERAL INTENT)

117. **INTRUSION (TORTS):** Intrusion is an action for INVASION OF PRIVACY caused by unreasonable intrusion into the peace and solitude of the plaintiff. Damages are measured by the injury to the plaintiff. (see INVASION OF PRIVACY.)

118. **INVASION OF PRIVACY (TORTS):** Invasion of privacy is a general term for four specific causes of action: FALSE LIGHT, APPROPRIATION OF LIKENESS, INTRUSION into solitude and DISCLOSURE of private facts (LAID). (see FALSE LIGHT, APPROPRIATION OF LIKENESS, INTRUSION of solitude and PUBLIC DISCLOSURE OF PRIVATE FACTS.)

119. **INVITATION TO NEGOTIATE (CONTRACTS):** An invitation to negotiate is any communication that fails to qualify as a contract OFFER because there is no manifestation of present contractual intent or else the terms are so vaguely stated no reasonable person would believe assent would form a bargain.

120. **INVOLUNTARY MANSLAUGHTER (CRIMES):** Involuntary manslaughter is the crime of unintentional homicide caused by criminal negligence (a.k.a. negligent manslaughter), recklessness (a.k.a. RECKLESS HOMICIDE) or the commission of a malum in se crime which is insufficient to support a charge of murder under the FELONY MURDER RULE (a.k.a. MISDEMEANOR HOMICIDE or MISDEMEANOR MANSLAUGHTER). Often this is said to be "without malice aforethought" but that is incorrect. The crime does imply malice aforethought, but in a different form from malice for murder. Involuntary manslaughter is a GENERAL INTENT crime. (See RECKLESS HOMICIDE, MISDEMEANOR HOMICIDE, MURDER, HOMICIDE, FELONY MURDER RULE.)

121. **KIDNAPPING (CRIMES):** Kidnapping is the crime of unlawfully taking or confining people against their will. At common law the victim had to be taken out of the country or across a state line. Modernly this requirement has been dropped. Kidnapping is not one of the "inherently dangerous felonies" for the Felony Murder Rule but modernly is often an "enumerated felony" for first degree murder.

122. **LAPSE (CONTRACTS):** An offer lapses if not accepted in the time stated, or if no time is stated within a reasonable period as indicated by the means by which the offer is transmitted. An oral offer

lapses at the end of the conversation. A written offer lapses at the end of the time established by the means of dispatch. An offer that is irrevocable under the terms of an option contract lapses at the end of the option period unless otherwise agreed.

123. **LARCENY (CRIMES):** Larceny is the trespassory taking and carrying away the personal property of another with an intent to permanently deprive. Where possession is gained by misrepresentation it is LARCENY BY TRICK. Modernly larceny is defined by statute under the label of THEFT. (see ROBBERY, EMBEZZLEMENT, FALSE PRETENSES.)

124. **LAST CLEAR CHANCE (TORTS):** The SAVING DOCTRINE in jurisdictions that recognize CONTRIBUTORY NEGLIGENCE (which see) as a bar to recovery that even if a plaintiff was negligent, that is not a bar to recovery if the defendant had the LAST CLEAR CHANCE to avoid the accident.

125. **LEGAL IMPOSSIBILITY (CRIMES):** An attempted act is not an attempted crime, even if it is committed with criminal intent, if from the moment of the first substantial step toward commission of the intended act it was always legally impossible for the attempted act to constitute a crime even if it had been completed. This usually involves an attempt to kill a person who is already dead or an attempt to steal property that has been abandoned.

126. **LEGAL RESTITUTION (CONTRACTS/TORTS):** Legal restitution is a money judgment awarded by a Court of LAW as a matter of right to a non-breaching party or tort plaintiff to prevent unjust enrichment by the wrongfully acting party instead of an award based on DAMAGES suffered.

127. **LIBEL (TORTS):** Libel is a written defamation or one recorded in some manner giving the false statement permanence. Libel is a DEFAMATION PER SE if it is clearly, on its face, defamatory and about the plaintiff. Otherwise it is a DEFAMATION PER QUOD. (see DEFAMATION.)

128. **LIQUIDATED DAMAGES (CONTRACTS):** A liquidated damages clause is an agreement that in the event of breach the remedy of the non-breaching party will be limited to a specified quantity of money damages. Liquidated damages clauses are unenforceable unless 1) at the time of execution the potential damages from beach were uncertain, 2) the liquidated damages specified were reasonable at the time of execution, and 3) the liquidated damages specified are reasonable at the time of breach. If a contract is for sale of UNIQUE PROPERTY money damages are inadequate and SPECIFIC PERFORMANCE is appropriate. Therefore a liquidated damages clause is unreasonable and unenforceable in such cases.

129. **LOST PROFITS (CONTRACTS):** See CONSEQUENTIAL DAMAGES.

130. **MAILBOX RULES (CONTRACTS):** Under the broadly adopted common law all contract communications are effective upon receipt by the offeror with the exception that ACCEPTANCES are generally effective upon dispatch by the offeree if they are sent by the means specified in the offer or by the same or faster means than the offer if the offer does not specify a means of communication. HOWEVER, if an offeree dispatches both an acceptance and a rejection the rejection will be effective, not the acceptance, if the rejection is received first and the offeror changes position in reliance upon it.

131. **MAJOR BREACH (CONTRACTS):** A major breach of contract is one that substantially deprives the non-breaching party of the EXPECTED BENEFIT OF THE BARGAIN. It excuses the non-breaching party from all contract duties, accelerates the duties of the breaching party, and waiving all remaining conditions on the duties of the breaching party. (see BREACH).

132. **MALICE (CRIMES):** Malice in criminal law is the requisite "mens rea" or "criminal intent" that must be proven for defendants to be found guilty of most crimes. Malice for murder may be shown by express intent to kill, intent to commit great bodily injury, intent to commit an inherently dangerous

felony (see FELONY MURDER RULE) or intent to commit an act with an awareness of and conscious disregard for unreasonable risks to life (see DEPRAVED HEART MURDER.) Malice for arson requires intent to cause a burning for any unlawful or wrongful purpose. Only strict liability crimes such as statutory rape or traffic offenses do not require proof of malice.

133. **MALICE (TORTS):** Malice in tort is the requisite mental state or wrongful intent required for a defendant to be liable for certain torts such as DEFAMATION, ABUSE OF PROCESS and MALICIOUS PROSECUTION (which see.)

134. **MALICIOUS PROSECUTION (TORTS):** Malicious prosecution is the tort of instituting and/or continuing a criminal prosecution of the plaintiff out of malice. The plaintiff must show the prosecution lacked probable cause and was terminated based on its merits. (see ABUSE OF PROCESS.)

135. **MANSLAUGHTER (CRIMES):** Manslaughter is either VOLUNTARY MANSLAUGHTER, the crime of unlawful homicide with intent to kill but without malice aforethought or INVOLUNTARY MANSLAUGHTER, the crime of unlawful homicide without intent to kill but with malice aforethought that is not sufficient to support a finding of MURDER.

136. **MATERIAL CONDITION (CONTRACTS):** A MATERIAL CONDITION is one that must be satisfied for the parties to a contract to have any duty to perform. A material condition may be expressly stated by the parties or implied by the nature of the agreement. The failure of a material condition generally denies one or both parties the EXPECTED BENEFIT OF THE BARGAIN, excusing them from the contract. (see EXPECTED BENEFIT OF THE BARGAIN).

137. **MERCHANT (CONTRACTS):** Under the UCC a merchant is one who deals in or otherwise holds himself out by occupation as knowledgeable about the goods of the contract. A hobbyist can be a merchant but an occasional purchaser of goods or buyer for personal use is generally not a merchant.

138. **MERGER (CRIMES):** A defendant can be CHARGED with crimes and the LESSER INCLUDED OFFENSES implied by that same crime. But the defendant cannot be CONVICTED of both a crime and the lesser included offenses implied by that same crime because the lesser included offenses MERGE into the conviction for the larger crime.

139. **MISDEMEANOR HOMICIDE (CRIMES):** Misdemeanor homicide is a term for INVOLUNTARY MANSLAUGHTER resulting from the commission of a crime insufficient to support a charge of murder under the FELONY MURDER RULE. This is a misnomer because the crime itself is a felony and the crime which causes the death may be a felony. Involuntary manslaughter is a GENERAL INTENT crime. (see FELONY MURDER RULE, MURDER, MANSLAUGHTER, INVOLUNTARY MANSLAUGHTER.)

140. **MISPRISION (CRIMES):** Under very old common law MISPRISION was the crime of knowingly failing to report a crime committed by another person to the police. Modernly there is no general duty to report crimes to the police and misprision is no longer recognized as a crime.

141. **MISTAKE OF FACT (CRIMES):** A mistake of fact is a valid defense if it negates implied criminal intent. It is a possible defense to both GENERAL and SPECIFIC INTENT crimes unless criminal intent is expressly shown. Any MISTAKE OF FACT is a valid defense if it negates the implied intent to either commit the criminal act charged (GENERAL INTENT crimes) or to cause the criminal result charged (SPECIFIC INTENT crimes). For a GENERAL INTENT crime the mistake must be reasonable, but for SPECIFIC INTENT crimes the mistake must only be actual. A reasonable mistake is one that a reasonable person would have made in the same situation. VOLUNTARY INTOXICATION never justifies an otherwise unreasonable mistake. Mistake of fact is never a defense

to ATTEMPT if criminal intent is expressly shown. (see SPECIFIC INTENT, GENERAL INTENT, FACTUAL IMPOSSIBILITY, LEGAL IMPOSSIBILITY, MISTAKE OF LAW.)

142. **MISTAKE OF LAW (CRIMES):** A mistake about the legality of an intended act does not alter the legality of the act attempted or committed. If the defendant commits or attempts to commit an act believing it to be legal, and it is illegal at the time committed, it is still illegal despite his intent. If the defendant intends an act believing it to be illegal, and it is not illegal at the time committed, it is legal despite his belief. (see MISTAKE OF FACT, LEGAL IMPOSSIBILITY, FACTUAL IMPOSSIBILITY.)

143. **MURDER (CRIMES):** Murder is an unlawful homicide, the killing of one human being by another, with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY MURDER RULE, or 4) deliberately creating extreme risks to human life or deliberately breaching a pre-existing duty to protect others from extreme risks with an awareness of and conscious disregard for the risks, the DEPRAVED HEART THEORY. At common law there were no degrees of murder but modernly statutes define first degree murder as those that are 1) willful, deliberate and premeditated, 2) by enumerated means, or 3) caused by the commission of enumerated dangerous felonies. All other murders are in the second degree. Murder is a SPECIFIC INTENT crime when it is based solely on intent to kill. Murder otherwise is a GENERAL INTENT crime.

144. **MUTUAL MISTAKE (CONTRACTS):** Under the common law doctrine of *Peerless*, if both parties enter into a contract because each suffers a misunderstanding of material fact the contract is void because there was no "meeting of the minds" and no valid contractual intent. (see UNILATERAL MISTAKE.)

145. **NECESSITY (CRIMES):** see DEFENSE of OTHERS, DEFENSE of PROPERTY, SELF-DEFENSE.

146. **NECESSITY (TORTS):** A person is privileged to act as reasonably necessary to protect people and property from harm. If the act is to protect the safety of any person, it is a complete defense. If it is to protect the property of any person besides the defendant, it is a PUBLIC NECESSITY and a complete defense. If it is only to protect the property of the defendant it is a PRIVATE NECESSITY and the defendant remains liable for any damage actually caused.

147. **NEGLIGENCE (TORTS):** Negligence is the failure to exercise the degree of care that a reasonably prudent person would use in the same situation. But to prevail in an action for negligence the plaintiff must show the defendant had a DUTY, BREACHED the duty, and that the breach was the ACTUAL and PROXIMATE CAUSE of DAMAGES suffered by the plaintiff (which see).

148. **NEGLIGENCE PER SE (TORTS):** If a duty is created by a statute, a defendant who violates the statute is negligent per se and liable to all plaintiffs who are actually and proximately caused injury as a result if the plaintiffs are in the CLASS of people the statute was intended to protect and they are caused the TYPE of injury the statute was intended to prevent. (see DUTY.)

149. **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (TORTS):** A bystander, witness or other person who was not directly involved in an accident or other tortious event may bring an action for Negligent Infliction of Emotional Distress if they can prove they have suffered severe emotional distress because they were closely connected in time, place or relationship to the event. Some jurisdictions require that the plaintiff suffer some physical contact during the event and others require a physical manifestation of emotional distress as evidence of injury.

150. **NONDISCLOSURE (CONTRACTS):** See CONCEALMENT.

151. **NUISANCE, PRIVATE (TORTS):** See PRIVATE NUISANCE.

152. **NUISANCE, PUBLIC (TORTS):** See PUBLIC NUISANCE.

153. **OFFER (CONTRACTS):** A contract offer is a manifestation of present contractual intent communicated to the offeree so certain in terms that an objective person would reasonably believe assent would form a bargain. Under common law an offer must generally specify the parties, subject matter, quantity, price, and time of performance. Under the UCC an offer must only specify the parties and quantity and the UCC "GAP FILLERS" may be used to determine additional terms. An offer LAPSES if not accepted within a reasonable period of time. (see LAPSE, ACCEPTANCE.)

154. **OPTION (CONTRACTS):** An option at common law is a contractual agreement under which an offeree exchanges consideration for a contract offer and a promise from the offeror that the offer will not be revoked for an agreed period of time. UCC 2-205 a firm offer in a signed writing by a merchant offeror that by its terms assures it will be held open for the stated time, or if no time is stated then for a reasonable time not to exceed three months, does not require consideration from the offeree.

155. **ORAL CONDITION PRECEDENT (CONTRACTS):** An ORAL CONDITION PRECEDENT is an oral agreement that a condition precedent must be satisfied or else a contractual duty to perform under the terms of a separate contract agreement will not be binding. It is an exception to the PAROL EVIDENCE RULE. (see PAROL EVIDENCE RULE, CONDITION PRECEDENT.)

156. **PALSGRAF (TORTS):** Under *Palsgraf* a duty based on PERIL is created whenever the defendant acts in a manner that creates reasonably foreseeable harm to others. Cardozo argued that a duty was only owed to those in the ZONE OF DANGER where the acts of the defendant caused reasonably foreseeable harm, and that liability should be limited to only those to which the defendant owed a duty. Andrews argued that if a duty was owed to anyone, the defendant should be liable to all that were actually and proximately caused harm by a breach of that duty.

157. **PAROL EVIDENCE RULE (CONTRACTS):** Evidence concerning PRIOR or CONTEMPORANEOUS agreements can not be introduced to VARY or CONTRADICT the terms of a FULLY INTEGRATED WRITING unless they are offered to show evidence of **[DAM FOIL]** Duress, Ambiguity, Mistake, Fraud, Oral condition precedent, Illegality, or Lack of consideration.

158. **PASSIVE DEFENSES (TORTS/CRIMES):** Passive defenses are arguments by criminal or tort defendants that the opposing parties (prosecutors or plaintiffs) have failed to meet their burden to prove each required legal element of their stated causes of action (e.g. that the defendant committed battery). (see AFFIRMATIVE DEFENSES.)

159. **PERFECT TENDER RULE (CONTRACTS):** Under the UCC goods must be delivered in complete conformity with the contractual agreement and any NON-CONFORMING delivery can be rejected by the buyer. In effect, every breach is treated as a major breach because buyers are released from their legal duties.

160. **PREMISES LIABILITY (TORT):** Premises liability is a form of duty based on RELATIONSHIP. Under the common law an occupier of land had no duty to unknown trespassers, a duty to protect people off the land from hazardous activities on the land, a duty to warn and protect both known trespassers and licensees from known, hidden hazards and activities on the land, and a duty to inspect, warn and protect invitees from hidden hazards and activities on the land. Modernly these categorical distinctions have generally been replaced by a general duty to protect all parties from unreasonably hazardous conditions and activities on the land. (See DUTY.)

161. **PREVENTION OF CRIME (TORTS/CRIMES):** See AUTHORITY OF LAW.

162. **PRIVATE NECESSITY (TORTS):** See NECESSITY.

163. **PRIVATE NUISANCE (TORTS):** A private nuisance is an unreasonable interference with the plaintiff's use and enjoyment of her own land in a manner that does not constitute a TRESPASS TO LAND (which see.) Nuisance may involve smoke, fumes, odors, noise, light, obstruction or aircraft. In the MAJORITY view the plaintiffs COMING TO THE NUISANCE (which see) is NOT a complete bar to bringing a nuisance action. (see COMING TO THE NUISANCE, PUBLIC NUISANCE, TRESPASS TO LAND.)

164. **PROMISSORY ESTOPPEL (CONTRACTS):** Promissory estoppel is an equitable doctrine barring a party from revoking a promise if 1) the party made a promise, 2) intending to induce or reasonably knowing that it would induce reliance, 3) there was reasonable reliance by the other party seeking enforcement of the promise, and 4) injustice would result otherwise. (see ESTOPPEL).

165. **PRODUCTS LIABILITY (TORTS):** Every person who releases an unreasonably dangerous product into the stream of commerce may be liable for personal injury, property damage and other harm caused. Liability may be based on four theories: BREACH OF EXPRESS WARRANTY, BREACH OF IMPLIED WARRANTY, NEGLIGENCE or STRICT LIABILITY IN TORT (which see.)

166. **PROXIMATE CAUSE (TORTS/CRIMES):** Proximate cause means that a defendant's act actually caused injury that was so direct and natural, close in time and place, by a chain of causation unbroken by UNFORESEEABLE INTERVENING EVENTS that the law will impose liability. (see UNFORESEEABLE INTERVENING EVENTS.)

167. **PUBLIC DISCLOSURE OF PRIVATE FACTS (TORTS):** Public disclosure of private facts is the INVASION OF PRIVACY tort of unreasonably disclosing private facts, about the plaintiff that a reasonable person would find embarrassing. Damages are usually measured by the injury to the plaintiff. (see INVASION OF PRIVACY.)

168. **PUBLIC FIGURE (TORTS):** Under *New York Times v. Sullivan* a public figure for purposes of a defamation action is a person who injects themselves into the public arena. Once a person becomes a public figure they probably remain a public figure until they fade from memory. (see DEFAMATION.)

169. **PUBLIC NECESSITY (TORTS):** See NECESSITY.

170. **PUBLIC NUISANCE (TORTS):** A public nuisance is an unreasonable interference with the plaintiff's use of public resources. To bring an action plaintiffs must prove STANDING (which see) by showing they suffer a particular injury from the acts of the defendant that is different from or greater than the injury suffered by the general public. (see PRIVATE NUISANCE.)

171. **QUANTUM MERUIT (CONTRACTS):** Quantum meruit is used by different people to mean different things. Generally it is used to mean RESTITUTION or the award of damages in restitution to prevent UNJUST ENRICHMENT (which see). But this term is also used at times to mean an implied-in-law contract or even implied contracts in general.

172. **RAPE (CRIMES):** Rape is the crime of intentional sexual intercourse with the slightest penetration without consent. Under the common law RAPE required the victim to be a female and not the wife of the defendant. Modernly RAPE is defined by statute. Rape is a GENERAL INTENT crime, meaning that VOLUNTARY INTOXICATION is never a defense and MISTAKE OF FACT is only a defense if it was reasonable. (see GENERAL INTENT, VOLUNTARY INTOXICATION, MISTAKE OF FACT.)

173. **RATIFICATION (CONTRACTS):** Ratification is the act of contract parties who lack contractual capacity at the time of execution (e.g. minors) affirming otherwise voidable contracts after attaining contractual capacity. (see INCAPACITY, REPUDIATION.)

174. **REASONABLE ASSURANCES (CONTRACTS):** A contract party that has reasonable doubts about the other party's ability or willingness to perform future duties under a contract may demand REASONABLE ASSURANCES from the other party in the form of a financial guarantee or payment to escrow. A failure to provide reasonable assurances may be treated as an anticipatory repudiation of the contract.

175. **RECAPTURE OF CHATTELS (TORTS):** Property owners attempting to recover chattel while in fresh pursuit or seeking recovery of chattel lost through no fault of their own may enter land of others and use reasonable force if they first request and are refused return of their chattel by the parties in possession. (Defense to trespass to land and battery.)

176. **RECKLESS HOMICIDE (CRIMES):** Reckless homicide is a term for INVOLUNTARY MANSLAUGHTER resulting from deliberate acts that created extreme risks to others, but insufficient to charge murder on depraved heart theory, perhaps because of a lack of awareness or lack of conscious disregard of the risks to human life. "Deliberateness" in creating extreme and obvious dangers distinguishes recklessness from risks created by "ordinary" negligence. For example, street racing is reckless behavior while the inadvertent running of a red light is not. (See INVOLUNTARY MANSLAUGHTER, CRIMINAL NEGLIGENCE, MURDER.)

177. **RECKLESSNESS (TORTS/CRIMES):** Recklessness is the deliberate creation of extreme risks to others. (See RECKLESS HOMICIDE, ACTUAL MALICE.)

178. **REDLINE RULE (CRIMES):** Under the Redline Rule most States hold that the killing of a criminal accomplice by any party other than another criminal accomplice during the commission of an inherently dangerous felony cannot be used as a basis for charging the surviving accomplice with murder under the FELONY MURDER RULE. [123] (see MURDER, FELONY MURDER RULE.)

179. **REMEDY OF NON-BREACHING BUYER (CONTRACTS):** A non-breaching party has a right to award of a money judgment for damages caused by the breach or for legal restitution to prevent the breaching party from reaping an unjust enrichment. A non-breaching buyer of unique property may also ask for SPECIFIC PERFORMANCE to obtain possession and title. Under the UCC a non-breaching buyer may also ACCEPT or REJECT non-conforming goods, REPUDIATE the contract and COVER by purchase of conforming goods or AFFIRM the contract and DEMAND DELIVERY of conforming goods.

180. **REMEDY OF NON-BREACHING SELLER (CONTRACTS):** A non-breaching seller may generally demand damages equal to the EXPECTED BENEFIT OF THE BARGAIN (which see). Under the UCC the non-breaching seller has four remedies: 1) If the goods can be sold at market price the seller may demand the excess of the CONTRACT PRICE over the MARKET PRICE. 2) Otherwise, the goods may be sold at a SALVAGE sale after NOTICE to the breaching buyer, and the seller can demand the excess of the CONTRACT PRICE over the SALVAGE PRICE. 3) In a LOST VOLUME situation where the seller cannot easily resell the goods to other customers the seller can demand LOST PROFITS. 4) If the goods are special made or otherwise unsuitable for sale to other customers the seller can demand a money judgment for the CONTRACT PRICE.

181. **REMEDY OF BREACHING BUYER (CONTRACTS):** A breaching buyer may obtain RETURN OF DEPOSITS paid to the non-breaching seller in RESTITUTION to the extent they exceed the seller's damages.

[123] All States except California and Massachusetts?

182. **REMEDY OF BREACHING SELLER (CONTRACTS):** At common law a seller that substantially performs has a right to be paid the contract price less an offset for damages. A seller that has committed a major breach may still obtain EQUITABLE RESTITUTION (quantum meruit reimbursement) to prevent unjust enrichment to the extent their performance conferred benefits on the non-breaching buyer. Under the UCC the breaching seller can give notice of intent to cure and has a right to cure during the contract period. The breaching seller also has a REASONABLE RIGHT FOR EXTRA TIME TO CURE their shipment of non-conforming goods if they shipped them with a reasonable belief they were suitable for the buyer's needs.

183. **REPUDIATION (CONTRACTS):** The act of a party lacking capacity declaring a contract void. (see INCAPACITY, RATIFICATION.)

184. **RES GESTAE (CRIMES):** The res gestae of a crime is the sequence of acts done within scope of its commission beginning with the first substantial steps to commit it and ending after it when the defendants have left the crime scene and reached a place of relative safety. A charge of murder based solely on the FELONY-MURDER RULE can only apply to a homicide caused by the acts done within the res gestae of an inherently dangerous felony. (see FELONY-MURDER RULE.)

185. **RES IPSA LOQUITUR (TORTS):** Under RES IPSA LOQUITUR a plaintiff may establish a presumption of breach if 1) negligence by someone is implied by the facts, 2) the defendant had substantial control over the situation that caused injury, and 3) the plaintiff had no control over the situation that caused them injury. By proving the elements of RIL the plaintiff may shift the burden of proof to the defendant to prove she did not breach her duty of due care.

186. **RESTITUTION (CONTRACTS/TORTS):** Restitution is a general term for any remedy awarded by the Court other than a money judgment by a Court of LAW for DAMAGES suffered. See LEGAL RESTITUTION and EQUITABLE RESTITUTION.

187. **REVOCATION (CONTRACTS):** A revocation is a withdrawal or cancellation of an offer by the offeror, and it is effective if received by the offeree before the offer has been effectively accepted. An offeror cannot revoke an option contract for the time agreed as long as the option contract is properly supported by consideration. Under modern SAVING DOCTRINES a UNILATERAL CONTRACT OFFER may not be revocable if the offeror is aware the offeree has commenced performance of the requested act (see SAVING DOCTRINES)..

188. **ROBBERY (CRIMES):** Robber is a larceny, the trespassory taking and carrying away of personal property of another with intent to permanently deprive, from the person by use of force or fear. (see LARCENY.)

189. **SAVING DOCTRINES (CONTRACTS):** Under the modern view a UNILATERAL CONTRACT OFFER generally cannot be revoked if the offeror is aware the offeree has commenced performance of the requested act necessary for acceptance until the offeree has been given a reasonable time to complete performance. Some States allow revocation but require restitution to prevent unjust enrichment.

190. **SELF-DEFENSE (TORTS/CRIMES):** A person who is not the aggressor in a fracas is privileged to act as reasonably necessary to protect his or her own safety. This is NOT a defense if the party was the aggressor unless they are no longer the aggressor because they attempted withdrawal from the fracas or the other party escalated the level of violence. (see AGGRESSOR, NECESSITY.)

191. **SLANDER (TORTS):** Slander is an oral defamation or one made in some manner that it is transitory and not permanent. May be SLANDER PER SE or SLANDER PER QUOD. (see DEFAMATION.)

192. **SOLICITATION (CRIMES):** A solicitation is the crime of urging another person to commit a crime. If the person urged commits the crime, the solicitation merges into the criminal result and cannot be convicted as a separate crime (see CONSPIRACY.)

193. **SPECIFIC INTENT (CRIMES):** Crimes are divided into two groups, GENERAL INTENT and SPECIFIC INTENT. The general intent crimes are BATTERY, RAPE, ARSON, INVOLUNTARY MANSLAUGHTER and MURDERS other than those based solely on intent to kill. All others are specific intent crimes. General intent crimes (e.g. arson) require the prosecution to prove defendants intentionally committed criminal acts that caused criminal results, but the prosecution does not have to prove the defendants intended to cause the criminal results that actually occurred. Specific intent crimes (e.g. attempted crimes) require the prosecution to prove defendants acted with intent to cause criminal results, but the prosecution does not have to prove that the criminal results that actually occurred (if any) were what the defendants intended. (See VOLUNTARY INTOXICATION, MISTAKE OF FACT, GENERAL INTENT.)

194. **SPECIFIC PERFORMANCE (CONTRACTS):** Money damages are generally an inadequate legal remedy for a non-breaching buyer of unique property (land, art objects, etc.) and in that case a Court of equity may order the breaching seller to deliver possession and title to the buyer.

195. **STANDARD OF CARE (TORTS):** Normally the standard of due care is the level of care a reasonably prudent person would use. If the defendant is a CHILD engaged in childlike activities the standard is the level of care a reasonable child of the same age and experience would use. A child engaged in adult activities is held to an adult standard. For defendants that are HIGHLY TRAINED or PROFESSIONAL (or claim to be) the standard of care is higher. The standard of MEDICAL CARE is the standard in the community (or nation in some jurisdictions). There is not a lowered standard of care for INCOMPETENTS. (see BREACH (TORTS).)

196. **STANDING (CONTRACTS/TORTS):** Standing means that a plaintiff has a right to pursue a legal remedy because they have suffered actual damages.

197. **STATUS QUO (CONTRACTS):** The status quo means the positions of the parties prior to entering into a contract agreement.

198. **STATUTE OF FRAUDS (CONTRACTS):** Under the Statute of Frauds certain contracts, otherwise valid, cannot be enforced unless supported by a writing. The contracts affected are those for MARRIAGE, those that would necessarily take more than a YEAR to complete, those for the conveyance of an interest in LAND, those by an EXECUTOR of an estate, those for the GUARANTEE of a debt. **[MYLEG]** The rule on the sale of goods is modernly superseded by the UCC. See UCC 2-201.

199. **STATUTORY RAPE (CRIMES):** Statutory rape is the statutory crime of having sexual intercourse with a minor below the statutory 'age of consent'. It is a strict liability crime and a MISTAKE OF FACT, whether reasonable or unreasonable, is generally not a defense. (see MISTAKE OF FACT.)

200. **STRICT LIABILITY (TORTS):** Defendants are strictly liable for negligence if plaintiffs are caused injury by 1) the keeping of a known dangerous animal (other than normally domesticated farm animals), 2) the keeping of exotic animals (if the injury is of a reasonably foreseeable type), 3) excavating by the defendant that causes a subsidence of the plaintiff's land, or 4) ultra-hazardous activities, activities so dangerous they are subject to strict regulation and licensing requirements.

201. **STRICT PRODUCT LIABILITY (TORTS):** Strict product liability is a products liability theory when 1) a commercial supplier of goods 2) releases unreasonably dangerous goods into the stream of commerce, resulting in 3) personal injury or property damage (not economic losses) to the plaintiff.

202. **SUBSTANTIAL PERFORMANCE (CONTRACTS):** Substantial performance means that a breaching contract party substantially provided the non-breaching party with the EXPECTED BENEFIT OF THE BARGAIN (which see.)

203. **THIRD-PARTY BENEFICIARY (CONTRACTS):** A person who is intended to receive benefits under a contract between two other parties has STANDING to enforce the contract and seek damages for breach if they are vested. Modernly it does not matter if the original contract parties acted to extinguish a debt to the third party (CREDITOR beneficiaries) or acted out of gratuitous motives (DONEE beneficiaries). The third-party beneficiary may enforce the contract after they vest by becoming aware of and relying on the existence of the contract. A party that benefits from a contract that was not established for their benefit is an INCIDENTAL beneficiary with no standing to enforce, even if they have relied on the contract's existence.

204. **TRANSFERRED INTENT (TORTS):** Under the doctrine of transferred intent a defendant that intentionally acts to cause any tort injury to anyone is liable for every injury suffered by everyone, even if the resulting victim or injury is different from that intended.

205. **TRANSFERRED INTENT (CRIMES):** There is NO transferred intent in criminal law because crimes are offenses against society and not just individuals. In the case of GENERAL INTENT crimes (e.g. arson) the prosecution must prove the defendants deliberately committed criminal acts that caused criminal results, whether those criminal results were intended or not. In the case of SPECIFIC INTENT crimes (e.g. attempted crimes) the prosecution must prove defendants acted with intent to cause a criminal result, whether the criminal results of the acts (if any) were intended or not. Since the prosecution never has to prove the criminal results that actually occurred (if any occurred at all) were intended by the defendant, the tort concept of transferred intent has no application in criminal law.

206. **TRESPASS TO LAND (TORTS):** Trespass to land is an intentional act to cause unauthorized entry onto the land of the plaintiff. Trespass may be by physical entry of the defendant herself, or by the defendant causing other people, objects or any particulate matter to enter onto, under or pass over the land of the plaintiff at low altitude. A continuing trespass occurs if the defendant leaves objects on the plaintiff's land. No damage to the land is necessary, but the defendant is liable for any damage caused. It is not a trespass to land for the defendant to cause smoke, fumes, odors, sounds, light, obstruction or objects at high altitude to pass over the land of the plaintiff, but such acts may constitute a PRIVATE NUISANCE (which see.)

207. **TRESPASS TO CHATTELS (TORTS):** A trespass to chattels is an intentional unauthorized interference with the chattel of another causing damage.

208. **TRESPASSORY (TORTS/CRIMES):** "Trespassory" means an act done "without permission".

209. **UCC (CONTRACTS):** Article 2 of the Uniform Commercial Code controls contracts for the sale of GOODS.

210. **UCC 2-201 (CONTRACTS):** A contract for goods worth $500 or more must be in writing, signed by the party against whom the contract is to be enforced. This limit has been raised in the UCC to $5,000 but many States still use the $500 limit. But between merchants a SALES CONFIRMATION by one listing quantity will bind both parties if the receiving party does not object within 10 days. Further, the rule does not apply to SPECIAL MADE GOODS, where there is an ADMISSION by the

party to be bound in a legal setting that there had been an agreement, or where there has been PARTIAL PERFORMANCE of the contract by acceptance of payment or goods.

211. **UCC 2-205 (CONTRACTS):** A firm offer in a signed writing by a merchant that by its terms assures it will be held open creates an OPTION that does not require consideration for the stated time, or, if no time is stated in the contract, for a reasonable time not to exceed three months. (see OPTION.)

212. **UCC 2-206 (CONTRACTS):** An acceptance may be made in any REASONABLE MANNER, including a promise to ship or shipment of either conforming or non-conforming goods, but a shipment of NON-CONFORMING goods as an EXPRESS ACCOMMODATION is not an acceptance.

213. **UCC 2-207 (CONTRACTS):** An acceptance containing varying terms is an effective acceptance, but the varying terms will NOT be included in the contract if 1) the offer expressly limited acceptance and the offeror does not agree to the new terms, OR 2) the parties are not both merchants, OR 3) the varying terms materially alter the contract OR 4) the party to be bound objects within a reasonable period of time.

214. **UCC 2-209 (CONTRACTS):** A contract for the sale of goods may be modified without additional consideration. But if the contract, as modified, requires a writing under UCC 2-201 the modification must be in writing to be enforceable. An oral modification that is not legally enforceable is treated as a waiver of condition that can be retracted. Retraction may be estopped by the Court if it would cause injustice.

215. **UCC 3-311 (CONTRACTS):** A good faith tender and acceptance of an instrument as "full satisfaction" of any claim that is unliquidated or the subject of a bona fide dispute is generally binding, subject to certain statutory limitations and exceptions.

216. **UNCONSCIONABLE CONTRACT (CONTRACTS):** A Court will not enforce a contract that is so one-sided that it implies a lack of reasonable intent to be bound on the part of the offeree. (see ADHESION contract.)

217. **UNFORESEEABLE INTERVENING EVENTS (TORTS/CRIMES):** If a subsequent act by a third party, or natural event ("act of God") is also an actual cause of the injury suffered by a plaintiff or victim, if will generally be viewed as an "unforeseeable intervening event" that terminates proximate cause and ends the liability of defendants that acted earlier. But negligence by a third party is presumed to be foreseeable and will not terminate proximate causation or liability. Criminal acts and intentional torts by third parties are presumed to be unforeseeable and will terminate all liability of defendants that acted earlier UNLESS the defendant knew the subsequent criminal act or intentional tort by the third party was likely to occur. (see PROXIMATE CAUSE.)

218. **UNIFORM COMMERCIAL CODE (CONTRACTS):** see UCC.

219. **UNILATERAL CONTRACT (CONTRACTS):** A unilateral contract offer is one that by its own terms unequivocally restricts the means of acceptance to the act of complete performance only. (See SAVING DOCTRINES).

220. **UNILATERAL MISTAKE (CONTRACTS):** Under contract law if a party enters into a contract suffering from a misunderstanding of fact that the other party knew or should have known about, the contract is voidable by the mistaken party. But if the other party did not know or have reason to know of the mistake the contract is legally binding and not voidable in most States. In a minority of States the mistaken party may rescind the contract if 1) the error is discovered before the other party has irrevocably acted in reliance, 2) prompt notice of the error is given, and 3) the other party is reimbursed for all expenses caused by the error and rescission. (see MUTUAL MISTAKE.)

221. **UNJUST ENRICHMENT (CONTRACTS/TORTS):** A Court may award damages in RESTITUTION to prevent an unjust enrichment. (see RESTITUTION).

222. **VICARIOUS LIABILITY (CONTRACTS/TORTS/CRIMES):** Vicarious liability means that a party (defendant) is legally liable for the acts of another party (co-defendant) which are done within the scope of the established relationship between the two parties. In contract and tort law vicarious liability can be created by principal-agent, master-servant, joint-enterprise, or employer-employee relationship. In criminal law vicarious liability arises within the relationship between accomplices and conspirators. (see ACCOMPLICE LIABILITY, CONSPIRACY LIABILITY.)

223. **VOLUNTARY INTOXICATION (CRIMES):** Defendants may claim a lack of criminal intent if they were so intoxicated they were unable to form the SPECIFIC INTENT necessary for a specific intent crime charged. But voluntary intoxication is never a defense to a GENERAL INTENT crime (see SPECIFIC INTENT, GENERAL INTENT.)

224. **VOLUNTARY MANSLAUGHTER (CRIMES):** Voluntary manslaughter is the crime of unlawful, intentional homicide without malice aforethought because the killing act was done spontaneously and without premeditation in response to adequate provocation which was sufficient to raise a reasonable person to such a fit of rage. Intent to kill must be proven. Voluntary manslaughter is a SPECIFIC INTENT crime. (See MURDER, HOMICIDE.)

225. **WAIVER OF BREACH (CONTRACTS):** A "waiver of a breach" is an ELECTION by a non-breaching party to treat a major breach as a minor breach, allowing the breaching party to continue performing under the contract. Following the waiver of a breach the non-breaching party cannot retract the waiver to claim a major breach.

226. **WAIVER OF CONDITION (CONTRACTS):** A waiver of condition means that a contract party performs a contractual duty that was not due to be performed because it was subject to a CONDITION PRECEDENT that was not satisfied. Following a waiver of a condition the performing party may retract the waiver and refuse to perform the duty in the future unless the condition is satisfied.

227. **WITHDRAWAL (CRIMES):** ACCOMPLICES and CONSPIRATORS who WITHDRAW from the conspiracy by 1) giving notice that they will no longer help to further the conspiracy goal and 2) acting to thwart the remaining conspirators from attaining the conspiracy goal generally cannot be charged with subsequent crimes committed by other conspirators based on CONSPIRACY LIABILITY. Courts vary widely with regard to the requirements and extent of this defense. Some cases have allowed withdrawal to be a defense to both conspiracy liability and ACCOMPLICE LIABILITY. In some Courts the defense of withdrawal requires the defendant to report the conspiracy to the police. And some Courts view withdrawal as a defense to the crime of conspiracy itself rather than just a defense to subsequent crimes by co-conspirators. (see CONSPIRACY LIABILITY, ACCOMPLICE LIABILITY.)

228. **ZONE OF DANGER (TORTS):** The zone of danger is the area where the acts of a defendant cause reasonably foreseeable harm. (see PALSGRAF.)

Appendix B: Sample Answers

The sample answers are presented in *italics.* An answer explanation follows each.

Sample Answer 17-1: Contract Formation

HOMER v. LUCY

The rights and remedies of the parties depend on whether or not there was a valid contract. A contract is a promise or set of promises the performance of which the law will recognize as a duty and for which the law will provide a remedy.

1) UCC?

UCC Article 2 governs contracts for the sale of GOODS, movable things at the time of identification to the contract. Otherwise, only COMMON LAW governs the contract.

Here the contract does not concern a sale of movable things because it is for the "rent" of a "house".

Therefore, only COMMON LAW principles govern this contract.

2) Is a WRITING REQUIRED?

Under the STATUTE OF FRAUDS certain types of contracts must be in writing to be enforced. A contract for conveyance of an interest in LAND often requires a writing, but not leaseholds of a year or less.

Here the question involves conveyance of an interest in land because the alleged agreement was to rent a "house", but this appears to be a month-to-month rental.

Therefore, a writing would not generally be required.

3) Was the ADVERTISEMENT an OFFER?

Under contract law an OFFER is a manifestation of present intent to enter into a bargain communicated to the offeree and sufficiently specific that an observer would reasonably believe assent would form a bargain. Advertisements are generally not offers because they usually fail to identify the parties or the quantity being offered.

Here the advertisement was not specific as to the parties because it did not guarantee that Lucy would rent to the first person to respond.

Therefore, the advertisement was not an offer.

4) Was the 9:00 statement by Homer an OFFER?

Offer is defined above.

Here the statement by Homer did not appear to manifest intent to enter into a bargain because even though he said, "I accept" he added that he "had to see the house first." No reasonable person would believe assent to that statement would form a bargain because it was clear he wanted to "see the house first."

Therefore the statement was not an offer.

5) Was the 9:00 response by Lucy an OFFER?

Offer is defined above.

Here the statement by Lucy did manifest intent to enter into a bargain because she said "It's a deal. I will rent to you for $550." A reasonable person would believe assent to that statement would form a bargain.

Therefore that statement was an offer.

6) Did Homer have a valid OPTION?

Offer is defined above. Under common law an OPTION is a contractual agreement that an offeror will not revoke an offer for a specific period of time in exchange for CONSIDERATION from the offeree. CONSIDERATION is an exchange of promises posing legal detriment such that the law deems it sufficient to support an agreement.

Here Lucy promised to give a "firm offer", but Homer gave no promise or value in exchange. While the UCC provides for "firm offers" from merchants, the UCC does not govern here. Therefore, Lucy received no legal consideration in exchange for her promise to give a "firm offer" and her promise cannot be enforced against her as an option contract.

Therefore, Lucy's offer did not create an option contract, and she could revoke her offer at any time.

7) Did Homer effectively ACCEPT at 3:00?

At common law an acceptance must be an unequivocal assent to the terms of an offer, dispatched to the offeror in the manner required, or if no manner is required in the offer, by the means by which the offer was dispatched or some faster means.. An offer must be accepted before it LAPSES. Unless there is an option, an offer lapses in the time stated or if no time is stated within a reasonable time after the offer is made.

Here the reasonable time for acceptance of Lucy's offer is defined by the understanding that Homer would view the house in only one hour at "10:00". That understanding established the

"reasonable time" within which Homer could accept the offer. But Homer was "five hours late," so Lucy's offer had already lapsed when he arrived. Homer's attempt to unequivocally accept Lucy's 9:00 offer by saying "I unequivocally accept" was ineffective because he could not accept an offer that had already lapsed.

Therefore, Homer's attempt to accept was ineffective.

[**ANSWER EXPLANATION:** This question is a typical FORMATION question because it goes through a series of communications between the parties. When you see messages going back and forth, it is a FORMATION question, so analyze each message.

Start with an INTRODUCTORY DEFINITION of a contract. Then chronologically analyze each communication to see if it is an OFFER. Once there is an offer, the next issue is whether the offer is ACCEPTED.

If there is offer and an acceptance a contract forms and the next issue is the TERMS of the contract.

After the contract and terms are discussed the next issue is whether there has been a BREACH. And if there is a breach, the issues are WHO BREACHED and the REMEDIES of the parties.]

Sample Answer 17-2: UCC and Acceptance Varying Terms

BOB v. AL

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy.

1) UCC?

Article 2 of the UCC governs contracts for the sale of GOODS, movable things at the time of identification to the contract.

Here the contract is for sale of a moveable thing because it was for sale of a "tuxedo".

Therefore this was a contract for a sale of goods and the UCC governs.

2) MERCHANTS?

Under the UCC MERCHANTS are people who deal in the goods or hold themselves out by occupation as knowledgeable about the goods in a contract.

Here Bob deals in tuxedos because he has a clothing store. Al may have "bought a lot of clothes " but there is no evidence he deals in tuxedos or hold himself out by occupation as being particularly knowledgeable about them.

Therefore Bob is a merchant and Al is not.

3) Is A WRITING NEEDED?

Under UCC 2-201 a contract for the sale of GOODS over $500 requires a writing. This limit is being raised to $5,000 but many States are still using the $500 limit. Under the UCC a contract between MERCHANTS may satisfy the need for a writing against both parties if there is a sales confirmation indicating the quantity sent to one party by the other and the receiving party does not object to the representation of a contract.

Further, under the UCC there is no need for a writing if goods are special made, the person to be bound acknowledges the contract in a legal setting or where a party has accepted payment or goods.

Here the goods are over $500 because the tuxedo costs "$519.95." And Al is not a merchant as shown above.

Further, this was a "ready-made" tuxedo, not special made, and Al never acknowledged the contract in a legal setting or accepted the goods.

Therefore a writing signed by Al is needed if the contract is to be enforced against him by Bob.

4) Did Bob OFFER to sell the tuxedo?

Under contract law an OFFER is a manifestation of present contractual intent communicated to the offeree that is so specific that an objective observer would reasonably believe assent would form a bargain.

Here Bob manifested an intent to sell a tuxedo because he "suggested Al buy" the tuxedo. And a reasonable person would believe assent to this communication would form a bargain.

Therefore, Bob made an offer.

5) Did Al ACCEPT Bob's offer?

Under the UCC acceptance of an offer can be made by any reasonable means showing assent to an offer.

Here Al showed assent by a reasonable means because he "agreed".

Therefore, Al accepted Bob's offer.

6) What were the TERMS of the bargain?

Under the UCC the subject matter, quantity and parties must be specified for a contract to be sufficiently certain, but all other terms can be supplied by the UCC's GAP FILLERS.

Here the parties are Al and Bob and the subject matter is one tuxedo that is to be "exactly Al's size." Although price was not agreed upon that term would be inferred by the normal price for such goods. If $519.95 was the normal price of the tuxedo, it would be the price supplied by the UCC. The place of delivery was Bob's store and the time of delivery was agreed to be "later in the week."

Therefore the TERMS of the contract were sufficiently certain for it to be enforced.

7) BREACH?

Under the UCC PERFECT TENDER RULE goods must be delivered exactly as ordered. A seller that gives notice of intent to CURE a shipment of non-conforming goods has a right to cure within the contract period and a right to extra time to cure if non-conforming goods were delivered with a reasonable belief they were suitable for the buyer's needs.

Here Bob delivered non-conforming goods because the tuxedo was not an "exact fit" as promised. Bob gave notice of intent to cure, and had time within the contract period to cure the lack of fit.

Therefore, Bob breached, but had a right to cure the breach.

Was the contract MODIFIED to a higher price?

Under the UCC a modification of a contract by agreement between the parties does not require additional consideration.

Here Al did not agree to pay a higher price because he only "nodded" agreement to the need for alterations. The alterations were so that Bob could cure his breach, and while Bob has a right to cure his breach, he has no right to charge Al for the alterations. Further, Al did not agree to modify the original contract terms.

Therefore, the contract was not modified to a higher price.

8) Can Al raise the LACK OF WRITING as a defense?

As discussed above, Bob could not enforce the contract unless he had a signed writing from Al.

No facts show that Al ever signed any writing to buy the tuxedo.

Therefore, Bob cannot force Al to pay for the tuxedo.

9) FRUSTRATION OF PURPOSE?

Under contract law, if the parties enter into a contract knowing that the failure of some condition beyond their control will deny one of the parties the benefit of the bargain, that condition is an implied material condition of the contract, the failure of which excuses both parties from the agreement.

Here Bob knew that if the wedding of Al's daughter was cancelled it would deny Al the benefit of the bargain because he wanted the tuxedo to "wear to the wedding."

Therefore, Al can claim frustration of purpose excuses him from the contract.

[**ANSWER EXPLANATION:** This is a UCC question, obviously. Bob breached by delivering non-conforming goods that failed to provide a perfect fit, as promised. But he has time to cure, and gave notice he intended to cure.

If Al wants out of the deal, he can claim a lack of a writing. He can do that because he is not a merchant, and the "sales confirmation" does not apply to him. He would be a merchant if he were a collector or hobbyist. But just buying lots of clothes doesn't make him a merchant any more than you are a merchant because you have bought a lot of groceries.

And Al also possibly can claim frustration of purpose.]

Sample Answer 17-3: Third Parties

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy.

1) UCC?

UCC Article 2 governs contracts for the sale of GOODS, movable things at the time of identification to the contract.

Here the question involves a sale of a "car" and it is movable because it was to be delivered.

Therefore, the UCC applies here.

GROUCHO v. HARPO

2) Groucho's rights under a THIRD-PARTY BENEFICIARY CONTRACT?

Under contract law a THIRD-PARTY BENEFICIARY CONTRACT is one with a main purpose of providing a benefit to a third party. The contract can be enforced by the original party, the promisee, or by a vested intended beneficiary.

A beneficiary may be a DONEE (of a gift) or a CREDITOR (payment of a debt) beneficiary. The beneficiary vests upon becoming aware of and changing position in reliance on the contract.

Here the purpose of the contract is to benefit Chico because he was to get a "new Dodge" as a "birthday present." Therefore this is a third-party benefit contract. Chico is an intended DONEE beneficiary because it is a "birthday present."

Groucho is the promisee because Harpo promised to "deliver" the car in "two weeks." Harpo is the promisor because he has promised to deliver the car to Chico.

Therefore, this is a third-party beneficiary contract, and Groucho as promisee can enforce it.

3) Groucho's REMEDIES?

Under the PERFECT TENDER RULE of the UCC a non-breaching buyer in a non-delivery situation can demand conforming goods, repudiate the contract or by goods to cover and demand the excess of the cover price over the contract price.

Here Harpo has breached because he did not deliver the promised car.

Therefore, Groucho can demand delivery from Harpo or repudiate the contract and demand return of his $2,000. If he covers by buying the car elsewhere he can demand the excess of his cover price, if any, over the contract price.

GROUCHO v. SWIFTY

4) Groucho's rights under the DELEGATION contract?

Under contract law a DELEGATION is a second contract conveying the duty of performance under the first contract from the original promisor to a delegatee. The promisor in the first contract retains primary liability to the promisee. The delegatee assumes secondary liability to the promisee of the first contract if she expressly accepts the delegation in exchange for consideration, a bargained for exchange of value creating legal liability. In the delegation contract between the promisor/delegator and the delegatee the original promisee is a CREDITOR third-party beneficiary with standing to enforce the contract.

A delegatee can raise all defenses that are available to the promisee in the original contract.

Here there is a delegation contract between Harpo and Swifty supported by consideration because Swifty expressly accepted the duty by saying he "agreed to deliver" in exchange for an "immediate payment of $20,000".

Therefore, Groucho has standing to enforce Swifty's promise to deliver the car as a creditor third-party beneficiary.

5) Groucho's REMEDIES against Swifty?

A promisee under a contract can enforce the delegation contract as an intended third-party beneficiary in the same way as the original promisee of the delegation agreement (Harpo).

Here Groucho's remedies against Swifty are the same as his remedies against Harpo, and Groucho can recover from Swifty any amounts he cannot recover from Harpo.

HARPO v. SWIFTY

6) Harpo's rights under the DELEGATION contract?

Delegation is defined above.

Here the delegation from Harpo to Swifty is a contract between them because Swifty promised "to deliver the car", and it is a legal contract supported by consideration because Swifty received an "immediate payment of $20,000".Swifty was the promisor and Harpo the promisee.

Therefore, Harpo can enforce his contract with Swifty and seek recovery from Swifty for any damages due Groucho and/or Chico.

CHICO v. HARPO

7) Chico's rights as a THIRD-PARTY BENEFICIARY?

Third-party beneficiary contracts are defined above. Chico is an intended third-party beneficiary because the known purpose of the original contract was to give him a "birthday present." He vested when he became aware of the original contract and changed position in reliance.

A vested third-party beneficiary can enforce the contract against the promisor in the same manner as the promisee.

Therefore, Chico can enforce the original contract against Harpo in the same manner and extent as Groucho

8) Chico's REMEDIES?

Chico's remedies would be the same as Groucho.

CHICO v. SWIFTY

9) Chico's rights and remedies against Swifty?

Since Swifty agreed to perform the duties of Harpo, Swifty assumed the same liability as Harpo. And since Chico has the same enforcement rights as Groucho, Chico's rights and remedies to enforce the contract against Swifty are the same as against Harpo.

CHICO v. GROUCHO

10) Chico's rights and remedies against Groucho?

A donee beneficiary cannot enforce the promise of a gift against the promisee at law and can only enforce at equity based on promissory estoppel.

Here Groucho entered into the contract with Harpo to give Chico a GIFT, so Chico was a DONEE beneficiary. While there is no evidence Groucho has breached the contract with Harpo, and even if he did Chico would have no right to enforce the contract against Groucho at law.

Therefore, if Groucho had refused to perform the contract (e.g. had refused to make the car payments) Chico could only plead equity against Groucho based on principals of promissory estoppel.

[**ANSWER EXPLANATION:** The point of this question is that a contract intended to benefit a third party (Chico) can be enforced against the promisor (Harpo) by both the intended beneficiary (Chico) and the promisee (Groucho). Further, a delegation contract supported by consideration (a legally binding contract and not just a gift promise) can be enforced by the delegator (Harpo) against the delegatee (Swifty) and also by the promisee (Groucho) and intended beneficiary (Chico).

But if the promisee's effort (Groucho's effort) to bestow benefit on the beneficiary (Chico) is gratuitous, the donee beneficiary cannot enforce the original contract (Groucho-Harpo contract) against the promisee (Groucho) at law. The donee beneficiary could only plead promissory estoppel or detrimental reliance against the promisee in equity, given evidence to support such a claim.

If the contract is for a sale of goods, as is the case here, the UCC also governs the remedies of the parties at law, but the equitable remedies would generally remain the same as at common law.

You should identify each party as promisee, promisor, delegatee, donee/creditor beneficiary, etc. because that designation determines their RIGHTS and REMEDIES (just as the call of the question asks.)

Keeping the parties straight may require drawing a diagram and labeling each party with the various terms.]

Sample Answer 17-4: Defenses

TOM v. AL

1. *Was the contract of January 1 unenforceable by Tom because it was oral?*

1) UCC?

UCC Article 2 governs the sale of goods, moveable things at the time of identification to the contract. But UCC Article 1 generally requires a written contract signed by the party to be bound for any sale of personal property that is not goods in excess of $5,000.

Here Tom claimed the records were "goods" but the contract was not for the sale of anything movable because it was for the sale of "recording rights". But it was for a sale of personal property because it was for "exclusive recording rights." The value of the contract was not stated to be over $5,000, and it might be argued that on that basis Article I would not require a writing at the time of execution, even though the song later became popular.

Therefore UCC Article 2 would not require this contract to be in writing, and it is arguable that Article 1 would not require a writing because the contract was not clearly in excess of $5,000 at the time of execution.

2) Statute of Frauds?

Under the STATUTE OF FRAUDS a contract that necessarily takes more than a year to complete from the time of formation must be in writing to be enforceable at law. But if an oral agreement that fails to satisfy the statute is partially or fully performed, it may be enforceable at equity to the extent necessary to prevent injustice. To plead equity one must have "clean hands".

Here the contract would necessarily take more than a year because it was entered "two days before" Al was 17 and it was to last until he was "18". That is more than a year.

Therefore, the Statute of Frauds required a writing even if Article 1 of the UCC did not. Al only agreed to the contract orally, so and the contract was not enforceable against him at law because it was oral.

Further, Tom would be unable to plead "clean hands" because he appears to have taken advantage of Al, a minor, and to have lied to Deccra about Al's age.

Therefore Tom would be unable to enforce the oral agreement against Al at either law or equity.

2. Was the contract of January 1 enforceable against Tom by Al?

3) STATUTE OF FRAUDS?

The Statute of Frauds is defined above.

Here Tom sent Al a "signed" confirmation that "gave all the details". And Al also has "performed completely".

Therefore there may be sufficient "writing" signed by Tom that the Statue of Frauds might be satisfied.

Otherwise Al would probably be able to enforce the contract against Tom at equity to the extent necessary to avoid injustice.

4) Enforceable by a MINOR?

Under contract law a contract, except for necessities of life, cannot be enforced at law against a party which lacked legal capacity at the time of execution. But if a legal incapacity is removed the party to be bound must repudiate the contract within a reasonable period of time or they will be deemed to have affirmed or ratified it. The period of time in which a party gaining legal capacity must repudiate a contract may be set by statue.

A party lacking capacity can enforce a contract against a party that does not lack capacity.

Here Al lacked capacity at the time of execution because it was "two days before his seventeenth birthday". But that does not prevent Al from enforcing the contract against Tom who did not lack capacity.

Therefore the contract is enforceable by Al, even though he is a minor.

AL v. DECCRA

3. Was the contract of March 1 enforceable by Al against Deccra?

5) FRAUD?

Under contract law FRAUD is a defense to enforcement of a contract where a party 1) deliberately misrepresented material facts, 2) the party raising the defense reasonably relied on the misrepresentations, and 3) the party to be bound would not have entered into the contract but for the misrepresentation.

Here Tom deliberately misrepresented facts because he said Al was "19" knowing that Al was a minor. And this was a material fact since it represented Al had legal capacity to enter into a contract. And Decca reasonably relied on Tom's misrepresentation, and could probably prove it would not have entered the contract had it known the truth.

Therefore, the contract of March 1 was unenforceable against Deccra.

4. ISSUE -- Was the contract of April 1 enforceable by Deccra against Al?

6) EFFECTIVE REPUDIATION OF CONTRACT?

As explained above a contract, except for necessities of life, cannot be enforced against a party lacking legal capacity at the time of execution. But if a party lacking capacity at the time of contract gains capacity, they must affirmatively repudiate the contract within a reasonable period

of time, or within the time set by statute, or they will be deemed to have affirmed or ratified the contract.

Here Al lacked capacity to contract at the time of execution because he was a minor who was "only 17".

Al later attempted to repudiate the contract "six months after becoming an adult". He would argue that this was within a "reasonable" time after he gained capacity. And if this was within the statutory time period the repudiation was effective. Otherwise the contract may have been deemed automatically affirmed and the repudiation would be ineffective.

If the repudiation was effective, Decca would generally be required to give to Al all money it had made on the sale of his song.

Therefore, Deccra cannot enforce the contract if Al's repudiation was effective.

5. If the contract of April 1 is legally unenforceable by Deccra, what equitable argument might it make?

7) PROMISSORY ESTOPPEL?.

Under the doctrine of PROMISSORY ESTOPPEL a party can seek enforcement of an otherwise unenforceable promise where 1) a party made a promise, 2) intending to induce reliance, 3) there was reasonable reliance by the other party and 4) injustice will result if the promise is not enforced..

Here Al made a promise to Deccra because he "agreed on April 1 to a new arrangement", and he did that intending to induce reliance.

Al would argue that Decca did not reasonably rely because it was aware Al was a minor and could repudiate the contract at any time. Deccra would argue that Al would reap an UNJUST ENRICHMENT because it incurred "$360,000 in distribution expense".

Therefore, it would appear that Decca's restitution to Al should be reduced by this amount and restricted to the actual profit made by Decca.

[**ANSWER EXPLANATION:** The most important thing this question teaches is how to "follow the call" of a STRUCTURED CALL while still addressing important issues the call fails to mention.

While the CALL asks you about Tom's rights against Al, and Al's rights against Tom, and Al's rights against Deccra, and Deccra's rights against Al, you only have to state the parties twice: "Tom v. Al" and "Al v. Deccra". It is simply a waste of time to state the parties again with their names switched around.

The call of the question asks the validity of an oral contract. That requires you to immediately determine if the UCC applies. UCC Article 2 does not apply because this question does not involve the sale of goods. Even if those do not apply, the Statute of Frauds applies because this is a contract that necessarily cannot be performed in less than a year.

Remember oral contracts and contracts signed by minors may be valid but not enforceable. Or, they may be unenforceable at law but enforceable at equity. It depends on the facts. Even if a party cannot enforce the contract, they may get quantum meruit reimbursement if the other party would otherwise receive an unjust enrichment.

Deccra's defense against enforcement of the March 1 contract could be stated as the issue of "unilateral mistake" where Tom knew Deccra was mistaken, but since Tom deliberately lied to Deccra about Al's age with intent to deceive "fraud" seems the more accurate issue statement.]

Sample Answer 17-5: Common Law Modification, Breach and Remedy

WANDA v. HOMER

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy.

1) UCC?

Article 2 of the UCC governs contracts for the sale of GOODS. GOODS are movable things at the time of identification to the contract. Otherwise only the common law applies.

Here the contract does not involve a sale because it is a contract for personal services -- building a house.

Therefore, only the COMMON LAW applies.

2) Is a WRITING REQUIRED?

Under the STATUTE OF FRAUDS certain types of contracts must be in writing to be enforced. A contract for conveyance of an interest in LAND generally requires a writing, and contracts that necessarily must take more than a year to complete require a writing.

Here the contract is for building a house, and does not involve conveyance of an interest in land because Homer "already owns" the land. And the contract can be performed in less than a year because it was to be completed before the "Winter rains".

Therefore, no writing is required by the Statute of Frauds

3) ANTICIPATORY REPUDIATION and WAIVER OF THE BREACH?

Under contract law an ANTICIPATORY REPUDIATION is a clear statement or indication that a contract party will not perform future contract duties, and it is a MAJOR BREACH of the contract. But if the non-breaching party allows the breaching party to continue performance, that constitutes a WAIVER OF THE BREACH and the non-breaching party effectively elects to treat the breach as minor. After that the non-breaching party cannot object that the earlier repudiation was a major breach.

Here Bill effectively indicated that he was not going to finish construction because he said he "could not finish" the house. So Homer could have objected at that time that Bill had committed a major breach. But Homer allowed Bill to continue performance because Bill eventually finished everything except the painting.

Therefore, Homer would be estopped from claiming that Bill's earlier behavior constituted a major breach.

4) MODIFICATION without CONSIDERATION?

Under COMMON LAW a contract modification must be supported by CONSIDERATION, a bargained for exchange of value posing legal detriment sufficient to enforce the modification at law.

Here the contract was modified because Homer promised to pay $30,000 more. But Bill did not give anything of value in exchange for that promise since he only agreed to do what he already had a PRE-EXISTING DUTY to do -- to build the house for $100,000.

Therefore, the modification of the contract was not supported by consideration and it is unenforceable at law against Homer.

5) Enforceable by PROMISSORY ESTOPPEL?

Under the theory of PROMISSORY ESTOPPEL an agreement that otherwise is unenforceable at law for a lack of consideration may be enforced at equity to the extent necessary to avoid injustice. In order to plead equity a party must have CLEAN HANDS. Promissory estoppel applies where the party to be bound made a 1) promise with 2) intent to induce reliance and there 3) was reasonable reliance and 4) failure to enforce the promise would cause an injustice.

Here Homer made a promise because he "promised" to pay $30,000. And he did that with intent to induce reliance because Homer didn't want to "live in a tent". Bill reasonably relied on Homer's promise because he "hired Fred" in "reasonable reliance" on the promise. But there is NO INJUSTICE because Bill was only induced by Homer's lie to do exactly what he was already legally obligated to do -- finish the house. Homer reaped NO UNJUST ENRICHMENT because he only got the house that he had already been promised, and had promised to pay for.

Therefore, Bill was not induced to do anything he was not otherwise obligated to do, and Homer did not receive anything of value that he was not entitled to.

Since there was no injustice, promissory estoppel would not apply.

Further, Bill had UNCLEAN HANDS because he had a legal duty to perform under the contract, and he elicited Homer's promise to pay $30,000 more by threatening to breach the contract. A Court of equity will not act to enforce a promise elicited by a threat of illegal conduct.

Therefore, Homer's promise to pay more cannot be enforced at either law or equity.

6) Defense of IMPOSSIBILITY?

Under contract law the defense of IMPOSSIBILITY excuses a breach where the performance of a contract has become impossible due to events beyond the control of the parties. Impossibility means that performance is physically impossible, and it constitutes a failure of an IMPLIED MATERIAL CONDITION of the agreement.

Here finishing the house was not impossible because Homer finished it by hiring Paul.

Therefore, Wanda cannot claim impossibility as a defense.

7) BREACH?

Under contract law a BREACH is a failure to perform contractual duties when they become due. A MAJOR BREACH is one which denies the non-breaching party the EXPECTED BENEFIT OF THE BARGAIN. A major breach completely excuses the non-breaching party from any further obligation under the contract. A MINOR BREACH is one where the breaching party has SUBSTANTIALLY PERFORMED. When there is a minor breach the non-breaching party must perform contractual duties but is entitled to an OFFSET as compensation for damages.

Here there was substantial performance because the home was all done "except for the painting". The minor breach cost Homer an additional $10,000, so he was entitled to an OFFSET in that amount.

Therefore, Homer must pay Wanda the contract price less an offset of $10,000, a net payment of $90,000.

[**ANSWER EXPLANATION:** Don't let sympathy blind you. Effective modification of a common law contract (not UCC) requires an exchange of consideration. Here Bill receives a promise of $30,000, but Homer gets nothing. If Homer gets nothing, then he gets no consideration (no bargained for thing in exchange for his promise).

Restatement 2nd provides that a "good faith" modification requires no consideration to be enforced at law. But that is not clearly "broadly adopted". The general view seems to be that consideration is required to enforce a modification agreement at law, and without consideration it may only be enforced at equity to the extent necessary to avoid injustice. Besides, an agreement made "under threat" is hardly in good faith anyway.

Consider a situation where Bill demands $30,000 more but also promises to paint the house a different color. In that case there would be a bargained for exchange of consideration, so Homer would have to argue he was forced to agree to pay more under duress, a different legal defense argument. But here that is not the case, so any argument of 'duress' is unnecessary and irrelevant.

For defenses, impossible means just that. If the non-breaching party can finish the job, so can the breaching party.

If the question has dollar amounts, state the dollar amounts each party should get (or pay) when discussing remedy.]

Sample Answer 17-6: Common Law Remedies

DOTTIE v. ESTATE OF FESTER

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy.

1. What are Dottie's remedies at law relative to the stock?

1) UCC?

UCC Article 2 governs contracts for the sale of GOODS. GOODS are movable things at the time of identification to the contract. Otherwise only the common law applies.

Here the contract is not for a sale of goods because it is an exchange of promises that Dottie will provide services and Fester will leave her his stock in his Will in exchange.

Therefore, only the COMMON LAW governs.

2) Is a WRITING REQUIRED?

Under the STATUTE OF FRAUDS certain types of contracts must be in writing to be enforced. A contract for transfer of stock is not one of them.

Therefore, no writing is required by the Statute of Frauds.

3) UNILATERAL CONTRACT?

Under contract law a UNILATERAL CONTRACT is proposed by an offer that unequivocally requires acceptance by performance and cannot be accepted merely by a promise of performance.

Here this offer unequivocally required Dottie to "actually take care of " Fester for the rest of his life because Fester "emphasized" Dottie could not accept by merely "promising" to do what he asked.

Therefore, this was an offer of a unilateral contract.

4) SAVING DOCTRINES of a UNILATERAL CONTRACT?

Under the common law an offeror could revoke her offer at any time before acceptance. Under that view Fester could revoke at any time, leaving Dottie without a remedy. Modernly SAVING DOCTRINES have been adopted to prohibit the offeror of a unilateral contract from revoking for a reasonable time after becoming aware that the offeree has begun performance in acceptance.

Under an alternative view the offeror may revoke but the offeree has a right to RESTITUTION to avoid UNJUST ENRICHMENT.

Here Dottie began performance in acceptance because she "sold her home", "moved" and "nursed Fester." And Fester was aware of her performance because he was alert despite his paralysis.

Therefore, under the modern savings doctrines Dottie would usually be given a reasonable time to complete performance. Here a "reasonable time" is the rest of Fester's life, since that was the condition of the offer.

5) BREACH OF IMPLIED COVENANT?

Under contract law an IMPLIED COVENANT by each party to a contract is that they will not act to prevent the other party from performing contract duties and they will take reasonable steps to assure the other party enjoys the expected benefit of the bargain. Performance of this implied covenant is an IMPLIED MATERIAL CONDITION of every contract,

Here Fester breached the implied covenant because he denied Dottie the opportunity to complete performance in acceptance. This caused a failure of an implied material condition because it totally denied her any of the benefits she expected from the contract.

Therefore, Dottie can claim a MAJOR BREACH by Fester.

6) Dottie's CONTRACT REMEDY?

Under contract law remedies are COMPENSATORY to give the non-breaching party the benefit of the bargain, the compensation that had been bargained for. If property is UNIQUE money damages are in inadequate remedy and SPECIFIC PERFORMANCE is appropriate.

Here the stock is not "unique" and money damages are adequate.

Therefore Dottie's remedy is an award of money damages equal to the value of the stock.

2. What are Dottie's remedies at law relative to the house?

The same common law and savings doctrines apply to the house as for the stock as explained above. But under the STATUTE OF FRAUDS contracts for interests in land must be in writing to be enforced at law.

7) STATUTE OF FRAUDS?

The Statute of Frauds is defined above.

Here the contract was for conveyance of an interest in land because the contract was for a "house" to be given to Dottie in exchange for services.

Therefore, the Statute of Frauds would require a writing, and this contract generally cannot be enforced at law regarding the house.

3. What are Dottie's remedies for enforcement at equity?

8) PROMISSORY ESTOPPEL?

If a plaintiff has no adequate remedy at law, they may be able to obtain a remedy in equity. Here Dottie has an adequate remedy at law as to the promise of the stock, so she cannot seek enforcement at equity as to that part of Fester's promise. But since she has no adequate remedy as to the promise of the house, she can seek a remedy at equity as to that part of her claim.

Under the equitable doctrine of PROMISSORY ESTOPPEL a promise or contract that cannot be enforced at law might be enforced at equity to the extent necessary to prevent unjust enrichment where 1) the party to be bound made a promise ,2) intending to induce reliance, 3) there was reasonable reliance on the promise by the party seeking equity, and 4) justice demands enforcement.

Here there was a promise because Fester "promised" to give Dottie the house. And Fester made the promise intending to induce reliance by Dottie because he wanted her to "move" to where he lived and "nurse" him. Dottie reasonably relied because she trusted him as an "honest, God-fearing Christian." And there would be injustice otherwise because she nursed him for "10 years."

To enforce the promise Dottie would argue that an award of money damages is insufficient to prevent unjust enrichment because the "house" is unique property. A Court of equity may order title to the house conveyed to her (EQUITABLE REPLEVIN) to prevent injustice.

Therefore, Dottie may be able to enforce the promise in equity even though it could not be enforced at law.

4. What are Dottie's remedies in alternative to enforcement?

9) EQUITABLE RESTITUTION?

At equity a party that cannot enforce a promise at law or equity may still seek damages in RESTITUTION to prevent UNJUST ENRICHMENT. The measure of damages may be either the benefits their performance conveyed to the breaching party, or else the detriment they have suffered in reasonable reliance.

Here Dottie can seek RESTITUTION for the benefits she conveyed to Fester. He enjoyed benefits that would have cost him $40,000 a year for ten years, so he enjoyed an unjust enrichment of $400,000.

In the alternative Dottie suffered a loss of $50,000 on her house and foregone wages of $2,500,000 over the ten year period, for a total of $2,550,000.

Dottie may seek an award of money damages in these amounts in equitable restitution.

[**ANSWER EXPLANATION:** This call of this question is for a discussion of REMEDIES and yet the facts raise other issues that should be discussed first such as the Statute of Frauds.

Always follow the call of the question, but you can use "sub-issues" as shown here to discuss necessary issues that the call does not mention.

The first question asked in the call should settle the matter of the stock since Dottie has an adequate legal remedy as to that part of her claim. The last three questions deal with the promise of just the house, and as to that Dottie has no adequate legal remedy because the Statute of Frauds generally bars legal enforcement of an oral contract for conveyance of an interest in land.

Another possible issue here is the “part performance doctrine” under which the Court will legally enforce an oral sales agreement for land in certain very narrow circumstances. The reason I don’t discuss it in my sample answer is that it would so clearly fail that it did not seem an intended issue. That doctrine requires the “buyer” to take possession of the land in a manner that almost unequivocally proves an oral sales agreement. Here Dottie did not take possession; she shared possession. And nothing she did “unequivocally” showed any oral agreement to “sell” the land.

Therefore, it appears Dottie’s only remedies as to the promise of the house are at equity.]

Sample Answer 17-7: UCC Formation, Breach and Remedy

SELLCO v. BUYCO

The rights and remedies of the parties here depend on whether there was a valid contract. A CONTRACT is a promise or set of promises the performance of which the law will recognize as a duty and for the breach of which the law will provide a remedy.

1) Does the UCC apply?

UCC Article 2 governs contracts for the sale of GOODS. GOODS are movable things at the time of identification to the contract.

Here the question involves a sale of "widgets" and they are clearly moveable because they were to be "delivered".

Therefore, Article 2 of UCC applies.

2) Are the parties MERCHANTS?

Under the UCC MERCHANTS are people who deal in the goods or hold themselves out by occupation as knowledgeable about the goods in a contract.

Here Sellco is clearly a dealer in these types of goods because it advertises them in its "catalogue." Buyco is by occupation knowledgeable concerning "widgets" because of the large quantities it is ordering ($60,000).

Therefore, the parties appear to be merchants.

3) Is there a NEED FOR A WRITING?

Under UCC 2-201 a contract for the sale of GOODS over $500 requires a writing signed by the party to be bound unless an exception applies. This limit is being raised to $5,000 but many States are continuing to use the $500 limit.

In a contract between MERCHANTS the need for a writing may be satisfied by a sales confirmation indicating the quantity sent to one party by the other if the receiving party has reason to know the contents of the writing and does not object to the representation of a contract within 10 days.

Here a writing is needed because the cost of the goods is $60,000 ("10,000" at "$6"). But this is "between merchants" because both parties appear to be merchants, and the 6/4 sales confirmation Sellco sent to Buyco specifies quantity at "10,000". That satisfies the requirement of 2-201.

Therefore a writing was needed, but the need for a writing would be satisfied by the 6/4 message, unless Buyco objected within 10 days.

4) Was the catalogue an OFFER?

Under contract law an OFFER is a manifestation of present contractual intent communicated to the offeree that is so specific that an objective observer would reasonably believe assent would form a bargain. An advertisement is never a valid offer unless it clearly identifies the QUANTITY of goods for sale and the PARTY to whom the offeror is willing to sell them.

Here the catalogue is not an offer because it is just a price list that does not specify the quantity of any product Sellco is willing to sell. No reasonable person would believe merely 'assenting' to the catalogue would alone form a bargain, so a catalogue cannot be an 'offer'.

Therefore, the catalogue itself is not an offer.

5) 6/2/99 OFFER by Buyco?

Offer is defined above.

Here the communication from Buyco expresses present contractual intent because it says "we hereby accept". The offer is specific as to parties because it says "we" and "your", and it is specific as to a quantity of "10,000". This is specific enough for an offer because it objectively appears assent would form a bargain.

Therefore, this is a valid offer.

6) 6/3/99 ACCEPTANCE?

Under UCC 2-206 an offer that does not clearly require acceptance in a specific manner can be accepted in any reasonable manner including a promise to ship or shipment of conforming or non-conforming goods.

Under UCC 2-207 an acceptance that includes varying terms is still effective. If the contract is between merchants the varying term proposed by the offeree may become part of the contract if the offer did not expressly require acceptance according to its terms, the offeror does not object to the varying terms within a reasonable time, and the varying terms are not a material alteration of the offer terms.

Even when varying terms do not automatically become part of the contract they may become part of the contract by agreement, and the UCC allows modification without additional consideration.

Here Sellco did not promise to ship in response to Buyco's offer because it said it "could provide" and not that it "would" provide the product. The word "could" does not imply any "promise to ship". Therefore the response of Sellco was a rejection of Buyco's offer and a counter-offer to sell on different terms.

Buyco's reaction to Sellco's offer to sell without warranty was an acceptance because Buyco "verbally agreed."

Even if one argues that Sellco accepted Buyco's offer with a varying term, Buyco still "agreed" to it, so that would have modified the contract to exclude the warranty term anyway.

Therefore, there was an acceptance under either interpretation, and there is "no warranty" under either interpretation.

7) TERMS?

Under UCC Article 2 a goods contract is enforceable if quantity and parties are specified. All other terms can be supplied by the UCC's GAP FILLERS.

Here the parties are specified as Sellco and Buyco. The quantity is 10,000 yellow widgets at a price of $6 without a warranty for delivery on 6/8.

Therefore the contract is specific enough to be enforced.

8) BREACH?

Under the PERFECT TENDER RULE of the UCC goods must be supplied exactly as ordered. Any non-conforming delivery is a major breach.

A seller that delivers non-conforming goods has a right to GIVE NOTICE of intent to cure, and may CURE the shipment of non-conforming goods at any time within the contract period. Further, the seller gets a reasonable amount of extra time beyond the contract period if the original shipment was sent with a reasonable belief it would satisfy the buyer's needs.

Here Sellco shipped non-conforming goods because it shipped "blue widgets". They were not sent with a reasonable belief they would satisfy the buyer's needs because they were sent by " mistake". And there is no time left to cure in the contract period because the shipment was on the deadline of "6/8/99".

Therefore, Sellco breached by shipping non-conforming goods, and has no time left to cure.

9) Buyco's REMEDY?

Under the UCC a buyer who receives nonconforming goods can REJECT the goods and REPUDIATE the contract. The buyer can COVER by buying the goods elsewhere and demand the excess of the cover price over the contract price, or demand the excess of market price over the contract price.

Here Buyco had a right to reject the goods, and covered by buying at a price of $5. Since this is less than the $6 contract price, Buyco has suffered no loss as a result of the breach and has no right to receive damages from Sellco.

Therefore, Buyco's demand for $50,000 has no basis and they would get nothing.

[**ANSWER EXPLANATION:** This is a simple UCC formation, breach and remedy question. The need for writing, and the existence of a writing must be discussed.

If an offeree says it “will” or “would” ship goods it is a promise to ship and an acceptance, even if they cite a varying term. In this case UCC 2-207 applies. But if the offeree only says it “can” or “could” ship on different terms it is not a promise to ship. It is really a rejection and counter-offer.

The unusual fact here is that Buyco has suffered no loss, so they can recover no damages. This should be expressly recognized. They promised to buy for $6 and they covered for $5. They benefited from Sellco's error and have no cause of action.]

Sample Answer 18-8: Intentional Torts

GATES V. KENT

1) TORTIOUS ASSAULT?
Under tort law an assault is an intentional act to cause, and which does cause, reasonable apprehension of an immediate battery, a harmful or offensive touching. An act is intentional if it is for the purpose or with knowledge with reasonable certainty a result will occur.

Here Kent acted intentionally because he intended to pull a "prank" on Gates. His intent because it was a "prank" was to cause Gates to be "apprehensive". Gates was "apprehensive" and that was reasonable because he was held "hundreds of feet in the air".

Therefore, Kent can be liable for assault.

2) TORTIOUS BATTERY on Gates?
Under tort law a battery is an intentional act done to cause a harmful or offensive touching.

Here Kent acted intentionally because he intended to pull a " prank", and he caused a touching because he "lifted and flew" Gates into the air. This would be an offensive touching to a reasonable person because it is socially offensive to be grabbed in this manner by a stranger.

Therefore, Kent can be liable for battery.

3) FALSE IMPRISONMENT?
Under tort law a false imprisonment is an intentional act causing the plaintiff to be confined to a defined space against their will with no reasonably apparent means of reasonable exit. The plaintiff must be aware of the confinement.

Here Kent intentionally acted because it was a "prank", and he confined Gates with no reasonably apparent means of reasonable exit because he put him on a "ledge". And Gates was aware of his confinement because he was "apprehensive" of falling and "taunted" by the crowd.

Kent may argue that Gates was not actually confined because all he had to do was go through the "window". But that means of exit was not reasonably apparent because even the "firemen" who tried to get Gates down for "hours" did not realize discover it.

Therefore, Kent can be liable for false imprisonment.

4) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

Under tort law intentional infliction is an intentional, outrageous act causing the plaintiff severe emotional distress. Generally emotional distress will not be assumed, and the plaintiff must present evidence showing that they did, in fact, suffer severe emotional distress. Evidence of mere humiliation and embarrassment is generally not enough.

Here there was an intentional, outrageous act because Kent "flew" Gates to the top of a building and strand him there in front of a crowd where he was "taunted for hours".

However there is no evidence Gates suffered severe emotional distress because the facts only state that he was "humiliated" and "embarrassed".

Therefore, Kent can only be liable for IIED if Gates presents additional evidence of emotional distress.

WORLD TRIBUNE V. KENT

5) TRESPASS TO LAND?

Under tort law a trespass to land is an intentional act causing unauthorized entry onto, under or over the land of another. The entry may be by the defendant personally or by some person or object directed or placed on the land by the defendant. When an object is placed on the land it constitutes a "continuing trespass." No damage is necessary, but the defendant is liable for all damage actually caused. And if malice can be shown the defendant may be liable for punitive damages.

Here Kent was over the land of the World Tribune because he "hovered" over the "building." And he caused Gates to go onto the land because he put Gates on the "ledge." This caused actual damage because Gates accidentally caused a "panel to fall." Additional damages are implied by the fact "firemen" worked in the building "for hours" trying to rescue Gates. This disruption probably caused Tribune to suffer lost wages and lost profits.

Further, the possibility of malice is implied by the fact that Kent worked for one newspaper, the Daily Planet, and he disrupted business activities at what appears to be a competing newspaper, the World Tribune.

Therefore Kent would be liable for all damages he actually caused Tribune based on trespass to land, and may also be liable for punitive damages if implied malice could be proven.

FIREMAN FRANK V. KENT

6) BATTERY by TRANSFERRED INTENT?

Battery is defined above. Under tort law transferred intent means that a defendant that acts with intent to commit any tort injury on anyone will be liable for every injury inflicted on everyone, even if the person injured or the injury suffered is not what was originally intended. Some Courts limit the application of transferred intent, but it is more likely to be applied when the original tortious act was intended to inflict harm.

Here Kent intentionally acted to cause Gates to suffer assault, battery, false imprisonment and possibly intentional infliction of emotional distress, and he intended to cause a trespass to the land of the World Tribune. In turn, that caused Frank to suffer a "harmful touching".

Therefore, Kent would be liable to Frank for battery by transferred intent.

[**ANSWER EXPLANATION:** This question has all of the common law intentional torts except for conversion and trespass to chattels. Why did Kent act? Because he intended to pull a "prank." That fact expressly proves his acts were intentional. His physical acts imply intent, but the fact he wanted to pull a "prank" expressly proves intent. That saves you time.

Be prepared for batteries that cause "offense" but not harm. Being pushed around by a stranger is offensive to a reasonable person, and be prepared to state that.

The whole purpose of having fireman Frank hurt is to raise the issue of transferred intent. Did you spot the issue? Don't turn to "negligence" when the acts causing harm are intentional.

If Frank was injured as the result of negligence by Kent or Gates, he might have no case because of the "Fireman's Rule" that rescue personnel cannot sue for injuries suffered as a result of the negligence of others that creates the emergency situation to which they have responded. That is often codified in statute, and it expressly recognizes the issue that emergency personnel, by occupation, have assumed the risks of their employment.

But the Fireman's Rule does not generally extend to injury caused by intentional torts.

Some professors insist that students "always discuss defenses", and if your professor insists on that humor the prof and discuss defenses, even when there are no facts to suggest any. Often this sort of professor also wants the defenses discussed at the end of the essay in a "Defenses" section.

But generally the writers of law exam and bar exam questions will guide you by giving you facts to suggest the issues you are to discuss, and if you are not given any facts that suggest an issue it means they don't want you to discuss that issue.

And generally question writers want and expect you to discuss the issues in the order in which they arise in the fact pattern.

If no facts are presented to suggest any plausible defense the writer is effectively saying, "I don't want you to discuss defenses!" Here there are absolutely no facts to suggest that Kent has any plausible defense claims, so I didn't waste my time discussing it.]

Sample Answer 18-9: Negligence

PAULA V. TOM

NEGLIGENCE?

Paula's only cause of action here is for NEGLIGENCE. Under tort law NEGLIGENCE is the failure to exercise that degree of care that a reasonably prudent person would use in the same circumstances. To establish a prima facie case Paula must generally prove DUTY, BREACH, ACTUAL AND PROXIMATE CAUSATION and DAMAGES.

1) DUTY?

Generally a person owes no duty to others. But a duty may be based on a STATUTE, a CONTRACT, a RELATIONSHIP, the ASSUMPTION of a duty, or PERIL caused by the defendant.

NEGLIGENCE PER SE?

If a STATUTE creates a duty, violating the statute may constitute NEGLIGENCE PER SE if the purpose of the statute was to protect the CLASS OF PEOPLE to which the plaintiff belongs, and the violation of the statute caused the plaintiff to suffer the TYPE OF INJURY the statute was intended to prevent.

Here Tom violated the law that prohibited fireworks in the National Forest, and that caused Paula to suffer injury. But she was not in the CLASS OF PEOPLE the statute was intended to protect because it was to protect people "on national lands" and she was "outside the National Forest boundaries". Further, she did not suffer the TYPE OF INJURY the statute was intended to prevent because it was to "prevent forest fires and injury" while her injury was getting wet and having her money stolen.

Therefore, Paula would be unable to prove Tom was negligent per se.

DUTY BASED ON PERIL?

Under PALSGRAF, Cardozo said that a duty is only owed to those who are in the zone of danger caused by the defendant's acts. The Zone of Danger is the area where the defendant's acts create reasonably foreseeable peril to others.

Andrews held that if the defendant owes a duty to anyone and breaches it, he should be liable for all injury actually and proximately caused by that breach.

Here the Zone of Danger was the gravel bar and the water area immediately around it because it was not reasonably foreseeable the firecrackers could cause peril to anyone outside that area. And there was nobody placed in danger within the zone of danger because "no one else was around" and there was "nothing that could burn".

Paula appeared to be outside the zone of danger caused by Tom's activities because she was a "half mile downstream." Paula might argue that the zone of danger was larger than the small area of the "gravel bar" because Tom should have seen the possibility injury could occur farther away.

Therefore, it would be difficult for Paula to prove that Tom had any duty at all, and almost impossible for her to prove that she was placed in foreseeable peril by his actions.

2) BREACH?

Under tort law a BREACH is the failure to exercise DUE CARE. The standard of due care is that level of caution a reasonably prudent person would use in the same circumstance.

Here Tom went to great lengths to be sure his activities did not endanger anyone because he went to a "gravel bar" in the "middle of the river" with no one around so there would be no foreseeable danger to anyone. And once there he threw the firecrackers "carefully".

Paula could only argue that a reasonably observant person would have seen the "log" floating down the river, and would have been careful not to throw any burning firecrackers onto it.

Therefore, it would be difficult for Paula to show that a reasonable person would have been any more careful than Tom.

3) ACTUAL CAUSE of injury to Paula?

Under tort law an act ACTUALLY CAUSES injury if the plaintiff would not have been injured but for the act.

Here Paula would not have fallen in the river and had her money stolen if Tom had not thrown the firecracker.

Therefore, Tom was the actual cause of Paula's injury.

4) PROXIMATE CAUSE of injury to Paula?

Under tort law PROXIMATE CAUSE means that the injury to the plaintiff was foreseeable, close in time and place to the acts of the defendant and a direct result of a chain of causation unbroken by unforeseeable intervening events.

Generally when there are two or more actual causes of an injury, the last, unforeseeable, intentional act will be an UNFORESEEABLE INTERVENING EVENT that becomes the sole proximate cause, cutting off all liability arising from prior acts. Further, criminal acts and intentional torts by third parties are presumed to be unforeseeable absent additional specific facts.

Here Paula was rather far away from Tom in time and space, and it would not be foreseeable she could be injured by a firecracker at that distance. Further a reasonable person could not foresee that a firecracker would cause money to be stolen. Finally, even if Tom was the proximate cause of Paula falling in the river, he was not the proximate cause of her money being stolen because Harry's criminal act was an unforeseeable intervening event.

Therefore, Paula probably could not prove Tom was the proximate cause of her fall into the river, and she certainly could not prove he was the proximate cause of her money being taken.

5) DAMAGES?

Under tort law DAMAGES are SPECIAL (out of pocket expense) and GENERAL (pain and suffering).

Here Paula had SPECIAL damages because she lost "two dollars" and she had GENERAL damages because she was "hurt and upset." But she got out of the river "laughingly" and was not "hurt and upset" until after she discovered the purse was stolen.

Therefore Paula suffered actual damages, but Tom was not the cause of those damages.

6) CONTRIBUTORY or COMPARATIVE NEGLIGENCE?

Under tort law CONTRIBUTORY NEGLIGENCE is a complete bar to recovery if the plaintiff was responsible in any manner for their injury. It is a MINORITY VIEW rule, and the MAJORITY approach is COMPARATIVE NEGLIGENCE which just reduces the plaintiff's recovery based on the degree of fault of the plaintiff. In some states a plaintiff that is over 50% at fault for her own injuries is completely barred from recovery.

NEGLIGENCE PER SE is defined above. Tom might argue Paula was NEGLIGENT PER SE because she was fishing on the bridge where that is prohibited by statute. But Paula did not suffer the TYPE OF INJURY the statute was to prevent/ The purpose of the statute was "traffic safety" and she was not injured in a traffic accident.

Therefore any "negligence per se" argument by Tom would fail.

Tom's better argument is that Paula was contributorily (comparatively) negligent because she sat "carelessly" and that placed her in PERIL of falling.

Therefore, Tom could easily prove Paula was "careless" and partly responsible for her own injury.

7) ASSUMPTION OF THE RISK?

Under tort law ASSUMPTION OF THE RISK is a complete defense when plaintiffs 1) put themselves at risk, 2) with a full awareness of the risks, and 3) a conscious acceptance of the risks.

Here Paula put herself at risk because she "sat carelessly". She had a full awareness of the risks that she could fall. And she appears to have consciously accepted those risks because the river was only a few "feet" below her, "she could swim" and it was a "nice day".

Therefore Tom may be able to prove assumption of the risks.

PAULA V. DICK

Negligence is defined above.

8) DUTY?

Duty was defined above. Here Dick could only have a duty based on PERIL, and there is little evidence Dick's act created reasonably foreseeable peril to anyone. The only foreseeable danger he caused by pushing the log in the river is that it might hit someone swimming in the river downstream. Therefore the "zone of danger" created by his act is the surface of the river downstream. There is no evidence anyone was in the river, and Paula was certainly not because she was on the bridge..

Therefore, there is no evidence Dick created any foreseeable peril to anyone, and if that could not be proven he did not owe Paula or anyone else a duty.

9) BREACH AND STANDARD OF CARE?

Breach was defined above. The STANDARD OF CARE for a child is to act in the manner reasonable children of the same age and experience act.

Here Dick was only "three years old" and he would only be negligent if he acted in a manner that children of that age do not reasonably act.

Since Dick was so young it is unlikely Paula could prove that he breached his duty, if he had a duty.

10) PROXIMATE CAUSE?

Proximate cause is defined above.

Here Dick was even farther away from Paula than Tom, and it was even more unforeseeable that his act could harm her or anyone else.

Therefore, Paula would have even a more difficult time proving Dick was the cause of her injury.

[**ANSWER EXPLANATION:** This question focuses on the outer limits of DUTY to a remotely situated plaintiff (with firecracker yet, a la *Palsgraf*) and PROXIMATE CAUSATION of damage by some burning object floating down a river (a la *Wagon Mound I and II*). The question also focuses on the outer limits of BREACH because one cannot be breaching a duty by an act that poses no foreseeable risk to others.

Law schools tend to brainwash every student into thinking they can always sue, and win, for every injury. The truth is that Paula's case is frivolous.]

Sample Answer 18-10: Product Liability

TOM V. SAM

Under PRODUCT LIABILITY LAW a person who places an unreasonably dangerous product into the steam of commerce may be liable for the injury it causes. There are four basic theories on which a product liability action may be brought: Breach of Express Warranty, Breach of Implied Warranty, Negligence and Strict Liability.

1) UNREASONABLY DANGEROUS?

A product is unreasonably dangerous if it 1) poses serious and likely dangers, that 2) could be reduced or eliminated easily, 3) without damaging product utility, or else 4) the product utility does not justify the dangers posed.

Here the product presented serious and likely dangers because it could burst into flame under normal use, and those dangers could have been eliminated or reduced easily by putting a warning on the saw.

Therefore this was an unreasonably dangerous product at the time of sale.

2) BREACH OF EXPRESS WARRANTY?

Under tort law there is a BREACH OF EXPRESS WARRANTY if a product is sold with 1) express representations that the buyer 2) relies on and 3) the representations are incorrect and 4) it causes the purchaser injury. The seller is liable to foreseeable plaintiffs, those with privity of contract or their family.

Here Sam made express representations to Tom because he said the saw "would cut 36" trees" and Tom relied because he "bought" the saw. This was incorrect because the saw would only cut "18" trees", and this caused injury because Tom was "burned" when the saw caught on fire. And Tom had privity of contract because he was a "purchaser."

Therefore, Tom can recover under a breach of warranty theory

3) BREACH OF IMPLIED WARRANTY?

Under tort law there is a BREACH OF IMPLIED WARRANTY if a product is unsafe for ordinary use or for the buyer's known intended use, the buyer relies on the expertise of the seller, and the buyer is injured as a result. The seller is liable to foreseeable plaintiffs, those with privity of contract or their family.

Here Tom would argue he bought the saw for ordinary use, relied on Sam's expertise, and was injured as a result. Sam might argue that he did not know what Tom's intended use was, and there was no evidence Tom relied on his expertise.

Therefore Tom can pursue recovery on a breach of implied warranty theory.

4) NEGLIGENCE?

Negligence is a failure to use the care a reasonable person would in the same circumstance. To prevail the plaintiff must prove duty, breach, actual cause, proximate cause and damages.

DUTY? Under tort law a person has a duty to not put an unreasonably dangerous product into the stream of commerce. Further, a person who makes express representations about a product assumes a duty of due care to make sure they are accurate and will not create peril.

Here Sam owed Tom a DUTY because he was the seller of a product that posed foreseeable harm.

BREACH? Sam BREACHED his duty because he "never read the owner's manual" and misrepresented the saw.

CAUSATION? That was the ACTUAL CAUSE of his injury because he would not have been hurt if he did not buy the saw. This was also the PROXIMATE CAUSE of injury because it was the direct and foreseeable result.

DAMAGES? Tom had INJURY because he was "burned."

Therefore, Tom could recover on a negligence theory.

5) STRICT PRODUCT LIABILITY?

Under tort law a commercial seller of a product is strictly liable for personal injury or property damage if the product is unreasonably dangerous at the time it leaves the seller. The seller is liable to any person who is injured as a result.

Here Sam was a commercial seller because he had a store, the "Bargain Center", selling the product. And the product was unreasonably dangerous because it "burst into flames" in normal use and had "no warnings on the saw." This caused Tom injury because he was "burned."

Therefore, Tom can recover under strict product liability.

DICK V. SAM

6) BREACH OF EXPRESS WARRANTY?

Breach of express warranty is defined above.

Here Dick cannot recover under breach of express warranty because Sam only said he was an "expert" and "recommended" the saw. These are not express misrepresentations.

7) BREACH OF IMPLIED WARRANTY?

Breach of implied warranty is defined above.

Here Dick relied on Sam's expertise because Dick said he "didn't know" about saws and Sam said he was an "expert". And Sam knew Dick's intended use of the saw because he said he wanted to cut "24" trees". Further, the saw was not safe because it could only cut 18" logs, and this caused injury because the saw "caught fire" and Dick was "burned".

Therefore, Dick can recover under breach of implied warranty.

8) NEGLIGENCE or STRICT PRODUCT LIABILITY?

Dick's rights under negligence or strict product liability are the same as Tom's.

HARRY V. SAM

9) BREACH OF EXPRESS or IMPLIED WARRANTY?

Breach of warranty is explained above.

Here Harry did not buy the saw from Sam so there is no privity of contract between them and Harry was not a foreseeable plaintiff to Sam. Further, Sam made no express or implied representations to Harry.

Therefore, Harry cannot recover based on breach of warranty.

10) NEGLIGENCE?

Negligence is defined above.

It is not clear that Sam was the PROXIMATE CAUSE of the injury to Harry because Moe's act of throwing the saw in the garbage appears to be an interceding event that breaks the chain of causation.

Therefore, Harry's injury might be too remote in place and causation for recovery on a negligence theory.

11) STRICT PRODUCT LIABILITY?

Strict Product Liability is discussed above.

Here Sam would argue that even though he originally put the saw into the stream of commerce, it was TAKEN OUT OF THE STREAM OF COMMERCE because Moe threw it in the "garbage".

Further, he would argue that Harry ASSUMED THE RISKS the saw was defective when he took it out of the garbage.

Therefore, Harry might not be able to recover under strict product liability.

[**ANSWER EXPLANATION:** This question calls for a discussion of the four theories of product liability. The facts are intended to illustrate the differences between express and implied breach along with the fact that strict product liability theory extends to remote plaintiffs.

The preliminary discussion of whether this is an "unreasonably dangerous product" or not is very, very important. Stating the "balance" test given here is MANDATORY if you want to score maximum points.

Be wary of products that are not really "unreasonably dangerous" at all because they have been extensively tested, have great utility (often saves lives), pose trivial risks (turns hair green) to a very small number of users (less than 0.05%), and what little danger they pose is totally unknown to the manufacturer or simply cannot be easily eliminated. That is NOT an unreasonably dangerous product!

As for Harry, it is not clear if a person can prevail on a products liability claim if the product has been discarded, scrapped or abandoned. The purpose of product liability law is to protect consumers and regular users of products, not "Dumpster Divers". There is a strong argument that a product is no longer in the "stream of commerce" after it has been discarded or scrapped.

Here it seems that Harry put the product back in the stream of commerce by retrieving it from the Dumpster. Also he has assumed the risk by doing that since he knew or should have known something might be wrong with a product that has been discarded.]

Sample Answer 18-11: Defamation

WILSON v. BARBARA

1) DEFAMATION?

Under the law of torts DEFAMATION is a false statement of material fact of or about the plaintiff published to another party causing damage to the plaintiff's reputation. If the statement involves innuendo, interpretation, or knowledge of extrinsic facts it is DEFAMATION PER QUOD. Oral defamation is SLANDER and written or recorded defamation is LIBEL.

A false statement may be PRIVILEGED if the defendant speaks to defend a private interest, group interest or the public interest and does so without malice and in a reasonable manner calculated to defend that interest without unnecessarily harming the plaintiff.

Therefore, if Wilson can establish a prima facie case, and that Barbara was not privileged, Barbara can be liable for defamation.

2) Were there FALSE STATEMENTS OF FACT?

To establish a prima facie case, Wilson must show Barbara's objectionable comments were false. Her comments about his physical appearance, the slurred speech and bloodshot eyes, would be true and not defamatory because they do not, by themselves, cause loss of reputation.

Wilson's denial that he had been drinking might not be credible enough to prove the point. He may have difficulty proving factually that he had not been drinking.

Therefore, Wilson may not be able to prove the remarks were false.

3) Were the STATEMENTS ABOUT THE PLAINTIFF?

Here Barbara might say her remarks were not clearly about Wilson because she only said "someone" had done something. But the context within which the remarks were made, comments on an interview with Wilson and his physical appearance, made it clear Barbara's statements were about Wilson.

The statement involved innuendo and required extrinsic facts and interpretation because it referred to "his old ways." Therefore Barbara would argue this was a defamation PER QUOD, if at all. But Wilson would argue that since the remarks were made along with observations about "slurred speech" and "bloodshot eyes" viewers would interpret this as a reference to prior drinking problems even if they had no prior knowledge of extrinsic facts. Wilson would argue this was defamation PER SE.

Therefore, the remarks would reasonably be interpreted to be about Wilson.

4) Did Barbara PUBLISH her remarks?

Here Barbara clearly published her remarks because they were made "on TV."

5) Were the statements DAMAGING TO REPUTATION?

A statement that Wilson had become an alcoholic would be damaging to reputation because alcoholism is generally seen as a character flaw and undesirable in a person placed in a position of responsibility.

Therefore, the remarks were damaging to reputation.

6) Did Wilson SUFFER DAMAGE?

Under the law of torts DEFAMATION PER QUOD requires proof of SPECIAL DAMAGES before GENERAL DAMAGES will be presumed. Special damages will be presumed in a slander per se concerning criminal acts, a loathsome disease, unchaste behavior or improper business practices.

Here Wilson might argue that the claim he was alcoholic is equivalent to accusation of a loathsome disease. Barbara would dispute this, but alcoholism often is seen as a disease that might cause others to avoid the plaintiff.

Barbara would argue that her statements were not defamatory on their face (not per se) because they involved innuendo and required interpretation. Wilson would dispute this.

Wilson would argue he had suffered SPECIAL DAMAGES because his "popularity fell" and he did not get a position he wanted. Barbara would argue that this did not damage Wilson because he was a "former" politician and "almost a recluse." Further, she would argue that Wilson "had little chance" of getting the post, so her broadcast did not cause his loss.

Therefore, damages may be presumed, or Wilson may be able to prove damages.

7) Is Wilson a PUBLIC FIGURE PLAINTIFF?

Under New York Times v. Sullivan a plaintiff that is a public figure must prove actual malice, statements made with knowledge or reckless disregard for their falsity. A public figure is one who injects themselves into the public arena.

Here Wilson had been inactive in the public arena because he was "almost a recluse" and only a "former governor." Barbara would argue that Wilson agreed to be "interviewed at his home" for a "TV" show, and hoped to become the "State Republican Chair."

Therefore, Wilson had been in the public eye, was placing himself in the public arena by willingly being interviewed, and was a public figure.

8) Can Wilson prove ACTUAL MALICE?

Actual malice means statements made with knowledge of or reckless disregard for their falsity. Reckless disregard means intentionally acting without awareness and with negligent disregard for the clear and serious risk to others.

Here Barbara did not act with knowledge her statement was false because she "suspected" it was true. But there was a clear risk of injury to Wilson because she made comments "on TV" that would damage him.

Wilson would argue she acted with a reckless disregard of whether her comments were true or not because she had an opportunity to ask Wilson and "did not ask."

Barbara would argue it was not reckless disregard because Wilson would only have denied drinking. She would show that no further effort on her part would have clarified the matter any further.

Therefore, Barbara probably would be held to have not acted with actual malice.

[**ANSWER EXPLANATION:** This question requires discussion of defamation actions by public figures. It is an example of defamation using innuendo, interpretation (COLLOQUIUM) or knowledge of extrinsic facts (INDUCEMENT).

A definition and discussion of actual malice is necessary. Actual malice may be based on recklessness. When it comes to recklessness, this question is a wobbler because Barbara clearly could have asked and then reported "Wilson denies a drinking problem."

If Wilson was not a public figure, he would only have to prove the falsity of Barbara's statements and that they were of the sort that would damage his reputation. Barbara might then claim she was PRIVILEGED to make the statements, even if they were false. But she would have to prove she acted in a 'reasonable manner' without malice to protect the public interest. But she would not be able to prove that because it is not clear what "public interest" she is protecting, and it would not be reasonable to make damning statements of this type on TV about a private individual without at least questioning the person about it first directly.

PRIVILEGE is frequently tested and poorly taught so be sure to consider it in any defamation question. Did the defendant have a legitimate reason to speak out, and did they do it in a reasonable manner? The 1st Amendment does not protect defamatory statements, but it does protect the right to speak out to protect legitimate interests, as long as the defendant acts reasonably and without malice. Privilege defines the balance between these two conflicting rules of law.]

Sample Answer 18-12: Invasion of Privacy

ELLEN v. INKWIRE

1) FALSE LIGHT?

Under tort law FALSE LIGHT is the intentional act of publishing a false portrayal of the plaintiff in a manner causing ridicule or embarrassment.

Here Inkwire published a portrayal about Ellen because it "reported she was a secret philanthropist." This was a false portrayal because she was a "tightwad." And this caused her embarrassment because she was "besieged with requests" that were "professionally impossible" to reject. Ellen's damages would generally be measured by the amount of embarrassment she was caused.

Therefore, Inkwire may be liable for invasion of privacy under a false light theory.

2) INTRUSION?

Under tort law INTRUSION is an unreasonable intrusion into the peace and solitude of the plaintiff. Damages are measured by the value of lost solitude to the plaintiff.

Here there was an unreasonable intrusion because Dick sent a "submarine" to photograph Ellen through a "telephoto lens". It disturbed her peace and solitude because she had attempted to be alone in a secluded place "miles" from shore with a "posted lookout." Ellen suffered damages because it "embarrassed her" into "seclusion" in her home for "six weeks."

Dick would argue that Ellen had no reasonable expectation of privacy because she was "in international waters." Ellen would counter that she had a reasonable expectation of privacy because of the location and precautions she had taken.

Therefore, Inkwire may be liable for intrusion.

3) APPROPRIATION OF LIKENESS?

Under tort law APPROPRIATION is the unauthorized use of the name or likeness of a person in a manner that implies endorsement of a product or support of a cause, but not mere publication of names and photos as news articles. Damages are generally measured by the profit to the defendant.

Here there was a use of Ellen's photo and name because billboards with her "picture" said "Ellen D. Generate" buys their paper. And the use was not authorized because she did not give permission. The purpose of the billboards was to profit by implying she endorsed their paper.

Ellen's damages would generally be measured by the profits Inkwire made from using her likeness.

Therefore, Inkwire could be liable for appropriation.

4) PUBLIC DISCLOSURE OF PRIVATE FACTS?

Under tort law PUBLIC DISCLOSURE is the unreasonable public disclosure of private facts that a reasonable person would find embarrassing.

Here there was a public disclosure because Inkwire "ran the interview" in its publication. And the facts were private facts because they were told to the ex-boyfriend in "strictest confidence." These were embarrassing facts because they concerned an "abortion", a matter of personal intimacy, and of a nature likely to cause public disdain and ridicule. Ellen would argue Inkwire acted in an unreasonable manner.

Inkwire would argue that it acted reasonably because these facts were a matter of legitimate public concern since Ellen had injected herself into the public arena as a "strong and vocal anti-abortion advocate." Inkwire would argue the public had a right to know Ellen's true background since she sought to influence public opinion on this controversial topic.

Therefore, Ellen might fail to show Inkwire acted unreasonably.

[**ANSWER EXPLANATION:** This question calls for discussion of each of the four Invasion of Privacy torts -- False Light, Appropriation of Likeness, Intrusion and Disclosure of Private Facts (LAID).

The focus in intrusion and disclosure is on the unreasonableness of the acts of the defendant. It is not unreasonable to take a picture of a naked lady if she is lying on a public beach, but it is unreasonable to take the same picture by going to great lengths to avoid detection because it violates "reasonable expectations of privacy".

The term "money damages" generally means an award intended to compensate the plaintiff for losses suffered in terms of property damage, lost income, inconvenience, lost privacy, embarrassment, pain and suffering, etc. But the plaintiff can also request damages measured by the unjust enrichment the defendant would otherwise reap. In that case the plaintiff is said to have, "waived the tort and sued in restitution", and the damage award in that case is often referred to as "damages in restitution". In most cases of False Light, Intrusion and Disclosure of Private Facts the plaintiff is suing for compensatory damages, and in most cases of Appropriation of Likeness the plaintiff is suing for damages in restitution.

The term "damages" is broadly misused to mean "money judgment" and students are strongly advised to get (and read) Nailing the Bar's **Simple Remedies Outline** early in their law school career.]

Sample Answer 18-13: Nuisance

KEN v. COUNTY

1) PRIVATE NUISANCE?

Under tort law PRIVATE NUISANCE is an unreasonable interference with the plaintiffs' use and enjoyment of their land.

Here there was some interference because the County airport caused "noise" that prevented Ken from "enjoying his yard" and "hearing the birds." And this involved the use of Ken's land because it was his "house" and "yard."

The two elements that would be most difficult to prove are whether Ken suffered significant damages, and whether the County action was unreasonable. The County would argue that the noise was insufficient interference to prevent Ken from enjoying his land because Ken "didn't think the noise was so bad" when he bought the house. He in effect CAME TO THE NUISANCE, and that fact suggests the situation was not as bad as Ken claims.

But Ken would try to prove that the interference was unreasonable because the County let flights increase "ten percent" in only "four years."

The County would also argue it did not cause the nuisance, and had not acted irresponsibly. The County might argue it was not responsible because the increase in noise was caused by "military use" beyond their control. Alternatively, the County would argue that it acted reasonably because the flights were in response to the "Romaria crisis."

Ken would argue he suffered damages because the value of his home was less that it otherwise would be. But the County would argue there was no proof of financial loss because the home had gone up in value and the claim of loss was speculative. Further, the County would argue there was no proof the birds did not sing as much as before.

Therefore, the County might be liable for private nuisance depending on whether Ken could prove these legal elements.

2) PUBLIC NUISANCE?

Under tort law PUBLIC NUISANCE is an unreasonable interference with the plaintiff's use and enjoyment of public resources causing her particular injury that is different or greater than the general public.

Here the noise interferes with the enjoyment of public land because it prevents Ken from "hearing the birds sing" on the "public river parkway."

The County may argue that Ken lacks standing because he does not suffer any injury that is different from any other member of the public. But Ken suffers particular injury because his home is "on the river" and he could hear the birds sing "from his backyard."

Ken would have to prove the other elements of nuisance which are discussed above under private nuisance.

Therefore, the County may be liable for public nuisance, depending on whether Ken can prove the County's action is unreasonable and produces significant damages.

3) COMING TO THE NUISANCE?

Under tort law COMING TO THE NUISANCE is the defense that the plaintiff moved to the location where the condition complained of already existed. It is a complete bar in a MINORITY view, but in the MAJORITY view it is only a factor to be considered in determining damages.

Here Ken moved to the location because he "purchased the home." And the condition already existed because he "realized his home was in the flight path" and the "realtor disclosed the fact."

Ken would argue that even though problems existed when he bought the home, they worsened after that. Further, he would argue that in any event the County action is unreasonable per se.

Therefore, the court would consider Ken's coming to the nuisances only as a factor in determining damages in most States.

4) REMEDIES?

The REMEDIES for a nuisance action include both money damages and injunctive relief. If the nuisance is a temporary situation money damages measured by the loss of use for the period of the nuisance will be an adequate remedy. If the nuisance would continue but for injunctive relief, the Court would consider granting an injunction. Injunctive relief is an equitable remedy, and the court has discretion to deny it. The Court will balance the interests of the parties, the interests of third parties and the feasibility of judicial enforcement. If the Court denies injunctive relief, the appropriate remedy is an award of money damages measured by the loss of property value caused by the nuisance.

Here the nuisance is a permanent condition, so the Court would consider injunctive relief. But the interest of third parties, people who use the airport, the military, and the County residents would be so significant the Court is unlikely to issue an injunction stopping the airport from continuing operations.

Therefore the Court would most likely award Ken money damages to reflect the loss of market value of his property caused by the increase in airport traffic.

[**ANSWER EXPLANATION:** This question is roughly based on true events. The point to remember is that "coming to the nuisance" is not a complete bar to recovery. If a defendant unreasonably interferes with the use of land, a new purchaser might "buy into the right to sue" for a nuisance the previous owner did not litigate.

Just state the rule and prove (or disprove) the elements. Here Ken's case is rather weak, so you may have to give "conditional" conclusions.

Discussion of "defenses" and "remedies" is mandatory because the CALL specifically asks for it.]

Sample Answer 18-14: Miscellaneous Torts

STAR v. BUCK

1) FRAUD?

Under tort law FRAUD is based on false representations of fact by the defendant made knowingly with intent to deceive that are reasonably relied upon by the plaintiff causing damages.

Here Buck made a statement of fact when he said a franchise "would be granted" if the location was suitable, and that was false because he had "no intention" of granting Star a franchise. He intended to deceive because he wanted her to reveal the location, and Star reasonably relied on his representation because she did reveal the location. That caused her damages because Buck used the information to convince Jack not to lease the "perfect location" to Star.

Buck also made false statements when he told Star the location was "too small for a franchise." He intended to deceive her so she would not go through with her lease plans. And she reasonably relied on that statement because she "withdrew" her offer to Jack. That caused her damages because she otherwise would have secured the lease.

Therefore, Star can prove the elements of fraud and Buck may be liable for the damages she suffered.

2) TORTIOUS INTERFERENCE?

Under tort law INTERFERENCE is an unreasonable interference with the plaintiff's known business relationships causing damages.

Here Buck interfered with Star's business relationship with Jack by suggesting to him that "Star drank" and was a "bad tenant choice". Buck also interfered by telling Star the space was "too small for a coffee shop".

Buck did these acts knowing that he was interfering with the business relationship between Jack and Star because Jack had told him he, "promised the location to Star." The acts were unreasonable because they were intentional false statements intended to damage Star. And they caused Star damages because it prevented her from completing the lease agreement with Jack.

Therefore, Buck can be liable for tortious interference.

3) ABUSE OF PROCESS?

Under tort law ABUSE OF PROCESS is bringing a civil action against the plaintiff without legitimate basis out of malice and for an improper purpose.

Here Buck brought a civil action against Star because he "sued Star for slander." And he had no legitimate basis because all of Star's statements were true. Buck acted out of malice and for an improper purpose because he was trying to refute Star's statements and hide the truth.

Therefore, Buck could be liable for abuse of process.

[**ANSWER EXPLANATION:** This very short question is intended to focus on the elements that must be proven for fraud, interference, and abuse of process.

Intentional infliction, defamation and false light were excluded by the call because they are covered in other questions.

There is no evidence of IIED anyway because Star did not suffer "severe emotional distress."

You are unlikely to ever get such a short, simple question on a real exam.]

Sample Answer 19-15: Attempt, Homicide, Res Gestae, Depraved Heart

STATE V. TOM

1. CONSPIRACY?

Under common law a CONSPIRACY is an agreement between two or more people to work toward an illegal goal. Modernly an overt step toward the criminal goal is often required. Conspiracy does not merge into the ultimate crime.

Here there was an implied agreement between Tom and Dick, two people, for an illegal goal, because they "burst" into the store together and "wanted to rob" the store. They committed an overt step toward their goal because of this.

Therefore Tom can be charged with conspiracy.

2. ATTEMPTED ROBBERY?

Under criminal law an ATTEMPTED ROBBERY is the act of taking a SUBSTANTIAL STEP toward commission of a robbery. A robbery is a LARCENY, a trespassory taking of personal property with an intent to permanently deprive, from a person by force or fear overcoming the will of the victim to resist.

Here Tom took a SUBSTANTIAL STEP toward completing the robbery because he went to the store "with a gun" and "burst" through the door. And his goal was the crime of robbery because he "wanted to rob" the store.

Therefore, Tom can be charged with attempted robbery.

3. DEFENSE OF MISTAKE OF FACT?

Under criminal law a mistake of fact is a valid defense if it NEGATES IMPLIED CRIMINAL INTENT. Attempt is a SPECIFIC INTENT crime, so any mistake of fact that negates criminal intent is a valid defense.

Here Tom made a mistake because he thought the store was open for business, but that mistake does not negate intent because he "wanted to rob" the store.

Therefore, Tom's mistake of fact does not negate his criminal intent, and his defense argument fails.

4. BURGLARY?

Under the common law a burglary was a breaking and entering of the dwelling of another in the nighttime with intent to commit a felony. Further, a CONSTRUCTIVE BREAKING would be found if an entry was made by trick, threat of violence or with the help of a conspirator. MODERNLY

burglary has been extended to almost any structure and all times of the day. If a larceny is not a felony, it still supports a charge of burglary. And modernly a constructive breaking will be found if there is any TRESPASSORY ENTRY, an entry without permission, express or implied.

Here there was no entry to a dwelling, and the entry was through an "open" door. Therefore, no common law burglary occurred. But there was an entry to a structure because they entered a "store" and it was with intent to commit a felony because they "wanted to rob" the store. Finally, a CONSTRUCTIVE BREAKING would be found modernly because their entry was trespassory. It was trespassory because the store was not open for business, and they had no permission to enter it, either expressly or impliedly.

Therefore, Tom could be charged with burglary modernly but could not have been charged at common law.

5. LARCENY?

Under common law LARCENY was the trespassory taking and carrying away of the personal property of another with intent to permanently deprive. Modernly it is codified as "theft".

At common law some Courts held that property attached to the land could not be the subject of a larceny because it was real property and not personal property. Other courts disagreed, and modernly all courts would hold that when property is severed from the land to be stolen it is transformed from real property to personal property and can then be the subject of a larceny.

Here Tom took and carried personal property of another because he "ripped the security camera" from the wall and took it to the "river", and he intended to permanently deprive because he threw it in the river.

Therefore Tom can be charged with larceny.

6. MURDER OF THE BABY?

MURDER is an unlawful HOMICIDE, the killing of one human being by another with MALICE AFORETHOUGHT. MALICE for murder can be 1) an express INTENT TO KILL, or implied by 2) intent to commit GREAT BODILY INJURY, 3) a homicide caused by commission of an INHERENTLY DANGEROUS FELONY, the "FELONY MURDER RULE" or 3) DELIBERATE CREATION OF EXTREME RISKS to human life with AWARENESS of the risks and a CONSCIOUS DISREGARD for them, the "DEPRAVED HEART" murder.

Under the common law and broadly adopted modern law a HUMAN BEING is a person that has been born alive and is not yet dead. About half the States have adopted FETAL-MURDER statutes which define the killing of a fetus with malice aforethought punishable as a murder, but they vary widely. The death of a fetus cannot qualify as a manslaughter.

Murder may be charged under the FELONY MURDER RULE if a death is caused by the commission of an inherently dangerous felony, but only if the death is caused by acts done during the RES GESTAE of the underlying felony. The RES GESTAE of a crime is the sequence of events

from the first substantial step to committing the crime and ending when the defendants leave the scene of the crime and reach a place of relative safety.

Here there was no homicide because the baby was "born dead" and not born alive. But this may be defined as a murder under a fetal-murder statute in some States because the fetus was "full term."

Even if this State had a fetal-murder statute, malice for murder could not be based on intent to kill, intent to cause great bodily injury or depraved heart because the collision was by "accident" and at a reasonable speed of "75".

Further, malice could not be based on the felony murder rule because the death occurred after the res gestae the attempted robbery had ended. It ended when they at a place of "relative safety" and were able to watch "TV".

Therefore, Tom cannot be charged with murder because there is no basis for finding malice, even if there was a fetal-murder statute.

7. INVOLUNTARY MANSLAUGHTER.

Under criminal law INVOLUNTARY MANSLAUGHTER is an UNINTENTIONAL homicide without malice aforethought resulting from GROSS NEGLIGENCE, RECKLESSNESS or the commission of a MALUM IN SE CRIME that is not inherently dangerous enough for application of the felony murder rule.

GROSS (CRIMINAL) NEGLIGENCE is the deliberate breach of a pre-existing duty to protect others from extreme risks, and RECKLESSNESS is the deliberate creation of extreme risks to others.

As discussed above, the death of a fetus does not qualify as a manslaughter.

Therefore, Tom's act was not sufficient to charge him with involuntary manslaughter.

8. MURDER of Victor?

Murder, defined above, can be based on the DEPRAVED HEART doctrine where one acts unreasonably to DELIBERATELY CREATE EXTREME RISKS TO OTHERS, the actus reus, with AWARENESS of the risks and a CONSCIOUS DISREGARD for the risks, the mens rea.

Here Tom caused a homicide because he killed Victor, a human being. And he deliberately created extreme risks because he drove down the "crowded surface streets" at "80 mph". Further, he was aware of the risks because he was in full control of his faculties. And he consciously disregarded the risks because he continued to do this without any compelling reason.

Therefore, Tom can be charged with the murder of Victor.

STATE V. DICK.

9. CONSPIRACY, ATTEMPTED ROBBERY, BURGLARY and LARCENY?

Dick was an equal participant in the crimes of conspiracy, attempted robbery, burglary and larceny, and did all of the same things as Tom relative to these acts.

Therefore Dick was DIRECTLY LIABLE and could be charged with each of these crimes on the same facts and legal theories as explained for Tom above.

10. MURDER of Victor?

Tom killed Victor and not Dick, and since "Dick was silent" and not urging Tom to run over Victor or do anything criminal, Dick could only be charged with this murder based on a vicarious liability theory. There are two vicarious liability theories: conspiracy theory and accomplice theory.

CONSPIRACY THEORY? A person may be charged with vicarious liability for a crime based on CONSPIRACY THEORY if while they are a member of a conspiracy a co-conspirator commits the crime within the scope of the conspiracy. But a conspiracy ends when the criminal goal is ATTAINED or ABANDONED.

Here Dick was a member of a conspiracy to rob the store, but that conspiracy goal was abandoned when they found the store closed. Since the conspiracy had ended, Tom did not kill Victor the next day "within the scope" of the conspiracy.

Therefore Dick cannot be charged on this basis.

ACCOMPLICE THEORY? A person who commits or helps commit a crime is liable for all subsequent crimes by co-felons that are a direct and natural result of the prior crimes.

Here Dick helped Tom try to rob the store the prior day, so he would be liable for any crimes by Tom that are a direct and natural result of the attempted robbery. But the murder of Victor was not a foreseeable result of the prior robbery attempt.

Therefore Dick cannot be charged with Victor's death based on accomplice liability.

Since Dick had no direct liability or vicarious liability he cannot be charged with Murder.

[**ANSWER EXPLANATION**: The main points here are that:

1) Modernly a burglary generally requires a trespassory entry, an entry without permission to enter, and does not necessarily require a physical breaking.

2) A fetus is not generally considered a human being.

3) There are fetal-murder statutes you might need to discuss, but there are no "fetal-manslaughter" statutes (or if there are it is extremely unusual).

4) The felony murder rule cannot be applied to a death that results from acts done so long after the robbery that they were not part of the res gestae of the crime.

5) There is no conspiracy liability for crimes committed by co-conspirators after the conspiracy has ended.

6) Accomplices in one crime are not automatically liable for all subsequent crimes committed by other accomplices, even if they are committed in their presence unless there is some direct and natural causality linking the second crime back to the first crime.]

Sample Answer 19-16: Accomplice and Conspiracy Liability

STATE V. HUEY

1) CONSPIRACY?

Under common law a CONSPIRACY was an agreement between two or more people to pursue an illegal goal. Modernly an overt step taken toward the criminal goal is often required. Conspiracy does not merge into the criminal goal. A conspirator may be charged with all crimes by co-conspirators while they are members of the conspiracy that are within the scope of the conspiracy agreement, foreseeable acts in furtherance of the conspiracy goal.

Here Huey agreed with another person because he "agreed" with "Louie", and the agreement was to pursue an illegal goal because it was to "kidnap Millie" and hold her for ransom. They took an overt step because they did kidnap her.

Therefore, Huey can be charged with conspiracy.

2) EFFECTIVELY WITHDRAW from the conspiracy?

Under criminal law EFFECTIVE WITHDRAWAL from a conspiracy is a defense to liability for subsequent crimes by co-conspirators if the defendant gives notice to the other conspirators of intent to withdraw and then the defendant must act to thwart the conspiracy from attaining its goal.

Here Huey gave notice because he told Louie "I quit." And he acted to thwart the conspiracy because he "told the police."

However, Huey did not act to thwart the conspiracy until after the kidnapping, rape and death of Millie. Withdrawal only is a defense to subsequent crimes by co-conspirators and here the withdrawal was not effective until after all crimes had been committed.

Therefore, Huey effectively withdrew from the conspiracy when he told the police everything, but that did not absolve him from crimes that occurred before that time.

3) KIDNAPPING?

Under criminal law a KIDNAPPING is the unlawful taking or confining of a person against their will.

Here Huey took and confined Millie against her will because he and Louie "kidnapped Millie".

Therefore, Huey can be charged with kidnapping.

4) RAPE under a theory of ACCOMPLICE LIABILITY?

Under criminal law RAPE is unlawful intercourse with a person without consent. An accomplice to a crime may be charged with all subsequent crimes committed by other accomplices if they were foreseeable as the direct and natural results of their own criminal acts.

Here Louie had intercourse with Millie because they "had sex." And it was without consent because Millie only agreed to intercourse because she had been kidnapped and Louie said he "would let her go in exchange." Since she was being held against her will and under duress, her apparent consent to intercourse was not effective.

Therefore, Louie raped Millie, and that rape was foreseeable to Huey as a direct and natural consequence of his own crime of kidnapping Millie. This was all direct and natural, and should have been foreseeable to Huey because he knew "Louie was a convicted rapist."

Therefore, Huey may be charged with the rape of Millie under a theory of accomplice liability.

5) MURDER of Millie?

Under criminal law murder is an unlawful homicide, the killing of one human being by another with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY MURDER RULE, or 4) intentionally acting with an awareness of and conscious disregard for unreasonable risks to human life, the DEPRAVED HEART THEORY. At common law there were no degrees of murder but modernly statutes define first degree murder as those that are 1) willful, deliberate and premeditated, 2) by enumerated means, or 3) caused by the commission of enumerated dangerous felonies. All other murders are in the second degree.

Under criminal law one of the "inherently dangerous felonies" for application of the felony murder rule is RAPE.

Here there was a homicide because Millie was a human being and she died as a result of the acts of Louie.

Huey would argue that Millie committed suicide and not homicide. But her death by her own hand was directly caused by the rape by Louie. She would not have killed herself if she had not been raped, and she would not have been raped if Huey had not kidnapped her and left her with Louie. The rape by Louie was foreseeable to Huey at the time of the kidnapping, so his own acts were the actual and proximate cause of her death. Huey and Louie effectively caused Millie to be the instrumentality of her own death.

Further, because Huey acted to place Millie at peril, he had an affirmative duty to protect her from the results of that peril, including protecting her from both Louie and her own suicidal impulses.

Therefore, the state would successfully argue that this was a homicide and not a simple suicide.

And the state would argue the FELONY MURDER RULE applies to prove malice aforethought for murder because Millie died because of the commission of an inherently dangerous crime, rape.

As an alternative, the State may also argue that DEPRAVED HEART THEORY applies. Huey kidnapped Millie and left her with Louie, deliberate acts that created extreme risks to human life, and he did that with an awareness of and conscious disregard for the risk to human life because he knew Louie was a "rapist".

Therefore, Huey could be charged with murder on a FELONY MURDER or DEPRAVED HEART theory.

6) MURDER of Louie?

Under the REDLINE RULE the killing of a criminal accomplice by any party other than another criminal accomplice during the commission of an inherently dangerous felony cannot be used as a basis for charging murder under the FELONY MURDER RULE.

Here there was a homicide because Louie was a human being and he was "killed by police." But the police shooting of Louie was a justified act to prevent a felony.

Therefore, Huey cannot be charged with FELONY MURDER of Louie.

[**ANSWER EXPLANATION:** This question points out two issues. Conspiracy liability only extends to acts within the SCOPE OF THE CONSPIRACY, meaning they must be foreseeable acts in furtherance of the conspiracy goal. But, accomplice liability extends to all foreseeable crimes by co-felons that are a direct and natural result of an initial crime. Here the rape is a direct and natural result of the kidnapping, so Huey is liable based on accomplice theory even if he is not liable based on conspiracy theory.

Secondly, Huey failed to effect his withdrawal promptly by acting to thwart the conspiracy, so he ends up liable for crimes that occurred after he said, "I quit."

But Huey cannot be charged with murder for the death of Louie (in many or most States) because of the Redline Rule.]

Sample Answer 19-17: Murder, Mistake of Law, Self-Defense, Insanity

STATE v. TOM

1) MURDER?

Under criminal law MURDER is an unlawful HOMICIDE, the killing of one human being by another, with MALICE aforethought. Malice for murder can be 1) express intent to kill or implied by 2) intent to cause great bodily injury, 3) intent to commit an inherently dangerous felony, the FELONY MURDER RULE or 4) intent to act with awareness of and conscious disregard for an unreasonably high risk to human life, the DEPRAVED HEART theory.

Under common law there were no degrees of murder, but modernly FIRST DEGREE murder is 1) willful, deliberate and premeditated, 2) murder by enumerated means or 3) murder during enumerated dangerous felonies. All other murder is second degree.

Here there was a homicide because Dick was a human being and he was "killed" by another human being, Oscar. But Tom did not do anything intending to cause Dick or anyone else to be killed or intending to cause great bodily injury to anyone.

Further, Tom was not engaged in commission of an "inherently dangerous felony" at the time so the felony murder rule has no application. Therefore the only basis for charging Tom with murder would be the DEPRAVED HEART THEORY.

Tom did not deliberately create extreme risks to other people. He could not have reasonably foreseen Oscar would start shooting. Even if some danger could have been foreseen, Tom was not aware of it and did not consciously disregard the risks because he was "in a daze".

Therefore, Tom did not appear to deliberately create and consciously disregard extreme risks to others, and cannot be charged with murder under the DEPRAVED HEART theory unless that could be proven.

If murder could be charged here, it would be second degree murder because the death was not willful and deliberate, during a typically enumerated felony or by a typically enumerated means.

2) INVOLUNTARY MANSLAUGHTER?

Involuntary manslaughter is an unintentional homicide resulting from CRIMINAL NEGLIGENCE, RECKLESSNESS or the commission of a MALUM IN SE crime insufficient to support the felony murder rule. CRIMINAL NEGLIGENCE is the deliberate breach of a pre-existing duty to protect others from extreme risks and RECKLESSNESS is the deliberate creation of extreme risks to others.

Here there was an unintentional homicide because Dick died and Tom did not intend for him to die. And Tom was not committing any crime because smuggling Viagra was "not a crime." The MISTAKE OF LAW by Tom does not make an otherwise innocent act a crime.

Further, resisting unlawful arrest is not a crime. Here the arrest was unlawful because there was "no probable cause" and the police wanted to "harass" and "beat" Tom and Dick.

And Tom was not criminally negligent or reckless because he drove "55 mph" and did not deliberately create extreme risks to others. The State may argue Tom created extreme risks by refusing to stop his car but he did not deliberately create those risks because he had an "overwhelming phobia", was "scared to death" and "could not bring himself to stop" the car.

Therefore, Tom could not be charged with involuntary manslaughter unless it could be proven his failure to stop was criminally negligent.

3) SELF-DEFENSE?

Under criminal law a defendant is privileged to use reasonable force as necessary for SELF-DEFENSE.

Here Tom acted to defend himself from harm because he was "scared to death" and Oscar wanted to "beat him." Oscar had no legal right to stop Tom because he had no probable cause. And Tom acted reasonably and used reasonable force because he only "drove at 55 mph".

The state may argue Tom acted unreasonably by refusing to stop, even if the police lacked probable cause, but there is no legal basis for such a claim.

Therefore, Tom would succeed in his defense that he acted in reasonable self-defense.

4) INSANITY?

Under criminal law INSANITY is a defense that negates criminal intent. Under the M'NAUGHTEN RULE a person is insane if a disease of the mind so impairs their reasoning that they are unable to appreciate the nature and quality of their acts or to know that they are wrong. Under the IRRESISTIBLE IMPULSE theory a person may raise the defense of insanity if they are unable to control their acts, even if they know the act is wrong.

Here Tom could not plead M'Naughten because "he knew it was wrong". But Tom could plead an irresistible impulse because "he had an overwhelming phobia" and "he could not help himself".

Therefore, Tom might be successful with an insanity defense.

[**ANSWER EXPLANATION:** This question is quirky so some paddling is necessary. Even if Tom and Dick were committing a crime it was not one of the "inherently dangerous crimes of rape, robbery, burglary or arson" so the felony murder rule has no application here.

Tom could only be charged under Depraved Heart. To do that it must be shown he created extreme risks to others with an awareness of the risks and a conscious disregarded for them. But how could he have foreseen Oscar was crazy enough to shoot Dick?

If Tom acted unreasonable enough to be charged with murder, how could he show he acted reasonably for a plea of self-defense? In the end the insanity plea is straightforward because "he could not help himself."]

Sample Answer 19-18: Arson, Larceny, Embezzlement, Larceny by Trick

STATE v. JIM

1) ARSON?

Under common law ARSON was the malicious burning of the dwelling of another. Modernly arson has been extended to the malicious burning of almost any structure. Malice for arson requires a burning with wrongful intent..

Here Jim caused a burning of a structure because the "wall" of the school "classroom" was "singed."

And Jim acted with malice because he acted with the wrongful intent of setting the fire to make himself look like a "hero." This was wrongful because he did it to disrupt the school and knowing it would damage the school's wastepaper basket.

Therefore, Jim can be charged with arson.

2) LARCENY of wallet?

Under criminal law LARCENY is the trespassory taking and carrying away of the personal property of another with an intent to permanently deprive. Modernly it is defined as THEFT. Under the RELATION BACK doctrine some courts held that an initial taking of lost property with intent to return property to the owner becomes trespassory when a later decision to steal "relates back" to the original taking. Other courts held that the finder of lost property holds it in "CONSTRUCTIVE TRUST" for the rightful owner and a later taking was an EMBEZZLEMENT.

Here Jim took and carried personal property of another because he "picked up" and "took" the "wallet belonging to Sue." However, at the time Jim took the wallet he did not have any intent to permanently deprive so that taking was not trespassory.

Later Jim formed a larcenous intent when he became "depressed", "pocketed Sue's money" and "threw" the wallet into the river. This was a trespassory taking and Jim clearly intended to permanently deprive because he threw the wallet into the river. This larcenous intent related back to the original taking under the RELATION BACK doctrine.

Therefore, Jim can be charged with larceny in a Court that recognizes the RELATION BACK theory.

3) EMBEZZLEMENT of wallet?

Under criminal law EMBEZZLEMENT is an intentional trespassory conversion of personal property of another by one entrusted with lawful possession. Modernly it is defined as THEFT.

As stated above, some Courts held that a decision to keep lost property after originally intending to return it was an EMBEZZLEMENT based on CONSTRUCTIVE TRUST THEORY.

Here there was no trespassory taking of the wallet because Jim "intended to return" it. Once he had the wallet he held it in constructive trust. But there was a trespassory conversion with intent to deprive because he decided to keep the money.

Therefore Jim could be charged with embezzlement in a Court that holds to the CONSTRUCTIVE TRUST THEORY.

4) EMBEZZLEMENT of $10?

Embezzlement is defined above.

Here Jim was entrusted with possession because Chester "gave him $10 to buy tickets." This was personal property because it was money. And Jim intentionally and trespassorily converted the money to his own use with intent to permanently deprive because he "decided to keep it" and "used it to buy cigarettes and Playboy magazines."

Therefore, Jim can be charged with embezzlement.

5) LARCENY of $20 BY TRICK?

Under criminal law LARCENY BY TRICK is the trespassory carrying away of the personal property of another with an intent to permanently deprive after gaining possession by means of a misrepresentation of fact. Modernly it is defined as THEFT.

Here Jim trespassorily carried away personal property of another because he took "Chester's $20" to buy himself cigarettes and Playboy magazines. And it was personal property because it was money.

Jim had an intent to permanently deprive because his intent at the time he gained possession was to "steal it." And Jim used a misrepresentation of fact because he said he would use the money to "buy pictures" when his true intent was to "steal it."

Therefore, Jim can be charged with larceny of the $20 by trick.

[**ANSWER EXPLANATION:** This question raises the issues of the malicious intent for arson. It is not arson to burn a building by accident unless the fire was not set for a "malicious" purpose.

Malice for arson means for a "wrongful" but not necessarily illegal purpose. The purpose for the fire is malicious if the defendant started it to injure or frighten people or to damage their property. If a fire is set to clear brush on the defendant's land and for no other purpose it is not malicious, even if the fire violated local burn-control laws. But if the fire is set to cause hurt, disruption, annoyance, etc. then the purpose is wrongful and malicious.

Defendants who take property intending to return it are not guilty of a larceny at the time of the taking, but it becomes larceny (under the 'relation back' view) if the defendant later decides to keep the property. Some Courts held that lost property taken with intent to return it is held in 'constructive trust' so a subsequent keeping of the property was embezzlement. That was especially true if property was lost on a "common carrier" like a taxicab, train, or boat.]

Sample Answer 19-19: Attempt, Mistake of Fact, Mistake of Law

STATE v. YANG

1) LARCENY from the "Hot Tomato"?

Under criminal law LARCENY is the trespassory taking and carrying away of the personal property of another with an intent to permanently deprive. Modernly it is defined as THEFT.

Here Yang took and carried personal property of another because he "deftly lifted" the "wallet." Yang's intent to permanently deprive is implied by the facts.

This was a larceny but not a robbery because he did not use force or fear.

Therefore, Yang can be charged with larceny.

2) ROBBERY of the Old Lady?

Under criminal law ROBBERY is a larceny, the trespassory taking and carrying away of the personal property of another, from the person by means of force or fear overcoming the will of the victim to resist.

Here Yang took and carried personal property of another because he "snatched a purse" and "rode away with the prize." Yang's intent to permanently deprive is implied by the facts.

This was a larceny from the person because the Old Lady was "holding tight" until she "lost her grip". And he used force to overcome the will of the victim to resist because he used force to break the Old Lady's "grip".

Therefore, Yang can be charged with robbery.

3) ATTEMPTED LARCENY of the Chick?

Under criminal law an ATTEMPTED LARCENY is a SUBSTANTIAL STEP toward committing a larceny. LARCENY is defined above.

Here a SUBSTANTIAL STEP was taken toward LARCENY because Yang "reached out to snag another purse" and he clearly intended to take and carry away the purse to permanently deprive the Chick of it.

Therefore Yang can clearly be charged with ATTEMPTED LARCENY.

4) ATTEMPTED ROBBERY or ATTEMPTED LARCENY of the Chick?

Under criminal law an ATTEMPTED ROBBERY is a SUBSTANTIAL STEP toward committing a robbery. ROBBERY is defined above.

Here there was IMPLIED INTENT that Yang intended to commit a larceny by use of force or fear because he had just previously robbed the "Old Lady" and that prior act showed he had no intention of letting go of the Chick's purse if she resisted his attempt to take it. Yang may argue that he only intended to commit larceny, not robbery. Whether that argument would be persuasive is up to the jury.

Therefore, Yang can be charged with ATTEMPTED ROBBERY and it would be up to the jury to decide if there was adequate evidence of intent to rob the Chick or if Yang did not intend to use force or fear to complete his crime..

5) MISTAKE OF FACT as a defense?

Under criminal law MISTAKE OF FACT is a defense that the defendant did not have the necessary intent because he either did not intend to commit the criminal act (GENERAL INTENT crimes) or to cause the criminal result (SPECIFIC INTENT crimes.)

Here Yang reached out to take a purse that did not exist. He clearly had an intent to commit a larceny or robbery. He might argue that the Chick did not have a purse so it would have been impossible for him to commit a crime. But ATTEMPT is a SPECIFIC INTENT crime so Yang would have to show he did not have any intent to cause a criminal result.

Since intent to cause a criminal result is shown, Yang could not use mistake of fact as an effective defense.

6) MISTAKE OF LAW as to the drugs?

Under criminal law a MISTAKE OF LAW about the legality of an intended act does not alter the legality of the attempted or committed act.

Here Yang attempted to buy a bag of "grass" that truly was grass. He intended to commit an illegal act because he thought the "grass" was illegal drugs. But he only took a substantial step toward an act that would have been a legal act, the act of buying lawn clippings.

If Yang had not been stopped by the police and he had been able to complete the buy, it would not have been a criminal act. His criminal intent does not change that legal act he attempted to complete into an illegal act.

Therefore, Yang cannot be charged with an attempted purchase of illegal drugs.

[**ANSWER EXPLANATION:** This question raises the distinction between larceny from the person (pick pocket, purse snatcher) and robbery (larceny from person by fear or force.) It also raises the issues of mistake of fact. This is only a defense if it negates criminal intent. It is no defense just because the attempted crime is not feasible.

Mistake of law is also raised, and it can be very confusing. All crimes (except the few strict liability crimes) require both criminal intent and a criminal act. An attempted or completed act is not changed into a criminal act simply because the defendant harbors criminal intent at the time. So if the defendant commits a legal act (buying real grass) while harboring criminal intent (thinking he is buying an illegal drug) no crime has been attempted or committed.

"Drug possession" is never talked about in law school and the Reader does not want to hear you discuss it except for its relation to other concepts you have learned in law school. There are a bunch of crimes you should just never discuss – smuggling, drug trafficking, prostitution, treason, vandalism, and malicious mischief are some of them.

Since the Reader does not want to read about those types of crimes, why are they occasionally put into the question fact patterns? To prompt you to discuss other "law school subjects" that you have been taught about. Always ask yourself, "What does the Reader want me to discuss?" Think about the facts given in essay questions in relation to the legal issues you have been taught about in your law school studies like "conspiracy", "mistake of law", "mistake of fact", "receiving stolen property" , "entrapment", etc.]

Sample Answer 19-20: Murder, Murder, Murder

STATE v. KAREN

1) MURDER of Marvin?

Under criminal law MURDER is an unlawful homicide, the killing of one human being by another with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY MURDER RULE, or 4) intentionally acting with an awareness of and conscious disregard for unreasonable risks to human life, the DEPRAVED HEART THEORY.

The felony murder rule applies to deaths caused by acts done during the RES GESTAE of an inherently dangerous felony, the events beginning with the first substantial step toward commission of the crime and ending when the defendants leave the scene of the crime and reach a place of relative safety.

At common law there were no degrees of murder but modernly statutes define first degree murder as those that are 1) willful, deliberate and premeditated, 2) by enumerated means, or 3) caused by the commission of enumerated felonies. All other murders are in the second degree.

Here there was an unlawful homicide because Marvin was a human being and he was killed by Lucy, another human being. And it was caused by commission of an inherently dangerous felony, ROBBERY, a larceny from the person by force or fear. Karen was taking personal property of another with intent to permanently deprive because she was taking "dynamite" from Marvin, and she was using force or fear to overcome his will to resist because she used a "gun". The death of Marvin occurred within the RES GESTAE of the robbery because he was shot before she left the scene of the crime.

Therefore, Karen can be charged with murder for killing Marvin during the robbery. This would typically be FIRST DEGREE MURDER because robbery is typically one of the "enumerated felonies" for first degree murder.

2) MURDER of Ruby?

MURDER is defined above.

There was an unlawful homicide because Ruby was a human being killed by Karen, another human being, without legal justification.

Here Karen appears to have acted with an express intent to kill because she shot Ruby in the "head" with a "gun". These facts imply an intent to kill. Alternatively, Karen clearly intended great bodily injury because the homicide was caused by a "firearm". Use of a firearm implies intent to cause serious bodily harm, regardless of where the victim is shot.

Karen also appears to have acted with a awareness and conscious disregard for danger to human life because she deliberately shot Ruby in the head for little good reason. Her act created extreme risks to Ruby, she apparently had an awareness of the risks and consciously disregarded them.

Based on any of the above theories, Karen could be charged with the murder of Ruby.

It appears Karen killed Ruby willfully and deliberately. If that is proven the murder was FIRST DEGREE. Karen might argue that she did not act willfully and deliberately to kill Ruby and only reacted instinctively because she had a "short fuse", a MITIGATING FACTOR that caused her to suffer from impaired capacity.

If Karen can convince the jury she acted instinctively and did not act willfully, deliberately and with premeditation the murder might be reduced to SECOND DEGREE.

3) ADEQUATE PROVOCATION for VOLUNTARY MANSLAUGHTER?

Under criminal law VOLUNTARY MANSLAUGHTER is an unlawful, intentional homicide without malice aforethought because of adequate provocation sufficient to raise a reasonable person to a fit of rage which could and actually did cause the homicide.

Generally "mere words alone" are not considered at law to be adequate provocation.

Here there was a lack of adequate provocation because "hard looks", being "dissed", challenged to a "spelling bee" and "criticisms of attire" are "mere words alone" that would not be sufficient to raise a reasonable person to a fit of murderous rage. The subjective factor that Karen "had a short fuse" would not lower the standard of conduct.

Therefore, Karen would not succeed in reducing the murder charge to voluntary manslaughter.

4) MURDER OF MARY?

Murder is defined above.

Here there was a homicide because Mary was a human being killed by Karen, another human being. And Karen had an express intent to kill because she "decided to kill Mary". Further, this killing was willful, deliberate and premeditated because it was planned in advance.

Therefore, Karen can be charged with FIRST DEGREE murder of Mary and she has no defense.

5) MURDER OF BILL?

Murder is defined above.

Here there was a homicide because Bill was a human being killed by Karen, another human being. Karen may have had an express intent to kill because she "knew the blast would probably kill Bill." But Karen would argue that she did not want to kill Bill because "she felt real bad about it." Regardless, Karen deliberately created extreme risks to human life with awareness of and conscious disregard because she "knew the blast would probably kill Bill."

Therefore, Karen could be charged with murder based on a Depraved Heart Theory of malice.

Further, this would generally be FIRST DEGREE murder because the use of explosives to murder is generally one of the "enumerated means" for first degree murder.

Therefore, Karen can probably be charged with FIRST DEGREE murder of Bill even if she did not willfully and deliberately cause his death with premeditation. She has no defenses.

[**ANSWER EXPLANATION:** This purpose of this question was to present four murders, each representing one of the four types of malice for murder. Marvin is a "felony murder rule" situation, Ruby is a "great bodily injury" case, Mary is an "intent to kill" case, and Bill is a "depraved heart theory" case.

A second purpose of the question is to illustrate that "depraved heart murder" is not necessarily a "second degree" murder.

The question asks about "first degree" murder, and it is an express call. The call also asks about "lessor included offenses." That means manslaughter and NOT assault, battery, robbery, etc.

You must define and discuss robbery as a basis for the felony murder rule application to some extent. A death caused by a robbery is almost always going to be first degree murder because virtually every State includes it as one of its "enumerated felonies".

Only one murder here presents any evidence of "provocation" or "mitigating factors".]

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