

CONSTITUTIONAL LAW ANSWERS

Answer to Question 1

- (B) The Equal Protection Clause of the Fourteenth Amendment prohibits state dilution of the right to vote by malapportionment of electoral districts. This rule applies to electoral districts for local governmental bodies as well as for the state legislature. When a local government establishes voting districts for the election of representatives, it must establish districts that do not have a significant variance in the number of persons in each district. Here, the Paulopolis districts have twice as many persons as the St. Minny districts, creating an unconstitutional dilution of the Paulopolis citizens' right to vote. (A) is incorrect. The clause in Article IV, Section 4 guaranteeing a "republican form of government" to the states has been judged by the Court to involve a political question. The Court will therefore decline to address that issue. (C) is incorrect because the Article IV Privileges and Immunities Clause, which provides that citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, only prohibits a state from discriminating in favor of its own citizens and against citizens of other states with regard to "fundamental rights," *i.e.*, those involving important commercial activities or civil liberties. Here, out-of-state citizens are not being discriminated against, so the clause is not applicable. (D) is incorrect because the Due Process Clause is usually used to review a law that limits the liberty of *all* persons to engage in some activity, whereas the Equal Protection Clause is implicated when a law limits the liberty or rights of some persons but not others. The option raising the equal protection argument is therefore the better choice.

Answer to Question 2

- (C) Dorit's strongest basis for challenging her denial of benefits by the federal government is the Due Process Clause of the Fifth Amendment. Dorit's argument is that the regulations for determining who receives benefits create arbitrary and discriminatory classifications among similarly situated groups. Such classifications by a *state* government can be challenged under the Equal Protection Clause of the Fourteenth Amendment, but there is no counterpart to this clause applicable to the *federal* government. Nevertheless, the Supreme Court has held that grossly unreasonable discrimination by the federal government violates the Due Process Clause of the Fifth Amendment, and has applied the same standards that it uses in equal protection actions against a state. Hence, this clause constitutes Dorit's only plausible basis for a suit challenging the regulations. (A) is wrong because the Privileges and Immunities Clause of the Fourteenth Amendment applies only to states and not the federal government, and because it protects only certain privileges and immunities of national citizenship, none of which are implicated in this question. (B) is wrong because, as discussed above, the Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government. (D) is incorrect because a bill of attainder is a legislative act that inflicts punishment without a judicial trial on individuals who are designated either by name or in terms of past conduct. No aspect of the law here constitutes a bill of attainder.

Answer to Question 3

- (D) The federal statute will be upheld if Congress had a rational basis for making the classifications that it did. Governmental actions involving classifications of persons are examined under one of three standards, regardless of whether it is a federal government action scrutinized under the Fifth Amendment Due Process Clause or a state government action reviewed under the Fourteenth Amendment Equal Protection Clause. If a suspect classification or fundamental right is

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involved, the strict scrutiny standard will be applied and the action will be struck down unless the government proves that it is necessary to achieve a compelling interest. If a quasi-suspect classification is involved, the Court will likely require the government to prove that the action is substantially related to an important government interest. If any other classification is involved, the action will be upheld unless the challenger proves that the action is not rationally related to a legitimate government interest. Here, the classification does not involve either suspect or quasi-suspect classifications. While the regulations do have an incidental effect on marriage, which is a fundamental right, they are not creating a direct obstacle to the exercise of this right. Thus, the rational basis standard will apply to the classifications; the statute will be upheld if Congress could rationally conclude that an unmarried disabled child, or one who marries another disabled person, is more likely to be needy than one who marries a nondisabled person. (A) is incorrect because Congress's power to spend money to "provide for the common defense and the general welfare" is not unfettered. The Fifth Amendment Due Process Clause and other constitutional restrictions on the exercise of federal government power apply to congressional expenditures. (B) is incorrect because the receipt of disability payments has been held to be a property interest that cannot be terminated under the Due Process Clause without fair procedures. [Mathews v. Eldridge (1976)] Nor can Congress condition the receipt of these benefits on some ground that itself constitutes a violation of the Bill of Rights. (C) is wrong because the fact that the classification will save the government money is not enough to make the classification rational. Congress could have instead retained benefits *only* for disabled persons who marry nondisabled persons; the classification would save the government money but it would be difficult to uphold even under a rational basis standard. Choice (D) offers the best justification for upholding the classification under the rational basis standard.

Answer to Question 4

- (C) A law containing gender-based classifications must be shown by its proponent to be substantially related to important government interests. State laws that discriminate by treating people in similar situations in dissimilar ways are subject to challenge under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court usually applies one of three tests for evaluating an equal protection challenge to a statute. Where the classification relates to who may exercise a fundamental right or is based on a "suspect" characteristic, the classification must be necessary to promote a compelling state interest. Where the classification relates only to matters of economics or social welfare, it is valid if it is rationally related to a legitimate governmental interest. For quasi-suspect classifications, the Court has applied an intermediate standard, upholding the law if its proponent can show, by an exceedingly persuasive justification, that the classification is substantially related to important governmental interests. A distinction based on gender, such as the provision in the Margate statute for free financial counseling to single mothers but not to single fathers in the same financial situation, is a quasi-suspect classification. Thus, to win the case, Margate must show that favoring mothers over fathers is substantially related to an important governmental interest. (A) is incorrect because a classification based on gender is subject to an intermediate level of scrutiny, requiring a "substantial" rather than "rational" relation and an "important" governmental interest rather than merely a "legitimate" governmental interest. (B) is incorrect because gender is not a suspect classification that requires the compelling state interest test to be applied. Even if it were, Peter would not have the burden of proving absence of a compelling interest; Margate would have to prove the existence of a compelling interest for the law to be upheld. (D) is wrong for similar reasons: gender is an "almost suspect" class that requires a showing of more than just a rational relationship, and, even if that test were appropriate, it would require Peter to bear the burden of demonstrating that the law does *not* have a rational relationship to a legitimate state interest.

Answer to Question 5

- (C) New Jingo cannot show a compelling state interest for treating resident aliens differently from other residents. Under the Equal Protection Clause of the Fourteenth Amendment, no state may deny to any person within its jurisdiction the equal protection of the laws. If a government statute classifies persons based on a “suspect” class, strict scrutiny will be applied (*i.e.*, the statute will be upheld only if it is necessary to achieve a compelling government purpose). State and local laws based on a person’s alienage are subject to strict scrutiny; the state must show a compelling state interest to justify the disparate treatment. Here, Josh is a resident of New Jingo. The statute treats him differently from other residents, however, because of his status as an alien—all resident aliens are scrutinized to determine whether they were citizens of a country that had taken United States citizens hostage. The state here has no compelling interest to justify the classification; the statute appears to be simply a political statement on a foreign policy matter that the state has no power over. Hence, the Equal Protection Clause is Josh’s best argument to strike down the statute. (A) is incorrect for two reasons: the Privileges and Immunities Clause of the Fourteenth Amendment applies only to citizens of the United States, and it only protects certain attributes of national citizenship (such as the right to vote for federal officials). Here, Josh is not a citizen of the United States, and the right to a higher education at a state university is not an attribute of national citizenship. (B) is incorrect because an *ex post facto* law is legislation that retroactively alters the *criminal law* in a substantially prejudicial manner. It does not apply to retroactive alteration of civil regulations, such as the right to attend a state university. (D) is wrong because Josh would have to overcome several hurdles to make an effective due process argument. Procedural due process principles, applicable to the states through the Fourteenth Amendment, provide that government shall not take a person’s life, liberty, or property without due process of law. While property includes more than personal belongings, an abstract need for or unilateral expectation of the benefit is not enough. There must be a legitimate claim or “entitlement” to the benefit under state law. While there is a property interest in public education when school attendance is required, the Supreme Court has never specifically held that a property interest exists in public education at the college level. [*See Board of Curators v. Horowitz* (1978)] Even if Josh could persuade the court to make that assumption, he would also have to establish that imposing the higher tuition effectively deprives him of that property interest and that the registrar’s procedures for denying him the lower tuition rate did not satisfy constitutional requirements. At best, he could require the university to give him a hearing before charging him the higher tuition. To strike down the statute itself, however, Josh’s best argument is based on the Equal Protection Clause.

Answer to Question 6

- (D) Timon’s constitutional arguments will fail because his firing by the school did not constitute state action. The Fourteenth Amendment Due Process Clause, which makes many of the provisions of the Bill of Rights applicable to the states, does not apply to purely private conduct that interferes with these rights. Thus, unless the private individual (i) was performing exclusively public functions, or (ii) took actions with significant state involvement, the individual’s action is not unconstitutional. In this case, The Classical School is a private institution performing a function—education—that has never been considered to be an exclusively public function. [*See Pierce v. Society of Sisters* (1925)] Furthermore, its licensing by the state and receipt of state funds do not constitute significant state involvement with regard to its personnel matters; thus, Timon cannot establish that the school exercised state action. [*See Rendell-Baker v. Kohn* (1982)] (A) is incorrect because constitutional protection for freedom of speech does not extend to actions taken by private individuals. Furthermore, even a public school probably could have fired Timon

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for his speech (if its termination procedures were otherwise proper). Because public schools generally are not public forums, reasonable restrictions based on legitimate pedagogical concerns rather than the content of the speech are permissible. [Bethel School District No. 403 v. Fraser (1986)] The school reasonably could argue that urging the student assembly to organize a protest against a school policy would disrupt discipline and interfere with its educational process. (B) is incorrect for the same reason as (A): the constitutional right to due process of law does not apply to private conduct. Had Timon been fired by a public school, he would be able to claim a property right in his employment for the balance of his contract. The school probably would have had to provide him with a pretermination opportunity to respond to the charges against him. [Cleveland Board of Education v. Loudermill (1985)] (C) is incorrect; Timon did have property rights in his job because he had a three-year contract with the school. Had Timon instead been an employee-at-will, without a contract, he would have had no property interest in continued employment even if his employer had been a public school. [Bishop v. Wood (1976)]

Answer to Question 7

- (C) Driller should prevail because Petrolia's law violates the Interstate Privileges and Immunities Clause of Article IV, Section 2. This clause, which provides that "citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states," prohibits discrimination by a state against nonresidents when the discrimination involves "fundamental rights." Fundamental rights for purposes of this clause are those involving important commercial activities (such as pursuit of a livelihood) or civil liberties. Here, the statute directly discriminates against nonresidents of the state by banning their being hired as oilfield workers unless no qualified residents can be found. Because employment is a fundamental right for purposes of the Interstate Privileges and Immunities Clause, the court should find the statute unconstitutional. (A) is incorrect. A state law that mandates employment discrimination on grounds of race, religion, etc., will probably violate the Fourteenth Amendment Equal Protection Clause, but that clause is not the only means of challenging discriminatory state laws. Discrimination based on state residency must pass muster under the Interstate Privileges and Immunities Clause. (B) is incorrect because the state cannot show a sufficient justification for discriminating against nonresidents. A state law requiring private sector employers to give hiring preference to residents will only be valid under the Privileges and Immunities Clause if the state can show that (i) the nonresidents are the cause or source of the problem it is attempting to solve, and (ii) there are no less restrictive means to solve the problem. [Hicklin v. Orbeck (1978)] In this case, Petrolia's high unemployment was caused by the drop in petroleum prices rather than by a large influx of nonresident workers, and state encouragement of alternative industries would be a less discriminatory alternative than what amounted to a total ban on the hiring of nonresidents. Hence, neither element of this test is satisfied, and the statute will not be valid under the Privileges and Immunities Clause. (D) is wrong because the Contract Clause prohibits states only from enacting any law that *retroactively* impairs contract rights. It does not affect contracts not yet entered into. Thus, a hiring law would not implicate the Contract Clause.

Answer to Question 8

- (B) The court will probably find the statute unconstitutional as an improper restriction of commercial speech. If the speech regulated concerns a lawful activity and is not misleading or fraudulent, the regulation will be valid if it (i) serves a substantial government interest, (ii) directly advances the interest, and (iii) is narrowly tailored to serve the substantial interest. While this test does not require that the *least* restrictive means be used, there must be a reasonable fit between the legislation's end and the means chosen. The greater the restriction on speech, the less likely it will be

deemed to be reasonable. The Supreme Court has never upheld a complete ban on truthful advertising of a lawful product because such a restriction is not narrowly tailored. [See 44 Liquormart, Inc. v. Rhode Island (1996)] Hence, the complete ban on advertising of tobacco products probably will be an unconstitutional infringement on freedom of speech. (A) is incorrect because the state's decision not to ban the sale of tobacco products does not preclude it from asserting a substantial interest in discouraging the sale or use of the products; regulations restricting advertising of the products clearly serve a substantial interest, satisfying the first prong of the test. (C) is wrong because regulation of speech is more likely to violate the First Amendment than regulation of conduct. Here, while the state's power to ban tobacco products would not raise First Amendment issues, the ban on advertising for a product does, and the constitutional requirements for regulations of commercial speech must be satisfied. Had the state chosen to make sale of tobacco products illegal, it could have banned advertising of the products, but since it chose not to make their sale illegal, any restrictions on advertising for the products have to satisfy the test described above. (D) is incorrect because the standard for testing the validity of commercial speech regulations is more stringent than the "rational basis" test. As stated above, the regulation must be narrowly tailored to directly advance a substantial government interest.

Answer to Question 9

- (A) The anti-littering ordinance will be upheld because it furthers an important government interest unrelated to the content of the communication and is narrowly tailored to the furtherance of that interest. As a general rule, conduct that is intended to communicate is not immune from reasonable government regulation, even though it takes place in a public forum such as a park. The noncommunicative impact of speech-related conduct in a public forum can be regulated to further an important government interest independent of the speech aspects of the conduct as long as the incidental restriction on the ability to communicate that message is narrowly tailored to further the interest in question, so that alternative channels for communicating the message are available. The prevention of litter, as a means of maintaining public facilities in usable condition and protecting property values, is an important enough government interest to allow some type of regulation. The ban on littering is narrowly tailored to accomplish its purpose, unlike, for example, a ban on distributing leaflets that may end up on the ground. The regulation probably would not have precluded Demagoga even from dumping the barrel if she had picked up the trash after her speech was over. (B) is incorrect because it is too broad; some speech-related conduct cannot be punished (*e.g.*, burning a flag). The critical distinction is whether the offense relates to the communicative content of the conduct or to state interests independent of its communicative aspects. (C) is incorrect because the conduct aspect of symbolic speech can be regulated under the test indicated above. (D) is incorrect because the compelling interest standard only applies where the restrictions are based on the content of the message being communicated. Where the regulation is not based on content, the government need show only an important interest.

Answer to Question 10

- (B) The action of the board is impermissible because it establishes a preference for some religious sects over others without a compelling interest. Under the Establishment Clause, if a law or government program includes a preference for some religious sects over others, the law will be held invalid unless it is narrowly tailored to promote a compelling government interest. Here, there is no legitimate reason for not extending the exemption to the Church of the Sunrise; the government is not permitted to classify religions based on a particular religion's popularity or the credibility of its beliefs. (A) is incorrect because the courts may not declare a religious belief to

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be false. Hence, regardless of what the board “proves,” it may not refuse to apply the exemption. (C) is wrong because the accommodation of religion by the exemption is a permissible government purpose and has only an incidental effect of advancing religion. [See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987)] (D) is incorrect. The state probably could abolish its exemption for religious employers without violating the Free Exercise Clause, because the antidiscrimination statute is a law of general applicability that was apparently not motivated by a desire to interfere with religion. However, since it does provide an exemption for religious employers, it is not permitted to discriminate among them.

Answer to Question 11

- (B) Congress may constitutionally regulate wages and hours of state and local employees under its commerce power. The Commerce Clause of Article I, Section 8 vests in Congress broad powers to regulate any activity, local or interstate, which either in itself or in combination with other activities has a substantial economic effect upon, or effect on movement in, interstate commerce. Under this approach, Congress clearly has the power to regulate wages and hours of those employed by private employers. [See *United States v. Darby* (1941)] This power has been held applicable to state and local governments; Congress can therefore require state or local governments to follow the provisions of federal legislation requiring a state or private employer to pay overtime wages to its employees. [*Garcia v. San Antonio Metropolitan Transit Authority* (1985)] Thus, Patchquilt will not succeed in its challenge to the statute. (A) is incorrect because the statute’s constitutionality is not dependent on the Necessary and Proper Clause, which permits Congress to exercise auxiliary powers that are “necessary and proper” for carrying out Congress’s enumerated powers. The power to require state and private employers to pay overtime wages to their employees comes directly from Congress’s enumerated power to regulate commerce among the states. (C) is incorrect because the Court has abandoned former holdings that the Tenth Amendment precluded Congress from regulating areas involving the traditional functions of state and local governments. A court is unlikely to strike down on Tenth Amendment grounds a law such as the one here that subjects state and local governments to regulations that are equally applicable to the private sector. (D) is incorrect because the state police power does not prevail over a federal statute based on Congress’s power over interstate commerce. Patchquilt’s health and safety concerns regarding the garbage can only be resolved by paying overtime wages or hiring additional employees.

Answer to Question 12

- (C) The statute banning Grippers is an unconstitutional burden on interstate commerce even though an equally safe alternative is available in all 50 states. If Congress has not enacted laws regarding a subject, a state may regulate local aspects of interstate commerce if the regulation: (i) does not discriminate against out-of-state competition to benefit local economic interests; and (ii) is not unduly burdensome (*i.e.*, the incidental burden on interstate commerce does not outweigh the legitimate local benefits). The facts do not suggest that Congress has regulated the subject of truck tires on state roads. The facts also do not indicate whether Grippers or Grabbers are manufactured in State Grapefruit, so discrimination in favor of local economic interests is absent. The final test is a balancing test to determine whether the regulation is unduly burdensome, and here the regulation probably will fail. In *Bibb v. Navajo Freight Lines* (1959), the Supreme Court invalidated an Illinois statute requiring trucks to use contour mudguards rather than flat mudguards. One aspect of the burden on commerce in that case was that another state required flat mudguards rather than contour mudguards, precluding trucking companies from using one type

of mudguard in all 50 states and indicating that the safety benefits that Illinois was claiming for contour mudguards had not been conclusively established. Because Grabbers are now legal in all 50 states, the burden on interstate commerce is not as great in this case. Nevertheless, it is still significant. By not permitting equally safe alternative types of tires, which might be cheaper or more readily available than Grabbers, Grapefruit is imposing an undue burden on all trucking companies in other states whose trailers might at some time pass through Grapefruit. On the other side of the equation, the Illinois mudguard regulation in *Bibb* arguably was a safety measure, which is an area of legitimate local concern. Here, there is no evidence of any safety benefit; both types of tires have been deemed equally safe by independent testing labs. On balance, therefore, the statute is unconstitutional because its incidental burden on interstate commerce outweighs any legitimate local benefits. (A) is incorrect because the equivalence in safety makes the state's argument weaker. Had Grabbers been shown to be substantially safer than Grippers, the state would be able to argue that a legitimate local benefit outweighs the burden on interstate commerce. (B) is incorrect because the state power to regulate highway safety is not absolute, but must be balanced against the federal commerce power. If a safety regulation imposes a significant burden on interstate commerce, particularly where the objective of the regulation could be achieved by less restrictive alternatives, the Court will probably find it unconstitutional. (D) is incorrect for two reasons. First, the Privileges and Immunities Clause of Article IV applies only to *citizens* of a state, and neither the trade association nor the corporations it is composed of are considered citizens of a state. More importantly, the Clause only prohibits *discrimination* by a state in favor of its own citizens concerning fundamental rights. Even an individual truck driver who is a citizen of another state could not use the Clause to challenge the Grapefruit statute because it also bars Grapefruit residents from using the tires.

Answer to Question 13

- (C) Executive agreements with other governments fall within the President's broad power over foreign relations and will supersede conflicting state laws. Although executive agreements are not expressly provided for in the Constitution, they have become institutionalized in practice. Because they are not ratified by the Senate as treaties are, they cannot override a valid federal statute, but they are supreme over conflicting state laws to the same extent as a treaty. (A) is incorrect even though the probate of property generally is within a state's exclusive power as far as regulation is concerned. Where this activity also falls within the federal government's exclusive power over international affairs, any conflicting state regulations are superseded. (B) is incorrect because, as against state law, an executive agreement has the same effect as a treaty. Unless in violation of federal constitutional provisions, an executive agreement takes precedence over state law. (D) is incorrect because the Full Faith and Credit Clause of Article IV, Section 1 requires only that each state recognize the laws and judicial proceedings of every other state. It has no application to executive agreements made by the President.

Answer to Question 14

- (D) The best reason to uphold the statute is that it reflects the balance of power between the President and Congress over war. The Constitution makes the President the commander in chief of the armed forces, but it gives Congress the power to declare war and raise an army and navy. The Supreme Court has never delineated the extent of either branch's power under these clauses, but clearly the power over war is shared. Since none of the other answers is correct, (D) is the only viable alternative. (A) is incorrect because it is too broad. The President need not obtain the advice and consent of the Senate concerning all foreign affairs, but only with regard to treaties. Moreover, nothing in the Constitution requires the President to obtain the advice and consent

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of the Senate regarding how to wage a war. (B) is incorrect because it is too narrow. The President's power as commander in chief has historically extended beyond the power to repel invasions. At the very least, it has also included the power to protect citizens abroad. (C) is incorrect because the President has the power, as commander in chief, to send troops to another country even in the absence of a declaration of war (*e.g.*, to protect United States citizens).

Answer to Question 15

- (A) Article III, Section 2 of the Constitution extends the federal judicial power only to "cases and controversies"; the Supreme Court has interpreted this requirement to prohibit rendition of advisory opinions. The opinion sought here is advisory since the law in question has not yet been passed. Had the legislation already been passed in its present form, the Court could have rendered a declaratory judgment even if the state had not yet attempted to enforce the law, because the "controversy" would be genuine. In this case, however, the legislation is not in its final form and ultimately may not be applied against Master Minerals' operation even if it becomes law. (B) and (C) are incorrect because the Court should refuse to hear the case altogether. It is irrelevant that the state supreme court has given an advisory opinion on the matter. (D) has the correct result but for the wrong reason. While a federal court should refuse to hear a case that turned on state law, the challenge here was that the law was unconstitutional, which may refer not only to its state constitutional status but also to its federal constitutional status, requiring a decision turning on federal law.

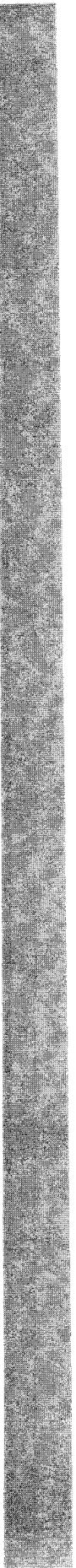
Answer to Question 16

- (C) The court should dismiss the action because Rupert cannot show that he has an injury that will be remedied by a decision in his favor. Even if a federal court has jurisdiction over the subject matter of a case, it will not decide a constitutional challenge to a government action unless the person challenging the action has "standing" to raise the constitutional issue, *i.e.*, a concrete stake in the outcome of the controversy. This requires plaintiff to show an injury in fact—caused by government conduct—that will be remedied by a decision in her favor. Here, Rupert cannot establish that whatever injury he might have suffered by having his purchase blocked would be remedied by an injunction against the subsequent transaction; hence, he does not have standing to obtain an injunction against the sale to Sumner. (A) is incorrect. While Rupert could claim that the Fifth Amendment Due Process Clause forbids discriminatory treatment in the exercise of a First Amendment right to be a broadcaster, that argument is unlikely to succeed (as discussed below). In any case, the court will not consider the merits of his argument because he does not have standing to enjoin the purchase by Sumner. (B) is incorrect because, even if Rupert were able to establish standing, the FCC may regulate ownership of the broadcast media by forbidding ownership of a radio or television station by a daily newspaper located in the same community, as a means of promoting the diversity of information received by the public. (D) is wrong even though it is a true statement (as discussed above). The court would not even reach the merits of Rupert's case before dismissing it; it would dismiss the action on the basis of Rupert's lack of standing to challenge the sale of the station to Sumner.

Answer to Question 17

- (A) The court should grant Bob's motion because the Eleventh Amendment generally prohibits a federal court from hearing a private party's claim against its own or another state government. This jurisdictional bar includes actions against a state government for injunctive or declaratory relief where the state itself, rather than state officials, is named as a party. Here, the citizens'

group is seeking an injunction against the state legislature itself rather than a state official. Thus, the action would be barred by the Eleventh Amendment. (B) is not as good an answer as (A) because political questions generally involve issues committed by the Constitution to one of the other branches of the federal government and issues lacking well-developed judicial standards for resolution and enforcement. Here, the lawsuit is alleging that the state legislature will violate the Establishment Clause if it allows Bob to take office. This issue does not involve other branches of the federal government and, at the same time, allows the court to use extensive Establishment Clause precedent to reach a decision in the case. Hence, the court is not likely to dismiss the lawsuit on political question grounds. (C) is wrong because standing to challenge an expenditure as a violation of the Establishment Clause is limited to specific enactment under the government's taxing and spending power. Even though state funds might be expended in this case as a routine part of the legislative privileges granted to Bob, it is not an expenditure that falls within the Establishment Clause exception. (D) is incorrect because, as discussed above, an action seeking *injunctive* relief against the state as a party is also barred by the Eleventh Amendment.



CONTRACTS ANSWERS

Answer to Question 1

(A) Babe can recover because, under the modern trend, the preexisting duty rule does not apply if the duty is owed to a third person. Generally, contracts must be supported by consideration. A promise to perform is valid consideration, but if a person already owes a duty to perform, traditionally that performance cannot be used as consideration for another promise. Thus, under the traditional rule, Babe could not enforce Joe's promise to pay Babe \$5,000 if Babe hit a home run because Babe gave no valid consideration in exchange for Joe's promise, since Babe owed a preexisting duty to his ball club to exert his best efforts to hit home runs. However, under the modern view as formulated in Restatement (Second) of Contracts, section 73, a duty is a preexisting duty only if it is owed to the promisor. Thus, a promise to perform a duty is valid consideration as long as the duty of performance is not already owed to the promisee. In other words, if the duty is owed to a third party, a promise to perform given to another is valid consideration as long as it was bargained for. (B) is incorrect because there is no exception to the preexisting duty rule—modern or otherwise—that allows the promisor to recover merely because his performance benefited the third party. Babe can recover under the modern approach because his promise to Jimmy's father was bargained for. Conversely, Babe does not have to prove that the value of his home run to Jimmy was at least \$5,000, because courts generally will not inquire into the adequacy of consideration. (C) would be correct under the traditional rule, but this question is one of the few questions where you are asked about and expected to know the modern trend. As explained above, under the modern trend, the promise here is valid consideration because the duty to hit home runs was owed to a third party (the ball club) rather than to the promisee (Joe). (D) is wrong because while it is true that moral consideration is not good consideration, Joe did not rely on moral consideration, but rather exchanged a promise to pay \$5,000 for Babe's performance.

Answer to Question 2

(B) Where a past obligation would be enforceable except for a technical defense to enforcement, a new promise in writing will be enforceable even in the absence of any new consideration. As a general rule, a contract requires a bargained-for exchange between the parties as consideration; "past" or "moral" consideration is usually insufficient. Among the many exceptions to this rule is where a technical defense such as the statute of limitations bars enforcement of the prior obligation and a new promise is made in writing. In such a case, courts will state that the "moral" consideration is sufficient consideration for the new agreement or that the existence of the prior obligation is a substitute for consideration. Regardless of how the courts characterize it, the new promise will be enforceable only according to its terms, not the terms of the original obligation. Hence, Cheap is entitled to recover \$600 on the basis of Deadbeat's signed letter promising to pay that amount. (A) is incorrect because the new agreement has no effect on the original obligation. The new agreement is what is being enforced, not the original obligation. Had Deadbeat instead promised to pay "the debt I owed to Cheap," the new agreement would be enforceable for \$1,000. (C) is incorrect because the statute of limitations just bars the judicial remedies for enforcing the prior agreement; it does not nullify the agreement. Hence, the prior agreement may serve as a substitute for consideration if a new agreement is made. (D) is incorrect because, as discussed above, no additional consideration is needed for the agreement to pay \$600.

Answer to Question 3

(A) United Leasing is contractually bound to lease the skybox to Multimedia. Under certain circumstances, an executory bilateral contract may be formed without any communication of

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acceptance. A common example is where prior dealings between the parties, or trade practices known to both, create a commercially reasonable expectation by the offeror that silence represents an acceptance. In such a case, the offeree is under a duty to notify the offeror if it does not intend to accept. Here, despite the language in the invitation making leases subject to approval, United never sent any notification of approval prior to sending out the tickets and invoice right before the season would start. This course of dealing over the past five years gave Multimedia reason to expect that United's silence after the invitation was returned constituted an acceptance by United, regardless of United's actual intent. [See Restatement (Second) of Contracts §69, illus. 5] (B) is incorrect because the language stating that approval would be required precludes the invitation from constituting an offer. Multimedia's response constitutes the offer and incorporates the term relating to approval by management of United Leasing. Thus, United had the power to reject Multimedia's offer if it acted within a reasonable time. Its failure to do so, given the course of dealing between the parties, constituted an acceptance. (C) is wrong because, as stated above, United Leasing had a duty to reject Multimedia's offer within a commercially reasonable time. Its delay of over two months before notifying Multimedia right before the season began, after Multimedia had scheduled clients to use the skybox, was not commercially reasonable under the circumstances. (D) is incorrect because Multimedia would not have to rely on a quasi-contract theory to recover its reliance damages. As discussed above, Multimedia was correct in its assertion that a contract was created between the parties and that United Leasing would be in breach if it did not perform. Multimedia would then be entitled to all appropriate contract remedies, including reliance damages.

Answer to Question 4

- (B) Bernaise and Hollandaise formed a contract when they agreed on all salient points after negotiations. One element of their agreement was that the terms would be put in writing, a process sometimes called "memorializing" the agreement. The writing does not constitute the agreement itself, but is merely a written record of it. Another element of their oral agreement concerned when it would take effect: upon completion of the "memorialization." Hobson's failure to initial the writing, whether deliberate or inadvertent, was not the failure of a condition, but rather a breach of the oral agreement that he would do so. (A) is incorrect because the oral agreement was already in effect at the time the writing was mailed. The processes of offer and acceptance took place during the oral negotiations. Even if the mailing of the writing could somehow be seen as an offer, there are no facts, such as detrimental reliance, that show it to be irrevocable. (C) is incorrect because the better view, as described above, is that the writing was a memorial of the existing oral agreement. Even if the requirement of Hobson's initialing were an express condition, Hollandaise would probably not be permitted to prevent the occurrence of the condition and then claim the benefit of its nonoccurrence. (D) is incorrect because acceptance had already taken place upon the parties' reaching oral agreement. This choice appears to invoke the mailbox rule but gets it wrong, since a mailed acceptance is generally effective upon posting (which occurred prior to the phone call), not upon receipt. In any event, the mailbox rule is not applicable to these facts.

Answer to Question 5

- (C) The extreme difficulty and expense of repairing or replacing the oven constitutes a good faith reason for FGF to cancel the contract, as it is entitled to do under the contract. Thus, GM will not prevail. Reservation of an unqualified right to cancel or withdraw from a contract at any time may amount to an illusory promise. However, the promise is not illusory, and there is a valid consideration, if the right to cancel is restricted in any way. Here, the right of either FGF or GM

to cancel is restricted because it must be preceded by reasonable notice to the other party. In addition, the Code's implied requirement of good faith in all sales contracts imposes an additional restriction on the parties' right to cancel. Therefore, the promises are not illusory, and both parties are bound. FGF finds itself confronted with circumstances that present extreme and unreasonable difficulty and expense in complying with its contractual duties of supplying pate. While this additional test might not be sufficient to discharge FGF's duties on grounds of impracticability, it is clearly grounds for supplying FGF with a good faith reason for canceling the contract. (A) is incorrect because FGF is entitled to cancel the contract for a good faith reason upon giving reasonable notice. It is not necessary to show impossibility. (B) is incorrect because the fact that the parties agreed to a cancellation provision indicates that FGF did not assume all risks of increased expenses in making pate. The unreasonable amount of expense and difficulty involved with the repair and/or replacement of the oven supports FGF's good faith decision to cancel the contract. (D) is incorrect because, while some courts have found promises to be illusory if the contract provided for an unqualified right to cancel the contract at any time, here the right to cancel is restricted by requirements of good faith reasons for cancellation as well as giving reasonable notice.

Answer to Question 6

- (B) Plunger can be held liable because its offer will be deemed irrevocable for a reasonable length of time on a theory of promissory estoppel. Promissory estoppel renders an offer binding as an option contract even without consideration if the offeror should reasonably expect it to induce action or forbearance of a substantial character by the offeree before acceptance, and such action or forbearance is in fact induced. [Restatement (Second) of Contracts §87] Plunger offered to do the work for \$10,000 if Jenny was awarded the contract. Plunger should have expected that Jenny would use this figure to prepare her bid and that if she was awarded the contract she would be bound. This is what occurred. The measure of Jenny's damages is the amount she reasonably paid for a substitute performance, less the amount saved as a consequence of the breach; *i.e.*, the \$12,000 paid to Flusher minus the \$10,000 not paid to Plunger, or \$2,000. (A) is incorrect because Jenny has not yet paid Plunger anything and has only suffered \$2,000 in damages. Jenny, therefore, is only entitled to the measure of damages described above. (C) is incorrect because it is irrelevant that Jenny paid a reasonable price for the substitute performance. In the absence of awareness on her part of Plunger's mistake, which is not indicated here, she was entitled to have the work done for the contract price, or to receive damages for the difference between the contract price and the cost of the substitute performance. (D) is incorrect because Jenny is entitled to relief even if she did not "accept" Plunger's bid, because she detrimentally relied on it by using it in her bid.

Answer to Question 7

- (C) Jenny did not accept Ohmco's bid even though she used it to prepare her bid. Jenny's advertisement constituted an invitation for subcontractors to make offers. Ohmco's bid constituted an offer. The general rule is that acceptance of an offer must be communicated to the offeror, and here Jenny did not communicate any acceptance to Ohmco. Although statutes in some cases may create an exception to the general rule by making acceptance of a subcontractor bid automatic upon the general contractor's being awarded the contract, no such exception is indicated by these facts. (A) is incorrect because the facts do not reveal any basis for an inference that Jenny would use the lowest bid. Typically, a contractor will consider other factors as well, such as reputation or past performance, in deciding which bid to accept. (B) is incorrect even though Ohmco's bid could be treated as an offer for an option contract. Here, the acceptance of the option contract to

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keep the bid open occurred when Jenny relied on the bid to prepare her own bid. [See Restatement (Second) of Contracts §87] The award of the general contract had no effect on the option contract and did not create an acceptance of the offer for the electrical contract (as discussed above). (D) is incorrect, although it is factually a true statement. Jenny's advertisement was an invitation for offers, not an offer in itself. The offer on these facts was made by Ohmco, and the reason no enforceable contract exists is that Jenny never accepted Ohmco's offer.

Answer to Question 8

- (B) Betsy will prevail because complete destruction of the dictionary results in avoidance of the contract and discharge of her duty to pay, since Stan still had the risk of loss. Since the contract here is for the sale of goods, it is governed by the Uniform Commercial Code ("U.C.C."). Under the U.C.C., if a contract requires for its performance particular goods identified when the contract is made, and, before risk of loss passes to the buyer, the goods are destroyed without the fault of either party, the contract is avoided. [U.C.C. §2-613] All of the elements of section 2-613 are present here. The contract required Stan's particular dictionary, which was identified at the time the contract was made. The risk of loss had not yet passed to Betsy because in a sale by a nonmerchant such as Stan, risk of loss does not pass to the buyer until tender [U.C.C. §2-509], and Stan never tendered the dictionary here (there was no actual tender and delivery was not due until April 20). Finally, the fire was caused by Hugh's careless smoking, and so the goods were destroyed without the fault of either party. Thus, the contract is avoided. (The same conclusion would result under the common law doctrine of impossibility—all executory duties are discharged when the subsequent destruction of the subject matter of a contract renders performance impossible.) (A) is incorrect because the U.C.C. contains no such rule. The only U.C.C. remedy that depends on an injured party's insurance involves the risk of loss after the buyer's revocation of acceptance or wrongful repudiation under section 2-510. Here, Betsy does not have to pay because the destruction of the dictionary discharged her duty to do so. (C) is wrong because, as explained above, the risk of loss had not yet passed to Betsy. (D) is wrong because the U.C.C. does not follow the doctrine of equitable conversion; rather, the Code contains very specific risk of loss rules, as detailed above.

Answer to Question 9

- (D) Pluto will not be liable to Olive because Pluto's duty to purchase ads was excused by Popeye's failure to use Pluto's repair shop exclusively. The facts indicate that Popeye and Pluto entered into a valid contract that required Pluto to render some performance to Olive. Olive is an intended third-party beneficiary because (i) she was expressly designated in the contract, (ii) some performance is to be made directly to her, and (iii) she stands in such a relationship to the promisee (she is Popeye's wife) that an intent to benefit her can be inferred. She can enforce the contract because her rights have vested; she has materially changed position in justifiable reliance on the promise by turning down work from two prospective clients because of the time Pluto's ads would take. However, when the third-party beneficiary sues the promisor on the contract, the promisor may assert any defenses to formation or performance that he would have been able to assert against the promisee, including failure of a condition. Pluto's promise to perform by placing all of his ads with Olive during the term of the agreement was dependent on the condition that Popeye have all of his buses repaired by Pluto. The failure of Popeye to fulfill this condition excused Pluto's duty to continue to place ads with Olive, and Pluto will be able to assert this defense to performance against Olive. (A) is incorrect because Olive's partial performance does not create a duty for Pluto to continue placing the ads. Pluto's duty is also dependent on performance by Popeye. (B) is incorrect because Olive's detrimental reliance only establishes

that her rights in the contract have vested. Thus, she can bring a contract action against Pluto, but Pluto will have a defense. (C) is incorrect because a third party can acquire rights in a contract as an intended beneficiary even though she provided no consideration. The fact that Olive may be a donee beneficiary would not prevent her from enforcing the contract.

Answer to Question 10

- (C) Because Olive's rights as a beneficiary had not vested, Popeye and Pluto had a right to modify their agreement without her permission. A contract that benefits a third party may confer rights on that party if she is an intended beneficiary rather than merely an incidental beneficiary. Olive is an intended beneficiary of the agreement between Popeye and Pluto because (i) she was expressly designated in the contract, (ii) some performance is to be made directly to her, and (iii) she stands in a close relationship to the promisee (Popeye), suggesting that he intended for her to benefit. However, an intended beneficiary can enforce the contract only after her rights have vested. Vesting will occur when the beneficiary (i) manifests assent to the promise in a manner invited or requested by the parties, (ii) brings suit to enforce the promise, or (iii) materially changes position in justifiable reliance on the promise. In contrast to the facts in the previous question, the facts for this question do not indicate any action on Olive's part that would have caused her rights to vest before the change in the contract extinguished her rights. (A) is incorrect even though it is a true statement. An intended beneficiary can enforce the contract only after her rights have vested, and here Olive's rights had not vested. (B) is incorrect because Olive had no contract with Pluto. Any rights that she had were through the contract between Popeye and Pluto. (D) is incorrect. Olive can be classified as a donee beneficiary because the promisee (Popeye) is gratuitously conferring a benefit on the third party (Olive). However, a donee beneficiary is still an intended beneficiary under the Restatement (Second) of Contracts section 302. Had Olive's rights in the contract vested before they were extinguished, her divorce from Popeye would not have prevented her from enforcing the contract.

Answer to Question 11

- (B) Bill can sue only Moran for breach. The effect of a valid assignment of contract rights is to establish privity of contract between the obligor and the assignee while extinguishing privity between the obligor and assignor. The assignee then replaces the assignor as the real party in interest and he alone is entitled to performance under the contract. As the real party in interest, he may enforce his rights against the obligor directly. Here, Alice (the assignor) has assigned to Bill (the assignee) the right to receive the performance of the contract by Moran (the obligor). Because Moran has materially breached the contract by departing from the specifications and using a cheaper paneling, Bill can sue Moran for breach. (A) and (D) are incorrect because Bill has no grounds for suing Alice (the assignor). The assignor does not guarantee that the obligor will perform the contract for the assignee. The assignor only warrants that she will not wrongfully exercise her power to revoke the assignment and that the obligor does not have any defenses against the assignor unknown to the assignee that can be successfully asserted if the assignee seeks to enforce the obligation. Here, Alice did not try to revoke the assignment and Moran does not appear to have any defenses against Alice. Thus, Bill cannot sue Alice. (C) is incorrect because Nicholls has no duties under the contract; he just has the right to receive payment. Unless a contrary intention appears, courts will construe language assigning "the contract" as including an assumption of the duties by the assignee. Here, however, Moran assigned only his right to payment to Nicholls and continued to perform the duties under the contract himself. Thus, no delegation of duties will be implied and Nicholls cannot be sued for breach.

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Answer to Question 12

- (B) Alice will have to pay Nicholls because she remains liable on the contract. This question builds on the previous question by adding delegation of duty issues to the assignment of rights analysis. A transfer of contractual duties to a third party is called a “delegation” of duties. However, the party delegating her duties (the delegator-obligor) remains liable on her contract, even if the third person (the delegate) expressly assumes the duties (*i.e.*, promises that he will perform the duties delegated). When the delegate promises that he will perform the duty delegated and the promise is supported by consideration or its equivalent, an assumption occurs; the nondelegating party (Nicholls) becomes a third-party beneficiary of the assumption agreement and can sue either the delegate who assumed the duty (Bill) or the delegator who remains liable on the contract (Alice). As between those two, the delegate is the principal and the delegator is the surety—if the delegator were sued on the contract, she could obtain reimbursement from the delegate based on the assumption agreement. In this case, therefore, Alice (the delegator-obligor) is still liable on the contract even though she delegated to Bill her duty to pay for the remodeling. On the other side of the contract, Nicholls is the assignee of Moran’s right to payment under the contract and therefore can seek enforcement of the contract directly against Alice. (A) is incorrect because a clause prohibiting assignment of “the contract” is generally construed as barring only the *delegation* of the assignor’s duties, not the right to receive payment from the obligor; thus, a general prohibition on assignments would not prevent Nicholls from recovering against Alice. Furthermore, a provision in a contract stating specifically that *contractual rights* may not be assigned is usually ineffective. In other words, the assignor retains the power to assign even though he may be liable for breach of contract, and the assignee may enforce the contract. Thus, the existence of a nonassignment clause in the contract between Alice and Moran would not have deprived Moran of the power to assign his rights to Nicholls. (C) is incorrect because, as discussed above, one who delegates her duties under a contract remains liable on the contract. (D) is wrong because the breach by Moran would be considered a minor breach and would not relieve either Bill or Alice of their duty to pay. A breach of contract is minor if the obligee gains the substantial benefit of her bargain despite the obligor’s defective performance. While the aggrieved party may have a right to any provable damages for the breach, she is not relieved of her duty of performance under the contract. To reach this result, the court may treat the paneling specification only as a promise by Moran and not as a condition to Bill and Alice’s duty to pay. Alternatively, if complying with the paneling specification is considered a condition to the duty to pay, the court will excuse the condition under the doctrine of substantial performance, which is particularly applicable to construction contracts. Excuse of the condition makes Alice’s duty to pay absolute. Since the two imported hardwoods are virtually identical and used interchangeably in the construction industry, Moran has substantially performed under the contract and his breach of contract will be considered minor. Hence, Alice will be liable to pay him for the work.

Answer to Question 13

- (A) Because Trendee accepted delivery of the 40 swimsuits, which was Stingray’s counteroffer to Trendee’s initial order, a contract was created for the 40 suits at \$10 each. As a general rule, advertisements, catalogs, and other price quotations are construed as invitations for offers rather than offers. If the language of the catalog could be construed as a definite promise to specific offerees, a court might construe it as an offer, but there is no evidence in this question for such an interpretation. Trendee’s order is therefore an offer to purchase 100 swimsuits; because goods are involved, U.C.C. Article 2 applies. Under U.C.C. section 2-206(1)(b), an offer to buy goods for

prompt shipment is construed as inviting acceptance either by a promise to ship or by prompt shipment of conforming or nonconforming goods. In this case, Stingray shipped goods that did not conform to the quantity term of Trendee's offer. The Code provides that the shipment of nonconforming goods amounts to both an acceptance of the offer and a breach of the newly formed contract unless the shipper precedes or accompanies the shipment with notice that it is offered as an accommodation. Here, Stingray notified Trendee at the time of its shipment that it would not be able to satisfy the balance of Trendee's order this season. This accommodation notice makes Stingray's shipment a counteroffer, which Trendee accepted by taking delivery and beginning to sell the swimsuits. Stingray is therefore entitled to \$400, the price specified by the counteroffer. (B) is incorrect because Stingray's shipment of the 40 swimsuits was not a breach of contract. Had Stingray failed to notify Trendee that its shipment was an accommodation, however, the shipment would have been a nonconforming acceptance and a breach of the contract, entitling Trendee to deduct its cover damages from what it owes Stingray. [U.C.C. §2-711] (C) is incorrect because Stingray is entitled to recover the price it specified in its notice of accommodation (which had made Stingray's shipment a counteroffer). By accepting the swimsuits and beginning to sell them, Trendee accepted Stingray's offer at the price it specified. (D) is incorrect because, as discussed above, Stingray's shipment was not a breach of contract. Even if it were, Stingray would still be entitled to recover for the goods Trendee accepted, minus Trendee's cover costs.

Answer to Question 14

- (B) An enforceable contract exists between WidgeCo and Distrucorp, but it does not include the limitation of liability added by Distrucorp's president. At common law, any different or additional terms in an acceptance of an offer made the response a rejection and counteroffer. In contracts for the sale of goods, however, U.C.C. section 2-207 substantially alters the common law rule. The proposal of additional terms by the offeree in a definite and timely acceptance does not constitute a rejection and counteroffer. Rather, the acceptance is effective unless it is expressly made conditional on assent to the additional terms. If both parties to the sale of goods contract are merchants, the additional terms will become part of the contract unless (i) they materially alter the contract, (ii) the offer expressly limits acceptance to the terms of the offer, or (iii) the offeror has already objected to the particular terms, or he objects within a reasonable time after notice of them is received. Here, a sale of goods contract is involved and both parties are merchants. Distrucorp accepted WidgeCo's offer by mailing back a standard printed acceptance form, even though the form contained an additional limitation of liability term added by Distrucorp's president. This limitation of liability provision did not become part of the contract, however, because it would have substantially changed the allocation of economic risks and benefits and impaired an otherwise available remedy. Hence, a valid contract exists between the parties but it is limited to the terms of WidgeCo's offer. (A) is incorrect because the material alteration by Distrucorp does not prevent formation of the contract under section 2-207, but the term that produces the material alteration will not be a part of the contract. (C) is incorrect. The additional term does not become part of the contract, even though WidgeCo raised no objection to it, because it materially altered the contract. An additional term will only become part of the contract if it is not a material alteration *and* if the offeror does not object to it within a reasonable time. Hence, WidgeCo's failure to object did not cause the term to be included in the contract. (D) is incorrect because under section 2-207, Distrucorp's response to WidgeCo was an acceptance rather than a counteroffer. For the response to have been a counteroffer rather than an acceptance, it would have had to ***expressly condition*** acceptance upon WidgeCo's assent to the additional term.

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Answer to Question 15

- (C) A contract was formed for \$10,000 because the oral modification is unenforceable under the Statute of Frauds. Under the U.C.C., a contract for the sale of goods priced at \$500 or more is not enforceable unless evidenced by a writing. Furthermore, contract modifications must also meet the Statute of Frauds requirement if the contract as modified is within the Statute's provisions. Here, the Statute of Frauds is applicable to both the original contract and the contract as modified. Since the modification was not in writing, it is not enforceable; hence, the terms of the original contract, which satisfies Statute of Frauds requirements, are effective. (A) is wrong even though Tekmart did accept before October 31 and no additional consideration was needed for the oral modification. Because the Statute of Frauds is applicable to the modification, the 1% discount is not effective. (B) is wrong because the parol evidence rule is applicable only to oral expressions made prior to or contemporaneous with the written contract; parol evidence can be offered to show subsequent modifications of a written contract. Since the contract was created when Tekmart dispatched the letter (as discussed below), the agreement regarding the 1% discount is a subsequent modification and therefore unaffected by the parol evidence rule. (D) is incorrect because the mailbox rule is applicable to the facts here; the acceptance was effective on dispatch. If Tekmart had sent its rejection *before* its acceptance, the mailbox rule would not apply and the rejection would take effect because it arrived before the acceptance. However, since Tekmart sent its acceptance first and then its rejection, and Megabyte did not change its position in reliance on the rejection, the mailbox rule is applicable and the acceptance was effective when it was sent.

Answer to Question 16

- (D) Tommy cannot enforce Dad's promise on either contractual or promissory estoppel grounds. An enforceable contract does not exist because there was no consideration for Dad's promise to send \$1,000. Tommy, the promisee, incurred no legal detriment by either refraining from doing something that he had a legal right to do or doing something that he had no legal obligation to do, with such detriment being part of a bargained-for exchange with Dad. However, consideration is not necessary if the promisor should be estopped from not performing. A promise is enforceable to the extent necessary to prevent injustice if: (i) the promisor should reasonably expect to induce action or forbearance; (ii) of a definite and substantial character; and (iii) such action or forbearance is induced. Dad had previously sent Tommy money for his expenses, and promised to send him the money here at issue for the same purpose. Due to Dad's express disapproval of Gidget, Dad certainly did not promise to send the money expecting to induce Tommy to buy Gidget a ring. Dad cannot be estopped from refusing to perform a promise where the result would be to require him to pay for something that he not only was unaware would happen but also of which he expressly disapproved. Thus, Dad's promise is not enforceable under a theory of promissory estoppel. (A) is incorrect because, although Tommy relied on Dad's promise in entering into the contract to purchase the ring, the promise was only made with the expectation of Tommy's incurring normal living expenses. Thus, Tommy was not justified in relying on the promise for the purpose that he did, and promissory estoppel does not apply. (B) is incorrect because the term "intended beneficiary" refers to a person not a party to a contract who is intended to have rights conferred by that contract. Here, there was no contract between Dad and someone else, pursuant to which Tommy became entitled to the money. (C) is not as good an answer as (D). It is true that Dad's promise was a gift unsupported by consideration. However, if circumstances existed justifying the application of promissory estoppel, the promise would be enforceable even in the absence of consideration. Therefore, (C) is not as precise as (D).

Answer to Question 17

- (C) The court should rule that there was sufficient consideration in Ellen's promise since her agreement to use her best efforts to sell and promote Calvin's gowns will be implied. For a contract to be valid, consideration must exist on both sides; *i.e.*, promises must be mutually obligatory. Here, Calvin has agreed to make Ellen his exclusive retail distributor, but Ellen's promise is less apparent—what is she obliged to do? The facts do not show any specific obligation. However, in a case where someone is to be the exclusive distributor, the court will *imply* a promise to use best efforts to sell the product. This implied promise is valid consideration both under the common law and the Uniform Commercial Code (applicable here because goods are involved). Thus, the contract between Ellen and Calvin includes an *implied* promise that Ellen will use her best efforts to promote and sell Calvin's gowns, and such a promise is valid consideration. (A) is wrong because merely placing an order for gowns would not cure the defect in the April 1 contract absent Ellen's implied promise, because Ellen still will not have promised to do anything under that contract (*i.e.*, she is not bound to do anything referable to the April 1 contract); rather, all she has promised to do is to pay for the goods that she ordered, which is sufficient consideration only for the May 1 order, not for the entire contract. (B) is wrong because a merchant's firm offer must contain words promising to keep the offer open for a period of time, and here the contract explicitly states that it may be canceled at any time. (D) is wrong because as in (A), Calvin's act here is not necessarily referable to the April 1 contract; rather, it is important only as to the May 1 order; it does not settle the issue of whether there was an enforceable April 1 contract.



CRIMINAL LAW ANSWERS**Answer to Question 1**

(A) Dorothy is liable both for the attempted murder of Melissa and, under the doctrine of transferred intent, for the murder of Hank. To be guilty of murder, one must unlawfully kill another human being with malice aforethought, which is a term of art encompassing various states of mind, including intent to kill, and the absence of facts excusing the homicide or reducing it to voluntary manslaughter. Here, Dorothy had the intent to kill Melissa. Under the doctrine of transferred intent, this intent is transferred from Melissa to Hank, the actual victim of the murder. There are no facts here excusing the homicide or reducing it to voluntary manslaughter on the basis of adequate provocation. Modern courts might allow a jury to consider whether discovery of the love letters would arouse the intense passion required for the first element of the provocation test; however, the third element, an absence of sufficient time between the provocation and the killing for the passions of a reasonable person to have cooled, is disproved by the facts of the question. The act of killing, although done by Sammy, is attributable to Dorothy as the principal because she caused an innocent intermediary (Sammy) to accomplish the result. Hence, Dorothy is liable for the murder of Hank; (C) is therefore incorrect. At common law, the crime of attempted murder required both a specific intent by the actor to kill the victim and an act that puts the defendant in close proximity to completing the crime. The Model Penal Code and most state criminal codes modify the "proximity" test for the act requirement, instead requiring an act that constitutes a "substantial step" towards commission of the crime. Here, Dorothy had the intent to kill Melissa and intentionally gave the loaded gun to Sammy with instructions to point it at Melissa and pull the trigger. Under either of the tests used, her conduct satisfies the act requirement of attempt. Thus, Dorothy is also liable for the attempted murder of Melissa; (B) is therefore incorrect. (D) is incorrect because the same act and intent can constitute both an attempt as to one person and a completed crime as to another person. Although, if Sammy's aim had been better, Dorothy could not have been convicted of both attempted murder of Melissa and murder of Melissa, the attempt against Melissa and the murder of Hank are separate crimes because more than one victim is involved.

Answer to Question 2

(A) Howard can be convicted of murder. Murder is the unlawful killing of a human being with malice aforethought, which may be (i) intent to kill, (ii) intent to inflict great bodily injury, (iii) reckless indifference to an unjustifiably high risk to human life, or (iv) intent to commit a felony. Intentional use of a deadly weapon authorizes a permissive inference of intent to kill. Here, Howard uttered statements of revenge, confronted Nick with a loaded gun, and intentionally shot him when he pulled out a knife—more than enough evidence for a jury to find that Howard had the malice aforethought necessary for murder. Furthermore, none of the issues raised in the other choices will suffice to excuse the killing or reduce it to voluntary manslaughter. (B) is wrong because Howard will not be able to meet all four tests for establishing the provocation necessary to reduce a killing from murder to voluntary manslaughter. Howard would have to offer evidence that (i) a provocation existed that would arouse sudden and intense passion in the mind of an ordinary person such as to cause him to lose his self-control, (ii) Howard was in fact provoked and lost his self-control, (iii) there was not sufficient time between the provocation and the killing for the passions of a reasonable person to cool, and (iv) Howard in fact did not cool off between the provocation and the killing. Howard can easily establish the first two elements, because discovery of one's spouse in bed with another person is virtually always considered adequate provocation by common law courts. However, the time interval between the provocation and the killing was probably sufficient for a reasonable person to cool off, and the facts

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strongly suggest that Howard did in fact cool off—he consumed several drinks to build up his nerve before setting off for Nick’s house, and he did not shoot Nick immediately when he confronted him. Thus, a jury would probably reject a claim of voluntary manslaughter here. (C) is incorrect because Howard’s voluntary intoxication would not preclude a finding of intent for murder. Because Howard became intoxicated to build up his nerve to kill Nick, a court would probably find that his intent at the time he began drinking would apply to his later conduct. Furthermore, voluntary intoxication is no defense to crimes involving recklessness. Howard can still be liable for murder based on a state of mind of reckless indifference to human life—his conduct in becoming intoxicated and then confronting Nick with a loaded gun is sufficient to establish that state of mind. (D) is incorrect because the homicide will not be excused on self-defense grounds. A person may use deadly force in self-defense only if (i) he is without fault, (ii) he is confronted with unlawful force, and (iii) he is threatened with imminent death or great bodily harm. Howard is not without fault, however, because he initiated the assault and prompted Nick to pull the knife. His status as the aggressor deprives him of the right to use force in his own defense under these circumstances.

Answer to Question 3

- (B) The court should affirm Larry’s conviction. Crimes imposing a mens rea of malice generally do not require the proof of intent that specific intent crimes require. It is sufficient if the defendant recklessly disregarded an obvious or high risk that the particular harmful result would occur. Here, the facts presented were sufficient to allow the jury to conclude that Larry knew of the probability that the ladder would collapse without the braces when someone climbed down it, and acted in reckless disregard of that risk by removing the braces. (A) is incorrect because the fact that Larry was committing larceny when he removed the braces does not establish malice for purposes of the malicious injury charge. Even if his conduct were otherwise legal, he could be liable for that charge if he acted with reckless disregard of the high risk of injury. (C) is wrong because, as discussed above, it is generally not necessary to show an *intent* to injure for a crime requiring a mens rea of malice; reckless disregard of an obvious risk will usually suffice. (D) is incorrect because crimes requiring a mens rea of malice do not refer to malice in the dictionary sense; a showing of ill will or hatred of the victim is not required.

Answer to Question 4

- (A) Dana can be convicted of first degree murder for Victor’s death. Murder is the unlawful killing of a human being with malice aforethought. In the absence of facts excusing the homicide or reducing it to voluntary manslaughter, malice aforethought exists if the defendant has (i) intent to kill, (ii) intent to inflict great bodily injury, (iii) awareness of an unjustifiably high risk to human life, or (iv) intent to commit a felony (felony murder doctrine). In this case Dana clearly had the intent to kill Victor; her motive for doing so is irrelevant for establishing malice aforethought. It is also quite possible under the facts that Dana acted with premeditation and deliberation, making her potentially liable for first degree murder. “Deliberate” means that the defendant reflected on the crime in a cool and dispassionate manner. “Premeditated” means that such reflection actually was undertaken, but it need only be for a very brief period. Here, Dana could have reflected on the crime before she visited the hospital; the fact that she had a gun in her purse is circumstantial evidence of such reflection. Even if she did not make the decision to kill until moments before she pulled out the gun, she would still have been capable of premeditation and deliberation. (B) is therefore incorrect because it is not the most serious crime of which Dana can be convicted. (C) is incorrect because of the absence of facts establishing adequate provocation that would reduce an intentional killing from murder to voluntary manslaughter. Adequate provocation is

most frequently recognized in cases of (i) being subjected to a serious battery or threat of deadly force, and (ii) discovering one's spouse in bed with another person. While modern courts have broadened somewhat the scope of what constitutes provocation, the law does not presently recognize feelings of mercy toward the victim as an adequate provocation. Thus, Dana can be convicted of murder for Victor's death. (This question is a good illustration of why you must always treat the defendant *objectively* in your analysis of Criminal Law questions.)

Answer to Question 5

- (C) The fact that Andt was seeking to retrieve swim fins that belonged to him negates the requirement in burglary of entry with intent to commit a felony. At common law, a burglary is defined as a breaking and entry of the dwelling of another at nighttime with the intent of committing a felony therein. If Andt entered into the cabin believing that the swim fins were his and intending only to retrieve them, he did not enter with intent to commit a felony, since it is not a felony to recover your own property. (A) is incorrect because if the other elements of burglary were present, the fact that Andt did nothing in the cabin would be immaterial; the burglary would have been committed the moment he entered the cabin with the requisite intent. (B) is wrong for a similar reason. The fact that he did not commit a felony does not negate the *prima facie* case for burglary. (D) is wrong because the requirement of a breaking is satisfied as long as some degree of force is used to gain entry. Opening a closed door is sufficient for this element; there is no requirement that the door be locked.

Answer to Question 6

- (C) Kuegler's conduct satisfies the mens rea of "malice" required for arson. At common law, arson was defined as the malicious burning of the dwelling of another. The mens rea required for arson is malice, which is broader than the intent required for specific intent crimes and has nothing to do with ill will or evil motive. The defendant need not have intended to burn down the building; it is sufficient if he intended a burning that creates an obvious fire hazard to the building. Here, Kuegler knew that the store had an automatic sprinkler system, and he was not motivated by an intent to burn down the building. Nevertheless, he intended to start a fire with reckless disregard of a high risk that it would cause damage to the building. The risk or hazard is not that the building will burn down, merely that damage to the structure from a burning will occur. The "burning" required for arson does not require significant damage to the building; a charring of the combustible material is sufficient. Here, the wall next to the barrel was charred. This satisfies the "burning" requirement. The common law requirement that the structure be a dwelling has been broadened by the statute in this question to include other buildings. Thus, Kuegler's conduct satisfies all of the elements of the crime of arson. (A) is incorrect because the mens rea for arson can be satisfied even in the absence of a specific intent to burn the building. He acted with the requisite intent—malice—by intentionally starting a fire that created a high risk that a burning of the structure would occur. (B) is incorrect because, as discussed above, all of the elements of the *prima facie* case for arson have been established; the charring of the wall next to the barrel satisfies the "burning" requirement. (D) is incorrect because there is no "felony arson" rule like the felony murder rule. It has no bearing on the *prima facie* case for arson that he started the fire while perpetrating another felony.

Answer to Question 7

- (C) As indicated in the question above, Kuegler is guilty of the crime of arson. He is also guilty of attempted larceny. Common law larceny requires a taking and carrying away of the personal property of another by trespass with intent to permanently deprive the other of his interest in the

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property. Here, Kuegler planned to take and carry away watches in the store's possession by trespass (*i.e.*, without permission) and with the intent to permanently deprive the store of them. However, he cannot be convicted of a completed larceny because he never actually took the watches. (A) and (B) are therefore incorrect. At common law, the crime of attempted larceny required both a specific intent by the actor to commit a larceny and an act that put the defendant in close proximity to completing the crime. The Model Penal Code and most state criminal codes modify the "proximity" test for the act requirement, instead requiring an act that constitutes a "substantial step" towards commission of the crime. Here, Kuegler intended to do what he did in order to commit a larceny for which he had the requisite intent. Also, he was apprehended after he set a fire to distract the store security guards and while he was smashing the glass on the watch case. Together, these acts satisfy the act requirement for attempt liability regardless of which test is employed. Thus, Kuegler is liable for attempted larceny and arson, making choice (C) correct and choice (D) incorrect.

Answer to Question 8

- (B) Dewey is least likely to be found guilty of an attempt crime because the act he committed is not a crime in the jurisdiction. The general rule is that a defendant cannot avoid liability for attempt on the basis that it would have been impossible to commit the completed crime. It applies to cases where the defendant's mistaken belief about the facts (*i.e.*, factual impossibility) or about the legal relationships or circumstances prevents him from completing the crime that he intended to commit. However, it is still necessary that the result desired or intended by the defendant constitute a crime. Even if he otherwise has the kind of culpability required for the completed crime, his objective must be proscribed by law. If those things the defendant does or intends to do would not actually be a crime, this is legal impossibility and a defense. The defendant will not be guilty of an attempt even though he firmly believed that his goal was criminal. The facts in (B) indicate that Dewey thought he was committing statutory rape, but in fact the conduct he engaged in, and intended to engage in, was not proscribed by law. Thus, his conduct does not constitute an attempt to commit statutory rape. (A) is incorrect because Don's mistake about the legal status of the goods he fenced does not constitute a defense to attempt. The jewelry in the fact pattern in (A) has lost its status as "stolen" jewelry because it is being forwarded to Don with the owners' permission; it is therefore impossible for him to be liable for the completed crime of receipt of stolen goods. However, Don is guilty of attempted receipt of stolen goods because the legal status of the goods, unlike the existence or nonexistence of a law proscribing the conduct, is one of the attendant circumstances; this is treated like factual impossibility by most courts. By accepting the goods he believes to be stolen, Don has purposely engaged in conduct that would constitute receipt of stolen goods if the circumstances were as he believed them to be; hence, he is liable for attempted receipt of stolen goods. (C) is incorrect because Doreen has intentionally engaged in conduct that constitutes an attempt to conduct an illegal demonstration. The issue in this situation is mistake of law rather than impossibility. The general rule is that it is no defense to a crime that the defendant mistakenly believed that her acts were not prohibited by law. This is true even if her mistake was reasonable or was based upon advice of private counsel. Nor will mistake of law negate intent unless the mental state for a crime requires a certain belief concerning a collateral aspect of law, which is not the case here. There is no indication that the statute prohibiting illegal demonstrations requires knowledge that the demonstration is illegal. Had Doreen actually begun demonstrating in the building, she would have been liable for the completed crime simply because she had the intent to conduct the demonstration. Doreen is liable under the state's attempt statute because, acting with the intent to conduct a demonstration that would be illegal, she purposely attempted to bring her picket sign

into the capitol building; this constituted an act in close proximity to completion of the crime. (D) is incorrect because Drew cannot defend on the ground that the completed crime was factually impossible to commit. The crime of theft by false pretenses requires that the defendant obtain title to the property of another by an intentional false statement of past or existing fact. This indicates that the false statement must be the cause of the victim passing title to the defendant (*i.e.*, the victim must rely on the statement). Because Hartigan was just disguising himself as a homeowner as part of the sting operation, it would have been impossible for Drew to commit the completed offense. However, Drew had the intent to commit the crime and purposely did everything necessary to complete the crime had the facts been as he believed them to be. As a result, Drew is liable for attempted theft by false pretenses.

Answer to Question 9

- (D) Jeffries could not be convicted of any of the listed combinations of crimes. (A) is incorrect because Jeffries did not have the mental state required to be an accomplice for attempted false pretenses. To be convicted as an accomplice under the prevailing common law rule, a person generally must have given aid, counsel, or encouragement with the *intent* to aid or encourage the principal in the commission of the crime charged. Under certain circumstances, *knowledge* that the crime will result from the aid provided will suffice for accomplice liability, but here Jeffries did not even know of Garth's plan to commit false pretenses. Thus, while Jeffries aided Garth's attempted false pretenses by procuring Mrs. Wealthy's key, he did not have the mental state to be liable as an accomplice for that crime. (B) is incorrect because the parties did not intend to achieve the same objective when they agreed to the theft of the key. Conspiracy requires three elements: (i) an agreement between two or more persons, (ii) an intent to enter into an agreement (which is often inferred from the act of agreement), and (iii) an intent to achieve the objective of the agreement. To establish the third element, a minimum of two persons must intend to achieve the same purpose; *i.e.*, there must be a "meeting of guilty minds." Here, the only objective that Jeffries and Garth intended and agreed to achieve was the theft of the key. The parties neither expressly nor impliedly agreed to commit a burglary, and the fact that Garth used the key for a different purpose than Jeffries anticipated indicates that there was no "meeting of guilty minds." (C) is incorrect. As explained above, Jeffries did not conspire to commit burglary. The same analysis applies to the charge of conspiracy to commit false pretenses. There was no agreement between Jeffries and Garth as to that crime. Not only did Jeffries not intend to bring about the crime of false pretenses, he did not even have knowledge that he was facilitating that crime by supplying the key. The third crime in choice (C), larceny, presents a closer question. As discussed above, under certain circumstances, a party may be liable as an accomplice by giving aid with knowledge that the crime will result from the aid provided. While the sale of ordinary goods at ordinary prices knowing they will be used in a crime will not suffice, procuring an illegal item or selling at a higher price because of the buyer's purpose may constitute a sufficient "stake in the venture" for a court to find intent to aid. Here, if Garth had intended to use the key to commit larceny and Jeffries knew this, his theft of the key might suffice for accomplice liability. However, Jeffries did not "know" that Garth was going to use the key to commit larceny because Garth was not going to do so. The fact that Garth later decided to commit larceny is probably not adequate for Jeffries to be liable as an accomplice. In any event, the combination of larceny, conspiracy to commit burglary, and conspiracy to commit false pretenses is clearly incorrect. Thus, by a process of elimination, (D) is the correct answer.

Answer to Question 10

- (A) The only additional common law crime that Garth could be convicted of is larceny. Common law larceny consists of (i) a taking (ii) and carrying away (iii) of tangible personal property

(iv) of another (v) by trespass (vi) with intent to permanently (or for an unreasonable time) deprive the person of an interest in the property. Garth has committed larceny of the statuette because he took it from Mrs. Wealthy's apartment by trespass (*i.e.*, wrongfully) with the intent to permanently deprive her of it. (B) and (C) are incorrect because Garth has not committed burglary. The elements of burglary at common law are (i) a breaking (ii) and entry (iii) of the dwelling (iv) of another (v) at nighttime (vi) with the intent to commit a felony therein. While Garth had gained entry to Mrs. Wealthy's apartment with the intent to commit the felony of false pretenses, whether he committed a "breaking" is debatable. At common law, a breaking can be constructive if the defendant gains entry by means of fraud, threat, or intimidation. The fraud, however, is typically a misrepresentation of identity to trick the occupant into opening the door of the dwelling. Here, while Garth misrepresented how he had obtained the key, Mrs. Wealthy invited him in as a gesture of thanks; *i.e.*, she was not tricked into opening her door to let him in. Even if Garth's conduct were sufficient for a constructive breaking, it also fails to satisfy the nighttime element. His entry into Mrs. Wealthy's apartment during the afternoon would not suffice for burglary at common law. (D) is incorrect because, as discussed in the answer to the previous question, there was no express or implied agreement between Garth and Jeffries to commit a burglary; hence, Garth cannot be liable for conspiracy to commit burglary.

Answer to Question 11

- (A) If the jury believes Bulky's testimony, he did not have the intent for robbery. A robbery consists of (i) a taking (ii) of personal property of another, (iii) from the other's person or presence, (iv) by force or intimidation, (v) with the intent to permanently deprive him of it. Thus, robbery is basically an aggravated form of larceny in which the taking is accomplished by force or threats of force. If the jury believes Bulky's testimony that he was only trying to beg some bus money, his only intent was to accept money that Juan voluntarily gave him. Bulky did not have an intent to permanently deprive Juan of his interest in the property because Bulky believed that Juan was freely transferring his interest to Bulky. Thus, the jury should find him not guilty of robbery. (B) is incorrect because the defendant's intent, rather than the effect of his conduct, is the controlling factor. Without any other facts, Bulky's conduct was sufficiently intimidating that a jury could conclude that he had an intent to rob. If the jury believes Bulky's testimony, however, it should find that he did not have the intent necessary for robbery. (C) is incorrect because Bulky's testimony, if believed, would also negate the intent necessary for assault. Criminal assault is either (i) an attempt to commit a battery, or (ii) the intentional creation of a reasonable apprehension in the mind of the victim of imminent bodily harm. If Bulky had intended to create an apprehension of imminent bodily harm, he would be liable for robbery because he would have been using that apprehension to permanently deprive Juan of his property. However, assuming that Bulky was just trying to beg rather than rob, he will not be found to have intended to create the apprehension that he did. (D) is incorrect not only because Bulky's testimony disproves the requisite intent of either offense, but also because the assault would be a lesser included offense of the robbery under these circumstances. A lesser included offense is one that consists entirely of some (but not all) of the elements of the greater crime. Under the constitutional prohibition against double jeopardy, lesser included offenses "merge" into the greater offenses, in the sense that one may not be convicted of both the greater offense and a lesser included offense. Here, the robbery would be by intimidation: conduct by Bulky that was intended to create apprehension of imminent bodily harm in Juan's mind. This element of the robbery offense would be enough to establish liability for assault as well, but robbery has additional elements; hence, Bulky could not have been found guilty of both robbery and the lesser included offense of assault.

Answer to Question 12

- (D) Doofus's waiver of his Fifth Amendment privilege against self-incrimination after receiving *Miranda* warnings applies to the subsequent questioning about another crime. *Miranda v. Arizona* (1966) requires that a person in custody be informed of his right to remain silent and his right to the presence of an attorney during questioning. A suspect may then waive his *Miranda* rights by answering an interrogator's questions as long as the waiver was knowing, voluntary, and intelligent. The suspect need not be informed of all potential subjects of an interrogation to effect a valid waiver. If the suspect has waived his rights, there is generally no need to repeat the warnings because of a break in the interrogation unless the time lapse has been so long that a failure to do so would seem like an attempt to take advantage of the suspect's ignorance of his rights. Here, Doofus was given his *Miranda* warnings and apparently made a knowing, voluntary, and intelligent waiver of his rights by agreeing to answer Smith's questions. The one-hour break for lunch does not invalidate the waiver, nor does the fact that the subsequent questioning involved a different crime. Hence, Doofus probably will fail to prevent the confession from being admitted at his trial. (A) is incorrect. If Doofus had *asserted* his *Miranda* rights during the initial questioning, any subsequent interrogation about a different crime would be invalid without a significant time lapse and a fresh set of warnings. However, because Doofus *waived* his *Miranda* rights during the initial interrogation, subsequent interrogation about a different crime does not require repetition of the warnings; the waiver applies to all potential subjects of an interrogation. (B) is incorrect because the custodial setting requires only that the police give defendant the *Miranda* warnings at the outset, which they did. The valid waiver that followed permits admissibility of the confession. (C) is incorrect because it is irrelevant what charge Doofus was in custody for. Unlike the offense-specific Sixth Amendment right to counsel, a detainee's rights under *Miranda* are not offense specific. Doofus was in custody because he was not free to leave; thus, any interrogation must satisfy the requirements of *Miranda*. If the police had not given him *Miranda* warnings before he was questioned on the first charge or if he had not validly waived his rights, any questioning regarding the second charge would have been improper.

Answer to Question 13

- (D) The state's best argument is that, because Gordon was not a government agent, he need not have given Denise the *Miranda* warnings. As a means of protecting the Fifth Amendment privilege against compelled self-incrimination, a person must be informed prior to custodial interrogation that: (i) she has the right to remain silent; (ii) anything she says can be used against her in court; (iii) she has the right to the presence of an attorney; and (iv) if she cannot afford an attorney, one will be appointed for her if she so desires. These *Miranda* warnings must be given only if the detainee is being questioned by someone known to be working for the police. Here, Gordon is a private security guard employed by a private business (the grocery store). Thus, since Gordon was not required to inform Denise of the *Miranda* warnings, he could not possibly have violated Denise's *Miranda* rights. (A), (B), and (C) all reflect matters that would come into play only if Gordon were a government agent. However, they would also be incorrect even if Gordon were a government agent. (A) is incorrect because Gordon's statement might be deemed to be interrogatory. "Interrogation" refers not only to express questioning, but also to any words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response from the suspect. Although it is not an express question to say "You're too young to be a thief," such words are reasonably likely to bring forth some sort of incriminating response. Therefore, it is incorrect to state that Gordon's statement was not interrogatory. (B) is incorrect because, in a delinquency proceeding, a juvenile must be afforded the right not to testify, including all aspects of the privilege against self-incrimination. *Miranda* warnings are a very important

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aspect of the privilege against self-incrimination. In addition, a juvenile court may determine that a child should be transferred to adult court for trial as an adult on criminal charges. Certainly, in such an instance, the requirement of *Miranda* warnings would be applicable. Consequently, regardless of whether a child is treated by the courts as a juvenile or an adult, it is incorrect to state that giving the *Miranda* warnings to juveniles is discretionary. (C) is incorrect because an actual arrest and formal charges are not a prerequisite to triggering the need for *Miranda* warnings. All that is required is that an interrogation be custodial in nature. An interrogation is considered custodial if the individual is not free to leave. Gordon grabbed Denise by the arm before making his statement. Thus, it could be argued that what followed was custodial interrogation, because Denise was not free to leave.

Answer to Question 14

- (C) The cocaine is inadmissible because it is the product of an unconstitutional search of Nick. The Fourth Amendment prohibition against unreasonable searches and seizures applies to an investigatory detention and any type of search during the detention. Under *Terry v. Ohio* (1968), police have the authority to briefly detain a person for investigative purposes, even if they lack probable cause to arrest, as long as they have an articulable and reasonable suspicion of criminal activity. However, an investigatory detention does not create the right to search the person being detained. The officer may conduct a protective frisk (a patdown of the outer clothing) only if he reasonably believes that the person may be armed and presently dangerous. A full search of the person is only permitted if the detention establishes probable cause for a lawful arrest. In this case, Sam may have had sufficient grounds to detain Mike and Nick to ask them questions. Whether police have a reasonable suspicion—supported by articulable facts—of criminal activity is judged by the totality of the circumstances. [United States v. Sokolow (1989)] Here, the conduct of Mike and Nick may have made Sam reasonably suspicious that they were smuggling drugs. However, after finding nothing in his search of their luggage, and having no reason to believe that they were armed and presently dangerous, Sam had neither probable cause nor reasonable suspicion to either search or frisk Mike and Nick. Hence, under the exclusionary rule, the cocaine obtained as a result of the unlawful search of Nick is inadmissible against him. (A) is incorrect because there is no general emergency exception justifying searches without probable cause, and the search at issue here had none of the exigent circumstances that the Supreme Court has relied on in prior cases to permit warrantless searches (such as the hot pursuit of a fleeing felon or the evanescent nature of the evidence). (B) is incorrect because the scope of a search permitted by consent is limited by the scope of the consent. Nick's consent to the search of his luggage created no implication of a consent to a body search. (D) is incorrect because Sam had Mike and Nick's consent to search their luggage. Police may conduct a valid and warrantless search if they have a voluntary and intelligent consent to do so from the individual being searched; Mike and Nick's consent here satisfies these requirements.

Answer to Question 15

- (D) Because Mike's Fourth Amendment rights were not violated by the unlawful search of Nick, the cocaine may be introduced against Mike at trial. Under *Rakas v. Illinois* (1978), Fourth Amendment rights may be enforced by the exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. Ownership of the property seized does not automatically establish violation of one's reasonable expectation of privacy; it is just one factor in the totality of the circumstances that the court will consider. [Rawlings v. Kentucky (1980)] Here, the cocaine was seized from Nick as a result of a search that violated his Fourth Amendment rights. However, nothing in the question indicates that Mike had a legitimate expectation of

privacy in Nick's body (such as the right to exclude others from searching Nick if Nick had consented). Under the circumstances in this case, Mike's ownership of the cocaine does not establish a reasonable expectation of privacy with regard to the search of Nick. (A) is incorrect because the fact that Mike did not have actual possession of the cocaine does not require that the cocaine be excluded from his trial. He may be liable under the jurisdiction's possession statute if he had sufficient dominion or control over the cocaine to be in constructive possession of it. (B) is incorrect even though it is a true statement. Sam's search of Mike violated Mike's reasonable expectation of privacy, but no evidence was obtained by the illegal search of Mike. Sam's search of Nick violated Nick's reasonable expectation of privacy but not Mike's expectation of privacy (as discussed above). Because Mike's Fourth Amendment rights were not violated by the search of Nick, he cannot use the exclusionary rule to suppress introduction of the cocaine. (C) is incorrect because the defendant has the right to testify and stipulate to facts at a preliminary hearing on a motion to suppress the evidence without his testimony or stipulation being admitted against him at trial on the issue of guilt. [Simmons v. United States (1968)] This rule allows a defendant to assert a possessory or ownership interest in illegally seized evidence just for purposes of invoking the exclusionary rule; if he fails to have the evidence excluded, he may still deny possession or ownership at trial.

Answer to Question 16

- (D) Statement III. offers Simpson the only basis for vacating his guilty plea and sentence. In accordance with the contractual view of plea bargains, a defendant who agrees to a plea bargain has the right to have that bargain kept. If the prosecution does not keep the bargain, the court will decide whether the circumstances require specific performance of the plea agreement or whether the defendant should be granted an opportunity to withdraw his guilty plea. Here, Simpson agreed to testify against his co-defendants in exchange for the recommendation of probation. His co-defendants' decision to plead guilty rather than go to trial may have been influenced by the fact that Simpson had agreed to testify; hence, the fact that he did not testify at their trial does not allow the prosecution to avoid the terms of the plea bargain. (A) and (B) are wrong because the fact that the prosecution threatened to bring additional charges, as indicated in Statement I., is not a basis for claiming that a guilty plea was involuntary as long as there was some legal basis for bringing the additional charges. Consistent with the contract theory of plea negotiation, the State has the power to drive a hard bargain in reaching a plea agreement. (B) and (C) are wrong because Simpson's claim of innocence does not prevent the court from accepting his guilty plea, contrary to Statement II. Before accepting a guilty plea, the court must find that the plea was voluntary and intelligent. However, admission of guilt is not a constitutional requisite to imposition of a criminal penalty. When a defendant pleads guilty despite protesting his innocence, the plea may still be seen as an intelligent choice by the defendant, and withdrawal of the plea will not be permitted when there is other strong evidence of guilt in the record. Here, Simpson weighed the risks and benefits before pleading guilty, and the statements by his co-defendants provide other evidence of his guilt; thus, his claim of innocence is not a basis for attacking his guilty plea.

Answer to Question 17

- (D) The state's best argument is that Chaven procured dismissal of the original trial on a technicality. The Fifth Amendment right to be free of double jeopardy for the same offense generally requires that, once jeopardy attaches in the first prosecution, the defendant may not be retried for the same offense. Under certain circumstances, however, a defendant can be retried even if jeopardy has

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attached. One such circumstance is that a trial may be discontinued and the defendant re-prosecuted for the same offense when the termination occurs at the behest of the defendant on any grounds not constituting an acquittal on the merits. Double jeopardy does not bar two trials, but only a retrial after a determination on the merits. Here, the municipal charge against Chaven was dismissed, and the trial terminated, at the request of Chaven on the basis of a technical error in the information. This was not an acquittal on the merits. Thus, there is no violation of the prohibition of double jeopardy presented by the current state prosecution of Chaven. Regarding (A), it is true that the constitutional prohibition against double jeopardy does not apply to trials by separate sovereigns. A person may be tried for the same conduct by both a state and the federal government, or by two states. However, a state and its municipalities are not deemed to be separate sovereigns. Thus, Chaven may not be tried for the same conduct by the city of Briggs and the state of Riverfront. (B) is incorrect. The fact that the state charge requires proof of a fact not required by the municipal charge does not satisfy the test for determining that the "same offense" is not involved for purposes of double jeopardy. At best, it indicates only that the municipal charge is a lesser included offense of the state charge. A lesser included offense is one that consists entirely of some, but not all, elements of a greater crime. Attachment of jeopardy for a lesser included offense usually bars retrial for the greater offense. Here, the municipal charge consists entirely of all the elements of the state charge, except for the element of intent to distribute the illegal narcotics. Therefore, the municipal charge is a lesser included offense of the state charge. This fact would, if anything, provide an argument in support of the position that the trial in state court constitutes double jeopardy. Thus, (B) does not present an argument against granting the motion filed on behalf of Chaven. (C) is incorrect because it misstates the point at which jeopardy attaches. Jeopardy attaches in a jury trial at the impaneling and swearing of the jury, and in a bench trial when the first witness is sworn. This question deals with a jury trial, and we are told that the jury has been sworn, selected, and impaneled. Thus, jeopardy has attached, despite the fact that no witness has been sworn.

EVIDENCE ANSWERS**Answer to Question 1**

(A) Father White's testimony as to Dassent's responsible nature is admissible as circumstantial evidence that he was not driving the hit-and-run vehicle. The accused in a criminal case can introduce evidence of his good character to show his innocence of the alleged crime. Federal Rule 405 allows the defendant to call a qualified witness to testify as to his personal opinion concerning a trait of the defendant that is involved in the case. In this case, whether Dassent was the driver of the hit-and-run vehicle is a critical issue in the case; thus, testimony that Dassent is a responsible person who would not leave the scene of an accident pertains to a relevant character trait. Father White, having known Dassent for 12 years, is qualified to give his personal opinion as to Dassent's character. The court should therefore permit White to testify. (B) is incorrect because Father White's testimony is character evidence rather than habit evidence. Both habit evidence and character evidence are admissible to show how a person probably acted on a particular occasion. However, habit evidence describes one's regular response to a specific set of circumstances, while character evidence describes one's disposition in respect to general traits. Here, there is no specific repeated situation that Dassent regularly responded to (such as regularly failing to stop at a certain stop sign). Rather, it is Dassent's general trait of responsibility that is being offered as evidence. (C) is incorrect because Father White's testimony is admissible as relevant character evidence. As a general rule, a party may not bolster the testimony of his witness until the witness has been impeached. Here, even though Father White's testimony bolsters Dassent's unimpeached testimony that he did not drive the hit-and-run vehicle, it is independently admissible as character evidence that supports Dassent's case. The fact that Dassent is testifying in his own defense when Father White is called to support him does not make Father White's testimony inadmissible. (D) is incorrect because it reverses the rule. In a criminal case, the defense does not need to have the prosecution put defendant's character in issue before the defense can rebut it; the defense can initiate evidence of the defendant's character. On the other hand, the prosecution cannot make an issue of defendant's character until the defendant has elected to put his character in issue.

Answer to Question 2

(B) Testimony of Devlin's reputation as a violent person is admissible to rebut the defendant's character evidence. The general rule is that the prosecution cannot initiate evidence of the bad character of the defendant merely to show that he is more likely to have committed the crime of which he is accused. However, if the defendant puts his character in issue by having a character witness testify as to his opinion of the defendant, the prosecution may rebut with evidence of the defendant's bad character. One means of rebutting defendant's character evidence is by calling qualified witnesses to testify to the defendant's bad reputation for the particular trait involved in the case. Here, Devlin put his character in issue by having Westin testify to Devlin's nonviolent nature, which is relevant to whether he committed the crime charged. The prosecution, assuming that it can show that the police officer has knowledge of Devlin's reputation in the community, can have the officer testify that Devlin had a reputation as a violent person. (A) is incorrect because Westin's credibility cannot be attacked by extrinsic evidence of specific instances of misconduct. While any matter that tends to prove or disprove the credibility of a witness is relevant for purposes of impeachment, extrinsic evidence of the witness's bad acts is not permitted to attack the witness's character for truthfulness. Unless the misconduct was the basis for a criminal conviction, for which a record of the judgment may be offered, bad acts may only be inquired about during cross-examination. Thus, a neighbor's testimony of Westin's specific instances of misconduct would not be admissible. (C) is incorrect. While Devlin has "opened the

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door" to evidence of his bad character by presenting testimony of his good character, the evidence must pertain to the particular trait involved in the case. Here, the defendant's capacity for violence has been placed in issue by defendant, but his reputation for truthfulness is not relevant to whether he has committed the crime for which he is charged. (And because Devlin has not placed his *credibility* in issue by taking the stand as a witness, his reputation for truthfulness cannot be offered for impeachment purposes.) (D) is incorrect because the basic rule is that when a person is charged with one crime, extrinsic evidence of his other crimes or misconduct is inadmissible if offered solely to establish a criminal disposition, regardless of whether defendant has placed his character in issue. [Fed. R. Evid. 404(b)] While evidence of other crimes is admissible if it is independently relevant to some other issue (*e.g.*, motive, intent, or identity), Devlin's battery conviction in this case appears to have no relevance other than as evidence of his violent disposition. It is therefore inadmissible.

Answer to Question 3

- (C) The testimony of Wally is character evidence; *i.e.*, it describes Don's general behavior patterns. Evidence of character to prove the conduct of a person in the litigated event is generally not admissible in a civil case. Here, Perry is trying to employ the circumstantial use of prior behavior patterns to draw the inference that Don drove at an excessive rate of speed at the time of the incident here at issue. Such a use of character evidence is not permitted. (A) is incorrect because character is not in issue. An exception to the general prohibition of character evidence is that, when a person's character itself is one of the issues in the case, character evidence is admissible. Don's character as a driver is not in issue; rather, his actions at a specific time and place are in issue. Thus, this exception does not apply to these facts. Regarding (B), it is true that character may be established by reputation evidence under the Federal Rules. However, as explained above, this is not a proper case for the use of character evidence. Therefore, (B) is incorrect. (D) is also incorrect. While it is true that testimony as to a person's reputation in the community may in some sense be considered hearsay (*i.e.*, such testimony reflects what people are saying about a person), reputation testimony is a permissible (and in fact, the most common) means of showing character. Thus, (D) does not present a basis for refusing to allow the testimony.

Answer to Question 4

- (A) The statement by Doug, who is one of the parties to the action, is admissible as an admission of a party-opponent. Federal Rule 801(d)(2) provides that a statement offered against a party that is the party's own statement is not hearsay and therefore cannot be excluded by the rule against hearsay. Assuming that it is relevant and not barred by other rules, the statement is admissible. Here, Doug's statement is being offered against him at trial. It is relevant because it can be interpreted as a prior acknowledgment by Doug that he was not totally blameless in the accident, which is undoubtedly inconsistent with his contentions at trial. The statement does not violate Federal Rule 408, which makes offers to compromise a disputed claim inadmissible to prove liability for the claim, because it was made by Doug before Peter made any claim; *i.e.*, there was not yet an actual dispute between the parties. Nor does the statement violate Rule 411, which bars evidence that a person has liability insurance when offered to show fault or ability to pay, because Doug's reference to his insurance was an intrinsic part of his admission and could not be readily severed from it. No other rules barring relevant evidence apply, so the statement should be admitted. (B) is incorrect because the statement against interest exception to the hearsay rule [Fed. R. Evid. 804(b)(3)] requires the declarant to be unavailable as a witness, which is not indicated here. More importantly, whenever the statement being offered is by a party, it will almost always be admissible as an admission of a party-opponent even though it does not qualify as a statement

against interest, because an admission has none of the restrictions that a statement against interest has. (C) is wrong because, as previously noted, Doug's statement was made before the existence of a disputed claim between the parties. The public policy rationale for Rule 408, which is to encourage settlement of disputes without litigation, does not come into play until litigation is at least threatened. (D) is incorrect because the statement is an admission by a party, which is treated as nonhearsay under the Federal Rules.

Answer to Question 5

- (D) The prosecutor's question was a proper means of impeaching Wendt's credibility. A witness may be impeached through cross-examination by evidence that he is biased or has an interest in the outcome of the case; *i.e.*, evidence that shows that he has a motive to lie. Since Wendt has been indicted for the same armed robbery, it clearly helps his case for him to provide an alibi for both of them. Furthermore, if Wendt were to testify that he and Doobad committed the robbery, his testimony could be used against him at his own trial as an admission. Thus, Wendt has a motive to lie and may be impeached by being asked on cross-examination about the facts that show bias, as the prosecutor did here. (A) is incorrect because the prosecutor is impeaching Wendt on the basis of bias, not on the basis of poor character for truthfulness. For the latter basis of impeachment, Federal Rule 609 requires a criminal conviction rather than just an indictment (unless it was for a crime probative of truthfulness, such as perjury, which could be the subject of cross-examination under Rule 608(b) even if there has not yet been a conviction). Thus, Wendt could not be impeached by being asked about an indictment (and (A) would then be the correct choice) if Wendt had been under indictment for a robbery other than the *same* robbery for which Doobad is being tried (since it would not show a motive to lie for Doobad). (B) misstates the law. A witness may be impeached by interrogating him as to specific acts of misconduct that may affect his character and show him to be unworthy of belief. [See Fed. R. Evid. 608(b)] (C) is incorrect because evidence is never admissible to show a person's criminal propensities. For impeachment purposes, the prosecution wants to attack the witness's credibility rather than his criminal propensity. The indictment, as opposed to the crime charged in the indictment, generally shows nothing with respect to the witness's character for truthfulness. Thus, to impeach this witness on a ground other than bias, the prosecutor would ask about the robbery itself, not the indictment.

Answer to Question 6

- (C) The question is a proper means of impeaching Weiner's character for truthfulness through specific instances of misconduct. Under Federal Rule 608(b), subject to the discretion of the trial judge, a witness may be interrogated on cross-examination with respect to any specific act that may impeach his character and show him to be unworthy of belief, as long as the act is probative of truthfulness (*i.e.*, an act of deceit or lying). A conviction of a crime is not necessary under this rule. Cheating on one's taxes is lying, so this would be a specific act of misconduct reflecting on Weiner's character for truthfulness. The objection should be overruled. (A) is incorrect. Any matter that tends to prove or disprove the credibility of a witness is relevant because it affects the weight that the trier of fact should give to his testimony. (B) is incorrect because Weiner is not being impeached by collateral extrinsic evidence (which is not permitted by Rule 608(b)); he is only being interrogated on cross-examination. (D) is incorrect because it states a requirement for impeachment by a prior conviction under Federal Rule 609, rather than by prior bad acts under Rule 608(b), which does not require that the conduct constitute a felony. Rule 609 is inapplicable because it requires a criminal conviction, and Weiner has never even been charged with tax evasion.

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Answer to Question 7

- (C) Evidence of Dunbad's purchases of insurance on Victa's life shortly before her death is admissible because it has a tendency to make Dunbad's murder of Victa more probable than it would be without the evidence. As a general rule, all relevant evidence is admissible if offered in an unobjectionable form or manner, as is the case here. This evidence is relevant because it establishes a motive for the murder, and facts showing motive for doing an act are circumstantial evidence that the act was done. Because there are no other grounds for excluding the evidence, it should be admitted. (A) is incorrect because exclusion of evidence on the ground of prejudice is a matter within the trial judge's broad discretion, and Federal Rule 403 requires that the evidence's probative value be *substantially* outweighed by the danger of unfair prejudice for it to be excluded. While all evidence is prejudicial to the adverse party, "unfair" prejudice refers to evidence that suggests a decision on an emotional or otherwise improper basis; evidence of the purchase of life insurance policies does not fall within this category. (B) is incorrect because it misapplies the rule excluding evidence of insurance. Federal Rule 411 excludes evidence of *liability* insurance on the issue of whether a person acted *negligently* or wrongfully. Evidence of insurance coverage (particularly where it is life insurance on the life of a homicide victim) is relevant and admissible for other purposes. (D) is incorrect for two reasons: First, the purchase of insurance does not establish a criminal disposition or a propensity to do criminal acts. Second, evidence of conduct offered to show criminal propensity is inadmissible character evidence under Federal Rule 404. Thus, if the evidence were offered to show criminal propensity, the objection should be sustained, not overruled. On the other hand, evidence of prior conduct (or misconduct) is specifically admissible under Rule 404(b) to show the defendant's motive, which is what the insurance evidence is intended to show.

Answer to Question 8

- (D) Birch's former testimony should be admissible. Under Federal Rule 804(b)(1), the testimony of a now unavailable witness given at another hearing under oath is admissible in a subsequent trial as long as there is a sufficient similarity of parties and issues so that the opportunity to develop testimony or cross-examine at the prior hearing was meaningful. In criminal cases, the accused or his attorney must have been present and have had the opportunity to cross-examine at the time the testimony was given. Here, Birch's testimony was given against Dogwood at a prosecution for the same conduct that constituted the felony murder offense for which Dogwood is now being prosecuted, and Dogwood had the same motive to challenge Birch's identification of him then as he does now. Hence, the testimony can be admitted under the former testimony exception to the hearsay rule. (A) is wrong because it is not essential, even in criminal cases, that the trials be on the same charge. The exception is satisfied as long as the subject matter is sufficiently similar that the defendant had an opportunity and similar motive to develop the declarant's testimony at the prior hearing. (B) is incorrect because the Supreme Court has rejected a Confrontation Clause challenge to the use of former testimony. As long as the defendant had the opportunity to cross-examine at the prior hearing and the witness is truly unavailable, the testimony is admissible. (C) is incorrect because it refers to prior statements of identification by a *witness at the present trial*. This case involves the hearsay exception for former testimony, which requires that the witness now be unavailable.

Answer to Question 9

- (B) The question of the existence or nonexistence of preliminary facts other than those of conditional relevance is to be determined by the court. All preliminary fact questions involving the standards

of trustworthiness of alleged exceptions to the hearsay rule are to be determined by the court. Thus, the court, not the jury, must decide whether a purported business record was made in the regular course of business. In the case at bar, the question to be decided is whether or not the "synopsis of sales" was in fact made during the regular course of business. Thus, this issue must be decided by the judge. During the hearing at which the judge makes the preliminary fact determination, both parties must be given an opportunity to present evidence with regard to the fact to be determined. Also, it is within the judge's discretion whether the jury should be excused during the preliminary fact determination. (B) is correct because it calls for the determination as to whether the document is a business record to be made by the judge, it allows for the presentation of evidence by both sides, and holding the hearing in the presence of the jury is within the judge's discretion. (A) is incorrect because it indicates that the hearing must be conducted outside the presence of the jury. (C) incorrectly calls for the jury to decide the issue. There is no question here of conditional relevance. The question is one of competency of the evidence. Therefore, this is not the type of preliminary fact to be decided by the jury. (D) also reaches the incorrect conclusion that the jury has the ultimate decision on this matter. Only the judge may decide whether the document in question qualifies as a business record. Once the decision has been made, this issue cannot be further pursued to the jury.

Answer to Question 10

- (D) Schrinkov should not be allowed to testify because Willie's credibility has not been impeached. Evidence of a witness's character is admissible only after the witness's character for truthfulness has been attacked. [Fed. R. Evid. 608(a)] Dr. Schrinkov's testimony would have been admissible if Willie's veracity had been attacked on cross-examination, but here the defense did not cross-examine Willie. (A) is incorrect because the rule for reinforcing a witness's veracity differs from the rule for challenging it. A party may put witnesses on the stand to bolster another witness's credibility only when the witness's credibility has been attacked. (B) is wrong because there is no indication that Willie's ability to testify is in issue or that his testimony may confuse the jury. Federal Rule 702 provides that expert testimony is admissible if the subject matter is one where scientific, technical, or other specialized knowledge would assist the trier of fact in understanding the evidence or determining a fact in issue, and Rule 703 permits an expert's opinion to be based on observations made at trial. However, evaluating the reliability of an eyewitness's identification is traditionally within the province of the jury. Since the court has determined that Willie is competent to testify, the jury has the ability to decide on its own what weight to give his testimony. (C) is incorrect because it is too broad. While courts generally allow a jury to evaluate a witness's veracity on its own, expert testimony would be allowed if Willie's credibility had been attacked on cross-examination or by other witnesses on the ground that he was too young to testify truthfully. Since this is an area where an expert's specialized knowledge would help the jury in evaluating Willie's testimony, Dr. Schrinkov probably would have been allowed to testify.

Answer to Question 11

- (D) Lorca's comparison of the letters is not a proper basis for authenticating Wilson's letter. Before a writing may be received into evidence, the writing must be authenticated by proof showing that the writing is what the proponent claims it is. The Federal Rules list several examples of proper methods of authentication through evidence of the genuineness of the handwriting of a letter writer. None of them, however, would permit an in-court comparison by Lorca of the Wilson-Lorca letter with another letter established to be Wilson's. Under Federal Rule of Evidence 901(b), an **expert witness** or the **trier of fact** can determine the genuineness of a writing by comparing the questioned writing with another writing proved to be genuine. Thus, choice (C)

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would be a proper basis for admitting Wilson's letter, because the jury, as the trier of fact, can compare the Wilson-Lorca letter with another letter that Wilson has admitted writing. Lorca, however, cannot undertake that comparison because he is not an expert witness. While Rule 901 does not limit the methods of authentication, the rule governing opinion testimony by lay witnesses [Fed. R. Evid. 701] would preclude Lorca's in-court comparison. To be admissible, opinion testimony by lay witnesses must be (i) rationally based on the perception of the witness; (ii) helpful to a clear understanding of his testimony or to determination of a fact in issue; and (iii) not based on scientific, technical, or other specialized knowledge. Here, Lorca can add nothing to the jury's determination of the authenticity of the letter because the jury can compare for itself that letter with a letter Wilson has admitted writing. Because Lorca's in-court comparison would not be helpful to the jury here, it would not be a proper basis for authenticating Wilson's letter. (A) is incorrect because a lay witness who has personal knowledge of the handwriting of the supposed writer may state her opinion as to whether the document is in that person's handwriting. Therefore, Wilson's wife could properly authenticate the letter by testifying that she recognizes his handwriting. (B) is incorrect because Lorca's testimony is proper circumstantial evidence of authentication under the reply letter doctrine. Under this doctrine, a letter may be authenticated by evidence that it was written in response to a communication sent to the claimed author. The content of the letter must make it unlikely that it was written by anyone other than the claimed author of the writing. Here, Wilson's letter to Lorca can be properly authenticated by Lorca's testimony that it was a reply to a letter that he sent to Wilson.

Answer to Question 12

- (B) Warren's testimony is admissible under the present state of mind exception to the hearsay rule. Under Rule 803(3), a statement of a declarant's then-existing state of mind is admissible as circumstantial evidence tending to show that the intent was carried out. [*See Mutual Life Insurance Co. v. Hillmon* (1892)] Here, Vanessa's statement to Warren is being offered to show that she probably went to the store where Trent was working that night, which is a material issue in the case. (A) is incorrect because the hearsay exception for present sense impressions applies to statements describing or explaining an event made while the declarant was perceiving the event, or immediately thereafter. Here, Vanessa's statement concerned her intent to do something, not an event that she was perceiving. (C) is incorrect because the hearsay exception for present state of mind does not require that the declarant be unavailable to testify. Unavailability is only required for (i) former testimony, (ii) statements against interest, (iii) dying declarations, and (iv) statements of personal and family history. (D) is wrong because Vanessa's statement is admissible under the state of mind exception even though her state of mind is not directly in issue. Her state of mind or intent needs to be established before the inference can be drawn that she acted on that intent by going to see Trent.

Answer to Question 13

- (B) Phil's testimony is admissible as a statement of past physical condition. As an exception to the hearsay rule, the Federal Rules admit statements of past physical condition if made to medical personnel to assist in diagnosing or treating the condition. [Fed. R. Evid. 803(4)] Here, proper treatment by Phil of Violet's injuries required disclosure of the nature and duration of such injuries. Thus, Violet's statement as to having been beaten, and the time span involving the beatings, is pertinent to her diagnosis and treatment. Rule 803(4) also allows statements of the cause or source of the conditions insofar as reasonably pertinent to diagnosis or treatment. In cases of domestic child abuse, courts have held that the identity of the attacker is pertinent for purposes of physical and psychological treatment. Here, Violet's statement that her mother's live-in boyfriend was her assailant would qualify under this rule. Consequently, Phil's testimony as to

Violet's statement is admissible under this exception to the hearsay rule. (A) is incorrect because the federal courts do not recognize any physician-patient privilege unless they are applying the law of a state recognizing the privilege, and here Darryl is being sued under a federal statute. Hence, no one would have to waive the privilege for Phil to testify. (C) is incorrect because, as explained above, statements as to the cause of a condition, including the identity of the assailant under the circumstances in this case, are admissible under this hearsay exception. (D) is incorrect. Unlike the hearsay exception for statements of family history, the exception for statements of past physical condition does not require that the declarant be unavailable.

Answer to Question 14

- (B) Julio's testimony is being offered to prove the truth of the matter asserted and is thus inadmissible hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. [Fed. R. Evid. 801(c)] Julio is attempting to testify to an out-of-court statement made by himself. This statement is being offered to prove the truth of the matter asserted in the statement (that the tanks overheated), because Julio is seeking to prove that overheating of the tanks caused the fire. Therefore, the statement comes within the definition of hearsay. Because no exception to the hearsay rule is applicable, testimony as to the statement is not admissible. It is true, as (C) states, that Julio's testimony is evidence of a fact in issue. However, (C) is incorrect because such evidence, as hearsay, is inadmissible. While Julio can testify as to his *present* recollection that the tanks overheated, he cannot use a prior out-of-court statement on that issue because the adverse party cannot effectively cross-examine the witness-declarant as to perception, memory, etc., *at the time the statement was made*. This is the main reason for the rule excluding hearsay. (A) is incorrect because a lack of other evidence about overheating of the tanks would not render admissible this otherwise inadmissible evidence. (D) is incorrect because Julio's testimony is offered to prove its truth, not as a verbal act. When an out-of-court statement is introduced for any purpose other than to prove the truth of the matter asserted in the statement, the statement is not hearsay. An example of such a statement is a verbal act (or legally operative fact), which is an utterance to which the law attaches legal significance. Evidence of such a statement is not hearsay because the issue is whether or not the statement was made. For instance, in an action on a contract, words that constitute the offer or acceptance are not hearsay, because they are offered only to prove what was said, and not that it was true. Here, Julio's out-of-court statement is not being offered simply to prove that it was made. Rather, the statement is offered to prove that its contents are true; *i.e.*, that the tanks overheated. Thus, the testimony is not evidence of a verbal act.

Answer to Question 15

- (A) Frogman's testimony should be admissible because it is relevant nonhearsay based on firsthand knowledge. The testimony is relevant to Gray's age discrimination suit because it is being offered to prove that the Board's motivation in firing Gray was his age. It is not hearsay, even though Frogman is repeating the statement of an out-of-court declarant (Cobb), because it is not being offered to prove the truth of what Cobb was asserting (*i.e.*, that Gray was in fact too old to fit the corporate image). Rather, it is being offered to show its effect on the Board; *i.e.*, it is being offered as circumstantial evidence of the Board's motivation in deciding to fire Gray, which is the critical issue in the case. Finally, Frogman is competent to testify to Cobb's statement since he heard it firsthand, and no other restrictions on the admissibility of relevant evidence are applicable in this case. (B) is incorrect because, as discussed above, the testimony as to Cobb's statement is not hearsay because it is not being offered to prove the truth of that statement. Even if it

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were being offered to prove its truth, it would not be hearsay under the Federal Rules because it qualifies as a vicarious admission by a party-opponent. [Fed. R. Evid. 801(d)(2)(D)] Cobb made the statement in his capacity as chairman of the board of Macho; hence, it will be admissible against Macho as an admission. (C) and (D) are incorrect because the best evidence rule applies only when the writing or recording is a legally operative or dispositive instrument or the knowledge of the witness comes from reading the document or listening to the recording. The best evidence rule does not apply where, as here, the fact to be proved exists independently of any writing or recording, and the witness testifying to the fact (Frogman) has knowledge of the fact independent of the audiotape or the transcription.

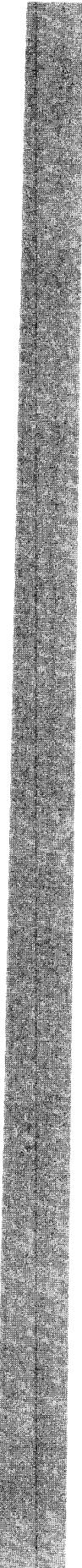
Answer to Question 16

- (C) The barograph record is admissible only if it is properly authenticated. Before a writing or any secondary evidence of its content may be received in evidence, the writing must be authenticated by proof showing that the writing is what the proponent says it is. In general, a writing may be authenticated by any evidence that serves to establish its authenticity. One means of authentication under Federal Rule 901(b) is by evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. Hence, for Akiro's barograph record to be admissible, evidence must be offered that the instrument is accurate and that it was in good working order when the record was produced. (A) is incorrect because past recollection recorded is inapplicable here. Past recollection recorded is an exception to the hearsay rule that applies when a witness testifying about an event has insufficient recollection of it, even after consulting a writing of the event. The writing itself may be read into evidence if a proper foundation has been laid for its admissibility. Here, no witness is testifying—the barograph record is being offered independent of any testimony. (B) is wrong because the hearsay exception for records of regularly conducted activity applies only to records made in the regular course of a business. Although "business" is defined broadly under the Federal Rules to include churches and other not-for-profit organizations, it does not include what Akiro does for a hobby in his backyard. Hence, that hearsay exception is inapplicable. (D) is incorrect because the barograph record is not hearsay. Under the Federal Rules, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" under the Federal Rules is an oral or written assertion or nonverbal conduct by a **person** intended as an assertion. A machine such as the barograph is not making or intending to make an assertion when it creates a record of an event; hence, the record is not a "statement" for purposes of the hearsay rule.

Answer to Question 17

- (A) Walter's testimony is admissible only to challenge the credibility of Bob's earlier inconsistent statement. Because the credibility of a hearsay declarant is as much at issue as the credibility of an in-court witness, Federal Rule 806 allows statements of a hearsay declarant to be impeached to the same extent as those of an in-court witness. Thus, a statement of the declarant made at any time that is inconsistent with his hearsay statement may be offered into evidence for impeachment purposes. Here, Bob's hearsay statement (which was admissible as an excited utterance) was testified to by Wilma. Bob's subsequent statement to Walter is inconsistent with his hearsay statement and is therefore admissible to discredit that statement. (B) is wrong because the statement would be hearsay not within any exception if it were offered as substantive evidence. Under Federal Rule 801(d)(1), prior inconsistent statements are only admissible as substantive evidence when they are statements of a witness who is now testifying at trial and were made under oath at a prior trial or deposition. (C) is wrong because the general requirement that an impeached

witness be given an opportunity to explain or deny an apparently inconsistent statement does not apply to hearsay declarants. Because hearsay statements are often admissible at trial after the declarant has died or is otherwise unavailable, Rule 806 provides that the declarant need not be given an opportunity to explain or deny statements that are inconsistent with the declarant's hearsay statement. (D) is wrong because the statement is admissible for the purpose of impeachment; hence, it does not fall within the definition of hearsay.



REAL PROPERTY ANSWERS

Answer to Question 1

- (B) Magnolia has a life estate pur autre vie and can be compelled to pay the property taxes. A life estate is an estate that is not terminable at any fixed or computable period of time, but cannot last longer than the life of a particular person. A life estate pur autre vie (for the life of another) is a life estate measured by the life of someone other than the life tenant. Such an estate will be created when the grantor conveys a life estate to A and A later conveys his interest to B. B owns an estate measured by A's life; it ends when A dies. Here, Nelson received a life estate in Redacre because the property would go to Dora on Nelson's death. When Nelson conveyed "his interest" to Magnolia, she received a life estate only for the period of Nelson's life. Under the doctrine of waste, the holder of a life estate is entitled to all the ordinary uses and profits of the land, but she cannot lawfully do any act that would injure the interests of the person who owns the remainder. If she does, the future interest holder may sue for damages and/or to enjoin such acts. Permissive waste occurs when the life tenant fails to take reasonable measures to protect the land, such as paying property taxes that are due. A life tenant is obligated to pay all ordinary taxes on the land to the extent of its reasonable value. Thus, Magnolia is obligated to pay property taxes for her period of occupancy. Dora holds a remainder interest in Redacre because she will acquire it when Nelson dies; therefore, she can protect her interest by compelling Magnolia to pay the taxes. (A) is incorrect because Magnolia only received the interest that Nelson had, which was an estate for his life. He did not have the power to convey a life estate for the period of Magnolia's life. (C) is wrong because, as discussed above, a life tenant has a duty to pay such taxes. (D) is incorrect because there was nothing in Orville's conveyance of the life estate to Nelson that prevented him from conveying his interest to another. Despite the general rule against restraints on alienation of property interests, a restraint on the transfer of a life estate that causes it to be forfeited if a transfer is attempted is a valid restraint on alienation. However, any such restraint must be specified in the conveyance itself. Here, no restraint on alienation existed in the conveyance to Nelson; thus, he was free to convey his interest to Magnolia.

Answer to Question 2

- (D) Suzanne takes a life estate pursuant to Hiram's will as the eldest grandchild living at Horace's death, but the remainder to Hiram's great-grandchildren is void because it violates the Rule Against Perpetuities. The Rule Against Perpetuities requires that an interest in property, to be valid, must vest, if at all, not later than 21 years after some life in being at the creation of the interest. In the case of a will, the perpetuities period begins to run on the date of the testator's death, and measuring lives used to show the validity of an interest must be in existence at that time. An interest that violates the Rule is void and is stricken. However, all other interests created in the instrument of transfer that are valid under the Rule are given effect. Here, at the time the interests are created (Hiram's death), Horace's life estate vests immediately. The next life estate (to the eldest grandchild living at Horace's death) will vest, if at all, upon the death of Horace, a life in being at the creation of the interest. Thus, the life estate to such eldest grandchild (which turned out to be Suzanne) is valid under the Rule. However, the gift to Hiram's great-grandchildren may not vest within a life in being plus 21 years. A grandchild born after Hiram's death (who is therefore not a life in being) may survive Horace as the eldest grandchild of Hiram, and may live for 21 years after Horace's death. In that event, the gift over to the great-grandchildren would vest outside of lives in being plus 21 years. It does not matter that the grandchild who actually survived Horace as the eldest, Suzanne, was alive at Hiram's death (and therefore a life in being). The interest is void because there is a *possibility*, viewed at the time the interest is created, that it

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will not vest within the period under the Rule. Therefore, the attempted gift of a remainder to the great-grandchildren is void under the Rule, and is stricken. The failure of this gift leaves a reversion in the testator, Hiram, which will pass to his heirs. (A) is incorrect because it ignores the fact that, despite the invalidity of the attempted gift to Hiram's great-grandchildren, Suzanne's life estate remains valid and takes effect. (B) incorrectly states that title goes to the four grandchildren living at Hiram's death. According to Hiram's will, the only interest to be given to any grandchild was a life estate, to be given to the eldest grandchild living at Horace's death. Thus, of the four grandchildren listed in (B), only Suzanne (as the eldest grandchild living at Horace's death) is entitled to an interest, and then only to a life estate. (C) is incorrect because, as explained above, the remainder to the great-grandchildren is stricken as violative of the Rule Against Perpetuities. Thus, the remainder goes to Hiram's heirs rather than to the great-grandchildren.

Answer to Question 3

- (D) The attempted contingent gift to the Boy Scouts' Council is void under the Rule Against Perpetuities. Under the common law Rule Against Perpetuities, an interest must vest, if at all, within 21 years of a life in being. The devise to Ronald gives him a fee simple determinable subject to an executory interest and attempts to give the Boy Scouts an executory interest in fee simple. However, the Boy Scouts' interest is void under the Rule because the camp might be used for noncamping or nonrecreational purposes long after any life in being plus 21 years. Thus, what remains is Ronald's fee simple determinable interest. Since Powell did not otherwise provide who would take if the Boy Scouts' interest failed, he was left with a possibility of reverter. Such an interest is not subject to the Rule Against Perpetuities. As Powell's sole heir, Erma took his possibility of reverter, and upon her death, her heir, Harold, took the interest. Thus, Harold has a possibility of reverter and the Boy Scouts have nothing, making (D) correct and (A) incorrect. (B) is incorrect because an executory interest is a future estate of transferees. Harold's interest arises through descent from Powell, the transferor, and so it must be a possibility of reverter rather than an executory interest. (C) is incorrect; remainders, whether vested or contingent, do not follow fees simple, including fees simple determinable, because remainders follow the natural termination of the preceding estate (a life estate) and fees simple do not naturally terminate. Any interest following a fee simple determinable is either a possibility of reverter (if held by or through the transferor) or an executory interest (if held by or through the transferee).

Answer to Question 4

- (A) The nonassignment clause is valid and Miller may enforce it by terminating the lease and regaining possession of the store. Nonassignment clauses in leases are valid and enforceable even though strictly construed, and allow the landlord in most states to refuse to consent to an assignment even if the refusal is unreasonable. If a tenant makes an assignment in violation of a nonassignment clause in the lease, the transfer is not void. However, the landlord may terminate the lease if specifically provided by the nonassignment clause. Alternatively, he may sue for damages if he can prove any. Only choice (A) upholds the validity of the nonassignment clause. Choice (B) is incorrect. While most courts require a landlord to mitigate damages where a tenant unjustifiably abandons the property, this duty does not affect the landlord's power to terminate the lease because of a breach of the lease agreement. Dwight will still be liable to Miller for any damages from the unauthorized assignment, including the cost of evicting Ariel. (C) is incorrect because most states do not require that a landlord's refusal to accept a new tenant be reasonable. Furthermore, the fact that Ariel is operating the same type of business does not mean that Miller has suffered no harm, since she might be a much poorer credit risk than Dwight. (D) is incorrect.

As an exception to the general rule that any restriction on the transferability of a legal interest in property is void, a provision in a lease prohibiting the lessee's assignment or subletting of her leasehold interest without the consent of the landlord is given effect in all jurisdictions.

Answer to Question 5

- (D) Dan must pay 10 days' lodging because his notice to terminate will not become effective until then. In the usual case, a hotel guest is treated as a licensee rather than a tenant. Here, however, the court found that the parties created a tenancy because they specifically agreed to a week-to-week arrangement at a special weekly rate. A periodic tenancy arises when the parties do not fix the duration of the tenancy. It continues from period to period and is automatically renewed for another period until terminated by the giving of proper notice. The period is generally based on an express understanding between the parties or an implied understanding based on the payment of rent. Dan's arrangement with the hotel constitutes a periodic week-to-week tenancy because it was of indefinite duration and "rent" was paid each week. To terminate a periodic tenancy of less than one year, a full period in advance of the period in question is required by way of notice. For a week-to-week tenancy, notice at least one full week prior to vacating would have to be given prior to the beginning of the period. Thus, Dan's notice had no effect on his liability for that week's rent and would operate as one week's notice starting at the beginning of the next week. (A) is incorrect. If the parties had expressly agreed that either party could terminate at any time, a tenancy at will would have been created and Dan would be liable for nothing. However, the payment of rent on a regular periodic basis will cause a court to treat the tenancy as a periodic tenancy. (B) is incorrect because it does not take the one week's notice requirement into account. (C) is incorrect because the notice must fix the last day of the period as the date of termination rather than some intervening day. Thus, the notice period does not begin to run until the end of the current week.

Answer to Question 6

- (B) Wallace has a valid easement, which was created by express grant, properly recorded, and presumed to be of perpetual duration. It is enforceable against Cyd, the subsequent purchaser of the servient estate, because nothing has occurred to terminate the easement. While an easement may be extinguished by abandonment, mere nonuse does not qualify as abandonment. Rather, there must be a physical manifestation of an intent to permanently abandon (*e.g.*, building a permanent structure blocking access to the easement). Since Wallace did not manifest an intent to permanently abandon, (A) is incorrect. (C) is incorrect because Wallace has an easement created by express grant, not implied by necessity. An easement by necessity arises by implication when the owner of a tract of land sells part of the tract and by this division deprives one lot of access to a public road or utility line. Aside from the fact that Wallace has an express easement and need not resort to one by implication, nothing in these facts indicates that Wallace purchased Woodlot from the owner of Smoothacre or that the paved way through Smoothacre was Woodlot's only access to *any* public road. (D) is incorrect because the easement was not interfered with for the 15-year prescription period. For an easement to terminate by prescription, the owner of the servient tenement must so interfere with the easement as to create a cause of action in favor of the easement holder. The adverse use must be open, notorious, continuous, and nonpermissive for the requisite period. The original owner of the servient estate, Arnold, apparently did nothing to interfere with Wallace's easement. Cyd, Arnold's successor, did everything necessary to terminate the easement by prescription, but his adverse use has lasted only six months instead of 15 years.

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Answer to Question 7

- (D) Michael's leasing Blackacre to Theresa for 15 years will allow him to acquire title by adverse possession. Title by adverse possession results when the owner of real property does not, within the period set by the statute of limitations, take legal action to eject a possessor who claims adversely to the owner. The owner is thereafter barred from bringing suit for ejectment and title to the property vests in the possessor. For one to obtain title by adverse possession, the possession must be (i) open and notorious (*i.e.*, such as the usual owner would make of the land), (ii) actual and exclusive (*i.e.*, not in conjunction with the true owner or the public at large), (iii) continuous throughout the statutory period, and (iv) hostile. Here, Michael's act of leasing Blackacre is a kind of use that a true owner would make of the property; thus, it is an "actual" possession even though Michael himself is not living on the property. Theresa's occupancy is open and notorious, since Seymour discovered it as soon as he came to look at Blackacre. Michael's possession is exclusive because he has allowed only his tenant to enter onto the property. It is continuous because his tenant has occupied the property throughout the 15 years, and it is hostile because Michael acted without the true owner's permission and in derogation of the true owner's rights. Having satisfied all of the requirements for adverse possession, Michael should be declared to be the owner of Blackacre. (A) is incorrect because a lease to a third party does constitute actual possession by Michael. Leasing the property is a type of use that a true owner would make of the property, and occupancy by the adverse possessor's tenant would give the true owner notice that a trespass is occurring. (B) is incorrect because Seymour's ignorance of the fact that Blackacre was occupied is not an excuse. Theresa's occupancy was sufficiently apparent to put Seymour on notice that a trespass was occurring. His failure to visit the property during the statutory period provides him with no defense. (C) is incorrect because Seymour's abandonment of Blackacre is not sufficient to bestow title by adverse possession on Michael. Michael must satisfy the adverse possession requirements to obtain title.

Answer to Question 8

- (B) Bart cannot evict Newt because he is not yet the owner of Springfield. The instrument of conveyance signed by Homer conveyed only a future interest and not a present estate. A future interest is an estate that does not entitle the owner thereof to possession, but it will or may in the future become a present interest. Because Homer's estate is not a life estate, the future interest conveyed to Bart is an executory interest. Furthermore, it is a springing executory interest because it divests the estate of the transferor, Homer (*i.e.*, Homer's fee simple will be cut short if and when Bart receives his degree before age 30). Because Homer has retained his present estate, which is a fee simple subject to the springing executory interests of Bart and Lisa, only Homer would have the power to evict Newt. Bart, as the holder of a future interest, has no right to possession of the property and therefore has no cause of action against another in possession. (A) is incorrect because the language of Homer's conveyance clearly indicates that he is conveying a future interest rather than a present interest. (A) would have been correct if Homer had used the following language in his conveyance: "to my son Bart; provided, however, that if Bart does not receive a college degree by his 30th birthday, title shall pass to my daughter Lisa." Bart would have had a fee simple subject to divestment by Lisa's executory interest. Here, however, Homer expressly stated that Bart's receipt of a college degree was a condition precedent to the transfer of the property. Hence, Bart has only a future interest and not a fee simple of any kind. (C) is incorrect. If Bart had acquired a present possessory interest in the property, nothing would have prevented him from evicting Newt, regardless of his motivation. (D) is incorrect. If Homer had conveyed his present interest in the property, Newt's tenancy would have been terminated by operation of law because it was, at most, a tenancy at will. However, Homer conveyed only a future interest to Bart, so the conveyance had no effect on Newt's tenancy.

Answer to Question 9

- (A) The court should require specific performance of Partridge and Wren. When a transfer of land is preceded by a contract for sale, the risk of loss to the property during that time interval is imposed on the buyer in most jurisdictions. Thus, despite a loss due to fire or other casualty (assuming it was not due to the fault of either party), the buyer must still pay the contract price at the closing date unless the contract provides otherwise. Consequently, Partridge and Wren were still under a duty to tender the amount due on the property. Their failure to do so puts them in breach of contract, allowing Eagle to obtain specific performance (payment of the balance due on the contract). (B) is wrong because the preferred remedy for Eagle is specific performance. While Eagle could obtain a damage remedy based on the difference between the contract price and the market value of the land on the date of the breach, that would leave him with the task as executor of trying to resell the property. Because land is considered unique, a buyer is entitled to specific performance of the contract. On mutuality of remedy grounds, the seller (Eagle) can also get that remedy. (C) is incorrect because, as discussed above, the destruction of the garage does not allow Partridge and Wren to avoid performing the contract. They bore the risk of loss and could not obtain a refund of the earnest money even if Eagle had not sought to enforce the contract. (D) is incorrect because the contract can be specifically enforced. The reason that the buyer bears the risk of loss is that the doctrine of equitable conversion treats the buyer as the equitable owner of the land once the contract is signed. Hence, Owl's death would not prevent Partridge and Wren from specifically enforcing the contract by requiring Eagle to transfer legal title. Mutuality of remedy requires that this same remedy be available to Owl's executor, who is regarded as being owed a debt of the balance due on the contract. Eagle can therefore require payment of the balance as specific performance of the contract.

Answer to Question 10

- (C) The court is likely to rule against Oiler because the covenant providing for the right of first refusal violates the Rule Against Perpetuities. Under the Rule, no interest in property is valid unless it must vest, if at all, no later than 21 years after a life in being at the creation of the interest. The Rule applies to rights of first refusal. Thus, if the right might be exercised later than the end of the perpetuities period, it is void. Since the interest ran to both parties' heirs and assigns, there was no limit on Oiler's right of first refusal; therefore, it could easily have been exercised beyond the perpetuities period, and so it violates the Rule. (A) is incorrect. The recording statute quoted by the question is a race-notice statute. Under a race-notice statute, a subsequent bona fide purchaser, such as Cowboy, is protected if he records before the prior grantee. To qualify as a bona fide purchaser, a person must, at the time of the conveyance, take without actual, constructive, or record notice of the prior interest. Since the deed to Astro was recorded, Cowboy had record notice of the right of first refusal because it was in his chain of title. Had the covenant been within the perpetuities period, Cowboy would not have been protected by the recording act. However, since the covenant is void, Oiler has no right to the property. Similarly, (B) is incorrect. The bad faith transaction of Astro and Ranger would not have overcome the covenant had the covenant not violated the Rule. In light of the fact that the covenant is void, however, their bad faith is irrelevant. (D) is incorrect because the covenant runs with the land. The requirements for the burden of the covenant to run are met in this case: The fact that the original covenanting parties intended the right of first refusal covenant to run to their successors is indicated by the use of the language "heirs and assigns." The notice requirement was fulfilled by recording the deed. The horizontal privity requirement is satisfied by the fact that Oiler and Astro shared an interest in the land independent of the covenant, *i.e.*, as grantor and grantee. The necessary vertical privity is also present, because Ranger and Cowboy held the entire durational

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interest held by Oiler when the covenant was made. Last, the covenant runs with the land because it “touches and concerns” the land; *i.e.*, it diminishes the landowner’s right with respect to Cattlefork.

Answer to Question 11

- (B) The court should partition Forestacre into two separate tracts. A court will presume that the devise to Pelt and Dash gave them a tenancy in common in Forestacre. Hence, each of them has the right to possess all portions of the property; neither of them has the right to exclusive possession of any part. However, any tenant in common has a right to judicial partition of the property, either in kind or by sale and division of the proceeds. When co-tenants are squabbling and cannot come to any agreement, the remedy of partition terminates the co-tenancy and divides the common property. Since Pelt and Dash cannot agree on the use of Forestacre by members of the hunting club, the court will probably partition the property. (A) is wrong because, even though there is no indication that Dash has ousted Pelt, *i.e.*, wrongfully excluded him from possession of the property, Pelt is entitled to the remedy of partition because the parties cannot agree on the use of the property. (C) is wrong because Torrens did not own Forestacre at the time he attempted to convey the property in trust. While the instrument Torrens executed was in writing and properly identified the trustees and an appropriate beneficiary, Torrens had already conveyed away in fee simple his interest in the property; thus, he did not have the power to create a trust of Forestacre. (D) is wrong despite the fact that Pelt is entitled to possession and use of all of Forestacre to the same extent as Dash. Since the co-tenants cannot agree on this particular use of the land by members of the hunting club, a court will grant whichever tenant is before it the remedy of partition.

Answer to Question 12

- (B) Dave will prevail only against Carla because only Carla has committed an actionable breach of the covenant against encumbrances. A grantor making a conveyance by general warranty deed generally makes five covenants for title, and warrants against title defects created both by herself and by all prior titleholders. The covenant of seisin, the covenant of right to convey, and the covenant against encumbrances are present covenants and are breached, if at all, at the time of conveyance. The covenant for quiet enjoyment and the covenant of warranty are future covenants and are breached only upon interference with the possession of the grantee or his successors. Unlike the future covenants, the present covenants do not “run” with the grantee’s estate and cannot be enforced against the covenantor by successive grantees in most jurisdictions. Here, because the party holding the judgment lien has not taken any action to enforce it, there is no disturbance of possession and the future covenants have not been breached. Since the only covenant that has been breached was the covenant against encumbrances, only Dave’s grantor, Carla, is liable. (A) is incorrect because most jurisdictions hold that a covenant against encumbrances is breached even if the grantee knew of the encumbrance, particularly if it is an encumbrance on title, such as a mortgage or lien, rather than a physical encumbrance such as an easement. (C) is incorrect even though it is true that Brenda will not be liable because she conveyed by special warranty deed, which covenants only that the grantor herself did not create any title defects. As discussed above, Allen is not liable to Dave because any future covenants he made have not been breached. (D) is incorrect because, as discussed above, neither Allen nor Brenda has breached any covenant owed to Dave, regardless of their knowledge of the lien. On the other

hand, Carla has breached her covenant against encumbrances despite her ignorance of the judgment lien.

Answer to Question 13

- (C) Christie owns Blackacre free of the mortgage because Brittany's status as a bona fide purchaser without notice brings the "shelter rule" into play. In general, a person who takes from a bona fide purchaser will prevail against any interest that the transferor-bona fide purchaser would have prevailed against, even if the person taking the property has actual or record notice of the prior interest. Hence, Brittany's status as a bona fide purchaser without notice "shelters" Christie from Maritime Bank's interest, and (C) is correct. (A) is incorrect because Christie's "sheltered" status as a transferee of a bona fide purchaser makes the fact that the recording act does not directly protect donees irrelevant. (B) is incorrect because a pure notice recording statute requires actual or constructive notice at the time of the conveyance. When Brittany conveyed to Christie, Maritime Bank had not yet recorded. (D) is incorrect because mortgagees for value are treated as "purchasers" under the recording act.

Answer to Question 14

- (A) Darlene's ownership of Copperacre is subject to Yukon's interest because Yukon's interest was first in time. The common law rule that priority is given to the grantee who was first in time still applies unless operation of the jurisdiction's recording statute changes the result. The statute in this question is a *race-notice* statute, under which a subsequent bona fide purchaser is protected only if she records her interest before the prior grantee does. While Darlene is a bona fide purchaser, she must still win the race to the recording office to prevail over Yukon's prior interest. Since neither party has recorded in this fact pattern, Darlene will take the property subject to Yukon's prior interest. (B) is wrong because Yukon's option is treated as an interest in land just like his leasehold interest, regardless of the fact that it cannot yet be exercised. (C) is wrong because Darlene probably would prevail if she were to record now. Under the recording statute, it is irrelevant that Darlene became aware of Yukon's interest at a later point; at the time of the conveyance to her, she did not have notice of his interest and therefore qualifies as a bona fide purchaser. Had she recorded when she first encountered Yukon, she would have prevailed. Even if she were to record now, she could still prevail if Yukon does not record first. (D) is incorrect because it states the result under a *notice* statute. In contrast to a notice statute, the race-notice statute in the question would still permit Yukon to prevail even though he failed to record before Darlene purchased the property, as long as Darlene does not record before he does.

Answer to Question 15

- (A) Unless Tully pays off the entire loan, First Bank can foreclose on Sweetacre. When a mortgagor sells his mortgaged property and gives a deed, the grantee takes subject to the mortgage, which remains on the land. A mortgage containing a "due-on-sale" clause allows the lender to demand full payment of the loan if the mortgagor transfers an interest in the property without the lender's consent. Under federal law, due-on-sale clauses are generally enforceable. Here, First Bank apparently did not consent to the transfer and Burt did not pay off the mortgage. The mortgage remained on Sweetacre and will allow First Bank to foreclose on Sweetacre unless Tully extinguishes the mortgage by paying off the entire loan. (B) is incorrect because First Bank cannot require Tully to assume the mortgage, which would make Tully personally liable on the loan (*i.e.*, make him liable for the balance of the loan if the bank forecloses and the foreclosure sale does not bring in enough to pay off the loan balance). However, First Bank can foreclose even if Tully does not agree to assume the mortgage. While the original mortgagor remains primarily and

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personally liable, if the mortgagor has not paid off the mortgage and the grantee (Tully) does not pay, the mortgage may be foreclosed because it remains on the land. (C) is incorrect because there is no indication that Tully signed an assumption agreement. The due-on-sale clause will allow the bank to foreclose but will not make Tully personally liable for any deficit after the foreclosure sale. (D) is incorrect. While some states refused to enforce these clauses unless the lender's security was endangered by sale to a poor credit risk, federal statute now makes due-on-sale clauses enforceable even if the lender is using it simply as an opportunity to raise the interest rate when the property is sold.

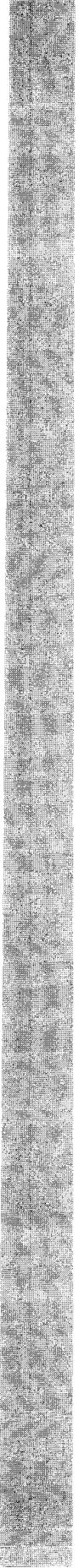
Answer to Question 16

- (B) TNB can require either Able or Brett to pay the deficiency. When a mortgage is foreclosed and the proceeds of the foreclosure sale are insufficient to satisfy the mortgage debt, the mortgagee can bring a personal action against the mortgagor for the deficiency. The mortgagor remains personally liable on the mortgage loan regardless of any subsequent transfers of the mortgaged property. Hence, Able remains liable to TNB for the deficiency because he was the original mortgagor. Brett is also liable for the deficiency because he "assumed payment of" the mortgage. When a grantee signs an assumption agreement, promising to pay the mortgage loan, he becomes primarily liable to the lender (who is a third-party beneficiary of the assumption agreement), while the original mortgagor becomes secondarily liable as a surety. Thus, TNB can seek judgment against either Able or Brett for the deficiency, making (B) correct and (A) incorrect. (C) and (D) are incorrect because Carly is not liable for the deficiency. When a mortgagor sells property and conveys a deed, the grantee takes subject to the mortgage, which remains on the land (unless the proceeds of the sale are used to pay off the mortgage). However, a grantee who does not sign an assumption agreement does not become personally liable on the loan. Instead, the original mortgagor remains primarily and personally liable. Here, Carly only took "subject to the mortgage," without assuming it. Thus, she cannot be required to pay the deficiency.

Answer to Question 17

- (C) Casbank should have its mortgage fully satisfied from the proceeds of the foreclosure sale, and the remainder should go toward satisfying Brubank's junior interest. As a general rule, the priority of a mortgage is determined by the time it was placed on the property. When a mortgage is foreclosed, the buyer at the sale will take title as it existed when the mortgage was placed on the property. Thus, foreclosure will destroy interests junior to the placing of the mortgage but will not discharge senior interests, which remain on the property. However, where a landowner enters into a modification agreement with the senior mortgagee that makes the mortgage more burdensome, the junior mortgage will be given priority over the modification. In particular, if a junior mortgage is placed on the property and the senior lender later makes an optional advance while having notice of the junior lien, the advance will lose priority to the junior lien. (An optional advance is one that the senior lender is not contractually bound to make.) Here, the senior mortgage of Brubank was modified by the additional advance after creation of the junior mortgage with Casbank; hence, the increase in the debt to Brubank will not have priority over Casbank's interest. Therefore, the proceeds of the foreclosure sale will be applied first to satisfy the \$15,000 mortgage of Casbank that is being foreclosed, and the balance of \$3,000 will go toward the \$15,000 modification of Brubank's mortgage. This leaves a \$12,000 deficiency, for which Augustus might be liable, and leaves the original \$20,000 mortgage of Brubank, which remains on the property in the hands of the foreclosure sale buyer. (A) is wrong because Brubank's senior interest on the property is not affected by Casbank's foreclosure action; since Augustus is not in default on that mortgage, Brubank is not entitled to recover foreclosure proceeds for it. (B) is incorrect because

the foreclosure proceeds are not divided proportionally between the interests affected by the foreclosure; they are first applied to fully satisfy the foreclosed mortgage, and whatever is left over is applied toward any junior interests in order of priority. (D) is wrong because Brubank's additional advance is junior to the Casbank mortgage and is wiped out by its foreclosure; hence, the balance of the proceeds after Casbank's mortgage is satisfied will be paid to partially satisfy Brubank's junior interest.



TORTS ANSWERS

Answer to Question 1

(C) If Dietz did not know he was striking a person, he did not have the required intent for battery. To establish a *prima facie* case for an intentional tort such as battery, plaintiff must prove (i) an act by defendant, (ii) intent, and (iii) causation. The intent of the actor that is relevant for purposes of intentional torts is the intent to bring about the consequences that are the basis of the tort. An actor “intends” these consequences when his goal is to bring them about or when he knows with substantial certainty that they will result from his actions. The intent required for battery is an intent to bring about harmful or offensive contact to the plaintiff’s person. [Restatement (Second) of Torts §13(a)] If Dietz did not know that he was striking a person, he could not have intended or known that a harmful or offensive contact with the person would result. Therefore, he will not have the intent required for battery. (A) is incorrect because the intent required is not an intent to cause harm to the person, but rather an intent to bring about the harmful or offensive contact. (“Offensive” contact is contact that the plaintiff has not expressly or impliedly consented to.) Thus, as long as Dietz at least knew that he was bringing about an offensive contact with Pansy, he will be liable for battery even though he had no desire to harm Pansy. (B) is incorrect because Dietz’s mental illness does not preclude him from possessing the requisite intent for battery. As long as he was capable of intending the consequences of his conduct, *i.e.*, intending to bring about the harmful or offensive contact, his inability to understand that his act was wrongful is irrelevant. (D) is incorrect because the defense of self-defense is only available when a person has *reasonable* grounds to believe that he is being attacked or is about to be attacked. This is an objective test—how the situation would have looked to a reasonable person under the circumstances. The facts here make it clear that a reasonable person would not have believed that he was about to be attacked. Dietz therefore will not be able to successfully claim self-defense.

Answer to Question 2

(D) Paul will prevail because Donnalou had the intent to commit a battery. To establish a *prima facie* case for battery, plaintiff must establish (i) an act by defendant that brings about harmful or offensive contact to the plaintiff’s person, (ii) intent on the part of the defendant to bring about harmful or offensive contact to plaintiff’s person, and (iii) causation. The harmful or offensive contact may be either direct or indirect; *i.e.*, it is sufficient if defendant sets in motion a force that brings about harmful or offensive contact to the plaintiff’s person. Here, all of the elements are present for a battery case against Donnalou. She acted by placing the drug in Paul’s juice knowing that he would drink it. While she did not expect Paul to have a severe reaction to the drug, she did intend for it to affect him; *i.e.*, she intended an offensive contact. Paul can establish causation not only for the initial reaction but also for the injuries from the car crash, because his ingestion of the drug was a substantial factor in bringing about those injuries. Thus, Paul can establish a *prima facie* case for battery against Donnalou, and Donnalou has no legitimate defenses that will prevent Paul from recovering for his injuries. (A) is incorrect because Dr. Pillpush’s negligence does not break the causal connection between Paul’s injuries from the auto accident and Donnalou’s tortious act. Even though the accident would not have occurred but for the doctor’s negligence, Donnalou’s conduct was the primary factor in bringing about Paul’s injuries. (B) is incorrect because Donnalou’s lack of intent to harm Paul is irrelevant. As long as she intended that Paul ingest the drug, she intended an offensive contact. Thus, she is liable for battery even though she did not intend to harm Paul. (C) is incorrect. Unlike in negligence cases, the un foreseeability of additional forces that contribute to plaintiff’s injury in an intentional tort case does not make them superseding forces that break the causal connection between the initial wrongful act and the ultimate injury. Even if the automobile accident could not have reasonably

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been foreseen, Donnalou will be liable because her conduct was a substantial factor in bringing about the injury.

Answer to Question 3

- (C) Steve can recover \$18,000 from Randy for conversion. A conversion is an interference with plaintiff's possessory rights in a chattel that is so serious as to warrant that the defendant pay full value for the chattel. Here, Randy's permission to use the boat had long since expired when the boat was severely damaged by the tree. While Randy would not have been responsible for that damage had it occurred while he was still rightfully in possession of the boat, the combination of the wrongful detention and the severe damage amounts to a conversion. Hence, Steve is entitled to recover damages for the fair market value of the boat at the time and place of conversion, in effect creating a forced sale of the boat. (A) and (B) are wrong because Steve can recover more than the actual damage to the boat and damages for dispossession; those remedies are appropriate for trespass to chattels, which is a less serious interference with plaintiff's possessory rights in a chattel. (B) and (D) are wrong because Steve is not liable for the damage to Randy's garden when he went to retrieve the boat. When a chattel is located on the land of a wrongdoer, the owner is privileged to enter upon the land and reclaim it in a reasonable manner. Unlike an entry onto the land of an innocent party, reasonable entry onto the land of a wrongdoer is completely privileged; *i.e.*, the chattel owner does not have to pay for any actual damage caused by the entry.

Answer to Question 4

- (D) Mommy will lose because she will not be able to establish a *prima facie* case for negligent infliction of emotional distress. An action for negligent infliction of emotional distress requires plaintiff to show that defendant's conduct created a foreseeable risk of physical injury to plaintiff, and that the emotional distress caused by this conduct also resulted in some physical injury to plaintiff. Here, the first element is established because the negligence of the theater employee created a foreseeable risk that Mommy would be injured by biting down on the coin, but the second element is not established because Mommy's nightmares and loss of sleep that night do not amount to an actionable physical injury, and she suffered no other injury by biting the coin. Note that if she had suffered physical injury by biting the coin, she would have a *prima facie* case against the theater for negligence. She then would have been able to recover for her emotional distress as a "parasitic" element of her physical injury damages. (A) is incorrect because Dizzie's negligence only establishes the first element of the case for negligent infliction of emotional distress; the element of physical injury is not established. (B) is incorrect because emotional distress alone is not a sufficient injury where the defendant's conduct was only negligent. If Dizzie instead had purposely put the coin in the popcorn with knowledge or reckless disregard of the likely effect of his conduct, Mommy's emotional distress probably would be sufficient for establishing a *prima facie* case of *intentional* infliction of emotional distress. (C) is wrong because the element of emotional distress in this tort does not depend upon foreseeability or a reasonable person standard; only the initial threat of physical injury need be foreseeable. Had Mommy otherwise established a *prima facie* case by proving physical injury, the fact that a reasonable person would not have suffered similar distress is irrelevant.

Answer to Question 5

- (A) Hound could not recover his economic losses from the injury to his dog unless Publicelectric was negligent. If Publicelectric was negligent, Hound could recover any property damage caused by the negligence, including whatever decline in the dog's value Hound is able to prove. (B) is incorrect because the fact that the guardrail meets typical industry standards does not preclude a finding of

negligence. If adherence to industry standards does not prevent an unreasonable risk of harm, defendant may be in breach of its duty of ordinary care. (C) is incorrect; the fact that the dog escaped from Hound's yard would only be relevant if it indicated contributory negligence on Hound's part. In this case, Hound frequently walked the dog on his lawn without a leash and had no advance warning that the dog would suddenly bolt after a squirrel; his conduct is not so lacking in due care as to amount to contributory negligence. (D) is wrong because that option does not take into account the duty of care to avoid injury to property. Although a lesser degree of care may be required where the defendant's conduct poses a risk of harm only to property and not to persons, the same general rules of negligence apply. Hence, if Publectric's conduct creates a risk of injury to property that is deemed unreasonable (based on the magnitude of the risk and the utility of the conduct), it may incur liability even though it created no risk of injury to persons.

Answer to Question 6

- (B) MMMA has breached its duty of care to Norton if it had reason to know of the danger. An owner or occupier of land owes a duty of care to make the premises reasonably safe for its invitees. For an owner of a place of public accommodation who gathers the public for profit, the duty extends to protecting its patrons from injury from third persons where the owner knew or should have known of the danger. Both Martha and Norton are business invitees of Modern Mall because Martha is a potential customer of the business, even though she was not planning to buy anything, and Norton is accompanying Martha. Thus, if MMMA had reason to know of any danger to Norton from criminal acts of third persons, MMMA has breached its duty to Norton. Norton should have little difficulty establishing actual cause, proximate cause, and damages, the other elements of his *prima facie* case. (Assuming that MMMA had reason to know of the danger of a criminal act against Norton, the act is foreseeable and thus not a superseding intervening force that would cut off the causal connection.) Hence, MMMA is likely to be found liable to Norton. (A) is incorrect because owners of land, even those opening their premises to the public for profit, are not strictly liable to their customers for injuries from third persons. MMMA must have been negligent for it to be liable to Norton. (C) is incorrect because a criminal act of a third person is a superseding force only if it is not foreseeable. If MMMA had reason to know of the danger of a criminal act against Norton, it was negligent in failing to take steps to eliminate the danger, and this negligence created a foreseeable risk that Norton would be harmed by a third person. (D) is incorrect because Norton was accompanying Martha, who was a potential customer of the business, and is therefore an invitee as to all areas of the mall that were open to the public, including its restrooms.

Answer to Question 7

- (B) The fact least helpful to the city's defense of Penquist's lawsuit is the identity of the workers who blocked the exit ramp. Under vicarious liability rules, a principal will be liable for the tortious acts of an independent contractor if the duty is nondelegable on public policy grounds; included is the duty of a possessor of land to keep its premises safe for its invitees. If the workers were negligent in leaving the ramp blocked without providing another means of exiting, the fact that they were not city employees would not absolve the city of liability; hence, their identity would be of no help to the city's defense. (A) is incorrect because if Penquist was aware of an alternate route, he may have been contributorily negligent in exiting down the entrance ramp. A plaintiff's contributory negligence may be established by violation of an applicable statute. However, as with a statutory duty imposed on defendant, plaintiff's violation of the statute may be excused if compliance was beyond plaintiff's control. If no other means of exiting the garage were known

to Penquist, he may be excused for violating the traffic statute; however, if he knew of an alternative exit, the city will probably be able to establish contributory negligence on his part by his violation of the statute. (C) is incorrect because whether the city collects fees and makes a profit in operation of the garage will be considered by the court in determining whether the jurisdiction's governmental immunity applies. Where municipal immunity still exists, courts have limited its scope by differentiating between "governmental" and "proprietary" functions of the municipality. If the municipality is performing a function that might as well have been provided by a private corporation, the function may be construed as a proprietary one and no immunity will attach. The inference that a function is proprietary will be strengthened where the city collects revenues by virtue of providing the service. Hence, the fact that the city is not collecting revenues or making a profit in operating the garage will make it less likely that the function will be deemed to be proprietary and more likely that it will be deemed to be governmental and thus immune; in other words, it will be more helpful rather than less helpful in the city's defense. (D) is incorrect because Totten's conduct under these circumstances would be deemed a superseding force that breaks the causal connection between any negligence on the part of the city and Penquist's injury. Assuming that the city workers were negligent, the fact that an independent intervening force caused the injury generally would not cut off the city's liability, because its negligence created a foreseeable risk of that harm occurring. However, where this foreseeable harm is caused by an unforeseeable crime or intentional tort of a third party, most courts would not hold the city liable, treating the crime or tort as a superseding force. Here, while blocking the exit ramp created a foreseeable risk that someone might collide with Penquist, it was not foreseeable that his enemy would take that opportunity to commit an intentional tort against him. Because Totten's conduct was unforeseeable under the circumstances in choice (D), the city would be relieved of liability for any negligence in blocking the ramp.

Answer to Question 8

- (D) If Zarkov had reason to know of Ming's violent propensity, he could be liable for his own negligence in not attempting to search for Ming or alert the authorities. Under principles of vicarious liability, the tortious conduct of one person may be imputed to another person when a special relationship exists between the tortfeasor and the other person. However, a parent is not vicariously liable at common law for the tortious conduct of her child. The statute given in the question does not change this result; it merely establishes that Zarkov would be liable for Ming's conduct to the same extent as if he were Ming's parent. Given the absence of vicarious liability in this situation, the only liability that Zarkov might face is for his own negligence in not preventing the beating. If Zarkov had reason to know that Ming had a propensity to commit violent acts, Zarkov owed a duty to persons who might be injured by Ming, and this duty was breached by Zarkov's inaction after Ming was reported missing. Whether Zarkov's negligence can be shown to be the actual cause of Gordon's injury is not conclusively established by the facts; given the short interval between when Ming ran away and when he was discovered missing, and the long interval between the discovery and the beating a few blocks away from the institute, Gordon probably can prove actual cause. Proximate cause can also be established because Ming's intentional tort was foreseeable; it was the very conduct that Zarkov had a duty to take precautions against. Hence, given the factual assumption in choice (D), Zarkov probably will be liable for Gordon's injuries. (A) is incorrect because whether or not Ming would be liable for administering the beating has no effect on Zarkov's liability for his own negligence. (B) is wrong because the statute merely makes those standing *in loco parentis* liable to the same extent as parents. Because parents would not be liable in the absence of reason to know of their child's violent propensity, Zarkov also would be liable only under those circumstances. (C) is incorrect even though its

statement of law is accurate. While Zarkov cannot be found vicariously liable for Ming's acts, he may be liable for his own negligence under the circumstances stated in choice (D).

Answer to Question 9

- (C) The court should grant Shortstop's motion for a directed verdict because Jason has not established a *prima facie* case of negligence on Shortstop's part. Jason has established that Shortstop owed a duty to him and that he has suffered harm from the fire caused by the short in the wiring. However, he has not established that Shortstop breached any duty to him. While breach of duty is ordinarily a question for the trier of fact, plaintiff's failure to offer any evidence on that element of the *prima facie* case will permit a directed verdict for defendant. Under certain circumstances, the fact that a particular injury occurred may itself establish or tend to establish a breach of duty owed, permitting the trier of fact to infer defendant's liability. This is the doctrine of *res ipsa loquitur* ("the thing speaks for itself"). However, for the doctrine to apply, plaintiff must show that (i) the accident causing his injury is the type that would not normally occur unless someone was negligent; (ii) the negligence was attributable to defendant; and (iii) the injury was not attributable to plaintiff. The second requirement can often be satisfied by showing that the instrumentality causing the injury was in the exclusive control of the defendant. Here, however, the wiring was exposed to work done by other contractors on an immediately adjacent chimney and hot water pipe, and in putting up the walls, and Jason has offered no evidence that the cut in the outer sheath of the wiring was present when Shortstop finished its work. Instead, the fact that the wiring had been approved by the building inspector suggests that the wiring was intact when Shortstop finished. Given these facts, Jason has not presented evidence that the negligence was attributable to the defendant. Since *res ipsa loquitur* does not apply and no other evidence of breach of duty was established, Shortstop's motion for a directed verdict should be granted. (C) is therefore correct and (A) and (B) are incorrect. (B) is also incorrect because Jason's motion for a directed verdict would be denied even if he had established *res ipsa loquitur*. Establishing *res ipsa loquitur* merely creates a permissible inference of negligence; it does not create a presumption of negligence. Where the *res ipsa loquitur* element has been proved, plaintiff has established a *prima facie* breach of duty on defendant's part and no directed verdict may be given for defendant. However, it does not require defendant to present evidence to rebut a presumption. The trier of fact is free to accept the inference of negligence that has been created and find for the plaintiff or reject the inference of negligence and find for the defendant, even if the defendant offers no other evidence on the issue. Thus, the court would not grant Jason's motion for a directed verdict even if he had established *res ipsa loquitur*. (D) is incorrect because Shortstop is not strictly liable for the short in the wiring. Jason's failure to offer some evidence of negligence on the part of Shortstop will allow Shortstop to prevail.

Answer to Question 10

- (B) Hospital Suppliers would be liable to Paul in a strict products liability action if it could have installed a safety latch on the footrest without incurring unreasonable additional cost or unreasonably impairing the table's utility. Under section 402A of the Restatement (Second) of Torts, a commercial supplier of a product may be liable to any foreseeable plaintiff who was injured by a product that was in a defective condition unreasonably dangerous to users. In making this determination, many courts have considered one of the principal factors to be whether the product could be modified to make it less dangerous without making it unreasonably expensive or without unreasonably impairing its utility, which is the condition stated in choice (B). (A) is not as good an answer as (B) because the fact that the x-ray table is defective does not establish by itself a breach of the manufacturer's duty. The defect must make the product unreasonably dangerous to users and the defect must have existed when the product left defendant's control for

defendant to be strictly liable. (C) is wrong because an intermediary's ordinary negligence is not a superseding cause that would relieve the manufacturer from liability. Here, the injury was caused by both the failure of the footrest and the improper tightening of the straps. The latter occurrence is ordinary foreseeable negligence that would not supersede whatever liability Hospital Suppliers is judged to have for the failure of the footrest. (D) is incorrect because the fact that the table was not in the exclusive control of Hospital Suppliers is irrelevant. Exclusive control is a means of showing an element of *res ipsa loquitur*, a doctrine for proving breach of duty in a negligence action. In a strict products liability action, Hospital Suppliers will be liable for an unreasonably dangerous defective condition as long as the table was expected to, and did in fact, become operational without substantial change in the condition in which it was supplied.

Answer to Question 11

- (A) If a hospital employee was negligent in strapping Paul to the table, the hospital is vicariously liable under the doctrine of *respondeat superior*. This doctrine imposes liability on an employer for the tortious conduct of its employee occurring within the scope of the employment relationship. Here, strapping Paul to the table was one of the employee's tasks. Since this task was performed negligently and this negligence was one of the causes of Paul's injuries, the hospital would be liable. (B) is wrong because the failure to make a reasonable inspection of the footrest is not the negligent conduct suggested by the facts; rather, it was the failure to strap Paul in securely that probably was negligent. (C) is incorrect because the hospital will be liable even if Paul cannot identify which specific hospital employee was negligent. Through the doctrine of *res ipsa loquitur*, Paul can establish breach of duty just by the fact that Paul fell off the table after he had been strapped in; in other words, an inference of negligence is established because the accident causing his injury is the type that would not normally occur unless someone was negligent. The other two elements required for *res ipsa loquitur* are that plaintiff was free of fault, which is easy to show in this case, and that the negligence was attributable to the defendant; *i.e.*, that this type of accident ordinarily happens because of the negligence of someone in defendant's position. This requirement often can be satisfied by showing that the instrumentality that caused the injury was in the exclusive control of the defendant. If Paul were suing the nurses or technicians individually, this requirement would prevent him from using *res ipsa loquitur* in most jurisdictions because he could not establish which individual party was negligent. However, the hospital will be liable under the doctrine of *respondeat superior* regardless of which of its employees was negligent, because the hospital, through its employees, did have exclusive control over the x-ray table. (D) is incorrect because Doctors' Hospital could still lose even if the injury to Paul was caused by a defect present at the time the x-ray table was purchased, if the defect could have been easily discovered through a reasonable inspection.

Answer to Question 12

- (B) Mac's is strictly liable to Pedro if Mac's sold a defective tire to Sandra. The question does not indicate what theory Pedro is using in his products liability action, so you should analyze the facts under a strict liability theory because it is the easiest theory for a plaintiff to establish. In a strict liability action based on a defective product, plaintiff must prove that (i) defendant was a commercial supplier owing a strict duty, (ii) the duty was breached because the product was supplied in a defective condition unreasonably dangerous to users, (iii) the defect was the actual and proximate cause of plaintiff's injuries, and (iv) plaintiff suffered damages. Here, Mac's is a commercial supplier because it is a retailer of the tires, and therefore owes a strict duty to any user or foreseeable bystander; Pedro need not have purchased the tire from Mac's to recover. If the tire was defective when it was placed into commerce by the manufacturer, it would be unreasonably

dangerous, *i.e.*, dangerous beyond the expectation of the ordinary consumer, and Mac's would be in breach of its strict duty by selling it. Pedro can establish actual cause by showing that, but for the defect, the tire would not have suddenly blown out and the car would not have crashed. Proximate cause can be shown even if Sandra, the original purchaser, was negligent in not discovering the defect before selling the car to Pedro, because the negligent failure of an intermediary to discover a defect is not a superseding cause that would cut off the supplier's strict liability. Upon proof of the final element, damages, Pedro can recover from Mac's on a strict liability theory. (A) is incorrect because the fact that the tire blew out for no apparent reason is not sufficient to establish that the tire was defective when it was placed in commerce, which is a necessary element to impose strict liability on commercial suppliers. While the fact that the tire blew out suggests that it may have been defective, Pedro must present some evidence that the blowout was not caused by improper use or maintenance by either Sandra or him. (C) is incorrect because the care taken by Mac's in distributing tires from a reputable manufacturer, while it would be a defense in an action based on negligence, is not a defense in an action based on strict liability. Because strict liability may be one of the theories Pedro is using, (C) is not the best choice. Similarly, (D) is incorrect because even if Pedro's exceeding the speed limit was contributory negligence, it would not be a defense to a strict liability action in a jurisdiction retaining traditional contributory negligence doctrines. The fact that it was widely known in the tire industry that users would exceed posted speed limits indicates that Pedro's misuse of the tires was reasonably foreseeable; hence, it is a type of ordinary negligence that is not a defense in a strict liability action.

Answer to Question 13

- (C) The court should deny Gasmask's motion if it determines that Gasmask's storage of chemicals was an abnormally dangerous activity, making Gasmask strictly liable for any harm caused by the chemicals. Canyon City can bring a private nuisance action against Gasmask for the substantial and unreasonable interference with the use of its water. Nuisances may be based on intent, negligence, or strict liability. A strict liability standard for engaging in an ultrahazardous or abnormally dangerous activity would apply where the activity (i) involves a risk of serious harm to persons or property; (ii) cannot be performed without risk of serious harm no matter how much care is taken; and (iii) is not a commonly engaged-in activity by persons in the community. Whether an activity is abnormally dangerous is a question of law that the court can decide on a motion for a directed verdict. Since Canyon City has presented no evidence of negligence on Gasmask's part, the only way that Canyon City can survive Gasmask's directed verdict motion is if the court finds that a strict liability standard applies, as suggested by (C). Choice (A) is incorrect. While no evidence of a breach of duty owed in negligence has been shown, Canyon City has presented enough evidence to establish breach of Gasmask's absolute duty to make the storage safe, if the court finds that Gasmask was engaged in an abnormally dangerous activity. Canyon City has a cause of action for the breach of duty because its use of the water table adjacent to the storage site makes it a foreseeable plaintiff. (B) is incorrect because the fact that Canyon City drilled its wells after Gasmask stored its chemicals would not bar Canyon City from recovering and would have no effect on Gasmask's motion. This defense, called "coming to the nuisance," is generally rejected by the courts. (D) is incorrect because, as discussed above, whether the elements making an activity abnormally dangerous are present is a question of law for the court rather than a question of fact.

Answer to Question 14

- (C) Primrose will prevail because Daffodil's violation of the statute resulted in Primrose's injuries. The applicable standard of care in a negligence action can be established by proving the applicability

to that action of a statute providing for a criminal penalty. If this is done, the statute's specific duty will replace the more general common law duty of care. For the statutory standard to be applicable, plaintiff must show that (i) he is within the class intended to be protected by the statute, (ii) the statute was designed to prevent the type of harm that the plaintiff suffered, and (iii) the statute clearly defined the standard of conduct expected. Here, the OADA provision applies because Primrose is a minor purchasing a large quantity of model airplane glue, the serious injury he suffered from sniffing the glue was one of the harms that the statute was designed to prevent, and the statute clearly prohibited the transaction that took place between Primrose and Daffodil. The effect of establishing a violation of the statute is that a conclusive presumption of duty and breach of duty is established. Primrose should then be able to establish that Daffodil's sale of the glue was the actual cause and proximate cause of Primrose's injuries, completing the *prima facie* case of negligence on Daffodil's part. (A) is incorrect because Primrose's assumption of the risk is not a defense under these circumstances. The facts indicate that the state has retained the common law tort defense of assumption of the risk. Under this defense, a plaintiff will be denied recovery in a negligence action if he either expressly or impliedly knew of the risk of injury and voluntarily proceeded in the face of the risk. However, courts refuse to permit an assumption of risk defense in some situations because of public policy considerations. When a statute applies and is enacted to protect a class, members of that class will not be deemed to have assumed any risk. Here, even though Primrose was aware of the danger when he voluntarily sniffed the glue, the statute was enacted to protect minors such as Primrose from the dangers of glue sniffing. Thus, Daffodil cannot rely on assumption of risk as a defense. (B) is incorrect because minors such as Primrose who were experimenting with glue sniffing were a primary target of the OADA provision. (D) is incorrect because the statute does not provide for a reasonable mistake to excuse its violation. If the common law duty of reasonable care were applicable here, the reasonableness of Daffodil's mistake would be relevant. However, the statute's specific duty replaces the more general duty of reasonable care, and violation of a statutory standard will only be excused where compliance would cause more danger than violation or would be beyond defendant's control. Neither situation is indicated here, so the statute applies.

Answer to Question 15

- (A) Donald is jointly and severally liable for the entire amount of Pluto's damages that Pluto himself was not responsible for, but can obtain contribution from Mickey in proportion to Mickey's fault. Comparative negligence jurisdictions allow a plaintiff to recover some percentage of his damages even though he was contributorily negligent in causing the accident. "Pure" comparative negligence allows a plaintiff some recovery no matter how great his negligence was. Most comparative negligence jurisdictions retain the doctrine of joint and several liability, which makes each of several tortfeasors liable to the plaintiff for the entire amount of damages to which the plaintiff is entitled. However, if one tortfeasor does have to pay the plaintiff the entire judgment, the rule of contribution allows the paying tortfeasor to recover the excess over his share from the nonpaying tortfeasor. If contribution is based on comparative fault, the nonpaying tortfeasor is required to contribute an amount in proportion to his relative fault. Here, Pluto suffered \$100,000 in damages but was 30% at fault, allowing him a net recovery of \$70,000—\$100,000 minus 30% (\$30,000). He can recover the entire \$70,000 from Donald because the jurisdiction retains the doctrine of joint and several liability. However, under a system of contribution based on comparative fault, Donald can compel Mickey to pay him \$40,000 as contribution because Mickey was 40% at fault in causing the \$100,000 of damages incurred by Pluto. (B) is incorrect. If Donald did only pay \$40,000 to Pluto, he could compel Mickey to pay \$10,000 as contribution (because Donald's proportional share of the damages is only \$30,000). However, because Donald is jointly and severally liable, Pluto can collect up to \$70,000 from him. (C) is incorrect because Donald is

liable for more than his proportional share of the damages if the jurisdiction provides for joint and several liability. (D) is incorrect because a pure comparative negligence jurisdiction allows recovery no matter how great plaintiff's negligence is compared with defendant's. (D) probably also would be incorrect in a "partial" comparative negligence jurisdiction that only allows plaintiff to recover if he is less at fault than defendant. Most of these jurisdictions use a "combined comparison" approach when several tortfeasors are involved, comparing plaintiff's negligence with the total negligence of all of the defendants combined. Because Pluto was only 30% at fault and Donald and Mickey together were 70% at fault, Pluto could recover against Donald even in a partial comparative negligence jurisdiction.

Answer to Question 16

- (C) In the absence of joint and several liability, Donald is liable only for the portion of Pluto's damages for which he was responsible. As discussed in the answer to the preceding question, joint and several liability makes each of several negligent actors liable to the plaintiff for the entire amount of damages to which plaintiff is entitled. Because the jurisdiction has abolished this rule, Donald is liable to Pluto for only 30% of his damages (\$30,000), because Donald was 30% at fault in causing the accident. (A) is incorrect because the jurisdiction has abolished joint and several liability. Had it been retained, (A) would be correct because common law contribution rules require all tortfeasors to pay equal shares regardless of their respective degrees of fault (*i.e.*, Donald would ultimately have to pay \$35,000 even though he was only 30% at fault). (B) is incorrect because Donald is liable only for \$30,000, because he was only 30% at fault in causing the accident. (D) is incorrect because, as discussed in the answer to the preceding question, a pure comparative negligence jurisdiction allows recovery no matter how great plaintiff's negligence is when compared with defendant's.

Answer to Question 17

- (B) The *Journal* will be liable if it was negligent as to truth or falsity because the statement was regarding a matter of public concern. Supreme Court decisions based on the First Amendment now impose a fault requirement in defamation cases involving public figures or matters of public concern. Where the defamation involves a matter of public concern but the plaintiff is not a public figure, the plaintiff must show that the defendant permitted the false statement to appear, if not through malice, at least through *negligence* as to its truth or falsity. Here, the defamatory statement was contained in a newspaper article about a contentious public meeting on a controversial issue; thus, its content, form, and context indicate that a matter of public concern was involved. The other elements required to establish defamation of a private person on a matter of public concern are also present here: the statement was false and defamatory to Carla (given her beliefs), was published in the newspaper, and caused her mental anguish, which is sufficient to satisfy the requirement of actual injury. (A) is incorrect because it is not sufficient for Carla to establish only the elements of common law defamation for her to prevail. Because this statement involves a matter of public concern, she must also show either (i) negligence as to truth or falsity *and* actual injury, or (ii) actual malice (knowledge of falsity or reckless disregard of truth or falsity). (C) is incorrect. Carla does not have to show knowledge of falsity or reckless disregard as to truth or falsity because she is not a public official or public figure. While a person may be deemed a public figure where she voluntarily assumes a central role in a particular public controversy (*e.g.*, a prominent community activist), merely voicing one's opinion at a public meeting does not make one a public figure, even though the matter is one of public concern and the subject of a newspaper article. (D) is incorrect because the qualified privilege for reports of public proceedings only excuses accurate reports of statements that were false when made; it does not excuse inaccuracies in the reporting of statements, which is what happened here.